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REPUBLIC OF SOUTH AFRICA

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

Case No: 32507/2021

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

REVISED

12 September 2022

In the matter between:

SUNNY THABANG DLAMINI

Applicant

And

JAN VAN DEN BOS N.O.

First Respondent

In Re:

JAN VAN DEN BOS N.O.

Applicant

And

SUNNY THABANG DLAMINI

First Respondent

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Second Respondent

JUDGMENT

MATOJANE J

[1] This is an application for the rescission of a default court order granted by this Court on 11 October 2022, declaring the first respondent's property specially executable and authorizing the issuing of a writ of execution. The applicant opposes the application.

[2] The applicant is the registered owner of a Sectional title unit described as door number [...], unit [...] Pearlbrook Complex, Located at [...] B [...] Street, Hillbrow, Johannesburg. Being a unit in the scheme, the applicant became a member of the body corporate by operational law and is consequently liable to make contributions raised by the first respondent in the upkeep control management and administration of the common property.

[3] The first respondent is the administrator of the Pearlbrook Body Corporate appointed in terms of section 16 of the Sectional Title Schemes Managing Act, act 8 of 2021. ("STMA")

[4] The first respondent alleges that the applicant has failed to make monthly payments for levies and other ancillary charges incurred in respect of the unit and remains indebted to the body corporate. As a result, the first respondent applied for and obtained summary judgment in the Magistrate Court against the applicant. The applicant was ordered to pay the sum of R 119 119.15 and costs.

[5] The applicant failed to satisfy the judgment debt, which led to the first respondent issuing an application in this Court to have the applicant's property declared executable in terms of Rule 46A of the Uniform Rules of Court. A writ of execution as envisaged in terms of Uniform Rule 46(1)(a) was authorized in respect of the property.

[6] On 3 November 2021, the applicant brought an urgent application seeking the stay of the writ. The order was granted, interdicting the first respondent from executing the order pending the outcome of this application. It is this execution order that the applicant seeks to have rescinded in this application

Locus Standi

[7] The applicant has raised a point *in limine* that the respondent does not have locus *standi* to launch this application. This *in limine* point originates from the wording of the order by which the respondent was appointed as an administrator. The applicant contends that the order does not appoint the applicant as the administrator of the body corporate but that it postpones the commencement of his appointment to be when a date for Part B of that application is obtained, and no such date has been obtained. It is appropriate to quote the relevant paragraph of the order, which admittedly is not properly worded; it reads"

"Jan van Bos N.O. ("the administrator) is appointed as administrator to the respondent for a period, from where a date obtained from the Court's Honourable Registrar to hear Part B opposed and / or unopposed, from a final appointment up to date of appointment in terms of the provisions of section 16 of Act 8 of 2011 ("the Act")"

[8] The Supreme Court of Appeal in *Endumeni*¹ has described the process of interpretation as involving a unitary exercise of considering language, context and purpose. It is an objective exercise where, in the face of ambiguity, a sensible approach is to be preferred to one which undermines the purpose of the document or order. The order and the Court's reasons for giving it must be read as a whole to assert its intention²

[9] Section 16 (2) (a) of STMA points to an underlying purpose of the order to be interpreted. It empowers a Magistrate to appoint an Administrator where she finds evidence of serious financial or administrative mismanagement of the body

¹ 2012 (4) SA (SCA) par [18]

² *Firestone South Africa 9Pty) Ltd v Gentiruco AG* v1977(4) SA 298 (A) at 304

corporate; and where there is a reasonable probability that, if it is placed under administration, the body corporate will be able to meet its obligations and be managed in accordance with the requirements of this Act.

[10] The interpretation advanced by the applicant undermines the purpose of the order. It will serve no purpose for the commencement of the appointment of an Administrator to be held back for an indefinite period pending the hearing of Part B in the face of serious financial and administrative mismanagement of the corporate body found by the Magistrate. It is sensible for the interim appointment of the administrator to take effect immediately to enable him to take charge of the affairs of the body corporate until the finalization of Part B. Various courts of this division followed a similar approach. There is no suggestion that any of those judgments were manifestly wrongly decided or that there has been a material change justifying a departure. Those judgments are binding on me. The point *in limine* must accordingly fail.

[11] The applicant states that the executability order should be set aside under Uniform Rule 42(1)(a) because it was erroneously sought or granted in his absence. Rule 42(1)(a) provides:

'(1) The Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

[12] The rule is not aimed at correcting a judgment that is wrong because the Court arrived at a wrong decision on the facts or the law. In *Bakoven*³, the Court explained that:

"An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of 'a mistake in a matter of law (or fact) appearing on the

³ *Bakoven Ltd v G J Howes (Pty) Ltd* [1992 \(2\) SA 466](#) (E) (at 471F):

proceedings of a Court of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings."

[13] Accordingly, if the order reflects a considered decision of the presiding officer, and the intention was to make the order as it is formulated in the judgment, a rescission thereof in terms of rule 42 (1) (b) is not possible on the basis that the reasoning and the findings which underlie the order were unsound or wrong. The appropriate remedy in such an instance is to appeal the judgment⁴.

[14] I now turn to consider the grounds upon which the applicant relies to have the order set aside.

14.1 Firstly, the applicant alleges that the executability application was heard without his knowledge and that he was unaware of the proceedings being instituted against him in terms of Rule 46;

14.2 Secondly, the applicant alleges that the first respondent did not comply with Rule 6(5)(b)(iii) in that the first respondent allegedly set the matter down eight days after allegedly serving the notice of motion on the applicant.

14.3 Thirdly, the applicant alleges that the failure of the first respondent to serve a final notice of set down on him constituted a "fatal error" to the application.

14.4 Lastly, the applicant alleges that the Court failed to take into consideration Rule 46A(2)(a)-(b) of the Uniform Rules of Court, in that the property concerned is the primary residence of the applicant and that the order is prejudicial to the applicant.

[15] On the reading of the sheriff's returns before the Court, the applicant was duly served with the notice of motion for the executability application on 15 September

⁴ *Seattle v Protea Assurance Co Ltd* 1984 (2) SA 537 (C) at 541 C-D

2021. The notice was served by affixing it at the domicile address. The second service was effected on 28 September 2021 personally on the applicant. The notice of motion indicated that the applicant had to file a notice of intention to oppose within 5 (five) days and that the matter would be heard on the unopposed roll on 11 October 2021. The applicant chose not to file a notice of intention to defend, and the matter was set down on the date set out in the notice of motion. The applicant cannot now claim that failure to serve a final notice of set down on him constituted a "fatal error" when he was made aware of the date of the hearing on the unopposed roll.

[16] The order reflects the intention of the Court, which considered the evidentiary material placed before it. The Court concluded that the first respondent was procedurally entitled to the order. In *Lodhi 2 Properties Investments CC*⁵, the Supreme Court of Appeal held that where a plaintiff is procedurally entitled to a judgment in the absence of the defendant, that judgment cannot be said to have been granted erroneously in the light of the subsequently disclosed defense. The existence or non-existence of a defense on the merits was found to be an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.

[17] In my view, that the rescission of judgment in terms of Rule 42 is not available to the applicant as the Court did not commit an error in the sense of a mistake in law appearing on the proceedings and the application thus falls to be dismissed. The applicant is attempting to appeal the judgment in the guise of a rescission application which should be deprecated as this is an abuse of a court process. It is not necessary to consider the rest of the grounds for rescission application in light of my finding that it is not possible to rely on Rule 42(1)(a) where the decision was right.

[18] In the result, the following order is make

⁵ *Lodhi* paras 25 and 27. See also *Freedom Stationery (Pty) Limited and Others v Hassam and Others* [2018] ZASCA 170; 2019 (4) SA 459 (SCA) para 18.

1. The application is dismissed with costs

**KE MATOJANE JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Heard: 31 August 2022

Judgment: 12 September 2022

For the Applicant:

Advocate D Ndlovu

Instructed by Precious Muleya Inc Attorneys

For the First Respondent:

Advocate N S Nxumalo

Instructed by Schüler Heerschop Pienaar Attorneys