IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

CASE NUMBER: 31765/2011

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

8/4/13
DATE

SIGNATURE

11/4/2013

In the matter between:

CROWN HILL PROP 3 CC **APPLICANT**
Registration number: 2004/00850023

and

BODY CORPORATE VILLA LUCA **RESPONDENT**

JUDGMENT

MABENA AJ:

[1] This is an application for rescission of a default judgment under Case number 38392/2010 granted on the 28th February 2011.

[2] **BACKGROUND**

2.1 The Applicant is an investment vehicle which owns a townhouse known as Unit 5 of the Sectional Scheme known Villa Luca at 68 South Street, Centurion, Pretoria.

2.2 The Respondent is a Body Corporate having it's *domicilium citandi et executandi* at Trafalgar Property Management, corner Beatrix street and Vermeulen street Arcadia Centre, Arcadia, Pretoria. Trafalgar Property Management (Pty) Ltd is the management agent of the Respondent.

2.3 Pivotal to this application, is a dispute regarding the monthly levies payable to the Respondent by the Applicant, which resulted in a default judgment and subsequently a liquidation order against the Applicant, also by default granted on the 28th February 2011 under case number 38392/2010.

2.4 The initial default judgment was based on arrear rentals allegedly owed by the Applicant to the Respondent.

2.5 The Respondent issued summons against Applicant during August 2009 for payment of the amount of R 3 985.08. The summons were served at the address described as a Shelf Company Warehouse.

2.6 The Applicant allegedly failed to deliver a Notice of Intention to Defend.

2.7 An application for default judgment was lodged on the 4th September 2009. Default judgment was granted by the Clerk of Pretoria Magistrate Court on the 21st September 2009.

2.8 A Warrant of Execution was granted on the 10th October 2009.

2.9 Following a Nulla bona return, the Respondent brought an application for liquidation of the Applicant which was lodged on the 21 July 2010. This application was also served upon the Applicant by affixing same on the door of the Shelf Company Warehouse.

[3] The Applicant, in it's founding affidavit seeks to bring this application in terms of Rule 42 of the Rules of this Court as well as common law. In it's heads of argument, the Applicant also relies on the provisions of Section 345 (i) of the Companies Act 61 of 1973, which provisions, it was submitted, are still applicable in terms of the Act 71 of 2008, to set aside the liquidation order.

[4] The Applicant raises the following as grounds for this application:

4.1 It was not aware of the summons, service and the attempted execution. It did not have knowledge of the existence of the legal action instituted by the Respondent, as the legal process was served at the address aforementioned.

4.2 It was also not aware of the liquidation application as same was not served at it's new domicile.

4.3 Prior to the aforesaid legal action it gave formal notice to the Respondent of it's change of domicile;

4.3 The Applicant contends that, had it been aware of the legal actions against it, it would have opposed the action as it had a *bona fide* defence against the Respondent's management agent, Trafalgar.

[5] For an Applicant to succeed in an application for rescission in terms of Rule 42 (1) (a) or common law, the Applicant is required to show "sufficient or good cause" for the setting aside of the judgment. This means that:

5.1 It must set out a reasonable and acceptable explanation for it's failure to deliver a Notice of Intention to Defend or it's failure to deliver a Plea, whichever is applicable;

5.2 Secondly, it must demonstrate that it's application for rescission of judgment is *bona fide* by setting out the grounds for it's defense or claim which prime facie carries some prospects of success.

[6] The Applicant, in it's heads of argument, also contends that, the liquidation order is liable to be set aside under the provisions of section 354 (1) of the companies Act 61 of 1973 (the Act).

[7] The Applicants under section 354 of the Act must show special circumstances which justified the setting aside of the order and also furnish satisfactory explanations for not having opposed the granting of the order.

[8] The Applicant contends that prior to the Respondent instituting an action against it, a formal notice was dispatched to the Respondent notifying of the Applicant's change of domicile.

[9] The Respondent does not, in so many words, deny knowledge of the change of domicile of the Applicant

[10] It was argued on behalf of the Respondent that Close Corporations and Companies who owns Sectional Titles used them mainly as investment vehicles to generate income. Therefore the occupants of the Sectional Titles are in almost all maters, tenants. It was accordingly contended that if the Sheriff serves the document on the unit at the *domicilium citandi et executandi,* that no representatives of the owner of Close Corporation and / or Company will be found at the unit itself. Therefore the Respondent preferred to serve the document at the registered address of the Close Corporation or the Company.

[11] Nowhere in the opposing affidavit does the Respondent deny the notification of change of domicile by the Applicant. It is my view that there is merit in the Applicant's contention in this regard. If

notification of change of domicile was dispatched to the Respondent one would expect that all documents will thereafter be send to the new *domicilium citandi et executandi.* I am satisfied that the Applicant has provided sufficient reasons that failure to file a notice of Intention to Defend was not a result of wilful default on it's part.

[12] On the question of *bona fide* defense, the Applicant raises the following defences on the merit:

12.1 That levies fell in arrears because the Respondent's managing agent Trafalgar failed in spite of numerous reminders to update it's administrative records to present the Applicant's debit order to the bankers for deduction of levies against the nominated account where the monies were available.

12.2 That the Applicant furthermore, took steps to pay to Trafalgar all the amount of levies claimed to be outstanding in the amount of R 15 260.95.

12.3 The Applicant furthermore deposited in favour of Respondent the amount of R 23 283 .42 of which the amount of R 8 000. 00 is in trust with the Applicant's attorneys, Machobane Kriel Inc as security to any action that maybe instituted by the Respondent.

12.4 That the only reason why the Respondent was not successful in recovering the levies from the Applicant was occasioned by Trafalgar as aforesaid.

[13] The Respondent denies that they are responsible for the Applicant's levies falling into arrears. However, it is contended and it was so submitted on behalf of the Respondent that:

> ....*"the reason that the debit order did present itself of payment is unclear and can be the cause of limitless reasons but the statement notes that the account was closed. (paragraph 13.9 Respondent's opposing affidavit)"*

[14] The Respondent denies having received Annexure "HK6" and "HK7", as they alleged that these Annexures were supported fax reports and prove is given that same is delivered by hand.

[15] I am satisfied that Annexures "HK6" and "HK7" comprised legitimate notification to the Respondent that the debit order was not presented for payment.

[16] I am satisfied that the Applicant, has advanced sufficient facts to demonstrate that it has a *bona fide* defence and it has accordingly shown good cause for the setting aside of the liquidation order granted by default on the 28th February 2011 under Case number 38392/2010. I do not deem it necessary to deal with the question whether or not the Respondent is entitled to claim the legal fees prior to taxation thereof.

[15] I make the following order:

1. The application for rescission of judgment is upheld;

2. The liquidation order granted under Case number 38391/2010 is set side;

3. The Respondent is ordered to pay cost of suit.

MH MABENA
ACTING JUDGE
NORTH GAUTENG HIGH COURT
PRETORIA