IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

DATE 7/11/16 SIGNATURE

CASE NO: A290/2015
A QUO CASE NO: 37681/2012
DATE: 11/11/2016

IN THE MATTER BETWEEN

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	APPELLANT/DEFENDANT
AND	
BROOKLYN EDGE (PTY) LTD	1ST RESPONDENT/1ST PLAINTIFF
PIVOT PROPERTY DEVELOPMENT (PTY) LTD	2ND RESPONDENT/2ND PLAINTIFF

JUDGMENT

PRINSLOO J

[1] The appellant appeals against the dismissal by the court *a quo*, per Bosman AJ, of an application by the appellant (as applicant) for the rescission of a judgment granted against it, by default, by Collis AJ on 9 May 2014.

[2] The judgment dismissing the rescission application is dated 13 November 2014.

[3] On 24 March 2015, the learned Judge *a quo* granted leave to appeal to the Full Court of this Division. The appeal came before us on 14 September 2016.

[4] Before us, Mr Strydom SC, with Mr Mkhwanazi, appeared for the appellant and Mr Labuschagne SC, with Mr Pretorius, appeared for the respondents.

Brief synopsis of the factual background of the case

[5] In a lengthy opposing affidavit to the rescission application, the respondents offered a useful summary of the background facts from which I will paraphrase some extracts for the sake of convenience.

[6] In terms of a written deed of sale, dated 31 July 2003, the first respondent (with the second respondent as its nominee, as briefly described hereunder), bought certain immovable properties from the appellant for the sum of R9,5 million.

[7] The properties are erven 162, 163, 164, 165, 193 and 194 as well as portions 1 and 2 and the Remainder of erf 195, Muckleneuk, Pretoria.

[8] In terms of the deed of sale, erven 162 to 194 had to be transferred into the name of the first respondent, and portions 1 and 2 and the Remainder of erf 195 into the name of the second respondent, described as the nominee of the first respondent in terms of clause 7.4 of the deed of sale. For present purposes, nothing turns on this.

[9] At the time of conclusion of the deed of sale, the property was zoned as "*Public Open Space*" in terms of the Pretoria Town Planning Scheme, 1974 ("the 1974 Scheme"). Collectively, all the properties are referred to, for purposes of this judgment, as "the property". At the time, the property, zoned as it was, was used mainly as public tennis courts.

[10] The respondents acquired the property in order to develop it into a mixed-use development leading to the necessity for the respondents to rezone the property.

[11] Because the property was zoned as a public open space, the respondents had to ensure its closure in terms of certain provisions of the Local Government Ordinance 17 of 1939 ("the 1939 Ordinance"). The deed of sale specifically provided for the rezoning and closure as mentioned.

[12] In terms of the deed of sale the appellant had the responsibility to secure closure of the property and the respondents the responsibility to apply for the rezoning of the property.

[13] The deed of sale provides that the property may not be transferred into the name of the respondents before the rezoning process is completed. For that to happen, the closure must first be completed.

[14] In terms of the deed of sale the existing tennis courts, clubhouse and sport facilities on the property must be relocated by the respondents to another property of the appellant's choosing.

[15] In December 2003 the respondents applied for removal of restrictive conditions and rezoning of the property.

[16] In July 2005 the City Planning Committee recommended to the full Council of the appellant that the rezoning be approved.

[17] After some delay, the respondents, in March 2007, launched an appeal against the perceived unreasonable delay in taking the required decision with the Department of Local Government, Gauteng Province. The appeal was upheld and, in March 2010, the application for removal of restrictive conditions and rezoning was granted.

[18] The prescribed closure of the property, *supra*, was not effected as required by certain sections of the 1939 Ordinance. The respondents allege that objections raised against such closure were formally withdrawn, but the appellant denies that the objections were, indeed, withdrawn. It is common cause that the appellant did not finalise the closure of the property as a public open space by presenting the Surveyor-General and the Registrar of Deeds with a closure certificate as intended by section 67 of the 1939 Ordinance.

[19] In October 2010, more than seven years after the deed of sale was signed, the respondents launched an application for relatively wide-spread relief, including a

mandamus to force the appellant to issue the closure certificate and, after compliance with certain other requirements, to sign transfer documents to enable the respondents to take transfer. There was also a claim for declaratory relief relating to the liability of the respondents, or lack thereof, to pay interest and alternative claims for cancellation of the deed of sale and damages.

[20] In 2011, the respondents withdrew the application after the appellant served a notice of intention to defend and, in June 2012, almost nine years after the deed of sale was signed, the respondents instituted the action, for essentially the same relief applied for in terms of the aborted application, which action is relevant for present purposes and during the course of which proceedings the orders were granted by default against the appellant.

Procedural developments leading up to the judgment granted by default

[21] The appellant's attorneys failed in their duty to serve a discovery affidavit timeously and also to formulate comprehensive answers to questions posed by the respondents during a pre-trial conference.

[22] The respondents' attorneys wrote regular reminders to their counter-parts for the appellant, calling for these failures to be remedied and for the discovery affidavit and the comprehensive answers to be supplied.

[23] Most, if not all, of these reminders went unanswered. The conduct of the appellant's attorneys is to be frowned upon, and not up to the standard expected from the reasonable attorney.

[24] Details of these reminders appear from the comprehensive opposing affidavit filed in the rescission application. I consider it unnecessary to repeat those details.

[25] Against this background, the respondents' attorneys launched an application to compel. In one application, they proceeded in terms of rule 35(7) to compel discovery and in terms of rule 30A to compel the furnishing of proper answers.

[26] The appellant's attorneys did not react when the application to compel was served on them so that the order was granted by default on 27 January 2014. As far as discovery is concerned the appellant was ordered to deliver its discovery affidavit within ten days of service of the order failing which the respondents were given leave to apply for the striking out of the defence and for granting of judgment in the main action. There was also an adverse costs order. A similar order was made in respect of the rule 30A application to compel a response to the pre-trial conference questions.

[27] The order was served on the appellant's attorneys on 17 February 2014. This was preceded by another letter, dated 6 February 2014, calling for compliance.

[28] When there was no response, the application to strike out the defence and to obtain judgment by default was launched on 7 March 2014. It was set down for 9 May 2014 when the orders were granted by default. The appellant's attorneys did not react to the applications which were served on them.

[29] Given the nature of some of the defences offered on behalf of the appellant for purposes of obtaining a rescission of the judgment, to which I will refer hereunder, it is useful to quote the contents of the somewhat lengthy 9 May 2014 order:

> "1. The defendant's defence in case no 37681/2012 ('the action') is struck out;
>
> 2. The defendant is ordered to pay the costs of this application;
>
> 3. Judgment is granted in favour of the plaintiffs in the action as follows:
>
> 3.1 the defendant is directed to, within 7 (seven) days of this order, submit to the Surveyor-General and the Registrar of Deeds, Pretoria, a closure certificate confirming the closure of erven 162, 163, 165 (*sic*), 165, 196 and 194 and portions 1 and 2 and the Remainder of Erf 195 Muckleneuk Township ('the properties') as public open space in terms of the provisions of section 67(9)(a) of the Local Government Ordinance 17 of 1939 ('the 1939 Ordinance'), read with section 68 thereof;
>
> 3.2 it is declared that the first and second plaintiffs, alternatively the first plaintiff, are/is not liable for the payment of interest on the balance purchase price for a period of 18 (eighteen) months from date of conclusion of the deed of sale by virtue of clause 1.2.2 of the deed of sale;
>
> 3.3 it is declared that the first and second plaintiffs, alternatively the first plaintiff, are/is further excused from the payment of interest on the balance purchase price from 15 January 2007 until the date of compliance by the defendant with its

contractual and statutory obligations pertaining to closure of the properties as a public open space;

3.4 the defendant is ordered to, after compliance with the Orders above, and after publication of the amendment scheme by the MEC in terms of section 7(16) of the Gauteng Removal of Restrictions Act 3 of 1996 ('the GRRA'), to sign all transfer documents which are required in order to pass transfer of Erven 162, 163, 164, 165, 193 and 194 Muckleneuk Township into the name of the first plaintiff and in order to pass transfer of Portions 1 and 2 and the Remainder of Erf 195 Muckleneuk Township into the name of the second plaintiff, alternatively to effect transfer of all the aforesaid properties into the name of the first plaintiff;

3.5 the first and second plaintiffs, alternatively the first plaintiff are/is ordered to pay, jointly and severally, the purchase price, less 50% of the replacement cost of the tennis-courts and clubhouse, being R10 919 000,00 to the defendant against registration of transfer of the properties, together with interest thereon pursuant to the deed of sale, such interest, however, limited in accordance with the order granted in 3.2 and 3.3 above;

3.6 the first and second plaintiffs, alternatively the first plaintiff are/is ordered to, prior to or simultaneously with any development of the properties, at its cost and to the reasonable satisfaction of the Defendant's City Planning Division and

General Manager: Land and Environmental Planning, relocate the existing sport and recreational facilities, consisting of two clubhouses and six tennis courts to the same existing standards and size thereof to the substituting property identified by the defendant;

3.7 in the event of the defendant failing to sign all transfer documents and to take all reasonable steps necessary to pass transfer of the aforesaid erven to the first and second plaintiffs respectively, as set out above and/or fails to issue the certificate referred to in 3.1 above, within 10 (ten) days of date of demand, the Sheriff is authorised to do so and to take all reasonable steps in regard thereto; and

3.8 the defendant is ordered to pay the costs of the action."

Brief synopsis of the exchanges to be found in the papers comprising the opposed rescission application

[30] The application was launched within twelve court days after the 9 May judgment.

In the founding papers, it is not explicitly stated whether the application is launched in terms of rule 31, rule 42 or the common law. However, in the founding papers the questions of wilful default (or lack thereof), *bona fides* on the part of the appellant and a true intention to proceed with the defence of the action and some defences relied upon were raised.

[31] In the notice of motion rescission is sought of the 9 May orders striking out the defence and granting the default judgment referred to.

[32] The deponent to the founding affidavit is Ms Marike Pretorius, a candidate attorney in the employ of the appellant's attorneys. She states that she had been dealing with the matter personally together with one of the directors, Mr Schalk Willem Hugo whose confirmatory affidavit is attached to the founding affidavit. I will refer to them as "Pretorius" and "Hugo" without intending any disrespect.

[33] What follows is a brief summary of some of the allegations in the founding affidavit:

- Pretorius had inadvertently and mistakenly confused the date of the hearing of the striking out and default judgment application with the date of hearing of another interlocutory application, issued separately and under another case number (22046/14) by the respondents in the same case and dealing with the question of whether or not there was compliance with the requirements of the Institution of Legal Proceedings Against Certain Organs of State Act no 40 of 2002. This latter application dealt with the question of applicability of that Act and, if applicable, condonation for failure to comply with the requirements as intended by section 3 of Act 40 of 2002 ("the section 3 application").

- The deed of sale was dated 31 July 2003. I add that the original particulars of claim is dated June 2012, almost twenty months after the abortive October 2010 application was withdrawn.

In an amendment dated 3 December 2013 (more than ten years after the date of the deed of sale) the respondents, as plaintiffs, inserted a new allegation into the particulars of claim, relying on a notification by the MEC of Economic Development, Gauteng Province to the first respondent on 8 June 2010 to the effect that an appeal regarding the rezoning application had been upheld and the rezoning approved. This was in terms of the Gauteng Removal of Restrictions Act no 3 of 1996 ("the GRRA").

- In a special plea delivered before the amendment, the issue of non-compliance with the provisions of Act 40 of 2002 was raised. In the amendment, the respondents alleged compliance with Act 40 of 2002.

- However, on 14 March 2014 about a week after the striking out and default judgment application ("the default judgment application") was served, the respondents delivered a notice of motion consisting of some 238 pages seeking a declarator to the effect that section 3 of Act 40 of 2002 does not apply to this particular action. In the alternative condonation for non-compliance is sought in terms of section 3 of that Act.

- The trial had been set down for hearing on 16 September 2014.

- The section 3 application was set down for 22 May 2014.

In order to mainly consider the section 3 application, Pretorius (and presumably Hugo as well) consulted with officers of the appellant and counsel

on 9 May 2014, the very day when the default judgment was granted. These consultations followed prior consultations between the appellant's senior and junior counsel. One of the main issues considered during the 9 May consultation was the issue whether or not the section 3 application could be granted if the claim had already been extinguished by prescription. I add that section 4(b) of Act 40 of 2002 stipulates that a court may grant condonation for failure to comply with the notice requirements of the Act if, *inter alia*, "the debt has not been extinguished by prescription".

- In the affidavits supporting the section 3 application, the respondents submitted that the issue of prescription would "better be ventilated" at the trial. I add that the papers of this application were not before us during the appeal hearing.

- In view of the aforegoing, it was decided by the appellant and its representatives that the respondents, as plaintiffs, ought to be approached with the proposal that the section 3 application be postponed for hearing at the trial and be considered after the leading of evidence. According to Pretorius, this issue was also addressed in correspondence.

- In the meantime, says Pretorius, the appellant was in the process of complying with the issues of discovery and pre-trial answers which formed the basis of the default judgment application. Significantly, for present purposes, she adds

> "... and in this process I erroneously became under the impression that the two above-mentioned applications, that is the one for striking out

> and judgment and the application for leave regarding (Act 44 of 2002) had both been set down for hearing on 22 May 2014 and have advised the defendant accordingly. It subsequently transpired that this was an error and omission on the part of the defendant's attorneys and should not be held against the defendant. This inadvertent diarising had now led to a judgment against the defendant without a hearing, without condonation having been granted to the plaintiffs and by default whilst the main action had been enrolled for 16 September 2014 as already aforesaid."

I add that, on a general reading of the papers, I am left with the clear impression that the appellant, at all relevant times, had the desire to defend the action and that the rescission application represented a *bona fide* effort to achieve that result. After all, the abortive application was opposed, the action was defended and a plea was filed and representatives of the appellant attended the consultation with their legal team on 9 May 2014, the very day when the default judgment application was granted. By the same token, I have difficulty in concluding, on the probabilities, that this is a proper case for blaming the appellant, a vast metropolitan municipality organisation represented at different times in this litigation by different officers, for mistakes made by Pretorius with her diary, and, for that matter, for the unsatisfactory failure by Pretorius and/or Hugo to answer promptly to letters and demands from their opponents, as described. I will revert to this subject.

- As to late discovery, Pretorius alleges that during the course of the abortive 2010 application "extensive documentation" was exchanged between the parties, and "all the facts" had already been within the knowledge of the parties. The documentation in question, particularly relating to the various rezoning applications and appeals, are voluminous. They cover developments which took place over a whole decade. Some had been archived in various sections of the appellant's administration sections from time to time. According to Pretorius it was not possible to timeously comply with the rule 35 notice or the ten day order. Pretorius says she did not intend to disrespect the order although, in my view, her failure to ask for an extension is difficult to understand. She says that the trial was still some six months away when she started working on the discovery effort and the discovery affidavits had been ready by 17 April 2014. She thereafter heard that the appellant's legal officer who attended the 9 May consultation said that he had been authorised to depose to the discovery affidavit (and not a different legal officer who had previously deposed to affidavits on behalf of the appellant). Pretorius amended the discovery affidavit and attached a copy to her founding affidavit. The schedule appears to be a lengthy and involved affair, running into some 96 items. Pretorius submitted that there was no real prejudice to the respondents, because they received the discovery affidavit some four months, rather than five or six months, prior to the scheduled trial date.

- As to the pre-trial answers, Pretorius argued that the issues raised in the questions were largely of a formal nature. After the pre-trial conference, the respondents amended their particulars of claim and subsequently sought to deal

with the issues involving compliance with Act 44 of 2002. The question of separating certain issues for adjudication during the trial became relevant and she held back delivery of the answers. She argued that there was no prejudice to the respondents, but, in any event, the pre-trial answers had been served on the respondents' attorneys by the time Pretorius deposed to the founding affidavit on 27 May 2014.

- Under a heading "public interest and merits" Pretorius, in the founding affidavit which was crafted in a rather unorthodox style, deals with the "merits" of the case and alludes to certain defences which the appellant relies upon:

  (i) Pretorius refers to paragraph 10 of the plea which contains allegations that the Council of the appellant approved the closure and subsequent sale of the properties to the first respondent on the basis of a report made to the Council by the then acting municipal manager. This report was based on oral and written representations made on behalf of the first respondent by its attorneys to the Strategic Executive Officer: Housing, City Planning, Land and Land Environmental Planning and other officials of the appellant. The case of the appellant is that the representations included that an international corporation would invest and develop the property in a joint venture with the first respondent. The development of the property would also serve as the headquarters for the "South African interest" of the international corporation. There would be a huge influx of foreign capital as part of the development costs. The shareholding of the first respondent would be proportionate

to the development and the majority of the shareholding in the first respondent would be held by the United States based company.

It is alleged that these representations were false so that the approval of the sale by the Council did not comply with the relevant sections of the Ordinance alternatively the approval is a nullity and should be set aside as it did not lawfully empower the appellant to dispose of the property.

These allegations are based, so it is pleaded, on a forensic report commissioned by the appellant prior to the institution of the action. The respondents were aware of the contents of the forensic report but did not attach same to any of their applications nor place the conclusions reached before the court.

Attached to the founding affidavit, is a copy of this forensic report. It is dated June 2005, and styled "Forensic investigation on the alienation of erf 162 to 165, 193, 194, portions 1 and 2, and the Remainder of erf 195, New Muckleneuk". It was addressed to the appellant. Before us, the forensic report was not analysed and debated. It is also clear from the opposing affidavit submitted by the respondents that the conclusions arrived at in the forensic report are in dispute.

It is not necessary, for present purposes, to express a view about the correctness of the forensic report, but it can be said that, according to the forensic report, the initiator of the report leading to the sale being

approved by the Council, was one Ms R Van Coller, "municipality legal advisor". It is also alleged that she had a hand in the preparation of the deed of sale.

For illustrative purposes, I quote two of the conclusions of the forensic investigator:

> "8.5.3 Furthermore, Van Coller misled or attempted to mislead the Council through a report which indicated, among other things, that there was an overseas investor, which would be making a capital investment in addition of about R100 million and that this would 'have substantial positive spin-offs and benefits to the city' and would result in 'the creation of thousands of job opportunities'. To date, almost two years after the conclusion of the transaction, there is no sight of such investor or the development envisaged in the report.
>
> 8.5.4 In addition, the valuation department, through the Strategic Executive: Corporate Services, Administrative Services (Property Valuation), did not act in the best interest of the municipality, in that it recommended a selling price of R9,5 million when the land was in fact worth approximately R28 million."

The investigator also recommends that corrective and/or disciplinary measures should be considered against Van Coller "in respect of her

negligence and misconduct", and also against the Department of Corporate Services, Administrative Services (Property Valuation) "in respect of their negligence and misconduct".

In this regard, and after having referred to the forensic report in her founding affidavit, Pretorius says the following:

> "I respectfully submit that it is of crucial importance to the defendant and also in the public interest that this matter proceed to trial and that the plaintiffs not be allowed to proceed with the judgment in their favour which they have obtained by default in the circumstances as set out above and which would result in the sale and transfer of property belonging to the defendant which sale would have been *ultra vires* and which default judgment had in any event been obtained without the issues of prescription and compliance with the Institution of Legal Proceedings Against Certain Organs of State Act, having even been considered by this honourable court."

It seems to me that this defence represents a triable issue, in the spirit of the principles applied when adjudicating upon rescission applications, which may well result in success for the appellant, if the allegations were to be ventilated in evidence before a trial court. This remark may be fortified by the finding of the forensic investigator that the property was sold to the respondents at a fraction of its true value.

In my view, a court presiding over a rescission application, and considering the relevant principles applicable, to which I will refer, ought to be slow to dismiss this defence as one without merit or reasonable prospects of success.

(ii) Pretorius also bemoans the fact that the defence of prescription raised by the appellant was overtaken by the granting of the default judgment application. Prescription was raised as a special plea and the pleadings were before the learned judge *a quo* when the rescission application was heard. This much is emphatically stated by the deponent to the opposing affidavit.

I now turn to this further defence offered by the appellant for purposes of obtaining rescission of the judgment. This is done in the exercise, in the spirit of considering rescission applications, of deciding whether good cause was shown to justify such a rescission.

- The defence of prescription is raised in the special plea, which came before the learned judge *a quo*, in the following terms (only extracts are quoted for the sake of brevity):

"**First special plea:**

1.

1.1 The deed of sale on which the plaintiffs rely was entered into on 31 July 2003.

1.2 The plaintiffs further plead that they had complied with all their obligations pursuant to the deed of sale and further plead that the defendant has, since the alleged withdrawal of objections against the closure process prescribed by section 68 read with section 67 and 63 of the 1939 Ordinance '... failed, despite demand, to carry out the closing of the property as a public open space' and further '... failed to, from date of submission of the first plaintiff's rezoning application to it on 8 December 2003 until 16 March 2007 consider such application and/or to take a final decision with regards thereto ...'.

1.3 The plaintiffs allege that the aforementioned failures amounted to breaches of the deed of sale which, according to the plaintiffs '... resulted in the transfer of the property being kept in abeyance by virtue of the provisions of clause 7.2 of the deed of sale'.

1.4 The second plaintiff, in so far as it may have *locus standi* and subject to the defendant's third special plea *infra*, further claims that it has been nominated by the plaintiff in respect of an entitlement to receive transfer of certain portions of the immovable property, with reliance on the same deed of sale entered into on 31 July 2003.

1.5 The plaintiffs further allege that the defendant could have complied with all its obligations and could thereafter have transferred the property or portions thereof to the first plaintiff and its nominee at the latest by 15 January 2007.

1.6 Based on the aforesaid, the plaintiffs jointly claim specific performance of the defendant's obligations pursuant to the deed of sale and jointly tender payment of the purchase price as calculated by them.

2.

The plaintiffs' summons was served on the defendant on 29 June 2012 and the application in case no 66099/10 issued on 25 October 2010, both of which are more than three years after the alleged date of breaches and/or the alleged date upon which the plaintiffs' claim for specific performance arose.

3.

In the premises, the plaintiffs' claims have become prescribed in terms of section 11 of the Prescription Act 68 of 1969."

- The respondents, as plaintiffs, filed a replication to the plea, dealing only with the prescription plea.

The case offered by the respondents to counter the prescription plea, in summary, is that monthly statements sent to the respondents by the appellant over a period of some ten years from October 2003 to January 2013 pertaining to the outstanding purchase price arising from the deed of sale of 31 July 2003 amounted to an express or tacit acknowledgement by the appellant of the

liability due in terms of the deed of sale (presumably the duty to give transfer against payment of the purchase price).

In this replication, the crux of the argument offered to defeat the prescription plea is crafted as follows:

> "2.3 Each monthly statement issued by the defendant to the first plaintiff, acknowledging the outstanding purchase price and interest thereon due, has interrupted prescription in terms of section 14(1) of the Prescription Act 68 of 1969 and prescription commenced to run afresh from the date of each of the aforesaid tax invoices."

In addition, it was pleaded in the replication that the appellant's obligations in terms of the deed of sale, ie to bring about closure of the property as a public open space in terms of the 1939 Ordinance, and to publish an amendment scheme as also contemplated in the deed of sale, "are obligations reciprocal to the plaintiffs' obligation to take transfer and make payment of the purchase price in terms of the deed of sale."

It was pleaded that the appellant's reciprocal debt arising from the contract has not become prescribed so that the respondents' right to claim transfer against payment of the purchase price has not become prescribed either by virtue of the provisions of sections 11 and 13(2) of the Prescription Act 68 of 1969.

- In their opposing affidavit to the rescission application, the respondents, in their efforts to persuade the learned Judge *a quo* not to grant the rescission because the appellant had failed to show good cause as required for that purpose, also dealt with their replication in response to the prescription plea, details of which I have now referred to.

  However, the respondents in this opposing affidavit only refer to the portion of the prescription plea based on the provisions of section 14(1) of the Prescription Act and the argument that prescription was interrupted with the delivery of each invoice, over the period of some ten years, with each invoice representing an express or tacit acknowledgement of liability.

  The additional argument, based on section 13(2) of the Prescription Act, raised in the replication, was not mentioned in the opposing affidavit to the rescission application. As mentioned, it has to do with the prescription of the reciprocal obligations flowing from the deed of sale. During the proceedings before us, the argument was also not pressed with any force. It may have something to do with the fact that the respondents themselves pleaded that the appellant ought to have been able to transfer the property by not later than 15 January 2007 so that "a reasonable period required for finalisation of the closure and rezoning would have expired on or about 15 January 2007".

- As to the section 14(1) plea to the effect that the monthly invoices constituted repeated acknowledgements of liability, the following is said in the appellant's replying affidavit in the rescission application (it is in the form of a

confirmatory replying affidavit attested to by an employee of the Finance Department of the appellant, and I only quote extracts for the sake of brevity):

"3.3 ... For this purpose a separate account is created, even for contractual payments, in similar fashion as the accounts of individual ratepayers. This is to ensure that, when an amount is paid to the Defendant, it is allocated to the correct account.

3.4 In the present instance such an account was created for the purchaser. The invoices, in referring to the balance purchase price and interest thereon as provided for in the agreement merely confirm the creation of the aforesaid infrastructure so that if and when payments were made, it would, accounting wise, be correctly allocated. It would not have been possible to render the necessary infrastructure without such an account and invoices having been created in the Defendant's accounting system.

3.5 The creation of the accounting system and the rendering of invoices did not amount to any tacit or express acknowledgement of the liability of either the purchasers or the Defendant and neither I nor the Finance Department has any authority to make such acknowledgements on behalf of the Defendant.

3.6 Lastly, had the agreement been fulfilled or complied with and had transfer of the property taken place, all of which fall outside the ambit of the Finance Department, then the creation of the account against which the invoices had been raised, would

simply have resulted in an account having been created for bookkeeping purposes to enable *contra* entries to be made balancing the diminishing of the Defendant's asset register upon transfer of the property. The creation of the infrastructure amounted to this and not the acknowledgements which the Plaintiffs seek to ascribe to the Finance Department."

- Against this background, it is difficult to see how the rendering of the monthly statements could have amounted to an acknowledgement of liability by the appellant, as the seller of the property, in the spirit of section 14(1) which simply provides: "The running of prescription shall be interrupted by an express of tacit acknowledgement of liability by the debtor."

- I add that, during the proceedings before us, a somewhat concise submission was made by counsel for the respondents representing, if I understood it correctly, a further argument why the claim could not have become prescribed. Counsel's submission, as recorded in my notes, is simply to the effect that "The right to transfer is yet to arise." According to my notes, counsel referred us to clauses 7.1 and 7.2 of the deed of sale dealing with the appellant's duty, in terms of the provisions of section 67 of the 1939 Ordinance, to close the property as a public open space, and clause 7.2 stipulates that the property will only be transferred after the publication of the amendment scheme contemplated in clause 7.3.

This argument was not raised in the opposing affidavit to the rescission application or, for that matter, in the replication to the plea, and, at first blush, it also does not appear to be in harmony with the argument, *supra*, offered in the particulars of claim and dealt with in the prescription plea, to the effect that "a reasonable period required for finalisation of the closure and rezoning would have expired on or about 15 January 2007".

In his address in reply before us, counsel for the appellant, dealing with this "alternative" argument to counter prescription, reminded us that it was not raised in the opposing affidavit and submitted that if the right to transfer is yet to arise, it is arguable that the action in itself is premature. Of course, where the argument was not raised in the answering affidavit, the appellant was also not able to address it in the replying affidavit. It is also fair to assume that it was not mentioned before the learned Judge *a quo*.

- In all the circumstances, I have come to the conclusion, and I find, that the plea of prescription was raised as a *bona fide* defence by the appellant and that it represents a triable issue. I am unable, for all the reasons mentioned, to find that the prescription argument has no prospects of success, and I decline to do so.

[34] I turn to some more defences raised in the founding affidavit, by reference to the plea and the special pleas which were also dealt with in the answering affidavit and the replying affidavit in the rescission application before the learned Judge *a quo*. I have mentioned that it is stated unequivocally in the papers that the pleadings were placed

before the learned Judge *a quo* and they were also placed before us in the form of volume 6 of the record.

(iii) A second special plea was raised by the appellant, based on section 3 of Act 40 of 2002, already referred to earlier.

- Section 3 of the said Act provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question. (Provision is also made for the organ of state to consent in writing to the institution of the proceedings without such notice or upon receipt of a notice which does not comply with the requirements of section 3(2). This does not apply for present purposes.)

- Section 3(2) provides that the notice must be given within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1) and set out the facts giving rise to the debt and particulars which are within the knowledge of the creditor. It was not disputed before us that the appellant is an organ of state.

- Section 3(4) of the Act stipulates:

  "(4)(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2)(a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(b) The court may grant an application referred to in paragraph (a) if it is satisfied that –

(i) the debt has not been extinguished by prescription;

(ii) good cause exists for the failure by the creditor; and

(iii) the organ of state was not unreasonably prejudiced by the failure.

(c) If an application is granted in terms of paragraph (b), the court may grant leave to institute the legal proceedings in question, on such conditions regarding notice to the organ of state as the court may deem appropriate."

- In the second special plea it is submitted that the respondents failed to comply with these provisions by not only failing to give the notice within six months from when the alleged debt became due, but, indeed, by failing to give any notice at all. It is accordingly pleaded that the respondents are precluded from having instituted the action and should further be precluded from proceeding therewith or claiming judgment in respect thereof.

- The respondents' replication to the plea is silent as to the second special plea.

- In the opposing affidavit to the rescission application, the respondents deal with this special plea, incorporated, as I mentioned, in the founding affidavit by reference.

- The deponent on behalf of the respondents makes the following submissions:

"31.32 I am advised that, in terms of the definition of the word 'debt' in section 1 of the Act, demand notice of intended legal proceedings to an organ of state is only required in terms of section 3 of the Act, if payment of damages is claimed.

31.33 The relief that was sought and obtained by default was for specific performance and a declaratory order. The relief does not impose liability on the defendant to pay damages.

31.34 Accordingly, in respect of the relief obtained by default against the defendant, the plaintiffs were not required to give notice in terms of section 3(2) of the Act and were not precluded in the absence of such notice, from proceeding with those claims in the action."

- In their heads of argument, counsel for the appellant deal with this argument in the following terms:

"The respondents' answer is a rather transparent attempt at erasing from both their original and amended particulars of claim the fact that they claimed damages as alternatives to the specific performance claims at the time when the learned Judge Collis had to exercise his/her discretion. It bears noting that the damages claims have as yet to be abandoned. It is only at the judgment stage that Judge Collis granted specific performance in the absence of the appellant.

Accordingly, at the time of default judgment, the respondents had failed to comply with the Act and the Supreme Court of Appeal

judgment of *Vhembe District Municipality v Stewarts & Lloyds* [2014] ZASCA 93."

This judgment has since been reported at [2014] 3 All SA 675 (SCA).

In *Vhembe* it was a straightforward claim for a liquidated amount of money with interest and costs. Damages did not enter the equation at all, as in the present matter, as argued by counsel. I need not say any more for present purposes.

- It is also useful to quote the definition of "debt" where it appears in the Act, as it is relied upon by the respondents in their answer:

"'**Debt**' means any debt arising from any cause of action-

(a) which arises from delictual, contractual or any other liability, including a cause of action which relates to or arises from any –

(i) act performed under or in terms of any law; or

(ii) omission to do anything which should have been done under or in terms of any law; and

(b) for which an organ of state is liable for payment of damages,

whether such debt became due before or after the fixed date."

(The fixed date is the date of commencement of the Act, in this case 28 November 2002.)

- Given the wide ranging nature of the definition, and the submissions made by counsel for the appellant, it seems to me that the second special plea raises a triable issue, and represents a *bona fide* defence which ought not to be

dismissed as having no prospects of success. This conclusion is also fortified by the fact (already referred to earlier in this judgment) that the respondents chose to launch a separate application under a separate case number (22046/2014) served on 14 March 2014 shortly after the respondents launched the striking out application and the application for default judgment. This is the application that was enrolled for 22 May 2014, after the default judgment application which was enrolled for 9 May 2014. This is the state of affairs which, according to Pretorius, led to her confusion and her incorrect assumption that both the applications were enrolled for the same day. In the first mentioned, separate application, the respondents seek declaratory relief as to the applicability of section 3 to the present action and, in the alternative, condonation for the late service of the notice contemplated in section 3 of the Act. This application never required attention from the court because it was overtaken by the 9 May default judgment forming the subject of the present proceedings. The conclusion about the triable issue raised in the second plea is fortified by the fact that, under these peculiar circumstances, condonation has not yet been granted and, if the prescription plea were to be upheld, such a result will be dispositive, not only of the whole case, but also of any condonation application in view of the provisions of section 3(4)(b)(i) already mentioned.

(iv) Another defence raised by the appellant in its plea, and incorporated by reference in the founding affidavit in the rescission application, is based on the provisions of clause 1.2.2 of the deed of sale which provides:

"The balance namely R8 550 000.00 (eight million five hundred and fifty thousand rand) plus interest thereon at the bond interest levied by the seller's approved Banker, against registration of transfer of the Property in the name of the Purchaser: provided that no interest shall be payable until the closure and rezoning referred to in clauses 7.1 and 7.3 had been completed or for a period of 18 (eighteen) months from the date of signing of the Deed of Sale, whichever period expires first: provided further that, should the closure and rezoning not be finalised successfully, this transaction shall be deemed to have been mutually cancelled by the parties, in which instance the seller will refund the purchaser all payments made by him in terms of this deed of sale, excluding those in respect of assessment rates and service charges, if any, plus interest at the rate referred to above." (Emphasis added.)

- The plea on this subject is crafted as follows:

"12.1 In terms of clause 1.2.2 of annexure A to the particulars of claim, the deed of sale shall be deemed to have been mutually cancelled by the parties in the event of '... the closure and rezoning not be (*sic*) finalised successfully'.

12.2 The closure and rezoning has not been finalised successfully.

12.3 In so far as the aforesaid clause does not prescribe a time period for the successful finalisation of the closure and rezoning, the defendant pleads that it was a tacit, alternatively implied term of

the said clause that such successful finalisation should have taken place within a reasonable period of time.

12.4 The defendant further pleads that, in the circumstances a period of one year, alternatively two years, alternatively three years would constitute a reasonable period of time and that all of the aforementioned periods have already elapsed.

12.5 In the premises the defendant pleads that the deed of sale should be deemed to have been mutually cancelled."

- The plea is dated August 2012, more than nine years after the deed of sale was signed and the default judgment was granted in May 2014, almost eleven years after the event.

- It is also recorded in paragraph 13 of the plea that the objections against the closure had not been withdrawn as alleged by the respondents in their particulars of claim.

It is further recorded in the plea that prior to the dates for the alleged compliance with the appellant's obligations regarding the closure and rezoning procedures, the forensic report referred to earlier, dealing with the possible irregular and fraudulent disposal of the property to the respondents, was received already on 18 July 2005, inspiring the appellant, as a responsible local authority, not to proceed with the closure and rezoning process.

As I mentioned, this aspect was not addressed in the replication but, as it was raised by reference in the founding affidavit to the rescission application, it was also dealt with in the opposing affidavit of the respondents in the following terms:

> "31.52 I am advised that on a proper interpretation of the deed of sale, clause 1.2.2 does not apply in the event of any party obstructing the finalisation of the closure and rezoning of the property. To do so would enable a party to frustrate the implementation of the deed of sale and leave the other party in those circumstances without remedy.
>
> 31.53 The defendant has obstructed the successful finalisation of the closure and rezoning of the property. In the premises, the deed of sale should not be deemed to have been mutually cancelled."

The same stance is adopted by the respondents in paragraph 2.2.31 of the amended particulars of claim.

In this regard, counsel for the appellant argued that "if one interprets the 2003 deed of sale, no mention is made of such a term (my note: that the deeming provision will not apply in the event of any party obstructing the finalisation of the closure and rezoning) and it cannot be a tacit or implied term as it is contrary to the express terms and intention of the parties". This is a reference, if I understood counsel correctly, to the so-called "non-variation" provision contained in clause 5 of the deed of sale which stipulates:

"This agreement contains the total agreement between the parties, and no addition, amendment or suspension of any provision in this agreement shall be effective unless reduced to writing and signed by both parties."

- In my view, it is also arguable that the decision of the appellant not to finalise the closure and rezoning procedures in view of the damning forensic report, cannot be said to amount to "frustrating and obstructing" the successful finalisation of these procedures.

- In the result, I have come to the conclusion, and I find, that this defence based on clause 1.2.2 also represents a *bona fide* and triable one which may redound, if presented to a trial court, to the advantage of the appellant.

[35] I add that, quite apart from the defences raised by the appellant in order to show good cause for purposes of obtaining a rescission, it is well settled that it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness to the other party and raises no new factual issues – see for example *Naude and Another v Fraser* 1998 BCLR 945 (SCA) at 960; *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) at 24B-G and *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 1 SA 276 (A) at 290E-I.

[36] On the wings of this principle, counsel for the appellant raised a number of legal arguments aimed at demonstrating that a number of jurisdictional and statutory requirements for the passing of transfer of the properties to the respondents were

absent, and were not pleaded either in the amended particulars of claim so that those particulars lack essential averments to sustain the respondents' cause of action for the relief claimed. In the result, so it was argued, the default judgment was erroneously sought and granted in the spirit of rule 42(1)(a), and for that reason alone, falls to be rescinded.

[37] In support of his argument, Mr Strydom relied heavily on the case of *Marais v Standard Credit Corporation Ltd* 2002 4 SA 892 (WLD).

In *Marais*, the agreement underlying the dispute between the parties was governed by the Credit Agreements Act 75 of 1980. It was held that where the agreement relied upon was governed by this Act, the averment that the initial payment had been made was essential. Its absence would render the summons excipiable in the sense that the summons would not disclose a cause of action.

Rule 42(1)(a) 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 affected rescind or vary
>
> (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

At 897A-B the learned Judge said the following:

> "In terms of rule 42(1)(a) I can rescind the judgment on application by the party affected. In my view the word 'erroneously' covers a matter such as the present one, where the allegation is that for want of an averment there is no

cause of action, ie nothing to sustain a judgment, and that the order was without legal foundation and as such was erroneously granted for the purposes of rule 42(1)(a)."

[38] It is also trite that once the court holds that a judgment was erroneously granted, it should without further enquiry rescind or vary the judgment. The applicant is not required in addition thereto to show "good cause" for the rule to find application – see *Tshabalala and Another v Peer* 1979 4 SA 27 (T) at 30D-E. See also *Topol and Others v L S Group Management Services (Pty) Ltd* 1988 1 SA 639 (WLD) at 650C-J.

[39] I also revisit my earlier remarks that no mention is made in the founding papers of the rescission application, crafted in a rather unorthodox fashion, of the specific rule in terms of which the application is brought, or, for that matter, that it is brought in terms of the common law. Nevertheless, it appears from the context of the founding and replying papers that the deponents covered the various requirements for rescission without making mention of the particular rules or the common law.

In this regard, we were also referred to *Mutebwa v Mutebwa and Another* 2001 2 SA 193 (Tk HC) where the learned Judge, in dealing with the relevant authorities said the following at 198F-H:

"On the basis of these two authorities the fact that an application is specifically brought in terms of one Rule does not mean it cannot be entertained in terms of another Rule or under common law provided the requirements thereof are met."

It was not argued before us that the application is flawed because the specific rules or the common law were not mentioned or identified.

[40] I turn to mention only two of the legal arguments raised by Mr Strydom in support of his submissions that the particulars of claim lack the required averments to found a cause of action and that rule 42(1)(a) can be applied for present purposes. The submissions are very briefly summarised:

- In terms of section 7(16) of the Gauteng Removal of Restrictions Act, 3 of 1996 ("the GRRA") the Registrar, upon receipt of the MEC's decision (in this case upholding the rezoning application) shall give notice of the decision in the *Provincial Gazette* without delay and shall in addition give written notice of the decision together with the reasons therefore to all parties to the appeal by registered post within 14 days of the decision of the MEC.

  The approved application shall come into operation on a date stated in the notice contemplated in the section. If an appeal is lodged the application shall not come into effect until such time as the appeal is approved in terms of section 7(16).

  It is common cause that the MEC has yet to publish in the *Provincial Gazette* the notice of approval in terms of section 7(16). As such, despite the 8 June 2010 letter from the MEC his decision to "uphold the appeal and approve the rezoning" has never come into operation because the provisions of section 7(16) have not to date been complied with.

The respondents have made no case in their amended particulars of claim (served on 3 December 2013) why –

(a) a party (namely the MEC) with a direct and substantial interest in whether or not to publish the amendment scheme has not been joined to the proceedings. This amounts to a fatal non-joinder;

(b) There is no relief seeking the court to compel the MEC to publish the mandatory section 7(16) notice in order to enable the approval of the application to come into effect.

The amendment of the Pretoria Town Planning Scheme, 1974, by rezoning the property and the publication of the amendment scheme is a pre-condition of transfer of the property in terms of clauses 7.2 and 7.3 of the deed of sale.

In the premises the default judgment was erroneously granted.

- The judgment was granted in breach of the mandatory provisions of the Municipal Finance Management Act 56 of 2003 ("the MFMA") which expressly forbid the transfer of appellant owned land absent compliance with the mandatory jurisdictional facts set out in section 14 of the MFMA.

What is contemplated is that the Council must take the decision and it must be minuted that the Council had considered, in accordance with section 14(2)(b) of the said Act the economic and community value to be received in exchange for the asset and that this must happen before ownership of the capital asset is transferred or permanently disposed of.

Additionally, the appellant may only lawfully transfer ownership or otherwise dispose of a capital asset in the following circumstances, where the appellant may prove that it did "at a meeting open to the public, ..., decide that the (property) was not needed to provide the minimum level of basic municipal services and ... set out the reasonable grounds for such a decision" – see *Emalahleni Local Municipality v Propark Association* [2013] 1 All SA 277 (SCA) at 285d-g.

The amended particulars of claim lacked the essential averments to sustain a cause of action for the relief claimed. The relevant statutory requirements had to be complied with. None of these mandatory statutory requirements have been complied with neither was compliance pleaded.

Consequently, the principles laid down in *Marais* fall to be applied.

So much for two of counsel's legal arguments. For present purposes I need only to conclude, as I do, that the arguments appear to represent *bona fide* defences which ought not to be dismissed at this stage as carrying no prospect of success.

I add that the learned author Harms, *Civil Procedure in the Supreme Court* at B-301 - B-302 also recognises, with reference to *Marais*, that an order is erroneously sought where it was granted on a summons that did not disclose a

cause of action. This remark is made by the learned author when dealing with the provisions of rule 42(1).

Brief remarks about submissions made in reply by Pretorius about the subjects of wilful default (or lack thereof) and the *onus* to show good cause

[41] What follows is a brief summary of the submissions which, in my view, are relevant for purposes of deciding the rescission application and, of course, also served before the learned Judge *a quo*:

- The inadvertent diarising of the applications, already explained, is not something to be laid at the door of the appellant which played no part in this oversight.

- It is denied that the appellant was disinterested and did not follow the proceedings with the necessary diligence. The defendant furnished the attorneys with the necessary copies of the documents, always attended consultations and confirmed its obligation to protect the assets of the local authority and not dispose thereof irregularly or to the detriment of the ratepayers or the citizens.

- The appellant (obviously, always a reference to its representatives) participated in dealing with the amendment of the particulars of claim and the introduction of a special plea regarding non-compliance with the requirements of Act 40 of 2002. It was in pursuance thereof that further consultations took place with witnesses from the appellant's financial department. At the consultations the issue of prescription was also considered as well as suggestions that had been

made to have the matter dealt with at the trial as it required the leading of evidence. It was during this process that, rather than electing to proceed to go to trial, the plaintiffs elected to avoid the giving of evidence by having the appellant's defence struck out and default judgment granted.

- Accordingly, officers of the appellant were at all times fully interested in the litigation.

- Submissions in the opposing affidavit regarding a lack of *bona fides* of either Pretorius or the appellant's representatives is without foundation and malicious.

- The defences raised, including those flowing from the forensic report, are *bona fide* and triable issues are evident therefrom.

- Failure to make discovery timeously or file pre-trial answers timeously, months before the trial, resulted in no real prejudice to the respondents.

- Details, already appearing from the founding papers, about how the mistaken diarising came about, are explained further. In the office of the appellant's attorneys, trial dates (which are customarily far in the future) are entered into written/hard copy diaries. Other dates such as short-term court appearances or applications, are noted on a whiteboard which is accessible to all relevant personnel in the office. The dates on the whiteboard are in the form of a calendar and customarily cover the following four months (roughly equal to a High Court term). If a month passes, the whiteboard is cleared and the dates

for yet a further month are written thereon. Dates for interlocutory applications are diarised in the same fashion and, in this case, had indeed been so diarised.

- The mistake, as already explained in the founding papers, was that of Pretorius and had nothing to do with the conduct or approach of the appellant's officers.

Brief remarks about the legal position

[42] It seems to me that the following may be offered as a concise summary of legal principles applicable to the adjudication of rescission applications:

(i) Rescission in terms of rule 31 does not apply to this case. The application either resorts under rule 42(1)(a), the common law or both.

(ii) As to rule 42(1)(a), I have dealt with *Marais*, and the supporting remarks made by the learned author *Harms*.

Once the rule finds application, it is not necessary to show good cause. The authorities have been listed.

In the leading case of *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 6 SA 1 (SCA) the following is said about rule 42 at 7B-C:

> "Not every mistake or irregularity may be corrected in terms of the Rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is

why the common law is the proper context for its interpretation. Because it is a Rule of Court its ambit is entirely procedural."

It was held, at 8G-H, that a filing error in the office of the attorneys was not a procedural irregularity or mistake in respect of the issue of the order which would render rule 42 applicable.

(iii) As to the relief under the common law, it was demonstrated in *Colyn*, at 9C-F, that in order to succeed, an applicant for rescission of a judgment taken against him by default must show good cause. This is generally achieved by -

(a) giving a reasonable explanation of the default;

(b) showing that the application is made *bona fide*; and

(c) showing that the applicant has a *bona fide* defence to the claim which *prima facie* has some prospect of success. In *Marais*, the learned Judge, dealing with the same subject, points out, at 895H-I, that the *bona fide* defence, which *prima facie* carries some prospect of success has also been described as "dat die verweer nie klaarblyklik ongegrond is nie en berus op feite wat in hooftrekke vermeld moet word en wat, indien bewys, 'n verweer daarstel" – *Du Plooy v Anwes Motors (Edms) Bpk* 1983 4 SA 212 (O) at 217.

(iv) What is also of particular importance, in my view, is that the court has a wide discretion to grant or refuse a rescission. In *Colyn* at 9D-E reference is made to what was said in *HDS Construction (Pty) Ltd v Wait* 1979 2 SA 298 (E) at 300:

> "When dealing with words such as 'good cause' and 'sufficient cause' in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words ... the court's discretion must be exercised after a proper consideration of all the relevant circumstances."

In *De Wet and Others v Western Bank Ltd* 1979 2 SA 1031 (A) the following is said about the discretion at 1042F-H:

> "Thus, under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient case (*sic*?) shown. This power was entrusted to the discretion of the courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause ... the courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the courts' discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The *onus* of showing the existence of sufficient cause for relief was on the applicant in each case ... It follows from what I have said that the courts' discretion under the common law extended beyond, and was not limited to, the grounds provided for in rules 31 and 42(1) ..."

In *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 1 SA 457 (TPA) the learned Judge says the following at 461H:

> "Die hof het by beoordeling van goeie redes ook 'n diskresie om toe te sien dat reg en billikheid teenoor partye geskied ..."

On the same subject, the learned Judge in *Abraham v City of Cape Town* 1995 2 SA 319 (CPD), at 321I-J, refers to the judgment in *Cairns' Executives v Gaarn* 1912 AD 181 in the following terms:

> "In his judgment at 186 Innes J declined to frame what he called 'an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence'. 'Any attempt to do so', he says, 'would merely hamper the exercise of a discretion which the rules have purposely made very extensive, and which it is highly desirable not to abridge'."

(v) On the question of wilful default I consider the words of the learned Judge, Moseneke J, as he then was, in *Harris v Absa Bank Ltd t/a Volkskas* 2006 4 SA 527 (TPD) at 530A-J as being of considerable significance:

> "[8] Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions.

[9] The decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an applicant required to establish sufficient cause. However, I do not agree that once wilful default is shown the applicant is barred; that he or she is then never entitled to relief by way of rescission as he or she has acquiesced. The court's discretion in deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description it bears, should be one of the several elements which the court must weigh in determining whether sufficient or good cause has been shown to exist ..."

See also *Neuman (Pvt.) Ltd v Marks* 1960 2 SA 170 (SR) at 173.

The judgment of the learned Judge *a quo*

[43] At this point it is necessary, and convenient, to consider the findings of the learned Judge, and to determine whether or not there is room for this court of appeal to interfere therewith. For this purpose, I will proceed to deal with the question as to whether or not there were any misdirections on the part of the learned Judge.

[44] The learned Judge, correctly in my view, deals with the neglect on the part of the appellant's attorneys to react to correspondence demanding compliance with the discovery and rule 30A notices and even to respond adequately after the orders granted by Baqwa J on 27 January 2014, compelling the appellant to comply with the

respective notices, were served on the appellant's attorneys. The same applies to the service of the actual striking out and default judgment applications. I have already expressed the view that the conduct of the appellant's attorneys fell short, in my view, of what is expected of a reasonable diligent attorney. The explanations by Pretorius and Hugo for these failures are also less than perfect.

[45] What I am in respectful disagreement with, is the finding by the learned Judge that the appellant, under these circumstances, "cannot hide behind the mistakes of their attorneys". I also disagree with the findings of the learned Judge that the appellant manifested a complete disinterest in the conduct of its defence to the action and that there was no effort on behalf of the appellant to request a postponement in regard to compliance with the Baqwa J orders. The same applies to the finding that the "delays and neglect" were on the side of the appellant.

In my view, it is patently clear that the officers of the appellant played no part in these delays and neglects, and this much is stated emphatically and repeatedly by both Pretorius and Hugo (in the case of the latter, in the form of a confirmatory affidavit).

I expressed the view earlier, that it is clear from the evidence read as a whole, that the officers of the appellant, throughout, played an active role in the conduct of this litigation: they attended consultations, a plea was filed to the particulars of claim and the abortive application which preceded the institution of the action was opposed. The appellant's Director: Litigation Management deposed to the replying affidavit and dealt with relevant issues such as the forensic investigation, the abortive application, the need to have the evidence considered at a trial, certain constitutional issues and the

defences relating to prescription and lack of compliance with the requirements of section 3 of Act 40 of 2002.

The employee in the Finance Department also filed an affidavit, already referred to, about the nature of the monthly invoices and the question whether or not that could have amounted to express or tacit acknowledgements of liability by the appellant.

What is plain, is that there is no evidence whatsoever to suggest that the officers of the appellant played a role in, or even had knowledge of, earlier failures of their attorneys to promptly answer letters or respond to demands or the service of court orders.

[46] In support of his conclusion that the appellant cannot hide behind the mistakes of its attorneys and that the appellant manifested a complete disinterest in the conduct of the case and that there was no effort on behalf of the appellant to request a postponement in regard to compliance with the Baqwa J orders, the learned Judge relies on the decision in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 2 SA 345 (A). In my view that case is distinguishable from the present: in that case the defendant's attorney withdrew as its attorney of record and wrote a letter to the defendant reiterating the withdrawal and suggesting that the defendant should instruct a Johannesburg attorney to act and, if possible, brief counsel. About three weeks after these events, the plaintiff's attorney sent a notice to discover as well as a notice of set down for the hearing of the trial on 27 January 1953 to the defendant. The notices were addressed to the defendant's local office in Pretoria but the notice of set down was evidently not sent to Johannesburg. The one director of the defendant said that it "subsequently slipped my memory". A few days later the plaintiff served by post on the defendant's Pretoria office a further

notice of set down of the trial. Both the directors of the defendant company stated on oath that they received the notice informing them that their attorney had withdrawn from the case. It also appears from the judgment (at 350F) that the two notices of set down were addressed to the correct Church Street address of the defendant. The learned Judge of Appeal states, at 351B: "... it is difficult to understand how the receipt of the notices of set down could have continued to be forgotten by the latter" (the reference to one of the directors).

In the present case, nothing of the kind happened: no notices of set down or other notices were sent to the appellant's officers, neither did their attorney withdraw from the case.

For all the reasons mentioned, I find no basis to justify the conclusion of the learned Judge that the appellant manifested "a complete disinterest" in the conduct of the defence of the action. Similarly, I cannot support the finding that, in this particular case, the appellant must be blamed for the failures of its attorneys.

In this regard, I have come to the conclusion that the learned Judge misdirected himself.

[47] The finding that no official of the appellant filed any supporting affidavit is also not correct, for the reasons mentioned.

[48] The finding of the learned Judge that "the indifferent attitude of the defendant is further illustrated in the fact that no correspondence was received from the defendant's

attorneys after the launching of the strike-out application and prior to the hearing thereof" also, in my view, amounts to a misdirection: I fail to see how the appellant's officers can be blamed for the failure of their attorneys to keep them up to date with correspondence. This, in my view, is also a misdirection.

[49] The finding that there was no condonation application accompanying the late filing of the replying affidavit is also not, strictly speaking, correct: built into the replying affidavit, more particularly in paragraph 8 of the Pretorius supporting affidavit, is an explanation for the late filing of the replying affidavit and a request for condonation.

[50] The learned Judge, in support of his finding that the appellant should be penalised for the failure of its attorneys, points out that "there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys". In this regard the learned Judge relies on the well-known judgment in *Saloojee and Another N.N.O. v Minister of Community Development* 1965 2 SA 135 (A). It appears to me that that case is distinguishable in the sense that it has nothing to do with a rescission application but involved a delay in noting an appeal and in lodging the record timeously, as well as a delay in seeking condonation. It is trite that, where condonation is sought under such circumstances, the prospects of success on appeal are of cardinal importance. In that case, at 142H-143A, the learned Chief Justice held that although he could not find that there were no prospects of success, "I cannot regard it otherwise than doubtful and uncertain".

I have already expressed the view, by referring to a number of defences raised, that, for purposes of meeting the common law requirements for a rescission, the appellant

showed *bona fide* defences "which *prima facie* carry some prospect of success" in the words of the learned Judge in *Marais* at 895G. I also revisit the words of the learned Judge in *Du Plooy, supra*, when dealing with this requirement, namely "dat die verweer nie klaarblyklik ongegrond is nie en berus op feite wat in hooftrekke vermeld moet word en wat, indien bewys, 'n verweer daarstel".

In these circumstances, I am of the view that the learned Judge misdirected himself by relying on *Saloojee* for purposes of his judgment.

[51] In the circumstances of this case, I am also not in sympathy with the finding of the learned Judge that "the application of the defendant is not *bona fide*". The weight of the evidence, for reasons mentioned, clearly indicates the contrary. This is also a misdirection.

[52] As to the approach by the learned Judge to the defences raised by the appellant, for purposes of showing good cause, I make the following brief and respectful remarks:

- I cannot agree with the finding that the reference by Pretorius to the forensic report, which is attached to the founding affidavit, amounts to hearsay evidence: it is common cause that the report was brought out on the subject-matter underlying this case and the respondents, in their answering affidavit, dealt with the contents of this report at some length, in denying any impropriety on their part. In the replying affidavit, the Director: Litigation Management, of the appellant, also refers to the forensic report at some length.

- As to the defences of prescription, and failure to comply with the requirements of section 3 of Act 40 of 2002, the learned Judge referred to them in rather sweeping terms. He simply found that the monthly invoices constituted express or tacit acknowledgements of liability by the appellant and that the need for a section 3 notice only applies if payment of damages is claimed.

  I went to the trouble to deal with these defences at some length earlier in this judgment, something which, in my respectful view, is not evident from the approach adopted by the learned Judge. In my view, the learned Judge misdirected himself by finding that the appellant failed to present sufficient evidence to constitute "*prima facie*, a prospect of success in the action". It appears that the learned Judge failed to consider the relatively generous requirement, for purposes of obtaining a rescission, at common law, of showing a *bona fide* defence which *prima facie* carries some prospect of success.

- The learned Judge did not deal at all with the other defence raised in the plea namely that based on a proper interpretation of clause 1.2.2 of the deed of sale and the deeming provision that if the closure and rezoning procedures are not completed successfully, the transaction must be regarded as having been mutually cancelled.

- The learned Judge, correctly, referred to the judgment in *Harris* and found that the wilful or negligent nature of the default of an applicant for rescission is one of the considerations which the court would take into account in the exercise of

the discretion to determine whether or not good cause is shown. However, it appears, with respect, that the learned Judge failed to appreciate the full significance of the judgment and the nature of the discretion which appears from the extract I quoted earlier in this judgment and, more particularly, the remarks made by the learned Judge at 530A-J. This, in my view, also amounts to a misdirection.

[53] In conclusion, I record that I did not overlook the trite principle that the powers of a Court of Appeal to interfere with the findings of fact of a trial court are limited (emphasis added). I refer to the well-known cases of *Rex v Dhlumayo and Another* 1948 2 SA 677 (A) and later decisions like *Taljaard v Sentrale Raad vir Koöperatiewe Assuransie Bpk* 1974 2 SA 450 (A) at 452A-B and *S v Francis* 1991[1] SACR 198 (A) at 204c-e.

In this case the court *a quo* did not sit as a trial court where the presiding Judge was "steeped in the atmosphere of the trial" and had the opportunity to observe the demeanour of the witnesses. In the result, although certain findings of fact of the learned Judge *a quo* are criticised in this judgment, it seems that the trite approach referred to does not find strict application. Moreover, the findings of fact which came under scrutiny had to be in harmony with the legal principles applicable to rescission applications.

[54] In all the circumstances I have come to the conclusion, and I find, that this is a proper case for this Court of Appeal to interfere with the findings and conclusions of the court below.

Conclusionary remarks

[55] The appellant succeeded in making out a case for good cause in order to succeed with a common law rescission application: there was a "reasonable and acceptable" explanation for the appellant's default, although the appellant's attorneys did not cover themselves in glory. There is no evidence that the appellant's officers had knowledge of the applications for striking out and default judgment and deliberately failed or omitted to take the necessary steps to avoid the default judgment and appreciated the legal consequences of their actions, in the spirit of the words of the learned Judge in *Harris* at 530A-J.

[56] The court's wide discretion in deciding whether or not there was wilful default on the part of the applicant for rescission as described in *Harris* and other cases mentioned in this judgment, should therefore be exercised in favour of the appellant.

[57] As to the second element, constituting the requirement to show good cause, I have come to the conclusion, and I find, that the appellant raised a number of *bona fide* defences which *prima facie* carry some prospect of success. The reasons for these conclusions have been mentioned.

[58] The appeal falls to be upheld and the costs should follow the result, and include the costs of two counsel.

The order

[59] I make the following order:

1. The appeal is upheld with costs, including the costs flowing from the employment of two counsel.

2. The order of the court *a quo* is set aside and replaced with the following:

"1. The application is granted, and the order of 9 May 2014 is rescinded and set aside.

2. The plaintiffs/respondents, jointly and severally, are ordered to pay the costs of the application, which will include the costs flowing from the employment of two counsel."

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A290-2015

I agree

pp J R MURPHY (with his consent)
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

N V KHUMALO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 14 SEPTEMBER 2016
FOR THE APPELLANT: T STRYDOM SC ASSISTED BY T MKHWANAZI
INSTRUCTED BY: HUGO & NGWENYA INCORPORATED
FOR THE RESPONDENTS: E C LABUSCHAGNE SC ASSISTED BY H P PRETORIUS
INSTRUCTED BY: ADAMS & ADAMS