THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 2522/2014

In the matter between:

MICHAEL MITCHELL	FIRST APPLICANT
LORRAINE REBECCA MITCHELL	SECOND APPLICANT
And	
DALE MATHEWS	FIRST RESPONDENT
ELTON JAMES OLIVER	SECOND RESPONDENT
FIRSTRAND BANK LIMITED	THIRD RESPONDENT
WASZZM AHMED DADARKER	FOURTH RESPONDENT
DADARKER & ASSOCIATES ATTORNEYS	FIFTH RESPONDENT
THE STANDARD BANK OF SOUTH AFRICA LIMITED	SIXTH RESPONDENT
THE SHERIFF OF THE COURT, MITCHELLS PLAIN NORTH	SEVENTH RESPONDENT
DE ABREU & COHEN INC	EIGHTH RESPONDENT
SUNSET BAY TRADING 546 cc trading as PAM GOLDING PROPERTIES ATHLONE	NINTH RESPONDENT
CITY OF CAPE TOWN	TENTH RESPONDENT
THE REGISTRAR OF DEEDS	ELEVENTH RESPONDENT
SOUTH AFRICAN REVENUE SERVICES	TWELFTH RESPONDENT

Heard: 3 March 2014

JUDGMENT: 23 APRIL 2014

BREITENBACH, AJ:

1. This unusual application came before me in the unopposed motion court on Monday 3 March 2014. The applicants ('the Mitchells'), who are married to one another in community of property, are the registered co-owners of Erf 1….., M……. P……, situate at 5….. B……. Street, L……. M……. Plain ('the property'). They apply for (a) an order declaring that they are the owners of the property, (b) an order that the first and second respondents ('Matthews & Oliver'), who are mother and son, are occupying the property unlawfully, (c) an order directing Matthews & Oliver to vacate the property within 30 days failing which the Sheriff must evict them and (d) an order that the Mitchells must institute within 30 days any action against any of the respondents to recover damages for any losses they may have suffered.

2. The sequence of events culminating in the present application is as follows.

3. On 19 May 2009, in an action in this Court under case number 1178/09 between the third respondent ('FirstRand Bank') (as plaintiff) and Matthews & Oliver (as defendants), the Registrar of this Court, acting in terms of under rule 31(5)(b) of the Uniform Rules of Court read with rule 45(1), granted default judgment against Matthews & Oliver in favour of FirstRand Bank. The orders made included orders for payment of R279 922.81 plus interest due under a loan agreement and an order declaring the property, of which Matthews & Oliver were then the registered owners and over which FirstRand Bank was then the mortgage bond holder, specially executable in satisfaction of that judgment debt and FirstRand Bank's costs of suit on the attorney and client scale. On the same day the Registrar issued a warrant of execution authorising the Sheriff to attach and sell the property.

4. On 15 March 2011, at the ensuing sale in execution conducted by the Sheriff, the property was purchased by the fourth respondent ('Dadarker').

5. On 13 July 2011 the property was transferred to Dadarker and registered in his name in the Deeds Registry.

6. On 22 August 2011 the Mitchells purchased the property from Dadarker. The deed of sale included a term (clause 5) providing that Dadarker would give the Mitchells vacant possession of the property on the date of transfer.

7. On 10 September 2011 the Mitchells and Dadarker concluded an addendum to the deed of sale which included a provision recording that Dadarker would not give them vacant possession of the property on the date of transfer and deleting clause 5 of the deed of sale. The background to this provision was that Matthews & Oliver were still living in the house on property (which is the property's main improvement) and had failed to move out despite correspondence from Dadarker's attorneys (dated 23 March 2011 and 26 August 2011) requiring that they do so or face proceedings for their eviction.

8. On 14 October 2011 the property was transferred by Dadarker to the Michells and registered in their names in the Deeds Registry. To pay for the property the Mitchells borrowed money from the sixth respondent ('Standard Bank') and caused a mortgage bond over the property in its favour to be registered in the Deeds Registry. This occurred on the same day as the registration of the transfer. Since then, and despite the events described below, Standard Bank has insisted that the Mitchells pay the monthly instalments due in terms of the loan agreement and they have duly done so.

9. On 15 October 2011, while Matthews & Oliver were still living in the house on property, the Mitchells gained access to the house and moved in with their belongings. In the ensuing proceedings by Matthews & Oliver for the eviction of the Mitchells referred to in paragraph 13 below, the Mitchells said they gained access to the house through a hole in the glass next to the front door which allowed them to unlatch the door from the inside. Matthews & Oliver

however said the Mitchells gained access by breaking the doors. What was common cause, however, is that Matthews & Oliver were out at the time and when Matthews arrived back at the house the Mitchells told her that they had moved in because they were now the registered owners of the property. After an argument Matthews left with some of her belongings, saying the Mitchells would hear from her lawyers.

10. On 25 October 2011 Matthews & Oliver brought an application in this Court under case number 21507/11 for orders rescinding the default judgment granted by the Registrar in case number 1178/09 on 19 May 2009 (incorrectly stated in the notice of motion to have been granted on 15 May 2009) and setting aside the sale in execution of the property to Dadarker on 15 March 2011.

11. The respondents were FirstRand Bank and Dadarker. The Mitchells were not cited as respondents, although Matthews's founding affidavit mentions them as having '*invaded my house and forcefully evicted me, telling me they had bought the house*'. It appears the reason the Mitchells were not cited as respondents was that a computerised Deeds Office search report obtained by Matthews & Oliver, though dated 20 October 2011, incorrectly did not reflect the registration of transfer from Dadarker to the Mitchells on 14 October 2011. It instead showed Dadarker as the being the registered owner of the property.

12. The facts and allegations supporting the application for rescission of the default judgment and the setting aside of the sale in execution, as they emerge from the various parts of Matthews's founding affidavit (which is not well structured), are as follows:

    12.1. FirstRand Bank's summons in case number 1178/09 did not allege that Matthews & Oliver were in default or had otherwise breached any of the terms of the mortgage loan;

12.2. when Matthews received the summons she immediately approached the bank's attorneys, made an arrangement to pay and was told no further legal action against her would be taken;

12.3. she thereafter made payments in terms of the arrangements;

12.4. she was not aware the bank had applied for default judgment;

12.5. neither the bank nor its attorneys told her that the default judgment had been granted and instead the bank continued to accept payments from her;

12.6. when she received a notice of the impending sale in execution she again approached the bank's attorneys and made another arrangement to pay (a reduced monthly amount) and was given an assurance that no further legal action against her would be taken;

12.7. thereafter she made payments in terms of the arrangement; she was not informed the property had been sold in execution;

12.8. she ignored the March and August 2011 letters from Dadarker attorneys demanding that she vacate the premises because she was continuing to make payments to the bank in accordance with their arrangement;

12.9. she subsequently caused a Deeds Office search to be done and found out the transfer of the property to Dadarker had been registered on 13 July 2011;

12.10. she would be approaching the court to regain possession of the property and '*in respect of registering the property in my name*'; and

12.11. the granting of default judgment by the Registrar '*has been rendered unconstitutional*' by '*recent Constitutional Court cases*' (presumably a

reference to *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) ('*Gundwana*'), which followed *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) ('*Jaftha*')).

13. On 26 October 2011 Matthews & Oliver brought an urgent application in this Court under case number 21566/11 against the Mitchells. In that application Matthews & Oliver sought the eviction of the Mitchells from the property and an interdict preventing them from re-occupying the property pending the finalisation of their application for rescission of the default judgment granted by the Registrar on 19 May 2009. In their answering affidavit the Mitchells said they would be filing and application for leave to intervene in the application for rescission because they had '*a substantial interest*' in the property. (However, for a reason which is not apparent from the papers, the Mitchells did not bring the application for leave to intervene.)

14. On 26 October 2011, in case number 21566/11, this Court (*per* Cloete J), having heard the attorney for Matthews & Oliver in chambers, granted a rule *nisi* with interim effect requiring that, pending the determination the application for their eviction brought by Matthews & Oliver, the Mitchells vacate the property or face eviction by the Sheriff. The Mitchells thereupon vacated the property and Matthews & Oliver returned.

15. On 1 December 2011 this Court (*per* Saldanha J) granted, on an unopposed basis, the relief sought by Matthews & Oliver in case number 21507/11 referred to in paragraph 10 above, i.e. the orders rescinding the default judgment granted by the Registrar in case number 1178/09 on 19 May 2009 (again incorrectly referred to in the order as having been granted on 15 May 2009) and setting aside the sale in execution of the property to Dadarker on 15 March 2011. Saldanha J did not give reasons for his order, to which I shall refer as 'the rescission order'.

16. On 29 February 2012, in case number 21566/11, this Court (*per* Allie J) granted a final order that the Mitchells be evicted from the property, with the result that

Matthews & Oliver have been staying there ever since. In the course of her *ex tempore* judgment, after referring to the rescission of the default judgment and the setting aside of the sale in execution by Saldanha J, Allie J said the following:

"*It now remains for the applicants [i.e. Matthews & Oliver] to bring the necessary application to reassert their right to ownership of the immovable property, which I understand they have not launched to date…. In the interim period we have a situation where as a result of the interim court order granted on 26 October 2011 the applicants [Matthews & Oliver] are now in occupation of the immovable property. The respondents [i.e. the Mitchells] have vacated the immovable property, but the immovable property is still registered in the names of the respondents [the Mitchells] and is no longer registered in the names of the applicants [Matthews & Oliver]. So it is clear to me that certain steps would have to be taken to bring finality to the aspect of ownership of the immovable property.*"

17. Matthews & Oliver however did not take any steps aimed at having the property re-registered in their names.

18. On 29 January 2013 the Mitchells brought an application under case number 1094/13 for a range of relief, including relief substantially in the form of the relief set out in the present application and summarised in paragraph 1 above. The respondents cited in that application are the same as the respondents in the present application. That application was opposed by Matthews & Oliver, and in addition Standard Bank brought a conditional counter-application to the effect that if the property was to be re-registered in the names of Matthews & Oliver that could not occur until the Mitchells had repaid their loan with it and its mortgage bond over the property had been cancelled.

19. On 10 January 2014 this Court (*per* Ndita J) delivered a written judgment in the application under case number 1094/13 in which, amongst other things, she said the following about the Mitchells' claim for an order declaring that they are the owners of the property:

19.1. "… *there is no legal basis upon which this Court may set aside the order issued by Saldanha J rescinding the default judgment*" (p. 12); and

19.2. "… *it is established law that where a judgment by default is rescinded and the sale in execution set aside, any warrant of execution issued pursuant thereto becomes null and void and the judgment debtor is entitled to the restoration of the status quo ante. In Menqa and Another v Markom and Others 2008 (2) SA 121 SCA, the court restated the principle thus: "[19] … where there was no sale in execution or where the sale in execution which purported to have taken place was a nullity, then it could not have served to pass any title to the property concerned to the purchaser or to any successor-in-title into whose name the property was subsequently transferred: The plaintiff [the judgment debtor], as owner of the property, would be entitled to recover the [property] by way of a rei vindicatio" (See also Campbell v Botha and Others 2009 (1) SA 238 (SCA).) It follows as a matter of course that in the present matter no title can be said to have passed to either the fourth respondent [i.e. Dadarker] or the applicants [i.e. the Mitchells]. The registration of the property in the applicants' and fourth respondent's names did not make either of them the owners of the property*" (pp.13-14).

20. Having made these findings, Ndita J, went on to refer to the invidious position in which the Mitchells find themselves: they are currently the registered owners of the property but are not permitted to occupy it and, despite that, Standard Bank insists that they pay the monthly payments on the loan they took out to pay for the property.

21. Ndita J also castigated Matthews & Oliver for not taking any concrete steps to secure the re-registration of the property in their names in the period since Allie J's judgment in late February 2012.

22. Ndita J then continued as follows:

"*Allie J, in her judgment evicting the applicants from the premises, dated 29 February 2012, was alive to the fact that steps would have to be taken to bring to finality the aspect of ownership of the immovable property. In as much as the respondents [i.e. Matthews & Oliver] are in lawful occupation of the property as per court order, it is clear to me that the court is bound to exercise its discretion in favour of finding alternative relief in order to ameliorate the apparent inequitability. To my mind, an order compelling the respondents [Matthews & Oliver] to institute proceedings regularising their ownership of the property within a stipulated period and failing which the applicants [i.e. the Mitchells] will be entitled to, on the same papers duly amplified, to apply for an order declaring them as the owners of the property and the eviction of the respondents [Matthews & Oliver] is justified*" (pp 22-23).

23. Ndita J concluded her judgment with an order which included the following provisions relevant to the present application:

"*1. The first and second respondents [i.e. Matthews & Oliver] are ordered to within 20 (twenty) days of service of this order take steps necessary to regularise their ownership of the property described as erf 17295 Mitchell's Plain, situate at 52 Bamboo Street, Lentegeur, Mitchell's Plain.*

2. The first and second respondents [Matthews & Oliver] are further ordered to file proof of the re-registration of the property in their names within 20 (twenty) days of service of this order.

…

4. Should the first and second respondents [Matthews & Oliver] fail to comply with this order, at the stipulated time, the applicants [i.e. the Mitchells] are entitled to apply on these papers, duly amplified for an order declaring them as owners of the property."

24. On 17 January 2014 the Sheriff served Ndita J's order on Matthews & Oliver.

25. On 17 February 2014 the Mitchells issued the present application and on 21 February 2014 it was served on Matthews & Oliver. As neither of them

opposed the application or delivered any papers, it came before me, as stated earlier, in the unopposed motion court. The application was moved by Adv. T Möller, who at my request prepared written submissions and addressed oral argument to me in support of the application.

26. In the founding affidavit the Mitchells allege that Matthews & Oliver have not taken any of the steps required by paragraphs 1 and 2 of Ndita J's order. The Mitchells consequently ask for an order declaring them to be the owners of the property.

27. As I see this matter the relief sought by the Mitchells and summarised in (a) and (b) of paragraph 1 above, both of which concern the ownership of the property, raises three questions for decision. The first question is whether the mere bringing of this application entitles the Mitchells to the relief sought. If the answer to that question is "No", the second question is whether I must refuse the relief sought in this application because I am bound by Ndita J's reasoning and findings, quoted in paragraph 19.2 above, that "*no title can be said to have passed to either the fourth respondent or the applicants. The registration of the property in the applicants' and fourth respondent's names did not make either of them the owners of the property*". If the answer to the second question is also "No", the third question is whether the Mitchells are indeed the owners of the property.

28. In my view, when Ndita J's judgment and order are read as whole it appears both the first and second questions must be answered in the negative. As I understand it the judgment makes provisional findings and allows this Court, in any proceedings the Mitchells may bring under paragraph 4 of the order (i.e. the present proceedings), to determine finally whether or not the Mitchells are not merely the registered owners of the property but also the true owners.

29. That brings me to the third question described in paragraph 27 above.

30. The possibility that despite the registration of the property in the Mitchells' names they may not be the true owners arises for two reasons. First, our

system of deeds registration is a negative one, i.e. any information in the deeds office that is inaccurate may be corrected (CG van der Merwe *Sakereg* 2 ed (1989) at 342; *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal, en 'n Ander* 1975 (4) SA 936 (T) at 940B-941C; *Standard Bank van SA Bpk v Breitenbach en Andere* 1977 (1) SA 151 (T); *Knysna Hotel CC v Coetzee NO* 1998 (2) SA 743 (SCA) at 753B-C). Secondly, the effect of the rescission order in case number 21507/11 on 1 December 2011 rescinding the default judgment granted in case number 1178/09 on 19 May 1009 and setting aside of the subsequent sale in execution of the property to Dadarker, may have been that the ensuing registration of the transfer of the property into Dadarker's name and the subsequent sale and transfer of the property by Dadarker to the Mitchells became void *ab initio*. If that is correct, then Matthews & Oliver did not lose their ownership of the property despite the registration in the Deeds Registry of its transfer to Dadarker and thereafter its transfer to the Mitchells.

31. The question for decision, therefore, is what effect, if any, did the rescission order have on the registration of the transfer to Dadarker, the sale by Dadarker to the Mitchells and the ensuing registration of the transfer to the Mitchells.

32. On its face the rescission order (for which as stated no reasons have been given), is limited to rescinding the Registrar's default judgment and setting aside the sale in execution to Dadarker. Does this mean the order does not extend to the registration of the transfer to Dadarker or the sale and registration of the transfer to the Mitchells?

33. As appears from paragraph 12 above, one of the grounds for rescission set out in Matthews's founding affidavit in the application for rescission was the granting of default judgment by the Registrar in terms of rule 31(5)(b) of the Uniform Rules of Court read with rule 45(1) was held to be inconsistent with the Constitution of the Republic of South Africa, 1996 ('the Constitution') by the Constitutional Court. As indicated there, the case in question is *Gundwana*.

34. In *Gundwana*, following *Jaftha*, the Constitutional Court declared that the granting by High Court registrars, who are administrative not judicial officers, of orders declaring specially executable hypothecated property constituting a person's home, unconstitutionally infringes the right to housing in section 26(1) of the Constitution.

35. Having made that finding, the Constitutional Court in *Gundwana* (*per* Froneman J) turned to the implications of the declaration of unconstitutionality for the validity of such orders by registrars granted prior to the date of its judgment (11 April 2011). It said the following at paras 57-60:

'*[57] But what about retrospectivity? In Jaftha, this court placed no limit on the retrospectivity of its order. The declaration of invalidity of the legislative provisions in that matter did not entail, however, that all transfers made subsequent to invalid execution sales were automatically invalid. Individual persons affected by the ruling still needed to approach the courts to have the sales and transfers set aside if granted by default. This was made clear in Menga and Another v Markom and Others. [2008 (2) SA 120 (SCA). See also Campbell v Botha and Others 2009 (1) SA 238 (SCA).] A similar approach should be followed here.*

[58] There may be a fear that the decision in this matter will lead to large-scale legal uncertainty about its effects on past matters, where homes were declared specially executable by the registrar, and sales in execution and transfers followed. The experience following Jaftha may be an indication that this fear is overstated. It must be remembered that these orders were issued only where default judgments were granted by the registrar. In order to turn the clock back in these cases, aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule, under which the property was declared executable, is not sufficient to undo everything that followed. [Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at paras 27-38; and Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (CC case No CCT 39/10, 13 November 2010) ([2010] ZACC 26), as yet unreported, in paras 81-85.] In order to do so the debtors will have

to explain the reason for not bringing a rescission application earlier, and they will have to set out a defence to the claim for judgment against them. [Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O); Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764I-765D; and De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042.] It may be that in many cases those aggrieved may find these requirements difficult to fulfil.

[59] From what has been stated above, in relation to the legitimacy of resorting to execution in order to obtain satisfaction of judgment debts sounding in money, and that only deserving cases would justify other means to satisfy the judgment debt, it follows that a just and equitable remedy, following upon the declaration of unconstitutionality, should seek to ensure that only deserving past cases benefit from the declaration. I consider that this balance may best be achieved by requiring that aggrieved debtors, who seek to set aside past default judgments and execution orders granted against them by the registrar, must also show, in addition to the normal requirements for rescission, that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home.

[60] Once these hurdles have been cleared, and it is determined that special execution should not have been allowed, the question of the effect of invalid execution sales and subsequent transfers will have to be considered as a next step. It is not possible to lay down inflexible rules to deal with all the permutations that may arise in these cases. Existing legal principles and rules will be sufficient to deal with most cases in a just and equitable manner.'

36. As I understand this part of the judgment in *Gundwana*, it means the following:

36.1. the Constitutional Court's declaration that it is unconstitutional for a registrar of a High Court to declare the home of a person specially executable when ordering default judgment under Uniform Rule 31(5), does not entail that every such default judgment order made by a registrar and every sale in execution and transfer pursuant to such a sale is automatically invalid;

36.2. a person affected by such a default judgment order may bring a rescission application in the relevant High Court to have the order and any ensuing sale in execution and transfer set aside;

36.3. to succeed in such an application the person must explain the reason for not bringing a rescission application earlier, set out a defence to the claim for judgment against him or her and, in addition, show that a court with full knowledge of all the relevant facts existing at the time of the granting of the default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the person's home; and

36.4. if the High Court decides that the registrar should not have declared the person's home specially executable, it must consider the effect of the invalid execution sale and subsequent transfer and deal with them in a just and equitable manner.

37. When viewed against this part of this part of the judgment in *Gundwana*, two problems with the rescission order emerge.

38. The first problem is that it does not mention the transfer to Dadarker or the sale and transfer to the Mitchells, nor does it deal with the effect of that sale and those transfers. I presume the absence of a reference to the sale and transfer to the Mitchells was due to the fact that the incorrect computerised Deeds Office search printout annexed to Matthews's founding affidavit showed Dadarker not the Mitchells as the registered owner of the property. I presume the absence of a reference to the transfer to Dadarker is because the order follows the form and content of the notice of motion, which similarly is confined to the sale in execution to Dadarker and does not mention the transfer to him. Having said that, if the rescission order means what it says, it does not invalidate the registration of the transfer to Dadarker or the sale and registration of the transfer to the Mitchells.

39. The second problem with the rescission order is that it was made in proceedings to which the Mitchells had not been joined as parties.

40. For the reasons which follow, if, despite the ostensibly limited scope of the rescission order, its legal effect was that it invalidated the sale and transfer to the Mitchells despite not referring to them – see in this regard *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA) at paras 24-25 and *Campbell v Botha and Others* 2009 (1) SA 238 (SCA) at paras 12-13 and 20; see also *Knox NO v Mofokeng and Others* 2013 (4) SA 46 (GSJ) at paras 20-22 – then, because the Mitchells were not joined as parties, the rescission order was a nullity, it has no force and effect and it may be disregarded without the necessity of a formal order setting it aside.

41. In *Lewis & Marks v Middel* 1904 TS 291 at 303, Mason J (Innes CJ and Bristowe J concurring) said:

'*It was maintained that the only remedy was to appeal against the decision of the Land Commission; but we think that the authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2, 4, 14; and 66; 49, 8, 1, and 3; Groenewegen, ad Cod. 2; 41; 7, 54; Willis v Cauvin, 4 N.L.R. 98; Rex v Stockwell, [1903] T.S. 177; Barnett & Co. v Burmester & Co., [1903] T.H. 30).*'

42. In *Sliom v Wallach's Printing & Publishing Co Ltd* 1925 TPD 650 at 655, Curlewis JP (Krause J concurring) said:

'*The action, therefore, of the respondent company in applying for judgment, apparently by default, against the individual partner Sliom, the appellant in the present case, was an illegal and wrongful act. A judgment was thereby obtained against a person who had not been legally cited before the Court, and the effect of that judgment is that it is a nulllity; it is invalid and of no effect. In the case of Lewis & Marks v Middel, to which Mr Murray has referred us, and also in an earlier case where the Roman-Dutch authorities were examined, it*

was laid down on the authority of Voet that a judgment given against a person who had not been duly cited before the Court is of no effect whatsoever. It is a nullity and can be disregarded. It seems to me that is the position here. A judgment was obtained against the individual Sliom personally, whereas he had never been cited personally and individually to appear before the Court. Therefore, that judgment was wrongly obtained against him, and that judgment, in my opinion, was a nullity as far as he was concerned. The only judgment the plaintiff, on that citation, was entitled to was against the partnership.'

43. Both *Lewis & Marks* and *Sliom* were cited with approval by the Supreme Court of Appeal ('SCA') in *S v Absalom* 1989 (3) SA 154 (A) at 164E-G and in *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) at paras 12-13. Moreover, *Lewis & Marks* was cited with approval by the SCA in *Campbell v Botha and Others*, *supra*, at para 16.

44. Even though the Mitchells were aware of the rescission application, could have applied to be joined as respondents and (in the eviction proceedings) said they intended doing so but then never did so, the fact remains that, throughout, the Mitchells were never parties to the rescission application. It was consequently not legally permissible to make any order in the rescission application the effect of which was to invalidate the sale and transfer of ownership of the property by Dadarker to the Mitchells.

45. Therefore, the registration of the transfer of owners\]hip of the property by Dadarker to the Mitchells was not affected by the rescission order. Despite the rescission order the Mitchells have remained the owners of the property. Moreover, as Matthews & Oliver are occupying the property without permission from the Mitchells, their occupation is unlawful.

46. If Matthews & Oliver wish to try and change the current legal position they must bring a fresh application for rescission of the default judgment granted by the Registrar and the setting aside of all the consequential steps (i.e. the sale in execution and transfer to Dadarker and the sale and transfer to the Mitchells).

They must also apply for condonation for the late bringing of that application. They must join Dadarker, FirstRand Bank, the Mitchells and Standard Bank as respondents in those proceedings and their founding papers must deal with all of the matters mentioned in paragraphs 36.3 and 36.4 above.

47. As appears from (c) in paragraph 1 above, the Mitchells have also sought orders directing Matthews & Oliver to vacate the property and authorising the Sheriff must evict them if they do not do so. Those orders cannot be granted in these proceedings because Matthews & Oliver are '*unlawful occupiers*' referred to in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') (*Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at para 5), PIE gives Matthews & Oliver some protection against eviction including the right to receive a notice in terms of sections 4(2) and (5) of PIE before the Mitchells may approach the court for an eviction order and the Mitchells have not complied with this procedural requirement. The Mitchells' application for the eviction order must therefore be refused.

48. For so long as the Mitchells remain the owners of the property and Matthews & Oliver remain in unlawful occupation, the Mitchells may bring a fresh eviction application, provided that when doing so they comply with the procedural requirements of PIE.

49. As appears from (d) in paragraph 1 above, the Mitchells also seek an order that they must institute within 30 days any action against any of the respondents to recover damages for any losses they may have suffered. There is no legal basis for such an order. If the Mitchells want to institute any such actions they are free to do so, subject to their complying with any applicable laws and to the claims on which such actions are based not having been extinguished by prescription.

50. As to costs, despite the refusal of the eviction relief and the prayer for the order concerning the institution of damages actions, in my view the Mitchells have been substantially successful, Matthews & Oliver have been substantially

unsuccessful and consequently Matthews & Oliver should ordered to pay the Mitchells' costs.

51. Finally, in view of the impact of this judgment on the real rights of Matthews & Oliver, Dadarker, FirstRand Bank and Standard Bank, I shall direct that the applicants ensure that a copy is served on each of them within 30 days.

52. I make the following order:

    1. It is declared that the applicants are the co-owners of Erf 1……, M….. P…., situate at 5…… B…. Street, L….. M….. P…… and that the first and second respondents are in unlawful occupation of such property.

    2. The application for orders directing the first and second respondents to vacate the property and authorising the Sheriff must evict them if they do not do so, is refused.

    3. The application for an order directing the applicants to institute within 30 days any action against any of the respondents to recover damages for any losses the applicants may have suffered, is refused.

    4. The applicants shall ensure that a copy of this judgment is served on each of the first to fourth respondents and the sixth respondent within 30 days.

    5. The applicants' costs shall be paid by the first and second respondents jointly and severally, the one paying the other to be absolved.

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BREITENBACH, AJ

For the Applicant: Adv. T Möller
Instructed by Dalene Kuhn Attorneys