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REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 077483/2023

(1) REPORTABLE: Yes ☐ / No ☒

(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒

(3) REVISED: Yes ☐ / No ☒

Date: 22 August 2023

WJ du Plessis

In the matter between:

**XYLO TRADING 253 CC**

**APPLICANT**

and

**MPHO ANNA HLAHLA NO**

**1ST RESPONDENT**

**RETHABILE ITUMELENG KIKINE NO**

**2ND REDPONDENT**

**SOLOMUZI OCTAVIAN MABUZA NO**

**3RD RESPONDENT**

**GILBERTO PEREIRA MARTINS NO**

**4TH RESPONDENT**

**LITA MBOKOTHO NO**

**5TH RESPONDENT**

**BUSISIWE LINDELWA MHAGA NO**

**6TH RESPONDENT**

**EZRA BOY NDWANDEWE NO**

**7TH RESPONDENT**

**GUGULETHU WENDY PHAKATHI NO**

**8TH RESPONDENT**

**PATIENCE PULENG RATLABALA NO**

**9TH RESPONDENT**

**SHERIFF OF BRITS**

**10TH RESPONDENT**

**SIMON JOHANNES MOKOTEDI**

**11TH RESPONDENT**

**BENEDICTOR LEAH TLOU-MOKOTEDI**

**12TH RESPONDENT**

**REGISTRAR OF DEEDS**

**13TH RESPONDENT**

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**JUDGMENT**

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**DU PLESSIS AJ**

**Background**

- [1] This is an application to interdict the transfer of property described as Portion [...] Erf 2[...] Ga-Rankuwa Unit 2 Township Registration Division JR North West Province ("the property") pending the hearing of part B of the application, the rescission application, of an order granted on 31 October 2019 by Mokose J.
- [2] The property served as security in a contractual agreement between the Applicants, represented by Mr Mdumele, and the Gauteng Partnership fund, represented by Ms Muvevi. The agreement was for a loan facility of R11 207 314, and a mortgage bond was taken on the property as security in the case of default or breach.
- [3] The Sheriff (10<sup>th</sup> Respondent) sold the property at auction on 4 June 2022, following a default order granted on 31 October 2019 in favour of the First to Ninth Respondents and an order to declare the immovable property executable on 11 November 2019.
- [4] On 22 May 2023, the Applicant avers, a member of the Applicant, Mr Sikander Mahomed, was informally informed by a GPF employee that the property had been

sold on auction. When he heard this news, he asked the other members if they were aware, to which they replied that they were not.

- [5] The Applicant then asked the First to Ninth Respondent and the 10<sup>th</sup> Respondent how the property was sold without the knowledge of the Applicant's members. It was then, the Applicant states, that they learnt that the notices for the default and sale in execution were not (on their version) properly served on the Applicant's members. They were thus not afforded an opportunity to defend such actions and or application.
- [6] Due to the improper service by the Sheriff, the Applicant states, it requested the first to ninth Respondents to suspend the transfer of the property to the 11<sup>th</sup> and 12<sup>th</sup> Respondents, which the first to ninth Respondents refused. This is the reason for the urgent application.
- [7] The Applicants state that the matter is urgent because the property was sold on 4 June 2022 and the transfer procedure commenced. Once there is a registration in the names of the 11<sup>th</sup> and 12<sup>th</sup> Respondents, the Applicant will suffer the loss of property unlawfully and irregularly, it argues. If the hearing is set down in the ordinary course, then the property might be transferred before the hearing.
- [8] The 1<sup>st</sup> to 9<sup>th</sup> Respondents raise various issues in defence, including whether Mr Mahomed could depose an affidavit, the lack of authority of Mr Mohamed to act and the non-joinder of the Sheriff in Pretoria. Likewise, the 11<sup>th</sup> and 12<sup>th</sup> Respondents (for the purchasers) raise *locus standi* and non-joinder. Both deny that the application is urgent, with the 11<sup>th</sup> and 12<sup>th</sup> Respondent raising the issue of "substantial redress is due course".
- [9] As the matter is brought on an urgent basis, the Applicant must first convince the Court that it is indeed urgent before the Court can consider the merits of the application.

## **The law on urgency**

[10] Rule 6(12)(b) requires that

"(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course (my emphasis)."

[11] There are two elements to this. For one, the time frames in Rule 6 are shortened. The second element relates to the test that is laid down: whether the Applicant will be able to seek substantial redress in due course to protect his rights. It should be noted that possible harm alone does not indicate urgency – the focus is on the possibility of substantial redress. This should be distinguished from irreparable harm required for an interim interdict. This question only arises when the matter is considered urgent enough to determine the merits.

[12] The question that thus must be answered first is whether the Applicant will not be afforded substantial redress in due course should the matter not be heard as a matter of urgency.

### **Does the Applicant have substantial redress in due course?**

[13] Should the court not grant the interdict today, would the Applicant be be afforded substantial redress in due course? The answer is yes.

[14] In *Joosub v JI Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd*<sup>1</sup> it was said that the owner of immovable property is entitled to have his property restored from a *bona fide* purchaser at a sale in execution where transfer has not taken place, and the sale is later rendered void

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<sup>1</sup> 1992 (2) SA 665 (N).

because of the rescission of the judgement that validated the sale. In other words, if there is a rescission before the transfer of property, then an owner is entitled to restoration once the rescission application is successful.

[15] In *Vosal Investments (Pty) Limited v City of Johannesburg*,<sup>2</sup> the court held that the purchaser of property who became aware of the claims of the owner (the owner's application for rescission) before registration, is obliged to restore possession to the owner, once the judgment has been rescinded. This is because the purchaser is aware of the attack on the judgment and the risk of the transfer.

[16] *Knox v Mofokeng*<sup>3</sup> dealt with the rights of *bona fide* purchasers of property at a sale in execution where the judgment in terms whereof the sale in execution was effected, has been rescinded. The judgment focussed on the validity of the transfer of the immovable property, also to a chain of successive purchasers. The court stated that if there was transfer of ownership by the time the judgment has been rescinded, then the judgment debtor is not entitled to recover possession of the property, unless it can be shown that the judgement or sale in execution is a nullity.<sup>4</sup>

[17] Case law<sup>5</sup> sets out why: where default judgment is rescinded after a sale in execution, both the default judgment and the warrant of execution issued in terms of the judgment become null and void, as between the judgment creditor and debtor. Thus, the judgment debtor is entitled to have the status *quo ante* restored against the judgment creditor. Since the warrant and sale of execution all depend on the default judgment, once the judgment is rescinded, the warrant and sale in execution have no legal basis between the parties in litigation.

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<sup>2</sup> [2009] ZAGPJHC 28; 2010 (1) SA 595 (GSJ).

<sup>3</sup> [2012] ZAGPJHC 23; 2013 (4) SA 46 (GSJ).

<sup>4</sup> Para 6.

<sup>5</sup> *Lottering v SA Motor Acceptance Corporation Ltd* 1962 (4) SA 1 (E) at 3H-4B; *Jasmat v Bhana* 1951 (2) SA 496 (D); *Maisels v Camberleigh Court (Pty) Ltd* 1953 (4) SA 371 (C).

[18] All this case law indicates that the Applicant has substantial redress in due course, even if the property is transferred. Moreover, the new owners know about the rescission application and the risks involved in the transfer, and thus fall in the category of *Vosal Investments* case.

[19] Apart from that, did the Applicant bring the rescission application as soon as it knew about the reasons for the sale of the property, the rescission application would be close to finalisation. The bringing of a rescission application in part B, is not dependent on part A being granted.

### **Order**

[20] I, therefore, make the following order:

1. The application is struck from the roll, with costs.

**WJ DU PLESSIS**

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

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|-----------------------------------------------------------------|--------------------------------|
| Counsel for the Applicant:                                      | Mr Mokgatsi                    |
| Instructed by:                                                  | Pillay Thesigan Inc            |
| Counsel for the 1 <sup>st</sup> – 9 <sup>th</sup> respondents:  | Mr Mothapo Nhlapo              |
| Instructed by:                                                  | POSWA Inc                      |
| Counsel for the 11 <sup>th</sup> & 12 <sup>th</sup> respondent: | Ms Barnard                     |
| Instructed by:                                                  | Van Velden Duffey Incorporated |
| Date of the hearing:                                            | 22 August 2023                 |
| Date of judgment:                                               | 23 August 2023                 |