



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: **15th January 2021** Signature: _____

CASE NO: 14946/2019

DATE: 15th JANUARY 2021

In the matter between:

AVUSA ENTERTAINMENT INVESTMENTS (PTY) LIMITED

Applicant

and

ACUCAP INVESTMENTS (PTY) LIMITED

First Respondent

**ERASMUS, MRS ANET t/a THE SHERIFF OF THE
HIGH COURT, KRUGERSDORP**

Second Respondent

Coram: Adams J

Heard: 14 January 2021 – The ‘virtual hearing’ of the urgent application was conducted as a videoconference on the *Microsoft Teams* digital platform.

Delivered: 15 January 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 15 January 2021.

Summary: Urgent application – to set aside warrant of execution and ejectment writ – no steps taken by applicant to have underlying judgment rescinded – case not made out for urgency – application struck from the roll –

ORDER

- (1) The applicant's urgent application be and is hereby struck from the Urgent Court roll due to lack of urgency.
 - (2) The applicant shall pay the first respondent's costs of this urgent application.
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JUDGMENT

Adams J:

[1]. The applicant leased from the first respondent business premises at the Key West Shopping Centre ('the premises'), from which premises the applicant ran a cinema entertainment complex. During 2019 the applicant had fallen into arrears with the rental and ancillary charges payable in terms of the written commercial lease agreement between it and the first respondent. The first respondent proceeded with the issue of a summons against the applicant and on the 1st of August 2019, after the dispute between the parties had become settled and a written settlement agreement was entered into between them, judgment was granted against the applicant in favour of the first respondent, on the basis of the written settlement, for payment of the capital sum of R1 989 351.36, as well as for an order evicting the applicant from the premises.

[2]. In this opposed urgent application, the applicant applies for an order declaring the attachment of its movable property and its ejectment from the premises pursuant to a writ of execution and a writ of ejectment, issued by the first respondent and executed by the Sheriff on the 12th of November 2020, to be invalid. The applicant also seeks an order that the movable property attached

pursuant to the said writ of execution against movables be released from judicial attachment, as well as an order that the writs of execution and ejectment be set aside. Lastly, the applicant urgently applies for interim interdictory relief in terms of which the first respondent, pending an application for rescission of the said judgment, is to be interdicted from issuing further writs of execution against the applicant's property or ejectment writs.

[3]. Underpinning the applicant's urgent application is the applicant's intention to apply for rescission of judgment granted against it as far back as the 1st of August 2019, which, according to the applicant, would be founded on the fact that the settlement agreement was entered into as a result of an error. The error is that the first respondent, so the applicant avers, did not have the necessary *locus standi* to claim the judgment debt from the applicant as the debt had been ceded to the bondholder over the Shopping Centre. The settlement agreement was however entered into by the applicant with it being well aware of this fact, which means that the applicant had known or ought to have known from as far back as August 2019 that the judgment should be rescinded. If not, then the applicant ought to have realised that writs were bound to issued and executed as long as the judgment remained.

[4]. The writs themselves were issued during September 2020 and the applicant was well aware of this. On the 12th of November 2020 the writs were served on the applicant – its movable property was attached and it was evicted from the premises. The applicant alleges that the execution of the writs was unlawful and not in compliance with the relevant Uniform Rules of this Court. The objection to the execution of the writs is of a very technical nature. These irregularities in the execution of the writs, so the applicant contends, makes the application urgent. Importantly, by the 12th of November 2020 the applicant would have become aware of the fact that the first respondent was proceeding with the execution of the judgment obtained on the 1st of August 2019.

[5]. Notwithstanding the foregoing, the applicant only launched this application on an urgent basis on the 15th December 2020 – smack bang in the middle of the December holidays and at a time when most legal practices would

be closing for the holidays. The point is that the applicant was fully aware that the first respondent, who had obtained judgment against it during August 2019 and was well within its rights to insist on payment of the judgment debt and compliance with the eviction order, was intending to execute the judgment during September 2020. The reasonable thing would have been for the applicant to apply for a rescission of the judgment at that stage, if not earlier. Similarly, no action is taken by the applicant when the writs were served on the 12th of November 2010 and it should have become apparent to the applicant that the first respondent then meant business.

[6]. Despite this, no steps were taken prior to 25 November 2020 and no indication is given as to the reasons for the delay between this period. Nor is there any explanation given by the applicant as to the delay from 25 November onwards, save to indicate that a physical request had to be made for the mortgage bond.

[7]. The applicant relies for its urgency on the sale in execution which would have taken place on 25 January 2021 and on the alleged risk of the loss of or damage to equipment and its inability to beneficially utilize such goods which are under attachment. The sale in execution had been cancelled and the applicant was advised accordingly. However, the applicant indicated that it would persist with the application also on the basis that it will not have beneficial use of the goods.

[8]. The main difficulty which the applicant faces relative to the issue of urgency relates to the fact that as early as the 1st August 2019 the applicant, on its own version, should have become aware of the fact that it should be applying for a rescission of the judgment obtained against it. Anomalous as that may sound, the applicant, who by then presumably would have formed the view that the judgment was granted against it in error, albeit on the basis of an agreement reached between the parties, should have filed an application for rescission then. If it had done so, there would have been no need for the first respondent to proceed with the issue of the writs and there would have been no need for the setting aside of same – and that is so irrespective of whether or not there was

any irregularity in the service of the writs. The point is that had the applicant, as a reasonable litigant, filed its rescission application during August 2019 and not wait for over a year, there would not have been any writs to be set aside, let alone on an urgent basis.

[9]. By then, it would have been crystal clear to the applicant that it had to take action in order to have the judgment rescinded, lest the first respondent decided to exercise its right to execute the judgment which it had lawfully and fairly obtained against the applicant. The applicant did nothing. Instead, it remained supine and only acted once attempts were being made to execute on the judgment. All the same, there is no explanation, let alone an acceptable one, why the applicant did nothing between August 2019 and December 2020 to protect its rights and to have the judgment rescinded.

[10]. It is the first respondent's contention that the alleged urgency of the matter is self-created and that there was non-compliance with the provisions of Uniform Rule of Court 6(12). I agree. Despite the fact that the applicant was aware as far back as August 2019 that it needed to have the judgment rescinded, the applicant failed to issue its application soon thereafter.

[11]. Rule 6 (12) (b) of the Uniform Rules of Court reads as follows that:

'(b) In every affidavit or petition filed in support of the application under para (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he would not be afforded substantial redress at a hearing in due course.'

[12]. On behalf of the applicant it was submitted that the application is urgent because it was only when the writs were served, allegedly without complying with the provisions of the Uniform Rules of Court, that the exigency of the matter dawned on the applicant. There is no merit in this contention.

[13]. I am of the view that the urgency of this application is self – created. In my view, the applicant should have launched an application for rescission during 2019 as soon as it would reasonably have formed the view that the judgment against it was granted in error. If it did so, as I have already indicated, urgency

would not have been an issue now – there would have been no writs to set aside or attachment and ejections to declare invalid.

[14]. It was incumbent on the applicant to as soon as possible after 1 August 2019 to launch legal proceedings to rescind the judgment. There is no explanation, let alone an acceptable one, as to why the applicant waited so long before deciding to take action. Even then they delayed in launching the urgent application.

[15]. I am not convinced that the applicant has passed the threshold prescribed in Rule 6(12)(b) and I am of the view that the application ought to be struck from the roll for reasons given above.

Costs

[16]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

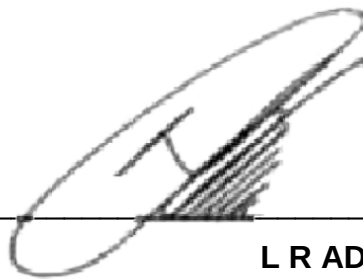
[17]. I can think of no reason why I should deviate from this general rule.

[18]. Accordingly, I intend awarding costs in favour of the first respondent against the applicant.

Order

Accordingly, I make the following order: -

- (1) The applicant's urgent application be and is hereby struck from the Urgent Court roll due to lack of urgency.
- (2) The applicant shall pay the first respondent's costs of this urgent application.

**L R ADAMS***Judge of the High Court**Gauteng Local Division, Johannesburg*

HEARD ON:	14 th January 2021 – in a ‘virtual hearing’ during a videoconference on the <i>Microsoft Teams</i> digital platform
JUDGMENT DATE:	15 th January 2021 – judgment handed down electronically
FOR THE APPLICANT / DEFENDANT:	Advocate Doron Block
INSTRUCTED BY:	Strauss Daly Incorporated, Sandton
FOR THE FIRST RESPONDENT / PLAINTIFF:	Advocate J G Dobie
INSTRUCTED BY:	Reaan Swanepoel Attorneys, Johannesburg
FOR THE SECOND RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance