REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 58912/2014

22/6/2016

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

June 2016
DATE

SIGNATURE

In the matter between:

NEDBANK LTD	**Applicant**
and	
ANDRIES JOHANNES BRITZ	**First Respondent**
RENIER MARTIN	**Second Respondent**
HENDRIETTE MARIE MULLER NO	**Third Respondent**
THE MASTER, NORTH GAUTENG HIGH COURT	**Fourth Respondent**

JUDGMENT

PETERSEN AJ:

INTRODUCTION

[1] On 19 November 2014 the estate of the first respondent was sequestrated by default judgment granted in favor of the second respondent, who was the sole applicant in the sequestration proceedings. This is an application for the rescission of the default judgment granted in favor of the second respondent. The applicant further seeks an

order allowing it to intervene in the sequestration proceedings in the event of the relief sought in rescinding the final sequestration, being granted. The application for rescission is opposed by the second respondent, whilst the further relief in the event of the rescission being granted is not. An application by the wife of the first respondent to intervene in this application was refused by this court on 03 May 2016 with costs. An application on 04 May 2016 by the second respondent to admit into evidence an affidavit by his attorney with a confirmatory affidavit of the wife of the first respondent was unopposed by the applicant.

BACKGROUND TO THE APPLICATION

[2] At issue in the sequestration application was an amount of R100 000.00 owing to the second respondent. The applicant, Nedbank Limited, as a secured creditor, received no notification of the provisional sequestration order and notice of the final sequestration order was only received on or about 25 November 2014.

[3] The applicant instituted an investigation into the sequestration proceedings and concluded that the sequestration was not to its advantage or any other creditors of the first respondent (which includes the second respondent).

[4] The applicant initiated these proceedings for the main purpose of opposing the sequestration proceedings brought by the second respondent against the first respondent.

[5] The parties are *ad idem* that the first respondent is the owner of immoveable property. It is not in issue that the first respondent and his wife are married out of community of property and are co-owners of a half share in the immoveable property.

[6] The first respondent and his wife are indebted to the applicant by virtue of a loan agreement entered into with the applicant which is secured by a mortgage bond in favor of the applicant in the amount of R 1 350 000.00, together with security in the amount of R338 000.00.

[7] The first respondent as at 01 December 2014 was indebted to the applicant in the amount of R1 095 641.97, together with interest at a rate of 7.40% per annum.

THE INTERLOCUTORY ISSUE RAISED BY THE SECOND RESPONDENT

[8] The applicant had the immoveable property valuated on 11 December 2014 by a registered professional valuer Gary Wampach ("*Wampach*") who determined the forced sale value of the property, which is the value relevant to sequestration proceedings, to

be R1 000 000.00.

[9] At the hearing of this application, counsel for the second respondent for the first time took issue with the affidavit of *Wampach* submitting that it fails to comply with the Regulations Governing the Administering of an Oath or Affirmation as promulgated in Government Gazette R.1258 of 21 July 1972 ("the Regulations") as amended. The said regulations have been promulgated in terms of section 16 of the Justices of the Peace and Commissioner of Oaths Act, Act 16 of 1963.

[10] A careful reading of the founding affidavit of Jacques Pienaar, a Senior Manager employed by Nedbank Limited in the Home Loans Legal Recoveries Division, illustrates that substantial reliance is placed on the affidavit of *Wampach*, insofar as the forced sale value is determined at R1 000 000.00. The forced sale value is the basis for contention that there is no advantage to the creditors of the first respondent in having him sequestrated.

[11] Our courts are regularly faced with documents purporting to be affidavits in compliance with the provisions of the Regulations. The affidavit of *Wampach* as with any affidavit in general, must comply with the requirements for affidavits as contained in the Regulations. The Regulations are couched in peremptory terms and requires strict compliance because of the implications of the contents of the document.

[12] The procedure prescribed by the Regulations requires of the commissioner of oaths before administering the oath or affirmation to ask the deponent:

(a) Whether he knows and understands the contents of the declaration;

(b) Whether he has any objection to taking the prescribed oath; and

(c) Whether he considers the prescribed oath to be binding on his conscience.

[13] It has become customary that the answers to the aforementioned questions, are typed as a matter of course. The present matter is no different as *Wampach* had the following typed in his affidavit:

"I Gary Wampach, Registered as a Professional Valuer, know and understand the contents of this Affidavit, have no objection to taking the prescribed oath and consider the oath to be binding". It is noteworthy that it is not clear on what he considers the oath

to be binding as no reference is made to his conscience. It is clear that the regulation requires of the deponent to sign the statement in the presence of the commissioner of oaths and the commissioner of oaths to certify that the deponent has acknowledged that he or she knows and understands the contents of the declaration.

[14] The duty of the commissioner of oaths in the present matter was pre-empted by *Wampach* who had the following typed as part of his "affidavit":
"I certify that the deponent acknowledges that he knows and understands the contents of this Affidavit, which was sworn to and signed before me."

[15] The next procedural step is that once the deponent answers the questions in the affirmative, the very important step of administering the oath by the commissioner of oaths follows. Regulation 4(1) provides that:
"Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he is required to state the manner, place and date of taking the declaration."

[16] The commissioner of oaths is required to:
(1) sign the declaration, (2) print his full name and business address below his signature, and (3) state his designation and (3) the area for which he holds his appointment or his office if he has been appointed *ex officio.*

[17] The commissioner of oaths in the present matter, signed the "affidavit", has placed what appears to be his initials and surname, rank and force number above the words "COMMISSIONER OF OATHS" and appended a stamp from Randburg Client Service Centre of the South African Police Service.

[18] In Absa Bank Ltd v Botha NO and Others (39228/12) [2013] ZAGPPHC 163; 2013 (5) SA 563 (GNP) (7 June 2013) at para [8], Kathree-Setiloane J, in the context of an

application for summary judgment and a challenge to the "affidavit" in terms of Rule 30 held:

"... Subject to whether there has been substantial compliance with the Regulations, the court has a discretion to refuse an affidavit which does not comply with the Regulations. Should a commissioner of oaths not certify that the verifying affidavit in a summary judgment application had been sworn to or affirmed, the court will be reluctant to apply the maxim o*mnia praesumuntur rite esse acta donec probetur in contrarium*[1], also known as the "presumption of regularity", for purposes of making the assumption that the document had, in fact, been sworn to (or affirmed) and signed in the presence of the commissioner of oaths."

[19] On a careful perusal of the "affidavit" of *Wampach* it cannot be gainsaid that it falls shy of the requirements of the Regulations. At most the "affidavit" of *Wampach* is tantamount to a statement. Counsel for the applicant has submitted that even if the statement falls shy of the requirements of the Regulations, *Wampach* has supplied a Valuation Certificate wherein he states the forced value of the immoveable property.

[20] Save for the challenge to the "affidavit" of *Wampach* no issue is taken with his qualifications and registration as a professional valuer in terms of the Property Valuers Profession Act, Act 47 of 2000. *Wampach* is subject to the Code of Conduct for the Valuers Profession 1 of 2004("the Code of Conduct"). Insofar as the valuation certificate is concerned, the Code sets out what a registered person is required to do in the conduct of his profession at section 5:

"In carrying on the property valuers profession, a registered person shall:

"(b) order his or her conduct so as to uphold the dignity, standing and reputation of the property valuers profession by maintaining a high standard of professionalism, honesty and integrity;

...

(h) sign all property valuation reports and other documentation relating to his or her work in the property valuers profession, prepared by or for him or her, and use his or

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title as provided for in section 22(3) of the Act; and (i) ensure, where possible, that his or her name is shown on all accounts rendered in connection with property valuations signed by him or her".

[21] I am accordingly satisfied that the valuation certificate of *Wampach* is in compliance with the high ethical standards as set out in the code of conduct and suffices for reliance on the forced sale value of the immoveable property as relied upon by *Pienaar* in the founding affidavit.

[22] The forced sale value of the immoveable property is challenged by the wife of the first respondent. In addition thereto her affidavit indicates that she has been making regular payments to the applicant and appears to be in advance with the payments. Counsel for the applicant submits that this evidence rather than advancing a case to dismiss the rescission application supports the application.

[23] A stark reality that the wife of the first respondent has to face is that any sale in execution of the half share of the first respondent in the immoveable property will have the undesirable effect of her having to share a half interest in her home with a stranger.

THE APPLICANT'S CASE

[24] The applicant relies on rule 42(1)(a) in submitting that the order granted by default was *"erroneously granted"*. The crux of the submission is that had the judge known that there was no benefit to the creditors of the first respondent in sequestrating his estate, no default judgment would have been granted in favor of the second respondent. The applicant relies in this regard on Naidoo v Matlala 2012 (1) SA 143 (GP) at 153C where it was found that a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment.

[25] Whilst Section 10(c) and 12(1)(c) of the Insolvency Act 24 of 1936, has been

argued in seeking dismissal of the sequestration order as one of the initial prayers, it is relevant in my view to the submission that default judgment was granted erroneously. The crux of the provisions being that there must be an advantage to creditors of the debtor if a final order of sequestration is granted. A fact the applicant submits was unknown to the judge in granting the sequestration order.

[26] The applicant submits that the following basic calculation illustrates that the sequestration of the first respondent holds no advantage to any of the creditors alternatively no dividend will accrue to any of the concurrent creditors:

ASSETS	**BALANCE**
Immoveable property bonded to Nedbank	**R1 000 000.00**
Less bond debt	**(R1 095 641.97)**
TOTAL	**(R 95 641.97)**
A. ADMINISTRATION COSTS	
3% on value of immoveable property	R30 000.00
VAT @ 14%	R 4 200.00
	R34 200.00
6% auctioneers costs on value of immovable property	R60 000.00
VAT @14%	R 8 400.00
	R68 400.00
B. OTHER ADMINISTRATION COSTS	
Master Fees	R 205.00
Costs to arrange security	R 216.00

TOTAL COSTS OF SEQESTRATION (A+B)	**R103 021.00**
AMOUNT AVAILABLE FOR DISTRIBUTION	
ASSETS TOTAL	**-(R 95 641.97)**
LESS SEQUESTRATION COSTS TOTAL	**-(R103 021.00)**
AMOUNT AVAILABLE FOR DISTRIBUTION	**-(R198 662.97)**
DIVIDEND PAYABLE TO CONCURRENT CREDITORS	**R0.00**

[27] On the common law requirements it is submitted that the applicant was not in willful default as it was not aware of the sequestration proceedings and that it has a *bona fide* defence to the second respondent's sequestration application of the first respondent with the crux being that there is no reasonable belief that there is any advantage to the creditors.

THE RESPONDENT'S CASE

[28] Counsel for the second respondent submits that "*Rule 42 does not purport to amend or extend the common law. Its object and purpose is to provide the procedure for the rescission of judgments and it has no effect on common law principles*". In support of this submission reliance is placed on the case of Theron NO versus United Democratic Front (Western Cape Region) and others 1984 (2) SA 532 (C). Counsel submits that the factual and legal conclusions of Strauss J in the sequestration application cannot be attacked on the basis that it was wrongly decided and was not the intended purpose of Rule 42.

[29] Relying on *Colyn supra* at para 6, it is submitted that the rule is only a procedural rule and does not create substantive law. On the requirements of Rule 42 it is further submitted that there was no procedural defect in the matter. Whilst the applicant's

interest in the matter is not disputed it is submitted that the failure to serve notice of the sequestration proceedings on the applicant does not necessarily constitute a procedural error.

[30] It is submitted with reliance on National Pride Trading 452 Pty Ltd v Media 24 Ltd 2010 (6) SA 587 (EC) that a mistake in the proceedings is the operative requirement. It is contended that the mistake/error must appear from the record of proceedings. The basis of this submission is founded in Bakoven Ltd v G J Howes (Pty) Ltd 1992 (2) SA 466 (E) at 472D, where it was said that judgment granted in the absence of the applicant Bakoven could not have been said to have been granted erroneously *"in the sense contemplated in Rule 42(1)(a), as applicant cannot point to an error or irregularity appearing from the record of proceedings"*. In the final analysis it is submitted that the application cannot be brought under the guise of an "erroneously" granted provision thereby seeking a total appeal of the facts and the decision of the court that granted the order sequestrating the estate of the first respondent.

THE LAW APPLICABLE TO THE RESCISSION APPLICATION

[31] The applicant seeks rescission of the default judgment in terms of Uniform Rule 42(1)(a) or in the alternative in terms of the common law.

Uniform Rule 42(1)(a) provides that:

"The Court may, in addition to any other powers it may have, mero motu or upon 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;...".

[32] In terms of the common law a judgment may be rescinded provided *"sufficient or good cause"* has been shown by the applicant. Our courts have accepted that sufficient or good cause entails two essential elements:

(1) a reasonable and acceptable explanation for the default (otherwise stated as an absence of wilful default; and

(2) a *bona fide* defence on the merits with *prima facie prospects of success (a bona fide*

defence). See Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9C; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352H-353A.

It may be added that the application must be made *bona fide*.

DISCUSSION

[33] It is a basic principle of our law that an order of court or judgment stands until set aside by a court of competent jurisdiction. Even in the event of such order or judgment being wrong it is presumed until the contrary is proven that the judgment is correct. Rule 42(1)(a) provides one of the remedies to rescind an order or judgment erroneously granted. Whilst a court of competent jurisdiction is afforded a discretion whether or not to grant an application in terms of this sub-rule, the common law remedy is not excluded by the sub-rule. Rule 42(1) is unambiguous in this regard in the words "...in addition to any other powers it may have...".

[34] The difference between the sub-rule and the common law is that a finding that a judgment or order has been granted erroneously should as a matter of cause lead to the rescinding of the judgment without any further enquiry needed. In terms of the common law, the applicant is required to show good cause.

[35] The respondent relying on *Bakoven* submits that the mistake or error must appear from the record of proceedings. The Supreme Court of Appeal in *Colyn*, however, has made it clear that that in deciding whether or not a judgment has been granted erroneously a court would not be confined to the record of proceedings. It is my view accordingly that the submission by the respondent that the applicant is bringing an appeal under the guise of an application for rescission is misplaced. This Court is at liberty to revisit the sequestration proceedings if it is shown that the judgment was granted erroneously because of some fact which was unknown to the court when granting such order.

[36] The absence of any advantage to the creditors of the first respondent in his

sequestration by the second respondent is a fact that clearly was not part of the papers. On the papers the court was satisfied that the final sequestration of the first respondent was merited. I have no basis to fault the finding leading to the final sequestration order. I am likewise not in position to say if the court would have refused the application for sequestration of the first respondent had the absence of advantage to his creditors been shown. It is my considered view that the intention of the legislature could not have been to afford the courts an opportunity to create a list of circumstances which would constitute a circumstance to find that a judgment has been granted erroneously. I am accordingly not inclined to exercise my discretion in favor of the relief sought in terms of Uniform Rule 42(1)(a).

[37] I turn to the common law. It is my view that the requirements at common law do not require of me to revisit the merits of the sequestration proceedings leading to the sequestration of the first respondent. Upon a careful preponderance of the requirements, I am satisfied:

(1) that the applicant for obvious reasons was not in willful default as it had never been notified of the sequestration proceedings and the explanation furnished by the applicant is reasonable and acceptable.

(2) that the application by the applicant has been made *bona fide* after having been informed of the sequestration of the first respondent, causing the sequestration to be investigated and initiating this application within two and half months of such knowledge.

(3) that the applicant has a *bona fide* defence to the sequestration of the first respondent with prima facie prospects of success.

[38] I am further satisfied that on the subject matter of the default judgment that the applicant has a direct and substantial interest in the sequestration of the first respondent.

COSTS

[39] In the ordinary course costs follows the successful party. Counsel for the respondent has urged the court not to grant costs against the second respondent in opposing this application. Counsel for the applicant seeks a costs order.

CONCLUSION

[40] In the result it is ordered:

[40.1] That the order of final sequestration of the first respondent issued on 19 November 2014 be rescinded;

[40.2] That the applicant be allowed to intervene in the sequestration proceedings of the first respondent by the second respondent.

[40.3] Costs are awarded to the applicant on an attorney and client scale.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Applicant : Advocate R. Carvalheira

Instructed by Enderstein and Van Merwe Incorporated

On behalf of the Second Respondent: Adv K Lewies

Intsructed by Heckroodt and Associates

DATE HEARD: 04 May 2016

DATE OF JUDGMENT: June 2016