IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 19260/20

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

[redacted] 01.03.2022

SIGNATURE **DATE**

In the matter between:

MYSTICAL ICE TRADING 50 CC APPLICANT

And

RIETFONTEIN VIEW ESTATE (PTY) LTD RESPONDENT

REASONS FOR ORDER HANDED DOWN ON 2 FEBRUARY 2022

BASSON J

Introduction

[1] The applicant (Mystical Ice Trading 50 CC) launched an application in terms of the Uniform Rules of Court Rules 46(1) and 46A to declare two of the respondent's (Rietfontein View Estate (Pty) Ltd) immovable properties situated in the sectional title scheme known as Riverview, specially executable.

[2] The execution of the respondent's immovable properties was sought pursuant to a default judgment order being granted by this Court on 8 December 2020 for the amount of R999 095.25, as well as interest at the rate of 10% per annum and the costs of suit on an attorney and client scale. Subsequently to the default judgment being granted, the applicant issued a warrant of execution for movable goods against the respondent.

[3] On 7 January 2021, the sheriff attempted to execute the warrant of execution for movables at the respondent's chosen *domicillium citandi et executandi*. The sheriff could not attach any movable goods as Mr Daniel Malunga ("Malunga"), the deponent to the respondent's affidavits and the representative of the respondent, claimed that the movable property belongs to the Masetla Family Trust. Malunga also informed the sheriff that the applicant's attorneys could sell one of his flats situated in Rietfontein. On 28 April 2021, the sheriff again attempted to execute the warrant of execution for movables.

[4] The sheriff demanded payment of the amount of R999 095.25 in terms of the warrant of execution. Malunga, on behalf of the respondent, informed him that he has no money or disposable movable property with which to satisfy the said warrant. Because no disposable movable assets were pointed out to the sheriff, or could not after a diligent search and enquiry be found, the sheriff issued a *nulla bona* return.

[5] As a consequence, the applicant launched this application in terms of Rules 46(1) and 46A.

[6] The respondent opposed the applicant's application instituted in terms of Rules 46(1) and 46A, and launched a counter-application to rescind the default judgment granted by the Court on 8 December 2020.

<u>The respondent's opposition and counter-application</u>

[7] In prayer 1 of the counter-application, the respondent sought an order that the execution of the default judgment be suspended in terms of the provisions of Uniform Rule 45A pending the finalisation of the application for rescission of the default judgment, and in prayer 2 the respondent (applicant in the counter-application) sought an order for condonation for the late filing of the application for recission. In prayer 3 of the notice of counter-application, the respondent sought the rescission of the default judgment in terms of Rule 31(2) or Rule 42 of the Uniform Rules of Court, alternatively in terms of the common law.

[9] The respondent concedes that the summons was received, whereafter Malunga (the sole director of the respondent) instructed an attorney to defend the proceedings on behalf of the respondent. He further states that he was under the impression that the proceedings would be attended to by his erstwhile attorneys. Malunga blames his erstwhile attorneys for not defending the action as instructed, but accepts that it is not a proper explanation:

> 'I am constrained to accept that the failure of the initial legal representative to properly execute the mandate to defend the proceedings does not translate to a reasonable explanation for the default in the entry of an appearance to defend and that the respondent ought to have done much more than to await the directions of the legal representative.'

[10] Malunga is, however, very vague who this attorney is and why he (Malunga) did not follow up on the progress of the matter. Malunga also does not tell the Court when he finally realised that his legal representative did not take any steps to defend the matter. In *Dreyer v Norval & others*[1] the Court made it clear that:

> '. . .It is a well-established principle that in an application for condonation the Applicant has the burden of showing, as opposed to merely alleging, the good cause that is required as a jurisdictional prerequisite to the exercise of the court's discretion. The person seeking condonation must at least furnish an explanation of the default sufficiently for the Court to understand how it came about and to assess the conduct and motives. . .'

[1] *Dreyer v Norval & others* [2006] JOL 18574 (T) at para 7.

[11] The person seeking condonation must at least furnish an explanation of the default sufficiently for the court to understand how it came about and to assess the conduct and motives.[2]

[12] Where a party is the author of its own misfortunes it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct.[3] As will be pointed out, the respondent in this matter does not have a reasonable explanation for the delay and does not adequately explain his inaction in pursuing the matter.

[13] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[4] the court considered a similar explanation for a default. The defendant also blamed his attorney for the delay. The Court concluded as follows:

> 'I have reservations about accepting that the defendant's explanation of the default is satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a reasonable explanation. While the Courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (Saloojee and Another NNO v Minister of Community Development). Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success (Melane v Santam Insurance Co Ltd).'

[14] Does the respondent in this matter have a *bona fide* defence which has prospect of success, despite the absence of a reasonable explanation for the default? Overriding also is the question, taking into account all the circumstances, whether it is

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[2] *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd & others* 2000 (3) SA 87 (W) at para 12.
[3] *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at p780 F.
[4] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para 12.

in the interests of justice to grant condonation in the circumstances. The Constitutional Court in *Grootboom v National Prosecuting Authority and Another*[5] explains:

> 'The failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long time. Even this court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the rules of this court.
>
> I have read the judgment by my colleague Zondo J. I agree with him that, based on Brummer and Van Wyk, the standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.
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> It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.'

[15] As far back as 7 January 2021 the respondent was made aware of the judgment when the sheriff attempted to execute the warrant of execution. This warrant was personally served on Malunga. There was a further attempt to execute the warrant in April 2021 yet the respondent did nothing. The explanation as to why the respondent did nothing for a period of nearly 8 months since Malunga became aware of the writ of execution is, to say the least, implausible. It is all too convenient to blame everything

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[5] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at paras 21 to 22.

on the legal representative. There exists, as already pointed out, no reasonable explanation for the delay.

Does the applicant disclose a *bona fide* defence?

[16] It is common cause that a sale of property agreement ("the agreement") was concluded between the parties pertaining to the sale of Units 9 to 17 in the sectional scheme known as Riverview.

[17] The parties specifically agreed in clause 3 of the agreement that the purchase price is R 6 750 000.00 (*VAT inclusive*). Having concluded the agreement, the applicant presented the respondent with a tax invoice as far back as 9 April 2019 for the total amount of R6 750 000.00 (VAT inclusive).

[18] The respondent now argues that the applicant is attempting to claim only the outstanding VAT portion pertaining to the property transaction in the summons. This contention is not borne out of the facts. The agreement clearly states that the purchase price of the units *included* VAT. The respondent now attempts to (mistakenly) claim that the purchase price of the units *excluded* VAT (and that the applicant is now only claiming the VAT portion). The applicant is claiming an amount of R 999 095.28 which constitutes the amount outstanding on the *full purchase price* (which in terms of the agreement *includes* VAT). The VAT portion stated in the agreement amounts to R880 434.89, which is *less* than the total amount claimed in respect of the outstanding purchase price and other costs, as reflected in Annexure "C", annexed to the summons. There is therefore no merit in the contention that it is only the VAT component that is claimed in the summons and for which default judgment was granted.

[19] The respondent persisted with the argument that the applicant failed to issue a tax invoice, as contemplated in section 20 of the VAT Act[6], and contended that the applicant was not be entitled to levy VAT on the purchase price for the sale of the residential units.

[6] Act 89 of 1991.

[20] The contention seems to be based on the argument that the respondent only received a statement from the attorneys of the applicant which incorporated the VAT component of the transaction. There is no merit in these submissions if regard is had to the terms of the agreement. This agreement specifically records that Malunga is representing a company to be formed under the name of Rietfontein View Estate (Pty) Ltd (the respondent) who would be the purchaser in terms of the agreement. The fact that the VAT invoice was provided to the respondent prior to it being incorporated is not irregular.

[21] Moreover, (and to restate) if regard is had to clause 3.1 of the agreement, it is clear that the purchase price is VAT *inclusive*. Nowhere in the respondent's affidavit is it alleged that payment of the entire purchase price (including VAT) was made as agreed to in the agreement. The respondent cannot, simply because it is convenient to do so, ignore the express provisions of the agreement.

[22] I should also pause to point out that the applicant had declared the VAT component to the Receiver of Revenue as it was legally obliged to do. The applicant had also paid over the VAT component of the purchase price to the Receiver of Revenue.

[23] I am therefore not persuaded that the respondent succeeded in proving a *bona fide* defence to the applicant's claim. Moreover, despite having admitted to receiving the summons in the action, and receiving two warrants of execution from the sheriff, the respondent did nothing until the application to declare the immovable properties executable was served.

[24] The respondent also made a vague allegation in its affidavit that the "*core allegations advanced in support of the existing defaults are of themselves, suspect*". There is no merit in this contention. Apart from the fact that the allegation is vague to the extreme, the terms of the agreement leaves no doubt that the purchase price *included* VAT. The further allegation that the applicant omitted crucial information, which if disclosed would have negated the grant of the default judgment, is equally without merit. I have perused the applicant's papers and I am satisfied that the

applicant had made a full disclosure (consistent with the agreement) of the factual events necessary to obtain default judgment and to obtain an order in terms of Rule 46.

[25] In conclusion: I have lastly considered whether it is in the interest of justice to grant condonation and in my view it is not in the interests of justice to do so. The recission application therefore falls to be dismissed. The counter-application is therefore dismissed.

[26] The remaining question to consider is whether this Court should grant an order for the execution against the properties.

Execution against the properties

[27] Rule 46(1)(a) provides that:

> 'Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless-
> (i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or
> (ii) such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5).'

[28] Accordingly, Rule 46A applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

[29] In terms of Rule 46A(2)(a):

> "A court considering an application under this rule must-
> (i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and
> (ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence."

[30] Rule 46A(2)(b) provides that –

> "A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted."

[31] It is common cause that the immovable properties sought to be declared especially executable are *not* the respondent's primary residence. In this regard, the full court held as follows in *ABSA Bank Ltd v Mokebe and related cases*[7]:

> '. . .It is therefore necessary for a court to determine whether a reserve price should be set based on all the factors placed before it by both the creditor and the debtor when granting an order declaring the property to be specially executable. If a debtor fails to place facts before the court despite the opportunity to do so, the court is bound to determine the matter without the benefit of the debtor's input. We cannot stress enough that this matter concerns and applies only to those properties which are primary homes of debtors who are individual consumers and natural persons. Rule 46A(8)(e), in operation since December 2017, now empowers the court to set a reserve price for the property at the sale in execution. It would, in our view, be expedient and appropriate to generally order a reserve price in all matters, depending on the facts of each case.'

It was further held:

> 'We are of the view that setting a reserve price would depend on the facts of each case. Some facts may indicate that the debt is so hopelessly in excess of the value of the property that the reserve price would be irrelevant compared to the value of the property but yet, if the debt is not satisfied by the proceeds of the sale of the property, a debtor still remains liable for any balance after realisation of the property. In all the circumstances, a reserve price should be set in all matters where facts indicate it. It will not be possible to set out a *numerus clausus* of factors to be considered in each case as the reserve price will depend on the facts of each individual matter. . .'[8]

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[7] *ABSA Bank Ltd v Mokebe and related cases* 2018 (6) SA 492 (GJ) at para 59.
[8] *Ibid* at para 62.

[32] In *Standard Bank of South Africa Ltd v Hendricks and Related Cases*[9] the full court of the Western Cape Division of the High Court approved the decision in *ABSA Bank v Mokebe*[10] and held that where a court grants an order for execution against the *primary residence* of a debtor, save in exceptional circumstances it is obliged to set a reserve price.

[33] It is common cause that neither of the respondent's immovable properties are the respondent's primary residence. There is therefore no need to set a reserve price.

[34] I have nonetheless exercised my discretion to set a reserve price as per paragraph 4 of the Court order.

Order

[35] In the event, the following order is made:

1. The following immovable properties are declared executable:

1.1 Section number 16 (door number) as shown and more fully described on Sectional Plan No SS 19 00166 in the Scheme known as RIVERVIEW in respect of the land and building situated at PORTION 6 OF ERF 233, RIETFONTEIN TOWNHSIP, LOCAL AUTHORITY: CITY OF TSHWANE METROPOLITAN MUNICIPALITY, of which section the floor area, according to the said sectional plan is 53 (fifty Three) square meters and held by Deed of Transfer No. ST19965/2019, subject to the conditions therein contained, which property is also known as UNIT 16, SS RIVERVIEW, 590 21st AVENUE, RIETFONTEIN, PRETORIA, GAUTENG PROVINCE.

1.2 Section number 17 (door number) as shown and more fully described on Sectional Plan No SS 19 00166 in the Scheme known as RIVERVIEW in respect of the land and building situated at PORTION 6 OF ERF 233, RIETFONTEIN TOWNHSIP, LOCAL AUTHORITY: CITY OF

[9] *Standard Bank of South Africa Ltd v Hendricks and Related Cases* 2019 (2) SA 620 (WCC) at para 63.
[10] *Supra* at note 7.

TSHWANE METROPOLITAN MUNICIPALITY, of which section the floor area, according to the said sectional plan is 56 (fifty Six) square meters and held by Deed of Transfer No. ST19965/2019, subject to the conditions therein contained, which property is also known as UNIT 17, SS RIVERVIEW, 590 21st AVENUE, RIETFONTEIN, PRETORIA, GAUTENG PROVINCE.

2. The Registrar of the above Honourable Court is authorised to issue a Warrant of Attachment in respect of the aforesaid immovable properties;

3. A reserve price in respect of the two immovable properties are set in the event of the properties being sold in execution;

4. The above-mentioned properties are to be sold in execution and the Sheriff of this Court may not accept any bid less than R500 000.00 in respect of each property:

   i) In the event of the Sheriff not receiving any bid higher than R500 000.00 the Sheriff is entitled to accept the previous highest bid, on condition that this bid must be at least R400 000.00;

   ii) Should the Sheriff not receive a bid for any amount as contemplated in (i) above then and in such an event, the Sale should be cancelled and the Sheriff should file his report in terms of Rule 46A and Section 9(d) to be provided in the required five (5) days, from date of which the Sale was cancelled;

5. The respondent is ordered to pay the costs of the application on a scale as between attorney and client, still to be taxed.

A.C. BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 1 March 2022.

Appearances

For the applicant:	Adv L Kotze
Instructed by:	Snyman De Jager Incorporated
For the respondent:	Adv ME Manala
Instructed by:	Lamola Attorneys