



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. <i>Yes</i>
<i>28/2/18</i>	
DATE	<i>[Signature]</i>
	SIGNATURE

28/2/18

CASE NO: 76288 /2012

In the matter between:

P.D. BEZUIDENHOUT

Applicant

and

STANDARD BANK OF SOUTH AFRICA LIMITED

Respondent

JUDGMENT

1. This is an application brought on an urgent basis for an order to stay a sale in execution of certain immovable property in Menlo Park, Pretoria, scheduled to

be held at 10:00 today, 28 February 2018. The application was served on the respondent yesterday morning at 9:15 and set down for hearing yesterday afternoon at 15:00. The application is for the aforesaid stay of the sale pending the finalisation of the application instituted by the applicant for the rescission of a judgement granted against the applicant on 4 March 2014 by Mali J.

2. The respondent filed a comprehensive and rather voluminous answering affidavit and it was indicated on behalf of the applicant that he does not want to file a replying affidavit and wanted to argue the matter on the papers before the court. The matter was argued on behalf of the parties until well after hours yesterday and due to the urgency of the matter I shall not refer to all the facts and all the arguments put up and raised before me but merely to the salient features thereof. Most of the facts were, in any event, common cause between the parties and the issues for decision by this court eventually turned out to be rather crisp.
3. Briefly, the relevant history leading up to the present application is the following. On 12 January 2011 the respondent instituted an application ("the main application") against the applicant by serving the application on him personally. The claim was for payment of the amount of R 1 244 965, 60 which was due to the respondent as the outstanding amount in respect of a home loan agreement in terms of which the applicant had fallen into arrears. The loan was secured by the registration of three mortgage bonds over the

aforesaid property of the applicant and the plaintiff accordingly also prayed for an order that the property be declared specially executable.

4. The applicant opposed the application and filed an answering affidavit to which the respondent filed a replying affidavit. The matter was argued in full by the legal representatives on behalf of the parties and Mali J gave judgement on 4 March 2014. The court rejected all the defences of the applicant and granted judgement in favour of the respondent including declaring the property specially executable.
5. The applicant applied for leave to appeal on 28 March 2014. The applicant took no steps to have the application heard and the respondent eventually applied for a date for the hearing and had the record typed. The application for leave to appeal was set down for hearing on 25 June 2015.
6. On 24 June 2015, the day before the hearing of the application for leave to appeal, the applicant brought an application for rescission of the judgement. On 25 June 2015 the applicant attempted to withdraw his application for leave to appeal. Mali J refused this attempt and dismissed the application for leave to appeal with costs.
7. The aforesaid 2015 rescission application remained pending and the applicant took no steps whatsoever to take the matter forward. The respondent submitted that this was done in order to delay the execution of the judgement.

8. The respondent opposed the 2015 rescission application by delivering its answering affidavit on 14 October 2015. The applicant failed to file a replying affidavit or to set the matter down and it was left to the respondent to prepare and enrol the matter for hearing on the opposed role.
9. The 2015 rescission application was set down for hearing on 16 May 2016. However, immediately prior to the application being heard on 16 May 2016, the applicant withdrew the 2015 rescission application. The institution of this 2015 rescission application delayed the execution of the order in favour of the respondent for approximately one year.
10. Thereafter, on 16 August 2016, the applicant petitioned the Supreme Court of Appeal for leave to appeal the judgement of Mali J. This application for leave to appeal came some two and a half years after the date of the judgement and some four months after the withdrawal of the 2015 rescission application. In the application to the Supreme Court of Appeal the applicant asked for leave to appeal "against the whole of the judgement and order" of Mali J delivered 6 March 2014.
11. In his affidavit supporting the application for leave to appeal the applicant submitted that Mali J erred in certain respects in regard to his application for leave to appeal as well as the judgement delivered in the main application. None of these grounds, however, referred to the order of Mali J that his property be declared specially executable although the applicant did submit that he was severely prejudiced as a result of the orders handed down by the

court in that the aforesaid property that had been declared specially executable was his home and primary place of residence, which stood to be sold in execution. He submitted that his property was valued for approximately R 2 500 000, 00 which was well over the judgement amount granted against him and that he would suffer severe financial loss if the property were to be sold on auction.

12. It was submitted on behalf of the respondent in the present application that it is to be noted that the applicant's affidavit in the present rescission application has for the most part been adopted word for word from the application to the Supreme Court of Appeal for leave to appeal.
13. When the respondent's attorneys of record attempted to file their notice of substitution as attorneys of record with the Registrar of the Supreme Court of Appeal, they established that the application for leave to appeal had not actually been lodged with the Supreme Court of Appeal. The respondent's attorneys wrote to the applicant's attorneys in this regard on a number of occasions but no response was forthcoming. As a result, the respondent, in the absence of the applicant lodging the application for leave to appeal with the Supreme Court of Appeal, lodged such application together with its opposing affidavit. That occurred on 19 December 2016.
14. In the opposing affidavit, the respondent detailed the applicant's dilatory conduct in the proceedings to date and also set out why none of the grounds of appeal raised by the applicant, in their view, had any merit.

15. On 30 January 2017 the Supreme Court of Appeal dismissed the application for leave to appeal with costs "on the grounds that there is no reasonable prospect of success on appeal and there is no other compelling reason why an appeal should be heard."
16. Some six weeks later, on 14 March 2017 the appellant lodged an application for leave to appeal to the Constitutional Court. This application was founded on one composite ground namely that the applicant's right to a fair trial had been infringed by the court *a quo*.
17. The respondent filed an opposing affidavit to the Constitutional Court application for leave to appeal and again set out the applicant's history of delaying and attempting to stave off execution of the judgement and also gave reasons why the applicant's application for leave to appeal was ill founded.
18. On 2 May 2017 the Constitutional Court dismissed the application for leave to appeal on the basis that "it bears no prospects of success".
19. On 21 August 2017 the applicant launched his next application for rescission of the judgement of Mali J. The respondent submitted that this application was simply a tactic by the applicant to delay the execution of the judgement against him even further and that it was brought solely in an attempt to forestall the sale in execution of the property. The applicant submitted that when the application for rescission was dismissed, as it would be, the applicant would

simply go through the entire appeal process again in an attempt to delay execution for another two or three years.

20. Despite anticipating that the applicant would not proceed to enrol the application but wait for the respondent to arrange a sale in execution simply to frustrate such a sale on the basis of the application for rescission, the respondent decided to proceed with the sale in execution.
21. In the interim, and prior to delivery of the respondent's answering affidavit, the applicant on 27 October 2017 delivered a notice of removal of the application for rescission from the unopposed roll. On 9 February 2018, the respondent received a letter from the applicant's attorneys threatening the respondent with an urgent application should they proceed with the sale in execution scheduled for 28 February 2018. In the letter the respondent was requested to deliver its answering affidavit to the rescission application by 16 February 2018.
22. On 16 February 2018, the respondent informed the applicant's attorney that the sale in execution would not be cancelled and any attempt to halt the sale in execution by way of an urgent application, would be opposed. On the same day the respondent's answering affidavit was e-mailed to the applicant's attorneys.
23. The applicant's attorneys denied that they received the letter of 16 February 2018 and the letter was eventually re-sent by the respondent's attorneys.

24. The respondent submitted that the fact that the applicant took no steps to progress the urgent application until shortly before the date of the sale in execution, and thereafter to attempt to rely on the present rescission application to seek the cancellation of the sale in execution, again fits in with the applicant's *modus operandi* of delay and illustrates that the applicant has no real belief in the 2017 application for rescission, save as a procedural mechanism to circumvent execution of the judgement.
25. The respondent referred to the fact that the applicant is currently almost 9 years in arrears with his repayments to the respondent which had grown to a total outstanding debt of R 2 301 670, 57. Furthermore that the respondent commenced proceedings against the applicant seven years ago and obtained judgement against him four years ago.
26. The respondent submitted that the applicant has in the present application for rescission simply recycled the grounds of appeal submitted in his applications for leave to appeal to the Supreme Court of Appeal as well as the Constitutional Court into a new rescission application, in an attempt to restart the entire process. It was submitted that there is no merit in the applicant's current rescission application or the present urgent application and that same constitutes another dilatory tactic on the part of the applicant to retain ownership and remain in occupation of the property without paying therefore.
27. The respondent further dealt with each and every ground offered by the applicant in the 2017 rescission application and showed that such grounds in

fact formed part of his applications for leave to appeal to the Supreme Court of Appeal and the Constitutional Court, which had both been dismissed by those courts.

28. I do not propose to deal with the delay in bringing the urgent application on the eve of the sale in execution and will rather deal with the merits of the application itself.
29. At the hearing of this application it was submitted by Attorney Perrel, on behalf of the applicant, that the applicant has a right to prosecute his rescission application and that, for purposes of the present application for the stay of the sale in execution, the merits of the rescission application are irrelevant, that this court cannot decide the merits of that application and that the court who eventually hears that application, would do so. She further submitted that the applicant stands to suffer an injustice if he were to be evicted from his home and that in such event he would suffer irreparable harm.
30. It was conceded on behalf of the applicant that the rescission application, as well as the present application for a stay, must, however, be *bona fide* applications. It is clear that this must be so for, if it is not, such applications would constitute an abuse of this court's process as it would simply be aimed at attempting to delay the execution of this court's judgement further.
31. On behalf of the respondent Advocate Groenewald referred me, *inter alia*, to the discussion in Erasmus, Superior Court Practice, of Rule 45A where

reference is made to the inherent discretion of a court to order a stay of a sale in execution, which discretion must be exercised judicially but which is not otherwise limited. It is furthermore stated that as a general rule the court will grant a stay of execution where real and substantial justice requires such a stay or, put otherwise, where injustice will otherwise be done.

32. The author furthermore referred to the fact that it has been held that in particular circumstances the court could, in the determination of the factors to be taken into account in the exercise of its discretion, borrow from the requirements for the granting of an interlocutory interdict namely that the applicant must show that the right which is the subject of the main action and which he seeks to protect by reason of the interim relief is clear or, if not clear, is *prima facie* established though open to some doubt; that if the right is only *prima facie* established, there is a well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in the establishment of his rights; that the balance of convenience favours the granting of interim relief; and that the applicant has no other satisfactory remedy. The authorities referred to by the learned author support the aforesaid statements of our law.
33. Although it has been stated in the authorities that the court is not concerned with the merits of the underlying dispute and that the sole enquiry is simply whether the *causa* is in dispute, I regard this as a general proposition *ceteris paribus* and not one which would prevent a court from exercising its discretion

against ordering a stay of execution if there is no valid underlying *causa* or if the applicant had failed to show a *prima facie* right which would justify the subsequent rescission of the existing order of court. It is consequently necessary to analyse the validity or otherwise of the application for rescission for this purpose.

34. It was stated on behalf of the applicant that the applicant relies for his application for rescission on the provisions of Uniform Rule of Court 42. Rule 42 provides 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;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

35. In paragraph 5 of the applicant's affidavit in support of his application for rescission the following is stated:

"This of course is a judgment that was erroneously sought and granted in the absence of any evidence so lead/reduced to justify the relief."

36. This is a clear indication that the applicant relies on Rule 42 (1) (a) for his application for rescission. When Me Perrel was reminded that the judgement and order were not sought or granted in the absence of the applicant, she submitted that in reality the applicant relies on Rule 42 (1) (b) for the reason that the order was granted in error because there were no facts before the court *a quo* on the basis of which the court could have granted the prayer declaring the property specially executable.
37. It was submitted that the applicant had failed to place any evidence before the court which would have enabled the court to make an order in respect of the issue of executability. It was submitted in particular that the respondent failed to place evidence before the court that the property was the applicant's primary residence. I disagree with the submission for a number of reasons.
38. The main application came before the court *a quo* as an opposed motion and the evidence before the court upon which it had to adjudicate the matter, was contained in all the affidavits, including the answering affidavit. In the answering affidavit the applicant stated that the property was the primary residence of him and his family and that he would be deprived of his fundamental right to adequate housing should the property be sold in execution. The court *a quo* was thus fully entitled to consider this evidence.

39. Furthermore, in response to the aforesaid, the respondent stated in its replying affidavit that in the event of the respondent wishing to rely upon his constitutional right to adequate housing it is incumbent upon him to place the information relevant thereto before the court. The respondent furthermore stated that in that paragraph the applicant merely stated that he and his family will be denied their fundamental right to adequate housing, but, however, failed to set out any foundational basis for that statement.
40. The applicant did not accept this invitation to place further facts before the court. In fact, in none of the documents in any of the proceedings before the different courts, had the applicant ever taken the point that the respondent had failed to place sufficient information before the court in order for it to declare the property specially executable and that the court had consequently, for that reason, erred in making that order.
41. Another, and more basic reason, why the applicant cannot succeed with an application for rescission in terms of Rule 42 (1) (b) is that the "patent error" referred to in the Rule can never refer to a situation where, such as was submitted on behalf of the applicant, the court did not have sufficient facts before it to have come to a particular conclusion and order. The "patent error" referred to in the Rule is an error as a result of which the judgement granted does not reflect the real intention of the Judge pronouncing it. In other words, the order does not express the intention of the Judge. And such an order may then only be varied to the extent of such ambiguity, error or omission.

42. The applicant's case namely that there was not sufficient evidence before the court *a quo* to have declared the property specially executable, can therefore never be entertained in terms of Rule 42 (1) (b).
43. Despite what had been argued on behalf of the applicant in the application before this court it seems that the applicant himself had earlier accepted the aforesaid as a correct interpretation of Rule 42 (1) (b). In his application for leave to appeal to the Constitutional Court the applicant stated in his affidavit in relation to his first rescission application instituted in 2015, the following:
- "5.31 I duly accepted my Attorney of Record's advice that I had followed the incorrect legal procedure in overturning the Judgement of the Honourable Acting Justice Mali dated 6 March 2014, and therefore withdrew my Application for Rescission of the Judgement on his advice."
44. The present about-face by the applicant has not been explained.
45. There is yet a further reason why the applicant cannot succeed in rescinding the order of Mali J in terms of rule 42 or any other Rule of Court or the common law. It was submitted on behalf of the applicant, as I have indicated before, that the order of Mali J falls to be set aside for the reason that there was not sufficient evidence before the court to have declared the property specially executable. On any interpretation that would mean that the court had made a wrong factual finding which would, if found to be correct, make the judgement and order susceptible to an appeal and not a rescission in terms of Rule 42.

46. I now turn to the main argument on behalf of the respondent namely that after the applicant had followed the appeal process, which culminated in the dismissal of his application for leave to appeal to the Supreme Court of Appeal, and for that matter the application for leave to appeal to the Constitutional Court, the matter was at an end and the applicant is not entitled to reopen the matter by way of a new process directed at the rescission of the order appealed against.
47. I agree with the argument on behalf the respondent. The applicant had applied to the Supreme Court of Appeal for leave to appeal against the whole of the judgement and order of Mali J. It does not matter, in my view, whether the applicant had included as one of his grounds of appeal the fact that, in his submission, Mali J had erred in declaring the property specially executable. If such had not been relied upon as one of the grounds of appeal, it would be regarded as having been abandoned by the applicant. Cf *Bredenkamp v Du Toit* 1924 GWLD 15 at 19; *Hardenberg And Another V Nedbank Ltd* 2015 (3) SA 470 (WCC) at p478A.
48. The fact remains that the applicant applied for leave to appeal against the order and judgement of Mali J, which included the declaration of the property to be specially executable. The moment the Supreme Court of Appeal refused leave to appeal, that was the end of the matter and it is not open for the applicant to reopen his attack on the judgement and order of the court *a quo* by means of a process in terms of Rule 42 or any other process. Any process

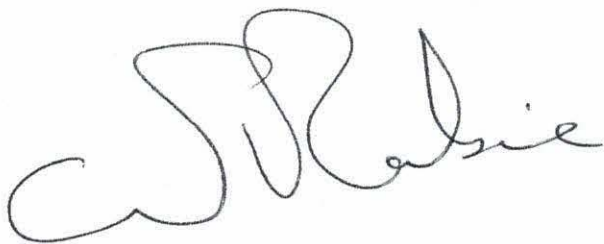
initiated by the applicant is met by the principle of *res iudicata* and issue estoppel and the principle of finality.

49. In the result I find that the applicant had failed to show that he has a *prima facie* right to apply for the rescission of the judgement and order of Mali J. On the evidence before this court it is abundantly clear that the applicant is still on his quest to frustrate and delay the efforts of the respondent to execute on its judgement. The application for rescission is not a *bona fide* application and neither is the present application to stay the execution of the order of Mali J.
50. In the circumstances I exercise my discretion against the granting of the order as prayed for by the applicant.
51. As far as costs are concerned it was submitted on behalf of the respondent that an order for costs should be made against the applicant on a punitive scale and that an order for costs should also be made against the attorney of record of the applicant *de bonis propriis*.
52. I am satisfied that a punitive order for costs should be made against the applicant for it is clear, as I have mentioned above, that his application was not *bona fide* but an abuse of the Rules of this court in the furtherance of his attempts to frustrate the respondent in its efforts to execute an order validly obtained from this court.

53. As far as an order for costs against the applicant's attorney is concerned many questions have been raised on behalf of the respondent but in my view there is not sufficient evidence before this court which would merit such an order.

54. In the result, the following order is made:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the respondent on the scale as between attorney and client.

A handwritten signature in black ink, appearing to read 'C.P. Rabie', with a large, stylized initial 'C' and 'R'.

C.P. RABIE

JUDGE OF THE HIGH COURT