REPUBLIC OF SOUTH AFRICA

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

Case Number: 2019/40670

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

03/05/2023
DATE SIGNATURE

In the matter between:

ESTATE AGENCY AFFAIRS BOARD OF SOUTH AFRICA First Applicant
THE CLAIMS, COMPLIANCE AND ENFORCEMENT

THE CLAIMS, COMPLIANCE AND ENFORCEMENT
COMMITTEE Second Applicant

and

MICHAEL JOHN KRUG Respondent

Neutral Citation: *Estate Agency Affairs Board of South Africa and Another v Michael John Krug* (Case No: 2019/40670) [2023] ZAGPJHC 416 (3 May 2023)

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is an application in terms of Uniform Rule 42 for the rescission of a judgment granted in favour of the respondent. The respondent successfully brought a review application in terms of Uniform Rule 53, seeking to review and set aside the decision and resolution taken by the second applicant.

[2] The applicants contend that the review judgment which was granted on 27 February 2020 was granted erroneously in the absence of the applicants.

[3] The respondent has opposed the application.

BACKGROUND

[4] In June 2015 the respondent secured the services of Mr Daniel Jacobus Coetzee ('Mr Coetzee') to purchase a commercial property. Mr Coetzee presented to the respondent an offer to purchase the commercial property on 17 June 2015 at Bedfordview. Mr Robert Snyman, duly representing Snyman Fisher Buildings CC, as seller of the property and the respondent signed the offer to purchase.

[5] According to the respondent, Mr Coetzee during March 2016 requested the respondent to pay the claim amount of R240 000-00 as a deposit into the trust account of A&D Incorporated, BCI Consultants ('A & D). This was a token of 'good faith' to indicate to the seller that the respondent was serious about purchasing the property.

[6] On 1 March 2016 at Bedfordview, Mr Coetzee representing A & D and the respondent, signed an instruction to invest trust monies, whereupon the claim amount of R240 000-00 would be paid into a trust account or an interest-bearing account. The respondent transferred the claim amount of R240 000-00 into the stipulated bank account on 4 March 2016.

[7] The seller of the property and his partner had a fall out and as a result, the property transaction did not materialise. This resulted in the respondent informing Mr Coetzee on 27 June 2016 that he no longer wished to continue with the purchase of the property and required a refund of the claim amount of R240 000-00.

[8] As a result of numerous excuses to the respondent's calls and follow-ups pertaining to the refund of the claim amount of R240 000-00 and suspecting that the claim amount had been

stolen, the respondent sent Mr Coetzee a final demand for the refund of the claim amount on 24 October 2016.

[9] On 14 November 2016 the respondent lodged the claim with the first applicant. The claim was lodged 22 days from the date that the respondent suspected that his deposit was stolen or misappropriated.

[10] On 22 December 2016 the respondent received a letter from the first applicant confirming that the second applicant had received the respondent's complaint.

[11] On 24 April 2018 an enquiry was held before the second applicant pertaining to the claim lodged by the respondent. On 7 December 2018 the resolution passed by the second applicant was e-mailed to the respondent.

[12] In terms of the resolution, the respondent's claim was rejected on two grounds, (i) that the respondent's claim prescribed in terms of s18 of the Estate Agency Affairs Act 112 of 1976 ('Act 112 of 1976') and (ii) that there was no proof that the funds were paid into Mr Coetzee's account.

[13] On 20 December 2018 the respondent's attorney served a notice in terms of s31(1)(a) of Act 112 of 1976 on the first applicant, in an attempt to obtain the reasons for the decision taken by the second applicant in accordance with the resolution. On 1 July 2019, a request for the transcript of the meeting where the resolution was passed, was served on the first applicant. The respondent only received the transcript on 27 August 2019.

[14] The respondent contends that notwithstanding the fact that the appeal procedure in terms of s31 of Act 112 of 1976 was followed, Mr Justice Majou ('Mr Majou') from the first applicant advised the respondent's attorneys of record, on 25 September 2019, that Act 112 of 1976 and the regulations to Act 112 of 1976 are silent in respect to appeals against board resolutions taken in respect of claims and only makes provision for appeals in respect of disciplinary committee's decisions in respect of improper conduct charges against estate agents. As a result, the respondent launched a review application.

[15] The review application was issued on 18 November 2019. The applicants did not oppose the application for review brought by the respondent, which led to the granting of the

order on 27 February 2020. The applicants now seek to rescind and set aside this order and pray that leave be granted to oppose the review application.

[16] The order granted on 27 February 2020 reads as follows:

"1. The Resolution of the Board of the Estate Agency Affairs Board taken at an Ordinary Meeting of the Claims, Compliance and Enforcement Committee held on 07 November 2018 in the Lekgotla Boardroom, 63 Wierda Road East, Wierda Valley, Sandton ('the Resolution') issued by the second respondent dated 7 December 2018 is set aside.

2. Substituting the outcome of the Resolution with an Order that:

2.1 The first respondent to pay the applicant the amount of R240 000.00; and

2.2 interest on the amount of R240 000.00 at the rate of 10% per annum from 4 March 2018 until date of payment in full."

EVALUATION

[17] In terms of Uniform Rule 42:

"(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;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties."

[18] In order for the applicants to succeed in rescinding a judgment taken against them by default, they must show good/sufficient cause. The learned author Van Loggerenberg DE[1], stated that:

"[t]his generally entails that the applicant must:

(i) give a reasonable (and obviously acceptable) explanation for his default;

(ii) show that his application is made *bona fide*; and

(iii) show that on the merits he has a *bona fide* defence which *prima facie* carries some prospect of success."[2] [my emphasis]

[19] The applicants contend that the incorrect procedure was utilised, in that the respondent used a motion procedure for a claim sounding in money, instead of using the action procedure, when it was apparent to the respondent that there was a dispute of fact clearly foreseeable at

[1] Van Loggerenberg DE, in Erasmus *Superior Court Practice*, Vol 2.
[2] Ibid D1-564.

the time of the institution of the proceedings. The applicants contend that the three disputes of fact are:

(a) whether the applicants are liable for the payment of the respondents claim, in light of the fact that the respondent was in terms of the sale agreement not required to pay the deposit;

(b) whether the respondent complied with s18(3) of Act 112 of 1976 when lodging a claim with the applicants;

(c) whether the claim had by the time it was lodged with the applicants, already prescribed.

Accordingly, it was contended the reviewing Court should have dismissed the application.

[20] Uniform Rule 53 states as follows:

"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so." [my emphasis]

[21] From the contents of Uniform Rule 53 the respondent had every right to bring the application for the review by way of motion. The wording of Uniform Rule 53 is clear and unambiguous. It applies to all review proceedings and it is not confined to those review proceedings where no conflict of fact is anticipated. Had the draftsman of the Rule intended the latter only, he would have said so. A party who is obliged by Uniform Rule 53 to bring proceedings by way of notice of motion, in the event of a conflict of fact arising on the papers which can be resolved only by oral evidence, cannot be penalized on the basis that he should have anticipated the conflicts and proceeded in another way.[3]

[22] There was nothing before the reviewing Court to suggest that there was a conflict of fact pertaining to (i) the prescription of the claim in terms of s18(3) of Act 112 of 1976 or (ii) that the funds were not paid into Mr Coetzee's account. The applicants in the matter *in casu* did not

[3] Van Loggerenberg DE, (note 1 above) page D1-706.

respond to the review application and filed no answer to the allegations to substantiate their defence and this they did at their own peril. In the absence of an answering affidavit, there is no way that the respondent ought to have known that such conflict of fact existed prior to launching the review application. Had the reviewing Court anticipated a dispute of facts it could easily have dismissed the review application, but it did not do so.

[23] The respondent complied with all the requirements in terms of Uniform Rule 53.

[24] This Court finds that the reviewing Court, in the absence of a defence by the applicants, was able to find that:

(a) The respondent paid the claimed amount of R240 000-00 to Mr Coetzee during March 2016;

(b) The respondent lodged the claim with the first applicant during November 2016;

(c) The second applicant only made known the contents of the resolution to the respondent on 7 December 2018, which was two years after the respondent lodged the claim.

[25] The reviewing Court accordingly had all the material facts before it in order to substitute the first applicant's decision as prayed for and reached an equitable decision which was based on fairness. There was sufficient evidence before the reviewing court to grant the order it did. The matter was postponed from 25 February 2020 to 27 February 2020 in order for the respondent's counsel to prepare heads of argument. Accordingly, the matter was fully ventilated before the reviewing Court, thereby eliminating any errors. As a result, this Court finds that the order was not granted erroneously and there was no need for the reviewing Court to have referred the matter to oral evidence.

[26] The matter *in casu* is distinguishable from the case of *Lombard v Droprop CC and Others*[4] which was referred to by the applicants. In the matter of *Lombard*[5] the application was defended and an answering affidavit had been filed.

[27] A claim sounding in money can be instituted by way of motion procedure if there is no apparent dispute of fact.[6] The object of review proceedings is to enable an aggrieved party to

[4] *Lombard v Droprop CC and Others* 2010 (5) SA (1) SCA.
[5] Ibid.
[6] *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty)) Ltd* 1949 (2) SA 199 (T).

obtain quick redress where his rights or interests are prejudiced by wrongful administrative action.[7]

[28] The applicants contend that due to the incorrect procedure being utilised, that the decisions of *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*[8] and *Freedom Stationery (Pty) Ltd v Hassam*[9] do not apply. This Court disagrees. "A judgment to which a plaintiff is procedurally entitled in the absence of the defendant cannot be said to have been granted erroneously as contemplated in this subrule [Uniform Rule 42(1)(a)] in the light of a subsequently disclosed defence."[10] [my emphasis]. Such a defence cannot transform a validly obtained judgment into an erroneous one.[11]

[29] In the matter of *Bakoven Ltd v G J Howes (Pty) Ltd*[12] the Court held that:

"An order or judgment is 'erroneously grante' when the Court commits an 'error' in the sense of a 'mistake in a matter of law appearing on the 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] [my emphasis]

[30] In addition to this Court's reasons at para [25] this Court further finds that the order of the reviewing Court was not erroneous in terms of Uniform Rule 42(1)(a), as the applicant's cannot point to an error in respect of the record of the proceedings.

[31] Even if this Court is wrong in this regard, this Court will consider whether good cause has been raised by the applicants to rescind the order.

Whether the applicants have given a reasonable explanation for their default

[32] The applicants contend that they lacked knowledge of the date on which the application for a review was served on them and that this contributed to the delay in opposing the review application. Furthermore, the outbreak of the Covid-19 pandemic led to the declaration of the national lockdown during March 2020 and resulted in the closure of the applicants' offices. The applicants contend that this further exacerbated the delay in opposing the review application.

---

[7] Joffe et al, *High Court Motion Procedure: A Practical Guide*, Service Issue 12, at page 1-89).
[8] *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 SCA.
[9] *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 SCA.
[10] *Lodhi 2 Properties Investments CC* (note 8 above) para [17] and *Freedom Stationery (Pty) Ltd* (note 9 above) pages 465G–H and 467G–H.
[11] *Lodhi 2 Properties Investments CC* (note 8 above) para [17].
[12] *Bakoven Ltd v G J Howes* 1992 (2) SA 466 (E) at 472D):
[13] Ibid page 471 F-G.

[33] The applicants contend that due to a relaxation of the lockdown restrictions in August 2020, the applicant's offices were opened for a short while and closed again after the discovery of a positive Covid-19 case in the applicant's offices, which led to the applicant's personnel working from their respective homes and only on certain days working in the office. The applicants also contend that during consultations, it transpired that the application for the review, which was served on the applicants, could not be located preventing the applicants from giving proper instructions to file an application for a rescission. Whilst the applicants were searching for a court file a writ of execution was served on the applicants. The applicants used the contact details appearing on the writ of execution to correspond with the respondent's legal representatives and requested a copy of the documents to be served on the applicants.

[34] This Court finds that we are not dealing here with applicants who;

(a) were unaware or excluded from the review proceedings, or

(b) who were not afforded a reasonable opportunity to participate.

[35] The applicants were given notice of the review proceedings launched against them. The Sheriff's return of service was served on both the first and second applicants on 29 November 2019. The legal manager, Ms Lindokuhle Nhlenyama signed receipt for both applicants.

[36] Prior to 25 February 2020 the applicants did not state they had not received the notice of motion. In addition, the respondent tried since 17 March 2020 to serve the court order on the first applicant, but to no avail.

[37] On 31 July 2020, the respondent's attorney sent an email with a letter dated 30 July 2020, requesting a physical address or alternatively a request to serve the order via e-mail. The order was attached to the e-mail dated 31 July 2020 and it was faxed to the applicants on the same date. The order was subsequently served on 23 September 2020 at the address of the first applicant and was personally served on the legal manager, namely, Lindokuhle Nhlenyama. The applicants still failed to respond. It is clear that on 29 November 2019 as well as 23 September 2020 the offices of the applicants were open. Notwithstanding that the order was brought to the attention of the applicant's more than once, the applicants waited until a writ of execution was served on them during December 2020, before they made an effort to give attention to the matter.

[38] This Court finds that the applicants were aware of the relief sought by the respondent and furthermore, that the relief requested by the respondent was within the bounds of what the reviewing Court could grant. The applicants possessing the requisite notice and knowledge of what was sought at the review stage, themselves elected not to participate.

[39] In the matter of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State*[14] the Constitutional Court held that:

"… Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted." [my emphasis][15]

[40] The learned author Van Loggerenberg DE[16], states that:

"When an affected party invokes rule 42(1)(a), the question is whether the party that obtained the order was procedurally entitled to it.[17] If so, the order could not be said to have been erroneously granted in the absence of the affected party. An applicant or plaintiff would be procedurally entitled to an order when all affected parties were adequately notified of the relief that may be granted in their absence. The relief need not necessarily be expressly stated. It suffices that the relief granted can be anticipated in the light of the nature of the proceedings, the relevant disputed issues and the facts of the matter."[18]

[41] This Court finds that the review application was timeously made known to the applicants on 29 November 2019 and furthermore that the order granted by the Court on 27 February 2020 was made known to the applicants on 23 September 2020. This Court finds no irregularity in the review proceedings. This was not an *ex parte* review application. The applicants were aware of the date of the review.

[42] The Supreme Court of Appeal has stated in the matters of *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills*[19] and *Chetty v law Society, Transvaal*[20] that an insufficient explanation for the applicants default must be balanced against an applicant's *bona fide* defence which has not merely some prospect but a good prospect of success. Accordingly, this

---

[14] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC).
[15] Ibid para 61.
[16] Van Loggerenberg DE (note 1 above).
[17] *Freedom Stationery (Pty) Ltd* (note 9 above) page 465H and 467G–H.
[18] Ibid page 467G–H.
[19] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) [2003] JOL 10811 (SCA).
[20] *Chetty v law Society,Transvaal* [1985] 2 ALL SA 76 (A).

Court has gone one step further to establish whether the applicants have a *bona fide* defence which has a good prospect of success.

Whether the applicants have a bona fide defence which carries some prospect of success

1. Prescription of the claim

[43] The applicants fully articulate the issue of prescription in terms of the Prescription Act No 68 of 1969 ('The prescription Act') for the first time in their heads of argument. It was not raised fully in the rescission application. Section 17(2) of the Prescription Act allows a Court a discretion to entertain an argument pertaining to prescription even if it was not raised on the papers. This Court has accordingly considered it.

[44] The applicants referred to s12(1) of the Prescription Act and contended that 22 July 2016 is the date on which the refund became due and payable to the respondent. As a result, in terms of s11(d) of the Prescription Act the respondent's claim prescribed on 21 July 2019. Furthermore, in terms of s18(3) of Act 112 of 1976, the respondent failed to give notice within three-months of becoming aware of Mr Coetzee's failure to refund the deposit. The applicants contend further that the respondent should have dispensed with the required notice on 22 October 2016 when he lay a criminal complaint against Mr Coetzee. It was contended that in terms of Act 112 of 1976 the period of three months could have been extended in order to inform the applicants of the proposed claim against it, however, this period had not been extended by the applicants. Accordingly, it was contended that the respondent's claim prescribed both in terms of the effluxion of time in terms of the Prescription Act and non-compliance with s18(3) of Act 112 of 1976.

[45] Section 12(1) of the Prescription Act provides that prescription shall only commence to run as soon as the debt is due. Section 12(3) of the Prescription Act provides that "a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises."

[46] The applicants provided the resolution on 7 December 2018. In terms of s18(3) of Act 112 of 1976, the applicant would only have been able to institute action against the applicants after 7 December 2018. If the Prescription Act was applicable, prescription would start running in December 2018 as this is the date the respondent became aware of the circumstances

surrounding the debt and more specifically that the applicants had rejected his claim. Therefore, the claim against the applicants had not prescribed at the time the review application was instituted as the review application was served on 29 November 2019.

[47] Section 16(1) of the Prescription Act states as follows:

"the provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specific period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of debt, apply to any debt arising after the commencement of this Act."

[48] This Court interprets s16(1) of the Prescription Act as having no application to Act 112 of 1976, as the latter regulates its own time periods to institute a claim.

[49] Section 18(3) of Act 112 of 1976 provides that:

"No person shall have any claim against the board in respect of a theft or failure referred to in subsection (1) unless – (a) the claimant has, within three months after he became aware of such theft or failure, given notice in writing to the board of such claim."

[50] The respondent became aware of the theft and/or misappropriation of the claim amount on 24 October 2016 and lodged the claim with the first respondent on 14 November 2016. It is clear that the respondent lodged the claim with the first applicant within the required three-month period after which the respondent became aware of the theft and or misappropriation of the claim amount, as prescribed by section 18(3)(a) of Act 112 of 1976. The respondent was not out of time and that is why he did not seek an extension of the time period.

[51] The respondent complied with the provisions of Act 112 of 1976 by giving notice in writing to the applicants of his claim. Accordingly, this Court finds no merit in the defence of prescription raised either in terms of s18 (3) of Act 112 of 1976 or in terms of the Prescription Act and accordingly, this defence must fail. Even if the reviewing Court had these facts before it, this Court finds it would not have reached a different conclusion. Accordingly, this Court does not find a *bona fide* defence in respect to prescription.

[52] According to the learned author Van Loggerenberg DE, "No statutory period is prescribed within which proceedings for review which are not covered by the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') must be brought, but it is clear that they must be brought within a reasonable time. If it is alleged that the applicant did not bring the matter to

court within a reasonable time, it is for the court to decide (a) whether there was an unreasonable delay."[21]

[53] The review application *in casu* was not defended, as a result no complaint was raised by the applicants of any unreasonable delay on the part of the respondent.

2. Whether the payment of the deposit by the respondent was an *ex-gratia* payment

[54] In the resolution, the grounds for rejecting the respondent's claim were (i) that the respondent's claim prescribed in terms of s18 of Act 112 of 1976 and (ii) that there was no proof that the funds were paid into Mr Coetzee's account. The issue pertaining to whether the payment was an *ex gratia* payment was not one of the reasons why the respondent's claim was rejected and the applicant's cannot raise grounds of opposition other than the reasons provided in terms of the resolution which were brought in the review application. On this basis alone, this third defence should be disregarded. However, in the interests of justice, this Court has considered it.

[55] The applicants contend that the offer to purchase signed by the respondent and the seller did not make provision for the payment of a deposit but rather a full purchase price on transfer of the property. As a result, the respondent was under no obligation in terms of the sale agreement, to pay a deposit.

[56] The applicants allege that the payment of a deposit is referenced in the proof of payment as a loan and not a deposit for the property and that there is no provision in the sale agreement for the provision of a loan to Mr Coetzee. Furthermore, although the sale agreement made provision for the payment of money towards the purchase price to the conveyancers, Mr Coetzee was not a conveyancer to whom such payment should have been made. The applicants contend that the respondent was required in terms of the sale agreement to provide a guarantee for the payment of the full purchase price within forty-five (45) days of acceptance of the offer and no such guarantee was furnished, as a result, the sale agreement had lapsed by the time the respondent paid the deposit.

[57] The applicants state they do not know who A&D are, yet the respondent understood A&D to be part of the estate agency firm Zoliscape (Pty) Ltd of whom Mr Coetzee was part of and according to the respondent, the deposit was paid into the estate agent's bank account.

---

[21] Van Loggerenberg (note 1 above) pageD1-701 to D1-702.

[58] The resolution made no mention of the fact that the proof of the payment of R240 000-00 deposit referred to a loan instead of a deposit. Nothing turns on this, as the respondent still suffered the damage whether it was a loan or a deposit. Even if the reviewing Court had to consider this fact, it was not a reason provided in the resolution why the applicants rejected the respondent's claim. As a result, the order was not erroneously granted by the reviewing Court.

[59] Section 18(1)(a) and (b) of Act 112 of 1976 provides that:

"18(1) Subject to the provisions of this Chapter, the fund shall be liable and applied to reimburse persons who suffered pecuniary loss by reason of –

(a) Theft of trust money, committed after the commencement of this Act, by an estate agent;

(b) The failure of an estate agent to comply with section 32(1) or 32(2)(e)."

[60] Even if this was an *ex gratia* payment, in terms of s18(1)(a) and (b) the applicants were still liable to reimburse the respondent who suffered a pecuniary loss. There is no requirement in terms of s18(1) of Act 112 of 1976 that the deposit paid by the respondent should have been part of the sale agreement. The respondent explained in the answering affidavit that the reference of 'M Krug – loan' on the proof of payment of the R240 000-00, was effected by Securities & Trading Technology (Pty) Ltd on his behalf and that this was a loan from Securities & Trading Technology (Pty) Ltd to the respondent who was the director of Securities & Trading Technology (Pty) Ltd. If there was an instruction by Mr Coetzee to pay this amount, the respondent cannot be penalized for following this instruction whether it was peremptory or not in terms of the sale agreement. As a result, the respondent's claim against the applicants complies with the requirements of Act 112 of 1976.

3.Whether there is proof that the claim amount of R240 000-00 was paid into Mr Coetzee's account

[61] From the annexures to the review application, it appears that the claim amount was paid into ABSA account number 9287855401 which belongs to Mr Coetzee who according to the respondent was the estate agent *in casu*. There is enough evidence under affidavit that the account into which the amount of R249 000-00 was paid was Mr Coetzee's account. There is also a written instruction by Mr Coetzee that the money had to be paid into his trust account.

[62] Section 78(2)(a) of the, now repealed, Attorneys Act 53 of 1979 ('the Attorneys Act') provided that:

"Any practitioner may invest in a separate trust savings or other interest-bearing account opened by him with any banking institution or building society any money deposited in his trust banking account which is not immediately required for any particular purpose."

Section 78(2A) of the Attorneys Act provided that:

"Any separate trust savings or other interest-bearing account – (a) which is opened by a practitioner for purpose of investing therein, on the instruction of any person, any money deposited in his trust banking account; and (b) over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity, shall contain a reference to this subsection."

[63] The remaining chapters of the Legal Practice Act were implemented on 1 November 2018, thereby replacing the Attorneys Act in its entirety. As at 4 March 2016, when the respondent transferred the claim amount of R240 000-00, the now repealed Attorneys Act still applied and in accordance with the instruction of Mr Coetzee, the claim amount of R240 000-00 had to be paid into a trust savings account or other interest-bearing account as provided by s78(2A) of the Attorneys Act.

[64] Accordingly, in respect to this defence, the applicants must also fail.

[65] The applicants referred to the Constitutional Court matter of *Occupiers, Berea v De Wet NO*[22] and contended that, had the reviewing Court in the matter *in casu* been aware of the issues raised above, it would not have granted judgment against the applicants. The facts of the matter of *Occupiers, Berea*[23] is distinguishable from the matter *in casu*, in that there were valid defences in respect of the order for eviction which was by agreement entered into by the parties. The Constitutional Court rescinded the order and held that the order was granted in error in that the applicants had a *bona fide* defence with good prospects of success.

[66] The defences in the matter *in casu* are not valid defences and the application for rescission must fail.

[22] *Constitutional Court matter of Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 366E – 367A.
[23] Ibid.

[67] The applicants requested in the absence of Uniform Rule 42(1), that this Court should set the order of the reviewing Court aside in terms of the Common Law. At common law a judgment can be set aside on the following grounds:

(a) fraud;

(b) *justus error* (on rare occasions);

(c) in certain exceptional circumstances when new documents have been discovered;

(d) where judgment had been granted by default; and

(e) in the absence between the parties of a valid agreement to support the judgment, on the grounds of *justa causa*.

An application on common-law grounds must be brought within a reasonable time. In this respect, an application to rely on the Common law was not made on the papers and secondly the applicants have not given a sufficient explanation for the delay in bringing the rescission application.

COSTS

[68] The respondent has requested that should this Court be in favour of the respondent in dismissing the rescission application, that the applicants should also pay for this application, together with all the costs incurred in the urgent applications that were brought by the applicants.

[69] On 3 December 2020, the sheriff duly executed a writ of execution at the premises of the applicants and attached their moveable assets. On 4 December 2020 the applicants' attorney addressed a letter to the respondent's attorney advising that they intended to bring a rescission application and they requested the respondent to hold the writ of execution in abeyance, pending the rescission application. The aforementioned letter did not give the respondent's attorney a date by which it had to respond. There was accordingly no response to the said letter sent by the applicants and neither was there any undertaking by the respondent to hold in abeyance the writ of execution pending the rescission application. The applicants contend that due to the respondent's silence, the applicants had no option but to bring the first urgent application to interdict the sheriff from removing moveable assets under attachment from the first applicant's place of business and to interdict and restrain the sheriff from selling in execution any goods that may have been removed from the first applicant's place of business.

[70] On 10 December 2020 the applicants delivered to the respondent's attorney the first urgent application which was to be heard on 15 December 2020, together with the applicant's

rescission application. On 10 December 2020 the respondent's attorney delivered a letter to the applicant's attorney stating that the respondent would undertake not to instruct the sheriff to remove the attached moveable assets, until such time as the applicants' rescission application had been disposed of. The respondent's attorney requested that the first urgent application be withdrawn as the relief requested had been provided and there was accordingly no urgency, failing which a punitive costs order would be sought against the applicants. The respondent's attorney requested a response to this by 17h00 on 10 December 2020, given the time frames for the respondent to file his answering affidavit as the *dies* expired on 11 December 2020.

[71] At 17h05 on 10 December 2020, Ms Cheri Beatie ('Ms Beatie') of the respondent's attorney attempted to contact the applicants' attorney, Mr Ndoe, in order to obtain a response, however, this attempt was unsuccessful. At 22h27 on 10 December 2020, Mr Ndou indicated that he would respond by 11 December 2020. Ms Beatie once again attempted to contact Mr Ndou at 08h00 on 11 December 2020 to obtain a response, however, the attempt was unsuccessful.

[72] The respondent's attorney once again delivered a letter to Mr Ndou at 08h51 on 11 December 2020 informing him that their application was not urgent. Due to the insufficient response received from Mr Ndou, the respondent's attorney delivered a notice to oppose and was forced to prepare an answering affidavit in respect of the first urgent application. Subsequently the parties agreed that the matter would be removed from the urgent roll, which it was. However, it was not withdrawn.

[73] The applicants counsel contended that they were in their rights to bring an urgent application as the respondent only gave his undertaking after the urgent application had been launched and if a cost order should be made, it should be made in favour of the applicants. This Court disagrees. It is clear that the applicant's attorney delayed in advising the respondent timeously, which led to the respondent filing a notice to oppose as well as an answering affidavit. It is clear the matter could easily have been resolved before a notice to oppose and answering affidavit was filed, and as a result thereof, the costs of the first urgent application are to be borne by the applicants.

[74] It is important to bear in mind that the rescission application was served on the respondent as far back as 10 December 2020. The applicants are *dominus litis* in respect of the rescission application and are obliged to do everything necessary to drive and finalise the rescission application. Since 10 December 2020, it is clear that the applicants have delayed in

finalising the rescission application as no date has been obtained on the opposed motion roll. Ms Beatie made numerous phone calls and sent numerous e-mails to the registrar of this Court to obtain a date for the hearing of the rescission application. The e-mails to the registrar were followed up on 28 May 2021, 14 October 2021, 19 October 2021 and 22 October 2021. On 5 November 2021 Ms Beatie sent a letter to Mr Ndou advising that the applicant's attorney had failed to take the necessary steps to have the applicant's application for rescission enrolled and that if the applicant's attorney did not attend to the necessary to enrol the matter within 5 days from receipt of the letter, the respondent's attorney would proceed with the writ of execution against the applicants.

[75] The respondent's attorney received no response from the applicant's attorney to the letter dated 5 November 2021.

[76] It is trite that an application for rescission of judgment does not stay the process of execution. It is clear that due to the applicant's nonchalant attitude in delaying the finalisation of the rescission application, the respondent instructed his attorneys to proceed with the execution. The reasons to persist with the execution was communicated to the applicant's attorney in a letter dated 25 February 2022. The applicant's attorney states that the respondent's attorney should rather have brought an order to compel the applicant's to enrol the rescission application, failing which the rescission application would be struck off. It appears the legal fees incurred by the respondent exceed R178 426-77 for a claim of R240 000-00. It would be nonsensical to expect the respondent to have incurred more legal expenses to compel the applicant. The respondent already had a judgment in his favour and was entitled to seek execution.

[77] Arising from the contents of the letter dated 25 February 2022, the applicants launched a second urgent application dated 28 February 2022 on newly drafted papers which was initially supposed to be heard on 8 March 2022. The relief claimed was the same as the first urgent application. The applicants failed to enrol the second urgent application due to problems experienced with CaseLines. The respondent's counsel contends the applicants' attorney, Mr Ndou, failed to communicate to the respondent's attorney of record, the reason why the matter would not proceed on 8 March 2022. The applicant's attorney contends that the problems experienced with CaseLines were relayed to the respondent's attorney through a letter dated 11 March 2022. Irrespective of the alleged letter dated 11 March 2022, it appears the letter did not reach the attention of the respondent's attorney and the respondent had to incur legal costs in

respect to the hearing of the urgent matter on 8 March 2022 by briefing counsel to ensure that the matter was not enrolled.

[78] The respondent's counsel contends that without notice to the respondent, the applicant then amended the date on the notice of motion and attempted to enrol the matter on 15 March 2022. Opposing papers were drafted by the respondent in respect of the second application. The matter was then set down on 15 March 2022. The applicant's contention that they are not familiar with CaseLines and that they should not be punished for not knowing how CaseLines operates is not an excuse. CaseLines has been in operation at the Johannesburg High Court since the end of 2019. The respondent cannot be punished for the applicant's inability to operate CaseLines. As a result, the costs of the second urgent application dated 28 February 2022, meant to be heard on 8 March 2022, are to be borne by the applicants.

[79] The fact that the applicant's enrolled the matter on the urgent roll for 8 March 2022 and then elected to remove it and place it down on the roll for 15 March 2022 in itself indicates that the urgency required as per the directive of the Deputy Judge President of the Gauteng Local Division, Johannesburg, dated 4 October 2021 was not met. The applicants knew since at least 5 November 2021, that the respondent was of the intention to instruct the Sheriff to attach and remove the applicants' movable assets. For the applicants to run to the urgent court only once the sheriff arrives at their premises to attach and remove the moveable assets is nothing else but self-created urgency. Had the applicant complied with all their duties in respect of this Court's practice manual, the rescission application might already have been finalised earlier and the necessity for the urgent applications would have been unnecessary. Accordingly, the costs of the second urgent application, dated 28 February 2022, meant to be heard on 15 March 2022 are to be borne by the applicants.

[80] The respondent's counsel contends that the first urgent application was not withdrawn and the matter is still *lis pendens* involving the same parties, based on the same cause of action and subject matter and that accordingly the second urgent application is vexatious in nature attracting a punitive cost order.

[81] Costs are within the discretion of the Court and this Court does not find that a punitive cost order is warranted.

ORDER

[82] In the premises the following order is made:

1 The applicants' rescission application dated 9 December 2020 is dismissed. Costs to follow the result.

2 The applicants are jointly and severally liable to pay the costs of the rescission application.

3. The applicants are jointly and severally liable to pay all the costs pertaining to the following urgent applications:

3.1 The urgent application meant to have been heard on 15 December 2020.

3.2 The urgent application dated 28 February 2022 meant to have been heard on 8 March 2022.

3.3 The urgent application dated 28 February 2022 meant to have been heard on 15 March 2022.

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 15h30 on 3 May 2023

Appearances:

On behalf of the applicants:	Mr. B.A Ndou
Instructed by:	Ndou Attorneys
On behalf of the respondent:	Adv. J.C Bornman
Instructed by:	Hutcheon Attorneys