

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case Nos: 538/2019 &
539/2019

In the matter between:

ZERANZA 299 (PTY) LTD

Applicant

v

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

MALCOLM CAMPBELL N.O.

Second Respondent

NATIONAL TREASURY

Third Respondent

Neutral citation:

Coram: Swanepoel AJ

Heard: 12 September 2019

Judgment delivered: 17 September 2019

JUDGMENT

[1] Before me are two consolidated applications, both arising from a forfeiture order which was granted against the applicant. The relief sought in the two applications are interrelated. In application 538/2019, the applicant sought interdictory relief that the National Director of Public Prosecutions (the first respondent) and one Malcolm Campbell (an appointed curator and the second respondent), be restrained and interdicted from proceeding with a public auction of property situate at 59 Winchester Way, Summerstrand (*“the property”*). In the application brought by the same applicant under case number 539/2019, the National Director of Public Prosecutions was cited as the first respondent, with

National Treasury – seemingly cited as an interested party – having delivered a notice to abide the decision of the court on 27 March 2019. The relief that is sought is as follows:

- “1. *That the forfeiture order granted in case number 3395/18 be rescinded;*
2. *That the applicant be granted leave to enter a late appearance in terms of section 49 of the Prevention of Organised Crime Act 121 of 1998 (“POCA”);*
3. *That the applicant is allowed in terms of section 39 to indicate the basis of the defence upon which she (sic) intends to rely in opposing the forfeiture order or to apply for the exclusion of her interest from the operation thereof”.*

[2] Both the interdict application under case number 538/2019 and the rescission application under case number 539/2019 are before me. The interim interdict did result in cancellation of a public auction which was scheduled in respect of the property. The costs occasioned by the cancellation of the public action was reserved on 6 March 2019, together with the costs of the interim interdict itself, which resulted in an agreed order dated 6 March 2019.

[3] The applicant seeks to rescind a forfeiture order which was granted without opposition on 27 November 2018 under case number 3395/2018 against the property (Winchester Way). This property had been purchased on 15 May 2014 for R3 795 000.00 and was transferred and registered in the applicant's name on 1 August 2014, without any mortgage bond having been registered against the property.

[4] The applicant seeks leave to enter a late appearance in terms of section 49 of the Prevention of Organised Crime Act 121 of 1998 (“POCA”). No such appearance was timeously entered and there was also no disclosure of a defence as required by section 39 of POCA. The basis of the applicant's defence ought to have been served and filed by no later than 9 November 1998. The applicant seeks to have the forfeiture order rescinded in terms of the provisions of rule 42(1)(a). At the outset, it

should be noted that the basis of the applicant's defence which had to be disclosed in terms of section 39(5)(c) of POCA, on which it intends to rely in opposing the forfeiture order, namely to disclose its defence on the merits of that application, hardly received any attention in the application before me.

[5] Instead, the applicant has focused on director Wessels's own interpretation of the jurisdictional requirements that must be satisfied in order to succeed with an application for rescission in terms of rule 42(1)(a) of the Uniform Rules of Court. And in this regard, Ms Bakker asserts that a party need not show good cause. But this approach posed a legal catch 22 to the applicant in respect of the application for leave to oppose the forfeiture order, rendering the basis of a defence relevant in terms of section 39(5)(c) of POCA.

[6] The forfeiture order which was obtained by the first respondent relates to alleged unlawful activities in which the applicant and its sole director, Andrea Jolene Wessels were involved. The applicant and its director, together with other accused, presently face criminal proceedings at the Port Elizabeth Specialised Commercial Crimes Court relating to fraud, theft and money laundering in a total sum in excess of R11 million. It is alleged that Wessels, the deponent to the applicant's affidavits, had utilised some of these funds which had been illegally obtained to *inter alia* acquire a Uitenhage property.¹ It is alleged that the further amount in excess of R9 million had been unlawfully channelled by a former assistant-director in the finance department of the Nelson Mandela Metropolitan Municipality, to a certain close corporation after a submission of a fictitious invoice. It is contended that the municipality received no value from the close corporation concerned. This close corporation concerned and its member are yet to face prosecution.

¹ In respect of that property, a forfeiture order was granted, despite opposition by Mageza AJ, on 31 July 2018.

[7] From the bank account of the aforementioned close corporation, the State alleges that funds were transferred to a private company; from there to a trust account of attorneys and from the trust account of attorneys, the funds were utilised to purchase a Summerstrand property located at 58 Ruben Crescent, Summerstrand, Port Elizabeth. It is alleged that the Ruben Crescent property in respect of which transfer and registration had occurred during October 2017, was also paid for in cash. No bond is being registered against that property. A forfeiture order was granted by this court on 30 October 2018 in respect of the Ruben Crescent, Summerstrand, property. It is alleged that an amount of R3 795 000.00 was derived from the aforementioned company's account and was utilised to purchase the property to which this application relates, namely the 59 Winchester Way, Summerstrand property.

[8] The State contends that neither the applicant nor its sole director, the said Wessels, have any members interests or shareholding in either the company or close corporation concerned and that there was no lawful *causa* for the transfer of R3 795 000.00 from the account of the aforementioned company concerned, towards the proceeds of the property. Consequently, so the State alleges, the (Winchester Way) property formed part of a money laundering scheme, constituting an "*instrumentality of an offence*", in turn rendering the property liable to forfeiture to the State.

[9] The State contends that the property should be sold and that the proceeds should then be paid by the appointed *curator* (Campbell) to the parties who suffered the loss. In this instance, the funds emanated (allegedly) either from Treasury (or the Department of Finance); the Department of Transport, or from the Nelson Mandela

Bay Municipality. This is the background context to the first respondent having first obtained a preservation order, and thereafter a forfeiture order in terms of POCA.

[10] It is common cause that neither a preservation order, nor the forfeiture order pertaining to the property *in casu*, was opposed. No entry of appearance in terms of section 39(3) and (5) of POCA had been delivered at all. The Court accordingly granted both orders on an unopposed basis. Wessels contends that she only became aware of the forfeiture order on 6 February 2019. She asserts that her attorney, one Ah Shene-Verdoorn (hereinafter referred to as “Ah Shene”) of Ah Shene Attorneys at 7 Bird Street, Central, Port Elizabeth did not have authority to have consented to the granting of a forfeiture order. Ah Shene’s authority to have consented to the preservation order is not challenged.

[11] It is asserted, in paragraph 18 of the interdict application, that the National Director of Public Prosecutions (the first respondent) as well as Ah Shene were under a “*mistaken belief*” that Ah Shene did have the authority to do so, namely to consent to the granting of the forfeiture order. It is further asserted as follows:

“Thus the Honourable Court granting the order was unaware of this serious mistake that existed at the time of the order”.

[12] Wessels further argued that the public auction had to be stayed because there would allegedly not have been prejudice for the NDPP.

[13] The applicant then brought another application, with the heading “*case number 538 and 539 of 2019*”, which was served on the State Attorney on 5 June 2019, one day before the applications were due to be heard by Revelas J. As a result, the hearing could not proceed. This application had a founding affidavit with the description “*in the application by the applicant to adduce further evidence*”. The import of this application was clearly aimed at broadening the ambit and scope of the

rescission application. The applicant had asserted that the circumstances were “*exceptional*” and somehow sought to contend that good cause existed for the court to accept a third set of affidavits in both applications. The applicant therefore sought to simultaneously adduce a further supplementary affidavit comprising of eighteen paragraphs contained on eight pages, *ex post facto*, after a forfeiture order had already been granted, without any entry of appearance having been filed, by way of an affidavit dated 5 June 2019, one day before a scheduled hearing. Clearly, this was a desperate attempt to bolster the applicant’s weak rescission application. The concluding paragraph of the proposed affidavit reads as follows:

“In the premises, the applicant humbly request the relief sought in its notice of motion dated 5 March 2019, to which the contents of this affidavit serves to confirm”.

[14] On 19 July 2019, the aforementioned application was withdrawn, after an opposing affidavit was delivered, with the “*wasted costs*” being tendered.² The emphasis in the opposing papers on the applicant’s and Wessels’s failure to have disclosed a defence, or at least a legally valid *causa* for the receipt of R3 795 000.00, no doubt played a significant role in the withdrawal of the so-called rule 6(5)(e) application. Having failed to address the detailed factual allegations, the applicant’s belated attempt to do so by way of a third set of affidavits, was always ill-conceived. In short, if the rescission application did not make out a proper case in respect of the relief sought in paragraphs 2 and 3 of the notice of motion at all in the founding papers, a third set of affidavits, tendered way out of time, was not going to save the applicant’s bacon.

[15] In the applicant’s heads of argument in the consolidated matter before me, counsel for the applicant describes the application under case number 538/2019 as “*the urgent application*” and the application under case number 539/2019 as “*the*

² The notice of withdrawal is on page 328 of the record under case number 539/2019.

main application". The urgent application was the interim interdict application pending the outcome of the rescission application, whilst the "*main*" application is the rescission application. In paragraph 6 of the applicant's heads prepared by Adv Bakker, it is unequivocally asserted that "*the main application is brought under the provisions of rule 42(1)(a) of the Rules of Court*". The heads continue to read that "*Rule 42 caters for mistake. Rule 42(1)(a) generally applies to ex parte applications or other matters where a party is absent. The rule applies when an order was consented to by an attorney without authority to do so*".

[16] It is *inter alia* further asserted that "*the court considering the rescission is entitled to have regard to facts that did not appear from the record of proceedings and of which the court granting the order was unaware*". For the last proposition reliance is placed on the decision of **Stander v Absa Bank Ltd 1997 (4) SA 873 (E)**.

[17] In paragraph 11 of applicant's counsel's heads, reliance is also placed on another decision of this division, that of **Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E)** at 471. In the **Stander** decision, it was held that **Bakoven** was "*wrongly decided insofar as it was held that a court, in deciding whether a judgment was 'erroneously granted', is confined to the record of proceedings*".

[18] The applicant's counsel did not refer the court to the Supreme Court of Appeal decision in **Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA)**.³

[19] In paragraph [24] to [27] of the **Lodhi** decision, Streicher JA, on behalf of a full bench of the Supreme Court of Appeal, stated as follows:

"[24] I agree that Erasmus J in *Bakoven* adopted too narrow an interpretation of the words 'erroneously granted'. Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the

³ Only in reply did applicant's counsel admit that she "*might have read the judgment*", but did not refer to this Supreme Court of Appeal decision.

proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the Sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously. See in this regard *Fraind v Nothmann* 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.

- [25] **However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by *Nepgen J in Stander*.** See in this regard *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003 2 All SA 113] in paras 9-10 in which an application in terms of Rule 42(1)(a) for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so because the application had not been brought to the attention of his Bellville attorney. **This Court held that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had erroneously been sought or had erroneously been granted by the Judge who granted the order.**
- [26] *Nepgen J* found support for his conclusion in *Theron NO v United Democratic Front (Western Cape Region) and Others* 1984 (2) SA 532 (C). In that case an order had been granted against *Theron* in his absence after short notice of the application and although no papers of any kind had been filed and no papers had been served on him. The order was nevertheless granted on the basis of an assumption on the part of the Judge that *Theron* had been given sufficient notice and that he had deliberately decided not to appear at the hearing of the application. In the application for rescission *Vivier J* found, on the facts placed before him, that these assumptions were wrong and that the order had for that reason been granted erroneously. In my view the judgment cannot be faulted. Regard was had to evidence external to the record of proceedings as it existed at the time the order was granted in order to determine whether proper notice had not been given. As a result the UDF was procedurally not entitled to the order sought when it was granted. The order was for that reason erroneously granted. **In *Stander* the plaintiffs who obtain an order in their favour were, unlike the UDF in *Theron*, procedurally entitled to the order when it was granted and the fact that it subsequently transpired that the defendants were not in wilful default could not transform that order, which had validly been obtained, into an erroneous order.**
- [27] **Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequent disclosed defence.** A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of

*the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. **The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transfer a validly obtained judgment into an erroneous judgment***".⁴

[20] It has therefore been authoritatively held by the Supreme Court of Appeal that in a case where a plaintiff is *procedurally entitled to judgment* in the absence of the defendant, such a judgment granted cannot be said to have been granted "erroneously" in the light of a subsequently disclosed defence.

[21] Such a judgment would have been granted on the basis that the defendant had been notified of the plaintiff's claim as required by the rules, failed to deliver a notice of intention to defend, and that the plaintiff was then in terms of the rules entitled to the order sought. Importantly, at page 95 F to G of **Lodhi**,⁵ it was emphasised that "[T]he existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, **cannot transform a validly obtained judgment into an erroneous judgment**".

[22] In this matter, the court which granted the forfeiture order was fully justified to have granted such an order as it did on 27 November 2018. Proper service had been effected on the applicant's erstwhile attorneys, Ah Shene Attorneys, at 7 Bird Street, Central, Port Elizabeth. The order was not granted erroneously made at all. No procedural error whatsoever had occurred.

[23] Having regard to the **Plascon-Evans** approach applicable in motion proceedings, Ah Shene in any event torpedoed her erstwhile client's case by deposing to an affidavit in which she rebuts Wessels's contentions categorically. In the affidavit of attorney Ah Shene, she asserts unequivocally that Wessels, the sole

⁴ Emphasis added.

⁵ The concluding sentence of paragraph [27].

director of the applicant, had only terminated her firm's mandate in relation to criminal proceedings which had been instituted against Wessels and the applicant and not in respect of the asset forfeiture application to which the rescission application relates.

[24] Preservation orders are followed by forfeiture orders. Dr Ndzengu has deposed to answering affidavits on behalf of the National Director of Public Prosecutions. In his affidavit, he asserts that the applicant and Wessels in particular, did not at any stage have any *bona fide* grounds to oppose either the preservation order or the forfeiture order which was granted in respect of the immovable property.⁶ It is asserted that attorney Ah Shene had received a mandate not to oppose either the granting of the preservation order or the forfeiture order. Ah Shene has, in a confirmatory affidavit, confirmed all these assertions by Dr Ndzengu.

[25] Ah Shene states further under oath as an officer of the court, that the clear instruction that was given by Wessels to her at the time when the forfeiture application was applied for, was **not to oppose same**.

[26] Paragraphs 21 to 24 of her affidavit⁷ reads as follows:

- "21. *I deny, as if specifically traversed, any influence that her instruction to me was only in relation to the Preservation Order. Her clear instruction to me was to consent to a Forfeiture Order being made. In any event, it is impossible to oppose a Preservation Order.*
- 22. *I deny ever having discussions with Wessels in respect of the Preservation Order being opposed only. On 23 October 2018 (i.e. after the Preservation Order had been granted on 16 October 2018) Wessels said to me in relation to the consenting to the Order, that "I am letting everything go. I want to make right with God (sic)".*
- 23. *On 24 October 2018, I met with Warren Myburgh (Myburgh), the State Attorney acting on behalf of the Respondent and informed him what my instructions were.*
- 24. *On 25 October 2018, Myburgh wrote to me confirming my advices to him. This correspondence is attached to the Applicant's Founding Affidavit marked Annexure "AJW3". The letter of Myburgh, referred to, indeed records a discussion between himself and Ah Shene. This letter reads as follows:*

⁶ He may well be right, but I do not have to make any decision in this regard, because the applicant has simply not made out a proper case for rescission in terms of rule 42(1)(a).

⁷ In the rescission application.

"I refer to the above matter and our consultation of 24 October 2018. I confirm the following:

- 1. that my client, the National Director of Public Prosecutions obtained a Preservation Order on 16 October 2018 in the Port Elizabeth High Court;*
- 2. that your client, Zeranza (Pty) Ltd, will not oppose the granting of a Forfeiture Order, to be moved in due course; and*
- 3. that it will be in order for us to serve the Preservation Order and Preservation Application on your offices via the Sheriff of the High Court.*

I trust the above suffices".

[27] In her affidavit, Ah Shene specifically confirms all the material assertions made by Dr Ndzengu and confirmed the correctness of a letter of Myburgh dated 25 October 2018 ("AJW3" on page 22) recording the discussion between himself and Ah Shene.

[28] Ah Shene proceeds further to state in her affidavit that "[O]n various occasions towards the end of October 2018, Wessels confirmed verbally her instructions to me not to oppose the granting of the Order". At one stage, she even approached Myburgh, on the instructions of Wessels, seeking authorisation that Wessels and one Rukaard Abrahams could continue to occupy the properties at Winchester Way and 59 Ruben Crescent, Summerstrand until the end of December 2019. In response to this request, Myburgh suggested that the court appointed curator had to be approached. Ah Shene makes the valid point, undermining Wessels's assertion, that if such an instruction had been given to her not to consent to the order, why would Wessels then have requested her in the first place to have approached the *curator* to continue to occupy the property until the end of December 2018?

[29] In Wessels's affidavit, she contends that she only obtained a copy of the papers in the forfeiture application, as well as the order, after same had been granted.

[30] She asserts that on the 6th of February 2019, she contacted Ah Shene “to express my shock and to enquire about the situation”. She states further that she visited Ah Shene, who had been on sick leave that day, with her son. She asserts that Ah Shene had contended at the time that she had “misunderstood” the instructions of Wessels regarding the preservation order and purportedly apologised. However, Ah Shene’s version differs markedly from these allegations. Whilst she admits that she was at home on the day in question, she contends that Wessels and Rukaard had barged into her bedroom while she was lying in bed. She felt physically afraid. She states, in paragraph 44 of her affidavit in the rescission application (record page 69), that “*I deny having told Wessels that I misunderstood her instructions at my residence*”.

[31] In paragraph 45⁸ of her affidavit, she states as follows:

“45. *After the visit, both Wessels and Rukaard bombarded me with telephone calls demanding that I admit to misunderstanding her instructions to me in relation to the Order. I did not*”.

[32] Wessels produced an unsigned e-mail from Ah Shene dated 7 February 2019 marked as an annexure “AJW.SP1”. This e-mail was attached to a supplementary affidavit of Wessels (record page 30) and was purportedly addressed to the applicant’s present attorney of record, which refers in its heading to the NDPP / Winchester Way / Zeranza case reads as follows:

“*The aforementioned matter refers.*

I confirm that a meeting was held with Mr Warren Myburgh during October 2018 regarding the aforementioned property.

It has now come to my attention that I misunderstood my client’s instruction. My client’s instruction was for my office to not oppose the Preservation Application and not to consent to a Forfeiture Oder (sic).

I trust this will clarify the situation”.

⁸ Also on page 69.

[33] With respect to this particular e-mail, Ah Shene states under oath as follows (in paragraph 48 of her affidavit, record page 70 of case number 539/2019):

“48. *Wessels demanded that I write to her attorneys via e-mail confirming that I had misunderstood her instructions. She then left the firm’s offices but Abrahams stayed behind. I was fearful for my safety and for Abrahams to leave. I decided to send the e-mail marked “AJW.SP1” attached to the Supplementary Affidavit by Wessels 8 March 2019. The e-mail was sent with Wessels’s daughter standing over me in an intimidating manner*”.

[34] Ah Shene categorically asserts that the assertions of Wessels are untrue and repeats that her firm’s mandate had only been terminated in relation to the criminal proceedings.

[35] Not only is the applicant confronted by **Plascon-Evans**,⁹ but as will be shown below, a case has not been made out establishing a procedural error of the nature envisaged by rule 42(1)(a) (in which regard, see: **National Pride Trading 452 v Media 24 2010 (6) SA 587 (ECP)**).

[36] Rule 42(1)(a) reads as follows:

“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;”*.

[37] The alleged mistake relates to *aliunde* circumstances of a substantive nature, and not to a procedural error or oversight as contemplated by rule 42(1)(a). In paragraph 26 of the founding affidavit,¹⁰ the applicant asserts that the forfeiture order may be rescinded “*under the provisions of rule 42(1)(a)*” in that this order was granted erroneously in the absence of the applicant.

⁹ **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).**

¹⁰ Record page 12.

[38] On these facts, and applying the ***Plascon-Evans*** rule, it is clear that the rescission application should fail, and that the same fate should then befall the interdict application.

[39] It is equally clear that these fundamental and material factual disputes were either well-known, or ought to have been foreseen by the applicant, prior to the institution of both these applications. The decision in **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)** is an old decision, but is as relevant today as it was in 1949. Where, at the hearing of an application, a dispute of fact arises, the court has a discretion to either dismiss the application with costs; order oral evidence to be heard, or order the parties to go to trial. The applicant's counsel now seeks to have the rescission application referred to oral evidence. The request should not be acceded to.

[40] Mr Myburgh is quite correct that the applicant has not made out any case whatsoever for the further relief sought in paragraphs 2 and 3 of the notice of motion under case number 539/2019. This was of the applicant's own making, and its defective founding papers could never be cured by a desperate attempt to introduce a third set of affidavits, to somehow *ex post facto* make out a case even post reply. The substantive and procedural lack of merit in this manoeuvre fortunately dawned upon the applicant, resulting in the withdrawal of such a *rara avis* of an application. The fate of the ancillary relief was sealed from the outset, given the failure to even raise a defence at all in the founding papers.

[41] I am of the view that both these applications should be dismissed, not only by reason of the fact that the applicant should have realised when launching the applications that material dispute(s) of fact already existed, requiring evidence or the

use of action proceedings,¹¹ but because the applications are simply without any merit.

[42] I am also not at all satisfied that the purported dispute is a *bona fide* dispute. To the contrary, the lack of candid disclosure of the perceived defence on the merits (as contemplated by section 39(5)(c) of POCA) invariably impacts on an assessment of the questionable *fides* of the deponent Wessels.

[43] But it is in any event clear from the applicant's heads of argument, and from the formulation of the founding papers in both applications, that the applicant proceeded from a premise that an *ex post facto* assertion of an alleged "misunderstanding" between herself and her attorney sufficed to obtain rescission in terms of rule 42(1)(a). Clearly, the applicant was mistaken. The ambit of rule 42(1)(a) applications is misconceived. The **Plascon-Evans** hurdle further poses an insurmountable stumbling block. Ah Shene denies that there was a misunderstanding. This should be the end of the matter, given the nature of motion proceedings.

[44] Moreover, such an error as alleged by Wessels on tenuous grounds, was neither a procedural error, nor a *iustus* or justifiable error. If anything, it appears to have been an unilateral, *iniustus* error. The respondent(s), especially its representative Myburgh, knew nothing about any alleged mistake at the time. No knowledge or causal contribution can be attributed whatsoever to the DPP. (See generally: **Christie: Law of Contract in South Africa, Seventh Edition**, LexisNexis, pages 366 to 375 and the ample authorities cited). Consent did prevail, as between Myburgh and Ah Shene.

¹¹ In which regard, see **De Wet v Western Bank 1977 (4) SA 770 (T)** at 776 G.

[45] This aspect would have been relevant if the application had been brought under the common law, but it was not so brought. Under the common law, the courts of Holland were empowered to rescind judgments obtained on default of appearance, on sufficient cause being established. This power was entrusted to the discretion of the courts. The discretion extended beyond, and was not limited to, the grounds provided for in rules 31 and 42(1) and those specifically mentioned in **Childerley Estate Stores v Standard Bank of SA Ltd 1924 OPD 163**. See **De Wet & Others v Western Bank Ltd 1979 (2) SA 1031 (AD)** at 1040 – 1042.

[46] The rescission application was squarely based on rule 42(1)(a) and was not brought under the common law (whether in the alternative or otherwise), which would have required proof of sufficient cause, which in this case, would have necessitated a disclosure of a defence on the merits.

[47] The dispute was known to have existed prior to the institution of the proceedings and was from the outset, incapable of resolution on the papers. Moreover, some of the authorities on which the applicant places substantial reliance, have either been overruled or criticised by the Supreme Court of Appeal in the decision of **Lodhi**, which decision was however, not mentioned, which is of concern to this court.

[48] Mr Myburgh on behalf of the respondents, emphasises that the applicant has failed to disclose any prospects of success on the merits of opposing the forfeiture order. That submission is relevant to the ancillary relief sought in paragraphs 2 and 3 of the notice of motion, but the primary relief (rescission) required proof that an *erroneous* order or *erroneous* judgment had been obtained, within the meaning as explained in **Lodhi**. The applicant has made its bed single: it is a rule 42(1)(a)

application. It must lie in this single bed, which, on the facts, is not an accommodating one.

[49] Mr Myburgh has argued that the rescission application is yet another attempt to delay the auction of property acquired from proceeds which, according to the State, stem from illegal activities. It may very well be so, but by reason of my earlier conclusion, I do not have to make any findings in this regard.

[50] The application for the rescission of the forfeiture order is dismissed, with costs. As a result, the fate of the interdict application should follow. Insofar as the execution auction was cancelled as a direct consequence of the interdict, the wasted costs occasioned thereby was sought. Such costs were indeed reserved. Adv Bakker conceded that such costs should be for the applicant's account if the applications are dismissed. I have found that the applications should be so dismissed.

[51] I accordingly make the following order:

- (1) Both applications under case numbers 538/2019 and 539/2019 are dismissed with costs.
- (2) The applicant is further liable for the reserved costs of the interdict application and for the costs and actual expenditure incurred in respect of the cancelled public auction pertaining to the property, which was scheduled to have taken place on 6 March 2019, which reserved costs are referred to in the court order which was granted by agreement on 6 March 2019.

APPEAREANCES:

FOR THE APPLICANT:

Adv H Bakker, instructed by Greyvensteins
Incorporated

FOR THE RESPONDENTS:

Mr W Myburg, State Attorneys