IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

14/9/16

CASE NO: 46585/2014

DELETE WHICHEVER IS NOT APPLICABLE

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

14/09/2016 .....
DATE

.....
SIGNATURE

In the matter between:

JANINE HARIBHAI Applicant

and

GEORGE DA SILVA N.O. First Respondent

PULENG FELICITY BODIBE Second Respondent

JUDGMENT

Carrim AJ

[1] This is an application for rescission of an order granted by this court on 12 August 2014. The applicant is the spouse of Mr Dinesh Haribhai who was declared insolvent in February 2013.

[2] The respondents are the trustees of the insolvent estate.

[3] The order of 12 August 2014 obtained by the respondents in default of the appearance of the applicant inter alia terminates the joint ownership of the applicant and Dinesh Haribhai in five properties which fell into the insolvent estate.

[4] The rescission is sought in terms of Rule 42(1)(a) of the Uniform Rules alternatively under the common law.

Background Facts

[5] Dinesh Haribhai ("*Dinesh*") was declared insolvent and his estate was placed under final sequestration on 26 February 2013 in the South Gauteng High Court, Johannesburg. He appealed that decision to the Supreme Court of Appeal but was unsuccessful.

[6] The respondents were appointed as trustees of the insolvent estate and set about their duties under the Insolvency Act 24 of 1936 ("*the Act*"). Five properties namely 20 Leadwood, 21 Mimosa Mews, 16 Mimosa Mews, 23 Bush Willows and 4 La Maison all situated in sectional title complexes in the suburb of Weltevredenpark fell into the insolvent estate and were registered in both the applicant's and Dinesh's names. The properties were hypothecated to the Standard Bank of South Africa.

[7] Unbeknownst to the respondents, the Haribhai's had changed their matrimonial regime from in community of property to ante nuptial without accrual in 2008. In terms of their notarial contract Dinesh Haribhai kept 100% ownership of all the properties save for 21 Mimosa Mews ("*the remaining property*") which was their matrimonial home at the time. Dinesh and Janine owned 50% each in the remaining property. Husband and wife had failed to make the necessary changes to the titled deeds of these properties, which still reflected them as co-owners. The mortgage bonds on the five properties also reflected them as joint owners.

[8] The trustees of the insolvent estate understood all the properties to be co-owned by Dinesh and Janine in undivided 50% shares. Accordingly letters were sent to the applicant by the attorneys acting on behalf of the respondents in which the applicant was requested either to purchase the undivided half-shares properties or to authorize the trustees to sell each of the properties by way of public auction or private treaty, she being entitled to one half of the proceeds of the sale after the indebtedness of the bank and administration costs were finalized. The applicant did not accede to this request.

[9] The respondents still under the misimpression that all the properties were co-owned by the applicant eventually brought proceedings in this court for the extension of their powers under the Act, for the termination of the joint ownership of the properties, authorizing them to sell the properties, requiring the applicant to sign all necessary documents and failing her authorizing the Sheriff to sign on her behalf for the disposal of the properties.

[10] The respondents obtained default judgement against Dinesh and the applicant on 12 August 2014 in terms of which –

10.1. The general powers of the trustees described by the Insolvency Act were extended;
10.2. The joint ownership of Dinesh and Janine in the five properties as described therein was terminated;
10.3. The respondents were authorized and allowed to sell the properties as provided in clause 3 thereof;
10.4. That the respondents and Janine sign all documentation necessary for the disposal of these properties and failing Janine, the Sheriff is authorized to sign.

[11] The respondents only learned of the change of the matrimonial property regime after this order was granted. They accordingly instructed their attorneys to abandon that part of the order that related to the 4 properties owned solely by Dinesh.

[12] It has subsequently transpired, two years later since the court order, that four of the five properties have been sold and the remaining property, 21 Mimosa Mews, is the one in which the applicant has a 50% share.

The Application

[13] The applicant now seeks an order to rescind the judgement granted in default on 12 August 2014.

[14] Her application was first brought in terms of rule 42(1)(a) on the basis that there the order was granted in error due to defective service. The application in terms of rule 42(1)(a) was filed on 17 November 2014.

[15] The respondents filed an opposing answering affidavit on 13 February 2015 in which they deny that service was defective.

[16] The applicant did not file a replying affidavit within the time frames permitted by the rules. However she filed a replying affidavit on 10 May 2016 almost a year later to which the respondents objected.

[17] The applicant filed an application to supplement her papers by the filing of a supplementary affidavit on 11 March 2016 more than a year after her application was filed in November 2014. In this supplementary affidavit she seeks to place before this Court the grounds of her defence to the main matters, which she alleges she neglected to do in her founding affidavit due to the inexperience of her attorneys.

[18] The respondents filed a supplementary affidavit in which they opposed the objected to the filing of the applicant's supplementary affidavit but pleaded over in the event that the Court permitted it by answering thereto.

[19] At the hearing of the matter I had to first decide whether to allow the applicant's replying affidavit and both parties' supplementary affidavits. However it also emerged that the respondents wished to adduce further evidence on the issue of the applicant's place of residence which was objected to by the applicant. The respondent's heads had also been filed late in the day.

[20] The hearing became marked by preliminary skirmishes. The respondents opposed the filing of applicant's supplementary affidavit. The respondents also opposed the filing of the applicant's replying application on the basis that it was filed almost a year later than required by the rules. The applicant on the other hand objected to the handing in of the respondent's heads of arguments and the application by the respondent to adduce new evidence through the filing of an affidavit by the instructing attorney and was of the view that were it to be admitted they might have to seek a postponement of the matter. I set these facts out here to convey the manner and tone that has dominated these proceedings which I will refer to later again.

[21] The matter was stood down to allow the parties some time to consider their positions. The parties eventually indicated that they desired to argue the merits of the application. To this extent the respondents elected not to press with their application to adduce further evidence. In light of the fact that the parties were eager to get to the merits of the matter and that it has been dragging on for a considerable length of time, I allowed the supplementary affidavits and the respondent's heads of arguments the consequence of which is that the applicant's application is also now brought on the basis of the common law and not only under rule 42(1)(a).

Application under Rule 42(1)(a)

[22] Rule 42 states –

> "***42 Variation and Rescission of Orders***
> *(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.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) *The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."*

[23] The core issue to be decided under this heading is whether the court order was erroneously granted. The enquiry under this Rule is whether order was granted in error on the part of the court, not on the part of the parties, having regard to the record of proceedings before it. Not every mistake or irregularity may be corrected in terms of the rule. While the rule caters for mistake, rescission or variation does not follow automatically upon proof of a mistake. The courts still have discretion to order it, which discretion must be exercised judicially. [1]

[24] The applicant's alleges that the order should be rescinded because there was defective service. The papers in the application for termination of the joint ownership ("termination application") were served on 23 Bush Willows. She did not reside at 23 Bush Willows but lives at 23 Fairviews 14th Avenue, Fairlands and has been living there for three to four years. In her founding affidavit she cites this address as her current residence.

[1] See Harms *Civil Procedure in the Superior Courts*

[25] Her second supplementary ground for defective service is that the Sheriff's return describes that address as her "*chosen domicilium citandi et executandi*". That was not her chosen *domicilium citandi et executandi* she had changed it sometime ago.

[26] She does not state when she first became of the default judgement or the circumstances in which it was brought to her attention but merely states that she took steps to apply for a rescission in November 2013. Her application for rescission was filed November 2014.

[27] The respondents deny that the order was granted in error on the following basis: the termination application, when it was first drafted, reflected the applicant's address as 21 Mimosa Mews. However additional efforts were made to confirm this. The respondents confirmed that she resided at 23 Bush Willows and as appears from the founding affidavit in that application, amended the papers to reflect this. The Sheriff's return of service confirms that the papers were served on 23 Bush Willows.

[28] The fact that the Sheriff's return describes that address as the '*chosen domicilium citandi et executandi*' is in my view of no consequence on the facts of this case. In the absence of evidence to the contrary and in the absence of choices being made subsequently, a person's residence is in law the *domicilium citandi et executandi* for the commencement of proceedings. There was substantial compliance with the requirements of rule 4(1)(a)(v) of the Uniform Rules. (See **Brangus Randburg (Pty) Ltd v Plaaskem (Pty) Ltd** 2011 (3) SA 477 (KZP))

[29] In my view on the basis of the record of proceedings before the court at that time the plaintiff (respondent) was procedurally entitled to the order sought. The respondents had described the residential address of the applicant in the papers as 23 Bush Willows and service had been done at that address. On the papers before the court at the time there was no suggestion that the applicant's residential address was incorrect or that the Sheriff had served on a address different from that described as hers or that the wrong documents had been served on 23 Bush Willows. (See **Lodhi 2 Properties Investments CC & Another v Bondev Developments (Pty) Ltd** 2007 (6) SA 87 (SCA) at para 24).

[30] There is authority to suggest that in considering an application for rescission a court may have regard to evidence outside the record of proceedings. See **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape** [2003] 2 All SA 113 (SCA) (31 March 2003) at 10 for a summary of the debate as to whether the error must be patent from the record of proceedings and that the court is confined to the four corners of the record or that regard to external evidence may be had. The applicant has put up what is alleged to be contemporaneous facts in support of her grounds which I consider below.

[31] The applicant alleges that she changed her *domicilium citandi et executandi* and the respondents ought to have been aware of this. However the document she puts up is an email addressed to Alana Pretorius of Eksteen Attorneys in which Dinesh advises her that "*our Domicilium is now changed to the below mentioned for any legal correspondence. But all levy statements must still come to me.*" The below mentioned address is that of their attorney Tony Webbstock. The email was sent to Eksteen Attorneys on 10 November 2010 and related to a matter of payment of levies for unit 16 and 21 Mimosa Mews. This notice could hardly apply to the termination proceedings nor was such an email sent to the respondents, because if it had undoubtedly, it would have been produced. In any event there would be no need for her to change her **domicilium** with the respondents because until the termination

proceedings commenced. There was no **lis** between the respondents and her.

[32] A further ground proffered by the applicant for defective service is that she had appointed Tony Webbstock as attorney of record and that the respondents ought to have served the papers on him. However the Notice of Appointment attached as Annexure B and as KK2 is addressed to a firm of attorneys Velile Tinto Inc and is in relation to a matter between the Standard Bank of South Africa as plaintiff and the Haribhai's as defendants together with Luke Pre-owned CC as third defendant. This matter does not involve the respondents but relates to a totally different case and cannot serve as the address for service for the termination proceedings.

[33] The respondents put up the affidavit of Jaco du Toit who attended at 23 Bush Willows on 25 June 2014 in order to value the property and serve a notice of vacation. He was employed as a Valuer-General by Park Village Auctions. Du Toit attests that it was clear to him that the Haribhai's resided at 23 Bush Willows. His version of events is that he used the intercom system to contact the resident and was connected to a man who identified himself as Mr Haribhai. He was refused access to the property by Mr Haribhai but had a conversation with him about the purpose of his visit. He gained access to the complex by one of the other tenants and left the notice to vacate at the front gate and slipped another notice under the garage door of the unit. Du Toit also left his contact details. Later that evening Mr Haribhai called him several times and indicated to Du Toit that his conduct was unlawful and that he would obtain an interdict against Du Toit.

[34] The respondents attest further that when the application for rescission was filed they took steps to investigate whether the applicant resided at 23 Bush Willows. To this extent they appointed a tracing agent whose report (record 184) confirms that as at 27 January 2015 the Haribhai's resided at 23 Bush Willows.

[35] The applicant puts up a weak case in relation to the abovementioned facts. In her reply she denies Du Toit's version, attacks his veracity and states again that at the time the application was served she and her husband were already residing at 23 Fairviews 14th Avenue Fairlands. But she puts up no evidence such as utility bills, rental slips, lease agreements or even title deeds if she was the owner thereof to show that she resided or resides at 23 Fairviews Fairlands. She also does not explain who resided at 23 Bush Willows, a fact she would have known given that she was co-owner of the unit at the time. In relation to the tracing report which also reflects Dinesh's contact details she has merely a bald denial.

[36] On balance of probabilities, even when regard is had to the evidence outside of the record of proceedings, I find that there was no error and the application fails under rule 42(1)(a).

Common Law

[37] I turn now to consider the relief under the common law. The requirements under common law are that there must be sufficient or good cause. (**De Wet and Others v Western Bank Ltd** 1979 (2) SA 1031 (A)). The Courts generally expect an applicant to show "*good cause*" by giving a reasonable explanation of the default, by showing that the application is made **bona fide** and that he has a **bona fide** defence to the plaintiff's case which has good prospects of success (see Colyn **supra** and **Melane v Santam Insurance Co Ltd** 1962 (4) SA 531 (A), **Chetty v Law Society Transvaal 1985 (2) SA**, **Grant Plumbers (Pty) Ltd** 1949 (2) SA 470 (O).)

[38] A court may also have regard to other factors such as prejudice to the respondents if the rescission is granted, the mental aspect of the default whether it was wilful, negligent or blameless.

[39] I have already discussed the applicant's explanation for her default earlier. In summary she alleges that the papers were served on the wrong address because she did not and still does not reside at 23 Bush Willows. I have already found her explanation wanting.

[40] The applicant has also not provided an explanation as to why she has enrolled the matter only now, more than two years after the order was granted and 22 months since she launched her application for rescission. There is a duty on an applicant to bring an application without undue delay if it is to be brought in good faith. I would venture to say that that duty extends not only to the bringing of an application by filing it but also to the finalization thereof so that the position can be rectified without undue delay in the interests of all concerned and in the interests of justice. **Van Wyk v Unitas Hospital** [2007] ZACC 24; 2008 (2) SA 472 (CC) at 477. As discussed above the applicant also does not explain when and how she became aware of the order - all that is stated is that she pursued an application for rescission in November 2014, which also happens to be the month in which her spouse's appeal was dismissed.

[41] What emerges from the respondents' supplementary answering affidavit is that the respondents only learned about the change in marital regime and the terms of the ante-nuptial contract of the Haribhai's after the default judgement was obtained on 12 August 2014. As a consequence they instructed their attorneys to abandon the order in relation to the four properties, the ownership of which vested solely in Dinesh's name. In their view the order of 12 August 2014 only remains effective in relation to 21 Mimosa Mews in which Dinesh and Janine have undivided (50%) half shares.

[42] More importantly what also emerges is that four of the five properties have already been sold and the dispute only relates to the remaining property being 21 Mimosa Mews. These changed circumstances were not brought to the attention of the Court by the applicant. In fact she persists in creating the impression that the four properties are still unsold by remaining silent. The sale of these properties would be a pertinent factor to consider in the exercise of my discretion.

[43] I turn to consider the applicant's defence to the main matter. In her supplementary affidavit she relies on sections 82 and 64 and 21(3) of the Insolvency Act (which I refer to as "*the Act*") although the last mentioned is linked to the first ground namely the lack of due and proper service. In addition she submits that the properties could not be sold by the respondents at this stage without the authority of the Master which has not been obtained. As the last ground she alleges that Standard Bank which was the second respondent in the default judgement could not seek to recover a debt from her because it has ceded its rights under the mortgage agreement to SB Guarantee (Pty) Ltd. Standard Bank is precluded from recovering debts on behalf of SBG under section 78(1)(g) of the Bank Act 94 of 1990.

[44] All of the grounds are opposed by the respondents.

[45] In relation to the last mentioned ground, it is apparent ex facie the documents attached as annexures GA7, GA8,GA9 and GA10 to the respondents' supplementary answering affidavit that the mortgage bonds in relation to the remaining property have not been ceded by Standard Bank and there is no basis for this defence.

[46] Her reliance on section 21(3) only holds water if the nature of the application was to execute against her portion of the jointly owned property. The application was to seek termination of the joint ownership between her and Dinesh. It might be that eventually the only way she is able to retain the value of her portion of the joint property is through the proceeds of a disposal thereof. But this is a matter she can discuss with and come to some arrangement with the trustees, which she has already been requested to do. Or she can purchase Dinesh's share. Reliance on section 21(3) is not a defence against the application for a termination of the joint ownership of the properties.

[47] The applicant relies on s 82 to argue that the respondents could not sell immovable property unless they have held the first and second meetings of creditors and that such meetings were not held. She states that she knows that these meetings were not held because if they were held Dinesh as the insolvent would have received a notice. Such a notice would have been sent to him in terms of section 64 of the Act. In reading section 64 together with section 82 she concludes that the trustees cannot sell the properties at this stage because the consent of the Master and creditors has not been obtained.

[48] While section 64 of the Act places an obligation on the insolvent to attend the first and second meetings of creditors it does not require the trustees to provide him with notice thereof. It further requires the insolvent to attend subsequent meetings when required by written notice thereof. The latter requirement of written notice to attend subsequent meetings supports the conclusion that there is no obligation on the trustees to send a personal notice to the insolvent in respect of the first and second meetings of creditors. Section 81(1)(bis(a) requires the trustees to send notices to all the known creditors in the estate but does not include the insolvent.

[49] Mr Da Silva submits, correctly in my view, that the Act does not place an obligation on the trustees to send notices to the insolvent to attend the first and second meetings of creditors. The insolvent is duty bound to ascertain these dates by inspection of the Government Gazette in which the notices of meetings are advertised. The first meeting of creditors is convened by the Master at which trustees are appointed. There after the trustees convene further meetings.

[50] These meetings appear to have been held as evidenced by a copy of the resolution of the second meeting of creditors dated 11 December 2013 (record 297 annexure GA5). At that meeting the trustees were authorized to dispose of the immovable assets of the insolvent estate by public auction, private treaty or public tender. In relation to the requirement of the Master's consent, one of the orders sought by the trustees was an extension of their powers which was granted.

[51] Significantly the applicant does not put up a single defence as to why the joint ownership ought not to be terminated. The termination application flows from the declared insolvency of her spouse. He was unsuccessful in setting it aside on appeal. The applicant has not put up any evidence to suggest that that he is on his way to solvency and that termination of the joint ownership of the properties might therefore be unnecessary. In fact the evidence seems to go the other way. The applicant and her spouse, joint owners of the remaining property in question being 21 Mimosa Mews are in arrears on their mortgage repayments and have failed to make any payments on any of the bond accounts with Standard Bank over that property since 1 February 2011. In other words even if the order were to be rescinded the applicant would not be able to prevent her 50% ownership from being adversely affected by the continued insolvency of her spouse.

[52] In conclusion I find that the applicant does not have good prospects of success in the main matter.

[53] As a final factor to consider is the change in circumstances that was brought about by the unexplained delay in enrolling this matter

[54] These events have been significant. Four of the properties have been sold and already transferred to the buyers. The applicant, as wife of the insolvent Dinesh would have been aware of these sales as would Dinesh. Through these protracted proceedings the fact of the 12 August 2014 order has become known to the applicant and yet she chooses to resist it 22 months later, without providing an explanation for this delay or bringing the court's attention to the fact that there is only one remaining property, but also persists in seeking a rescission of the entire order.

[55] Rescinding of the order in relation to all five properties would result in prejudice not only to the trustees in their function to wind up the insolvent estate but also to the new owners of the sold properties. The reason why there is a duty on the applicant to bring a rescission application without undue delay is precisely so as to avoid these kinds of complexities arising out of changed circumstances due to the passage of time.

[56] In light of the above I do not consider the application to be brought in good faith nor do I consider the applicant to have a bona fide defence. Having regard to this and to the fact that there is a likelihood of prejudice to third parties and the respondents were the order be rescinded I make the following order –

56.1. The application for rescission is dismissed

56.2. The applicant to pay the respondent's costs occasioned by opposition to this application.

Y. CARRIM

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:	07 September 2016
Delivered on:	14 September 2016
For the Applicant:	Mr Z. Omar
Instructed by:	Zehir Omar Attorneys
For the First Respondent:	Advocate L. W. de Beer
Instructed by:	Vezi & De Beer Attorneys