

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

CASE NUMBER: 10726/18

DATE: 12 March 2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: **2021.03.12**

THEMBA SITSHONI

Applicant

V

ASA CAPITAL (PTY) LTD

First Respondent

TYGERBERG HEIGHTS BODY CORPORATE

Second Respondent

THE SHERIFF OF JOHANNESBURG

Third Respondent

JUDGMENT

MABUSE J

[1] This is an application in which the Applicant seeks the following order:

“(a) *rescinding and setting aside the order of this Court by Basson J, dated 4 November 2019;*

- (b) *setting aside the Writ of Execution authorised by the Registrar of this Honourable Court against the Applicant's immovable property, fully described as Unit 1[...], Door 1[...], Tygerberg, 4[...]-4[...], P[...] T[...], Berea, Johannesburg;*
- (c) *The Applicant be granted leave to defend the main Action and to file any pleadings necessary in the matter by no later than 15 days from the date of granting of this order;*
- (d) *ordering the Respondents to pay the costs of this application.”*

[2] **THE PARTIES**

2.1 The Applicant is an adult male pensioner who resides at the property described in paragraph [1](b) *supra*. He is the Defendant in the main action of the application.

2.2 The Respondent is ASA Capital (Pty) Ltd, a private company duly registered in terms of the company laws of this country with its registered office situated at 9[...] O[...] Apartments, 7[...] R[...] Street, Hazeldean, Gauteng.

2.3 The Second Respondent is Tygerberg Heights Body Corporate, a Body Corporate established as such in terms of the provisions of s 2 of the Sectional Title Scheme Management Act 8 of 2011 with the registered address at No. 4[...] -4[...] P[...] T[...], Berea, Johannesburg.

2.4 The Third Respondent is the Sheriff of Johannesburg Central, whose offices are located at 2[...] H[...] Street, Johannesburg.

No order is sought against the Third Respondent.

[3] This application for rescission is based on fraud and discovery of new documents. It is contended by the Applicant that if these new documents had been placed before Basson J on 4 November 2019, when she granted the order which is the subject of this application, she would not have granted the order that is the target of this application.

[4] The reason for the application, so contends the Applicant, is that Basson J granted the said judgment after the said Gauteng Local Division, in Johannesburg, had made an order or judgment on 20 March 2019 in which it prohibited the sale of any or all the units at Tygerberg Heights. It appears that Basson J was not aware of

the said order. The Applicant contends that the judgment of the South Gauteng Local Division was deliberately withheld from Basson J.

[5] As at 15 December 2017 the Applicant was in arrears with the payment of levies, interest and penalties in the sum of R121,807.00 which amount the Applicant has failed or refused or neglected to pay to the First Respondent, notwithstanding the rendering of monthly statements by the Second Respondent to the Applicant. On 15 December 2017 the trustees of the Second Respondent, as represented by an administrator appointed in terms of s 46 of the Sectional Titles Act 95 of 1986, entered into a written agreement of cession with the Second Respondent in terms of which the full amount of arrears was ceded to the First Respondent in terms of a deed of cession annexed to the POC as Annexure 'B'.

[6] On 24 January 2018 the First Respondent notified the Applicant in writing about the said cession and the legal effect of such a cession. A copy of the written notification by the First Respondent to the Applicant is annexed to the POC as Annexure 'C'. Accordingly, the amount of R121,807.00 became due and payable by the Applicant to the First Respondent.

[7] On or about 16 February 2018, the First Respondent instituted action proceedings against the Applicant under the case no. 10726/2018 in which it sought, *inter alia*, judgment for payment of the sum of R121,807.00, representing the accumulated arrear amounts of levies owed by the Applicant to the First Respondent.

[8] On 1 March 2018 a copy of the summons was served on the Applicant personally at his residential place. On 15 March 2018, and not 2020, the Applicant delivered his notice of intention to defend on the First Respondent's attorneys of record. As the Applicant failed to file his plea in the matter sooner thereafter, the First Respondent applied for summary judgment against the Applicant.

[9] The application for summary judgment was heard on 23 May 2018. It was granted.

[10] There was subsequently an attempt by the Applicant to rescind the summary judgment. The rescission application was heard and dismissed by the Court on 11 February 2019. On 14 June 2019 the writ of execution against the immovable property of the Applicant was issued by the Court. On 7 August 2019 the Sheriff of the Court attended on the property to attach the movable assets of the Plaintiff. The Sheriff's return of service stated that there were only four tenants at the premises and no attachable goods.

[11] For that reason the First Respondent proceeded to issue an application for an order that the Applicant's movable property be declared especially executable in terms of Rule 46A on 12 December 2018. The Applicant again filed a notice of intention to defend through his new attorneys. The Applicant's opposing affidavit was filed electronically on the attorneys of the Respondent on 30 August 2019.

[12] The First Respondent filed its answering affidavit on 27 August 2019 and the matter was adjudicated on the Opposed Motion Roll of 4 November 2019. Despite opposition from the Applicant, the Applicant's immovable property was declared executable by Basson J. It is this judgment of Basson J of 4 November 2019 which the Applicant seeks to rescind.

[13] The Applicant's immovable property was advertised for an auction sale to take place on 30 March 2020. Owing to the fact that this date fell within the level 5 national lockdown, which was announced by the President on 23 March 2020, the auction could not proceed. The property was again placed for auction to take place on Monday, 26 October 2020, but it was postponed because on 23 October 2020, being the Friday before the date on which the auction was scheduled to take place, the Applicant served his current application for rescission on the attorneys of the Respondent.

[14] As indicated herein *supra*, the grounds of rescission of this summary judgment or of the judgment of 4 November 2019 was that the said judgment was obtained fraudulently. The Court order dated 20 March 2019 under Case No. 10218/2019 of the Johannesburg High Court was obtained by the Respondent. The

Court order obtained on 20 March 2020 has no bearing on the matter before this Court. It is the only basis for the rescission application.

[15] The Applicant was in consultation with his attorney in the attorney's office. It would seem that he had always been looking for a reason to upset the judgment of Basson J or to delay its execution. Out of the blue, his attorney suggested that he must enquire from some of the unit owners of any court proceedings or documents relating to the sale of units in Tygerberg Heights. The attorney undertook to go and obtain copies of the relevant record. On 11 June 2020 he got the relevant information from one of the owners of the units in Tygerberg Heights, Mr Tumelo Lerole. It was a remarkable coincidence. He then requested documents from him.

[16] On or about 25 August 2020 he was given a copy of the court order of the matter nr. 10218/2019 of the Gauteng Local Division, Johannesburg. This was a court order in a tribunal matter brought by a Mr Lerole against Jan van den Bos & Associates, Paul Properties and Tygerberg Body Corporate, the First, Second and Third Respondents respectively.

[17] Of paramount importance in the court order is paragraph 29.4 of the adjudication order made an order of Court on 20 March 2019. It states as follows:

“The Second Respondent together with the appointed service providers are to suspend all seals of units where the owners owe levy and handed over, pending submission of audited financial statements to the Applicant and other interested parties. Should there be a misappropriation of funds by the First and Second Respondents, the Applicant is advised to report the parties to the relevant authorities.”

The matter in the said tribunal did not involve the Applicant. I have already mentioned the names of the parties involved in the matter. In that matter the Applicant, a Mr Lerole, who is a registered owner of unit 4[...], Tygerberg Heights, had lodged a dispute against the said Respondents for incorrect debit of a fine on the Applicant's levy statement and failure by the Second Respondent to issue correct

levy statements to the owners of units and for failing to provide him with the Body Corporate's Bank Statements.

[18] The Applicant in the application under consideration was not involved in the dispute of Mr Lerole and the three Respondents. He had not disputed the correctness of the amounts that were sent to him by the Body Corporate. The current three Respondent's action proceedings have nothing to do with the dispute of Mr Lerole.

[19] On 20 March 2019 the Court was not aware that already on 23 May 2018 the applications for summary judgment had been granted.

[20] The court order of 20 March 2019 is predicated on the award of the arbitrator. It was designed to prevent the Respondents or anyone of them in the arbitration from selling any units in the Scheme for as long as the issues or complaints of the tenant, Mr Lerole, and other issues that the arbitrator had identified, remained unresolved. This court order was not designed to prevent the attachments and sale in execution or properly obtained court orders.

[21] There are, in my view, valid and lawful reasons why the unit in question belonging to the Applicant had to be attached. The Applicant owed the First Respondent. That debt has not been challenged. The First Respondent took steps to recover the debt. Such steps were not resisted by the Applicant. Following such steps, the First Respondent obtained judgment against the Applicant. That judgment has to be satisfied. The First Respondent has taken steps to satisfy the judgment. The Applicant has not made any arrangements whatsoever with the First Respondent to pay off the debt. He may not ride on issues involving other parties' with the Respondent's arbitration proceedings to forestall the satisfaction of a court order. In my view, any reliance by the Applicant on the court order of 20 March 2019 is misplaced.

[22] It is furthermore contended by the Applicant and proffered as one of the reasons why the order in paragraph [1] supra is sought, that the order of 4 November 2019 by Basson J, was fraudulently obtained. Counsel for the First Respondent

explained that the First Respondent was aware at all material times of the order of 20 March 2019.

[23] In fact, in his opposing affidavit, Albert Stefanus Alant, testified that the parties to the dispute in respect of which the court order of 20 March 2019 was handed down are not parties to the application under consideration. The First Respondent was armed with a copy of the record in the Johannesburg matter. They had obtained these records before 4 November 2019. They were aware of the case when they were before Basson J. Counsel for the First Respondent told the Court that they had not deemed it necessary to inform Basson J of the judgment of 20 March 2019 because it was irrelevant. The parties were different and so were the facts and issues involved in the matters. In other words, Basson J would still have granted the order of 4 November 2019 even if she have been told of the order of 20 March 2019. That order would not have prevented her from granting the order of 4 November 2019.

[24] In terms of common law, a judgment or an order of court may be set aside on, *inter alia*, the grounds of fraud and in certain exceptional circumstances where new documents have been discovered. In this regard see **Schierhout v Union Government 1927 AD p 94**. In order to succeed on the ground of fraud, an applicant for the rescission of an order of court, it is necessary for such an applicant to allege and proof:

(1) That the successful litigant, *in casu* the First Respondent, was a party to the fraud. See in this regard **Markings v Markings 1958 (1) SA 338 A**. In the head notes this is what it stated that:

“A judgment will not be set aside on the ground of fraud including perjury, unless it is shown that the successful litigant was a party to the fraud.”

At pages 344 H - 345 A the Court stated as follows:

“It is not clear that R v Schiff can be said to have decided, as part of its ratio decidendi, that a judgment will not be set aside on the ground of fraud, unless it is

shown that the successful litigant was a party to the fraud. But the question was under consideration and, as I read the judgments, the view of the members of the Court was that the litigant must have been a party to the fraud if the judgment is to be open to attack. On principle that would seem to be right. The law draws a distinction for present purposes between merely erroneous evidence and evidence that is fraudulently false; the distinction is well brought out in the judgment in Childerley Estate Stores v Standard Bank of SA Ltd 1924 OPD 1963, 166 at p 166-169. But there does not seem to be any reason why the rights of the parties should not according to the wrong evidence of the witness was honestly given or was deliberately falsified to serve some purpose of its own. If the successful litigant was a party to the perjury there would be good reason why, notwithstanding the general desirability that lawsuits should come to finality, the wrongdoer should not be allowed to hold his ill-gotten judgment.”;

- (2) that the evidence was in fact incorrect;
- (3) that it was made fraudulently and with intention to mislead; and
- (4) that it diverged to such an extent from the true facts that the Court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the correct evidence to proof.

See **Rowe v Rowe 1997 (4) SA 160 SCA at 166**. There the Court stated as follows: *“It is alleged in the particulars of claim that the Respondent’s fraudulent representations induced the appellant to enter into the settlement agreement and asked for a divorce in terms thereof. It is also alleged that but for the fraud, the Court would not have made the order of divorce in its present form. Annexed to the particulars of claim is the settlement agreement signed by the Respondent which recorded the birth of three children from the marriage, including Brenda and Raymond who were mentioned by name. The respondent knew, it is further alleged, that this was not the truth and she knew that the appellant who was not aware of the true state of the facts would present agreement and thus unwittingly deceive the Court. In my view this constituted a fraud perpetrated on the Court itself.”*

[25] The Applicant has proved none of the above requirements. His application, in my view, cannot succeed.

[26] There are, strictly speaking, no new documents discovered in the matter. The Applicant refers to the court order as new documents. In any event the issue of new documents has been dealt with by the Court in **Childerley Estate Stores v Standard Bank of South Africa Ltd** *supra*. In this judgment, De Villiers JP concluded that a judgment could be set aside on the ground of discovery of new documents after the judgment has been given under certain circumstances only. This include:

- i. testamentary suits in which judgment has been given on a will and subsequently a later will/codicil has been discovered;
- ii. cases in which it was in consequence of a fraud of the opposite party but it had the relevant documents was not found or produced at the trial;
- iii. cases in which it was without slightest fault on the part of the applicant seeking to introduce the new document or his legal representatives that the document was not filed and produced before judgment; and
- iv. cases in which the judgment was founded on a presumption of law, on the opinion of the *jurisconsult* or on even expert evidence.

In the current situation there are no new documents. The application cannot succeed. Accordingly, I make the following order:

The application is dismissed with costs.

PM MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the

Applicant: Adv SF Sibisi

Instructed by:

Sibanda Bukhosi Attorneys Inc.

Counsel for the First Respondent:

Adv M Arroyo

Instructed by:

Marius Blom Inc.

Date on the unopposed roll before Mabuse J: 8 March 2021

Date of Judgment: 12 March 2021