

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/34410

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>24/8/2020</u>	
Date	<u>LT Killops</u> LT Killops

In the matter between:

AMICHAND, KAVITESH

APPLICANT

And

PROTEA ESTATES BODY CORPORATE

FIRST RESPONDENT

SHERIFF, HALFWAY HOUSE
(ALEXANDRA)

SECOND RESPONDENT

In Re:

CASE NO : 2015/34410

In the matter between:

PROTEA ESTATES BODY CORPORATE

PLAINTIFF

And

AMICHAND, KAVITESH

DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 24 August 2020.

KILLOPS AJ

[1] This is an application for the setting aside of a default judgment granted in this court by the Honourable Acting Judge Nyathi ("the Nyathi order") in favour of the first respondent, Protea Estates Body Corporate ("PEBC"), on 4 October 2017 against the applicant, Mr Amichand, declaring the applicant's immovable property specifically executable.

[2] The applicant application further seeks an order staying the execution of immovable property issued in favour of the first respondent, and ancillary relief. (The applicant's Notice of Motion has not sought the rescission of the default judgment granted against him on 26 March 2016 by the Registrar, from which the other orders flow.) The rescission application is opposed by the first respondent, the judgment creditor.

[3] Although the Sheriff, Halfway House is cited as the second respondent, no order is being sought against the second respondent and they have not opposed the application.

[4] It is apposite to provide a short history of the matter as the facts emerge from the papers. I will refer to the applicant in the rescission application (the defendant in the main application) as Mr Amichand, and the first respondent in the rescission application (the plaintiff in the main application) as PEBC.

[5] Mr Amichand owns immovable property situated at Unit 22 Sugarbush Protea Estate, corner George Road & 14th Road, Erand Gardens, Johannesburg ("the property").

[6] PEBC instituted proceedings against Mr Amichand in respect of outstanding levies in the amount of R20 887.10. Summons was served on Mr Amichand at his chosen *domicilium citandi et executandi* on 8 October 2015. No Notice of Intention to Defend was received by PEBC.

[7] Default judgment was granted against Mr Amichand by the Registrar on 29 March 2016 in the sum of R20 887.10, together with interests and costs.

[8] It is common cause that pursuant to the granting of the default judgment, and prior to the application to have his immovable property declared executable, the Sheriff served a Warrant of Execution against Mr Amichand's movables on 23 March 2017. The attached movables of Mr Amichand were however insufficient to settle the judgment debt, and thus the assets were not removed and sold. At this date Mr Amichand must have been aware of the default judgment against him as the sheriff attended at his property to attach his movables and made an inventory of his assets.

[9] PEBC's application to declare Mr Amichand's immovable property specifically executable was served on Mr Amichand on 17 July 2017, by affixing a copy of the application to the principle door of the property. As is evident, this application came to the knowledge of Mr Amichand as he filed his Notice of Intention to Oppose on 1 August 2017. Mr Amichand however failed to file an Answering Affidavit to that application.

[10] Although a copy of the Notice of Set Down for the hearing of the application was served on Mr Amichand's *domicilium* address (being the property), on Mr G Naidoo his tenant on 8 September 2017, it is common cause that Mr Amichand failed to attend the hearing on 4 October 2017 to have the immovable property declared specifically executable.

[11] This is the order Mr Amichand seeks to be rescinded.

[12] Mr Amichand issued the rescission application on 16 March 2018 against PEBC and the second respondent, and served the application on PEBC's attorney. The application for rescission is brought in terms of Rule 42(1)(a), the common law and the Constitution of South Africa.

[13] PEBC filed its answering affidavit on 18 April 2018.

[14] Mr Amichand failed to set the matter down but instead launched an urgent application to be heard on 27 July 2018 after receiving a Notice of Sale in Execution in respect of the property. The urgent application was not heard as the parties reached an agreement which was made an order of court.

[15] Mr Amichand served his Replying Affidavit for the rescission application on 3 August 2018, as per the agreement reached in respect of the urgent application. Mr Amichand adopted a "need to know" response in his affidavit. He failed to address any allegation raised and/or placed in dispute by PEBC in its answering affidavit, and alleges rather that *"there is no need to burden the Honourable Court by making any response to the opposition by the First Respondent as given in the answering affidavit"*, thus leaving various allegations disputed by PEBC, and unanswered.

[16] Although Mr Amichand was unrepresented when he filed his Notice to Oppose the application to have the property specifically executable, he was legally represented in the rescission application, as well as the urgent application. Mr Amichand has been legally represented by L Padayachy Attorneys. Mr Amichand appeared at the Teams online hearing of the rescission matter in person. He confirmed that his attorney does not have right of appearance in the High Court and that he did not have funds to appoint counsel. He elected to proceed with the application, representing himself.

CONSTITUTIONAL RIGHT TO HOUSING

[17] The nub of Mr Amichand's complaint is that the Nyathi order violates his right to housing as provided for in clause 26 of the Constitution of South Africa, and the execution *"is going to offend against the spirit and the new dispensation established by the Constitution"*.

[18] Mr Amichand alleges in his founding affidavit that the property is his residential property and that he is employed by a company situated in Sandton. The rest of his family members reside in KwaZulu Natal.

[19] It is evident from the sheriff's return of service (dated 8 September 2017) in respect of the Notice of Set Down that the tenant advised the sheriff that "*the defendant (Mr Amichand) does not stay at the given address*", being the address of the property in this matter. Notwithstanding the fact that Mr Amichand alleges that he resided at the property in his affidavits, on his own version there is a contradiction and he fails to place any information before the court to show that he resided at the property at the time of the judgment, or explain why his tenant would state that he does not reside there if it was not true.

[20] PEBC sets out allegations in paragraph 14 of its Answering Affidavit regarding how Mr Amichand's constitutional rights were protected in the application before the Honorable Acting Judge Nyathi. According to PEBC, Mr Amichand was cautioned and warned, in the application, that if he failed to oppose the application, his rights in terms of clause 26 of the Constitution would be affected, and that Rule 46 mechanisms will be strictly adhered to in line with the sale in execution of the immovable property. Although it is common cause that Mr Amichand received the application and was therefore aware of its content, he provides no explanations regarding any of these allegations and chooses instead not to address same.

[21] It therefore remains in dispute that Mr Amichand's primary residence was the immovable property subject to the execution order at the time the order was

granted, and thus the applicant has failed to satisfy the court that the order granted affects his constitutional right to housing.

- [22] Mr Amichand adopts an intentionally vague approach of providing selective and limited information to the court. I am not satisfied that he has provided any grounds illustrating that his constitutional rights have been or will be breached.

UNIFORM RULE 42(1)(a)

- [23] The application for rescission is further based on uniform rule 42(1)(a) which provides as follows: *'42(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party effected, rescind or vary: (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby...'*

- [24] As such, the applicant must show that there was a procedural irregularity or mistake in respect of the issue of the default judgment by His Lordship Justice Nyathi.

- [25] During argument, Mr Amichand could provide no information regarding any procedural irregularity with respect to the default judgment being granted. Nor is there any evidence of any irregularity set out in his founding affidavit.

- [26] An order or judgment is erroneously granted in the absence of a party, if irrespective of whether or not such judgment order is otherwise correct, the absent party was not notified or did not know of the date of hearing. As set out above, the Notice of Set Down was served on Mr Amichand on 8 September

2017. Mr Amichand failed to address this issue at all, and failed to explain why he did nothing after receiving the Notice of Set Down.

[27] Mr Amichand confirms that he failed to attend the hearing on 4 October 2018 and alleges that the reason for his failure to attend has "no bearing" on this application. He also failed to file an Answering Affidavit in that matter, setting out any facts he required the court to consider, an opportunity that was available to him at the hearing, which he failed to take up.

[28] In the rescission application there does not seem to be any ground for Mr Amichand to succeed based on Rule 42(1)(a). According to the respondent's Answering Affidavit, there appears to be nothing irregular about the process of service of the application for the execution of the immovable property which was opposed by Mr Amichand, the process of service of the Notice of Set Down, or the enrolling of the application on 4 October 2017.

[29] Mr Amichand asserts that the court failed to consider "all the relevant facts" before granting the order. No explanation is provided why Mr Amichand failed to place any facts before the court in an affidavit, or personally at the hearing of the matter.

[30] In *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*¹, the Supreme Court of Appeal held that a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously, as envisaged by rule 42(1)(a), by reason of facts of which the learned judge who

¹ 2007 (6) SA 87 (SCA)

granted the judgment, as he was entitled to do, was unaware². The existence or non-existence of a defence on the merits is an irrelevant consideration, which cannot, if subsequently disclosed, transform a validly obtained judgment into an erroneous judgment³. It was always open to Mr Amichand to raise facts, which he failed to do.

[31] PEBC confirmed that all the required facts were placed before the Presiding Judge at the hearing of the matter, which Mr Amichand did not deny in argument or in his replying affidavit.

COMMON LAW

[32] For a rescission of an order in terms of the common law, sufficient cause must be shown, which means that:

32.1 there must be a reasonable explanation for the default;

32.2 the applicant must show that the application was made bona fide; and

32.3 the applicant must show he has a bona fide defence which prima facie has some prospect of success⁴.

[33] As set out above, Mr Amichand states that *'the circumstances accounting for his failure to attend the hearing have no bearing on this application'*. He however sets out in paragraph 59 of his affidavit that he did not believe that his property could be executed to recover a debt of R20 887.10, and he did not want to increase wasted costs by entering into any opposition. This explanation is

² 2007 (6) SA 87 (SCA) at par [25]

³ 2007 (6) SA 87 (SCA) at par [27]

⁴ Chetty v Law Society, Transvaal 1985 (2) SA 756 at 764 I to 765 E

extremely unreasonable considering him being faced with a court application in which the First Respondent was seeking a court order to do exactly that. No other reason for the default is provided. Therefore, there is no reasonable explanation before me regarding the reason for the default.

[34] Mr Amichand alleges the application is *bona fide*, yet he fails to allege any grounds evidencing same. Bald allegations are insufficient.

[35] What is evident is that Mr Amichand was aware of the default judgment granted against him by the Registrar as far back as 2017, when his movables were attached by the sheriff. Mr Amichand launched this rescission application in an attempt to save his immovable property from being sold, yet failed to do anything about the outstanding debt until he allegedly made payment on 30 July 2018, only after the urgent application. This, notwithstanding the fact that he conceded in his founding affidavit that he owed the debt. Furthermore, PEBC alleges that Mr Amichand has not paid his levies regularly and he is further indebted to the first respondent to the amount of more than R80 000.00. This was not denied by Mr Amichand. I therefore fail to see how Mr Amichand alleges his application is *bona fide*. It appears that the application is self-centred as he realised he is at risk of losing his immovable property.

[36] Although Mr Amichand includes a paragraph in his affidavit titled "THE EXISTENCE OF A BONA FIDE DEFENCE", he fails to set out any defence at all. He merely questions whether it was just and equitable the court to order his property specifically executable. This falls short of substantiating any defence which may have a prospect of success.

[37] In the circumstances as there is no other defence, no basis exists to grant the rescission application and start this process afresh. Mr Amichand has failed to prove on a balance of probabilities that he has sufficient cause for the rescission of the default order. He provides no grounds for the rescission of the order granted in terms of the common law.

[38] This brings me to the issue pertaining to costs.

[39] As set out above, PEBC delivered its Answering Affidavit on 18 April 2018. Mr Amichand failed to take steps to enrol the rescission application in terms of the rules of court and Practice Manual, until he was served with the Notice of Sale in Execution informing him that the property would be sold on 31 July 2018.

[40] Mr Amichand then elected to launch an urgent application, which was set down for 27 July 2018, which was opposed by PEBC. The matter did not proceed in the urgent court, the parties having reached an agreement in respect of the sale of the immovable property not proceeding. The costs of the urgent application were reserved. Mr Amichand is however persisting with his application for rescission.

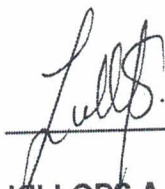
[41] PEBC submits that the rescission application should be dismissed with costs, including the costs of the urgent application which were reserved on 27 July 2018.

[42] Mr Amichand's only objection to the prospect of a cost order being granted against him is that he has incurred substantial legal fees himself. This is hardly

an adequate reason for opposition, considering Mr Amichand's insistence on proceeding with this matter.

[43] In the circumstances, I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the rescission and the costs of the urgent application on 27 July 2018.



KILLOPS AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Date of hearing:	27 July 2020
Date of Judgment:	24 August 2020
For the Applicants:	IN PERSON
Instructed by:	L Padayachy Attorneys Tel: 011 039 1924
For the Respondent:	Mr L Peacock (Attorney)
Instructed by:	Messina Incorporated Attorneys Tel: 011 447-6535/084 929 7760