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

CASE NO: 26411/2021

(1) REPORTABLE: YES/NO

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

(3) REVISED

DATE: 22/11/2024

SIGNATURE:

In the matter between:

SIBONGILE MVUZA

Applicant

and

BODY CORPERATE OF FALCON CREST

First Respondent

FIRST RAND BANK LTD

Second Respondent

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

Third Respondent

**SHERIFF OF THE HIGH COURT, PRETORIA
SOUTH EAST**

Fourth Respondent

QUINTIN DARRYL THIRING

Fifth Respondent

In re:

BODY CORPORATE OF FALCON CREST

Applicant

And

SIBONGILE MVUZA

First Respondent

FIRST RAND BANK LTD

Second Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Third Respondent

JUDGMENT

MATSEMELA AJ

[1] In terms of notice of motion this is an application for the following:

1.1. Condoning the late application in terms of Rule 27 (3) for the recession of two (2) taken against the applicant without her knowledge.

1.2. Rescinding Judgements made on the 13 JULY 2021 and on the 24 AUGUST 2022 respectively, in terms of Rule 42 (1) (a).

1.3. Declaring that the execution of the property described as **Unit [...] Falcon Crest (The Wilds) Body Corporate, 9[...] J[...] Street The Wilds Estate Pretorius Park,0081**, invalid and unconstitutional.

1.4. Declaring the Sale Conditions dated the 18 July 2023, is null and void.

1.5. Granting the applicant leave to defend.

BACKGROUND

[2] On the 30 March 2006 the applicant purchased the property described as Unit [...] as shown and more fully described on the Sectional Plan No SS 308/2006 in the scheme known as Falcon Crest in respect of the land and building or buildings situate at Pretorius Park Extension 19 of which section, the floor area, according to the said section plan, is 132 (One Hundred and Thirty Two) square metres in extent, and undivided in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan held by a Deed of Transfer ST 108381/2006. This property is also known as Unit [...] Falcon Crest (The Wilds) Body Corporate, 9[...] J[...] Street, The Wilds Estate Pretorius Park, 0081 (The property).

[3] She purchased the said property for a total amount of R720, 000. She financed the purchase price through a bond granted by the second respondent.

[4] The applicant has to date paid an amount of R1, 350,000 from the date of registration and was left with a balance of about R348 000.

[5] On the 4 June 2021 the first respondent caused summons to be issued out of this Court for the amount of R47,175 .52. This summons was served by fixing the copy thereof as alleged by the fourth respondent principal place of residence of the applicant. The date on which the summons was served is 21 June 2021.

[6] On the 13 July 2021 the registrar of this Court granted the first respondent a default judgement to the amount of R 47,152.52 against the applicant.

[7] On the 2 August 2021 the first respondent caused a writ of execution to be issued against the applicant's movable property to recover the said arrears.

[8] On the 15 September 2021 the fourth respondent issued a return of service citing that the execution could not be served. The attempts which were made by the fourth respondent, according to the return of service, its two (2).

[9] The first respondent then proceeded to bring an application in terms of **Rule 46 and 46 A** of the Uniform Rules requesting for an order to be declare the property executable.

[10] On the 21, June 2022 the fourth respondent served the said application in terms of **Rule 46 and 46 A** by fixing same on the principal door of the residence.

[11] On the 24 August 2022 the Court granted the application in terms of Rule 46 and 46A and declared the property executable.

[12] On the 18 July 2023 the property was sold in execution by the fourth respondent to the fifth and sixth respondents, to the amount of R760,000. The judgement debt was only R47,000.00. The applicant attended the auction.

[13] When the 1st Respondent proceeded with its application in terms of Rule 46 it made the clear averment that the property was valued at R1 400 000.00. The valuation was supported by a valuation report.

[14] Despite the valuation, the 1st Respondent requested that the property be sold without reserve and indicated that it was unable to reach the bond holder despite request.

APPLICATION FOR CONDONATION

[15] Rule 27 (3) provides as follows:

‘(3) The court may, on good cause shown, condone any non-compliance with these Rules.’

[16] The phrase “*good cause*” is defined by the Courts as a phrase that defies

comprehensive definition. It requires the exercise of a judicial discretion and flexible approach. It involves broad principles of justice and fairness. The court must consider of all the relevant facts and circumstances view the case as a whole¹.

[17] In practice, however, there have traditionally been two requirements which an applicant is generally expected to establish to succeed in a rescission application, viz. a reasonable explanation by the applicant for the default, and a bona fide defence which has some prospects of success **2**.

[18] Recently, in considering the approach to be taken, the Constitutional Court in Fick³ confirmed the traditional approach adopted, for instance, in Chetty at 765D-F –

“It is not sufficient if only one of these two requires is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the appellant’s application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule nisi issued on 22 April 1980.”

[19] In cases where the applicant brings the application for condonation it is a requirement that he must give the court a reasonable explanation as to why he failed to oppose the application against him in time. It is important to take the court into confidence and explain that he was not in wilful default. He must ensure that that the

¹ See *De Wet and others v Western Bank Limited* 1979 (2) SA 1031 (A) at 1042G-H and *Chetty v Law Society Transvaal* 1985 (2) SA 756 at 765A-B.

² *Chetty* at 765A-C.

³ *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at 350D.

papers which had been filed can be trusted.

[20] The respondent has a duty too. Before the applicant can be said to be in wilful default the respondent must show that the applicant:

(a) had the knowledge of the action brought against him.

(b) has deliberately refrained from defending the action.

(c) has shown a certain mental attitude towards the consequences of the action.

[21] The applicant herein has presented a case wherein she is able to demonstrate that various documents were served at her property, but denies that same were ever actually brought to her attention. Indeed, the situation exists that the sheriff enquiries at the 1st Respondent as to whether the applicant resided at the property, and after confirmation, left documents at the property. This can be found in the return of service attached as annexure “**SV2**” to the founding affidavit.

[22] The applicant discredits services by the sheriff which **results in a**” he said she said “ scenario. To take the Court into confidence, the 1st Respondent did put before Court forward various correspondences, from the applicant, between 2018 to 2023 which indicated that the matter was actually, within her knowledge and that despite this, she failed to act.

[23] The dispute regarding the Applicant’s debt is not a sudden occurrence. The 1st Respondent has engaged at length with the Applicant from as far back as May 2018 in order to resolve the indebtedness in this matter. The Applicant has as earliest acknowledged indebtedness on of the 29th of May 2018. “B1” is a copy of the relevant correspondence from the applicant attached to answering affidavit.

[24] An acknowledgement of debt was sent to the Applicant; she acknowledged receipt of same on the 29th of May 2018. “B2” is an annexure attached to the answering affidavit of the relevant mail from the applicant.

[25] Despite the sending of the relevant acknowledgment of debt, the applicant failed to complete and sign same. Wherein the 1st Respondent's attorneys made a request on the applicant to supply a signed copy, the applicant reverted on the 4th of July 2018 and enquired as to what acknowledgment as mentioned above. Annexure "B3" attached to the answering affidavit is a copy of the relevant mail from the Applicant.

[26] Regarding legal proceedings, the Applicant reverted to the 1st Respondent Attorneys on the 5th of November 2019 and indicated that she was in receipt of a notice of attachment and that she never received a copy of the summons. It should be noted that it was only wherein enforcement was taking place did the applicant elect to respond. "B4" is an annexure attached to the answering affidavit copy of the relevant correspondence from the Applicant.

[27] The above was in respect of the previous action as issued in 2018. What is of importance is that the Applicant was aware of the action as early as January 2019 and that she elected to ignore same. It was only wherein the 1st Respondent was proceeding with enforcement of its order did the Applicant elect to act. This shows a pattern of ignoring legal proceedings and only electing to act wherein enforcement takes place is not isolated herein.

[28] The applicant was also aware of the granted rule 46, that the property was set down for auction and only wherein same was sold does she elect to act and bring the present application for rescission of judgment.

[29] In order to avoid legal proceedings, the Applicant placed through an offer of R5000.00 per month, which offer was accepted. The offer was presented by the applicant on the 8th November 2019. "B5" is an annexure attached to the answering affidavit of the relevant offer from the Applicant.

[30] In the subsequent month of December 2019 the Applicant was advised that she defaulted on the arrangement and that the 1st Respondent would be proceeding with legal action. "B6" is an annexure attached to the answering affidavit of the relevant is a copy of the relevant mail to the Applicant. As a result of the Applicant's failure to adhere to any arrangement or make payment the 1st Respondent proceeded with its

application in terms of Rule 46.

[31] On the 12th of October 2023 the Applicant contacted the 1st Respondent's managing agent and requested a payment arrangement. At this point the 1st Respondent's attorneys advised that the property had been sold and that they were in the process of transferring the property.

[32] The applicant reverted on the 17th of October 2023 and indicated the following:

32.1. That she was aware that the property had been placed up for auction.

32.2. She was under the impression that no one had bid for the property.

3.3. That despite being of the view that she was under the impression that no one had bid for the property at auction. She suspected that the purchaser was acting on insider information didn't give an indication as to what this information was. "B7" is an annexure attached to the answering affidavit of the relevant correspondence.

[33] In summary it can be concluded that the applicant was aware of arrears. The Applicant was aware of judgement and that an order for the sale of her property existed. The applicant only elects to react to legal proceedings wherein there is a real or actual impact to her.

[34] Despite this complete disregard, attending the auction, the various correspondence indicating that the Applicant was indeed aware of proceedings, she requests that the judgments as granted be set aside so that she can defend the matter at trial on the basis of service. Wherefore it is my view that given the above, the applicant was in wilful default in acting in this manner. She has elected to only act at the last minute.

RULE 42 (1) (a)

[35] Rule 42 (1) (a) provides as follows:

(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;

[36] When proceeding with an application as sought by the applicant she must present a defence that is capable of taking the matter forward to trial. A defence must be presented that had the court been aware of, judgment would never have been granted both at the default judgment stage or Rule 46 application.

[37] There are facts and issues that should have been addressed by the Applicant in her founding affidavit in order to properly place forward a defence and to indicate that the application should be granted with the Applicant being allowed to proceed to trial.

[38] The applicant cannot go to trial and as her defence to the plea that she was never served with the summons in this matter. She will be required to indicate that the claim as placed forward by the 1st Respondent is indeed incorrect and that she can explain why.

[39] The Applicant does not address what the claim of the 1st Respondent action is for, nor how it is incorrect. It should be noted that the 1st Respondent proceeded with legal action for recovery of arrear contributions.

[40] The only mention to contributions and the status thereof can be found in paragraph 41 of the founding affidavit wherein the applicant states:

“It is denied that I do not keep up with my monthly levies as stated by the Respondent’s papers.”

This is the only averment mentioned and is meant to address the cause of this entire matter. In my view this is completely inadequate.

[41] The Applicant should have disputed the statement of account. (marked as annexure "C" to answering affidavit for the period between January 2021 to November 2023). Despite the factual nature of the statement of account and contributions as imposed, the Applicant makes the allegation that she denies not keeping up with her monthly levies. It would have been impossible for this matter to proceed to trial if the applicant kept up with her monthly levies.

[42] Wherein the Applicant gave her denial of not keeping up to date with her monthly contributions, one could expect proof of payment or reference to payments on a statement of account. Making the bare averment in light of the attached statement of account casts nothing but doubt regarding the honesty expressed by the Applicant and destroys any possible defence that could be raised by the applicant.

[43] No annexure is attached by the Applicant in support of this statement or details provided. The statement presented by the Applicant is meant to be accepted on face value, and from what I can only assume, the Applicant was hoping that the 1st Respondent may overlook this statement and forget to reply.

[44] The Applicant makes an issue about the legal fees herein. It is noted that there are legal fees on this account, but majority of same were imposed after the Rule 46 was granted. The first Respondent has not made any request or demand on the Applicant to pay any of these legal fees. In addition, same were settled by the fifth and sixth Respondent as the part of the clearance figures. This was separate of the purchase price.

[45] The Applicant alleges that there is conspiracy among the Respondents to swindle her of her property. The conspiracy theory without facts to support it cannot be entertained.

[46] On the papers as filled by the Applicant, and in light of the averments as presented and support by attached statement of account, that the Applicant would be proceeding to argue this matter at trial purely on the basis of the supposed non-

service of a legal document. This cannot hold water.

[47] The applicant is facing the first Respondent's claim of levies that are in arrears. This is the crux of the entire claim by the first respondent. The first applicant was duty bound to place forward facts that would remove any doubt that the court may have in respect of the Applicant's bona fides.

[48] It should be noted that the matter was unopposed. As such, the matter was initially set down to be heard on the date as per the notice of motion. As such, there was no requirement to give further notice. Further notification of the applicant was immaterial. The applicant was required to respond to the Notice of Motion, not the Notice of Set Down.

[49] The Applicant attempts to place forward the cause that she had movable property and that the 1st Respondent attempted to attach. These facts are apparent from the founding affidavit and attached annexure. The Applicant indicated that the sheriff only attempted to attach movable property twice and that this is unreasonable and irregular. Reason as to why this is unreasonable and irregular are absent.

[50] It is my view is that the applicant never foresaw that the 1st Respondent would one day be entitled to proceed with the sale of the property in this matter and as such treated her obligations towards other 3rd parties within the complex with disregard, despite the possible hardship that her actions may have cause.

[51] The Applicant has in actual fact placed nothing forward which may constitute a defence. As such should the application be granted, the matter would move to trial in order to consider whether the service of documents constitutes a defence. Same cannot constitute a defence.

[52] I am of the view the Applicant has failed to present a proper and valid defence and that in the light of this, the Applicant cannot be successful with her application.

PRIMARY RESIDENTS

[53] The Applicant indicates that she has a right to housing in terms of section 26 of the constitution. This issue was canvassed by the first respondent in terms of paragraph 17 of the founding affidavit to the Rule 46 application. The applicant makes reference that the property is her primary residence and that the founding affidavit used in support of the Rule 46 was misleading. Despite this, the applicant fails to indicate as to why it was misleading.

[54] In terms of paragraph 11.3 of the founding affidavit of the 1st Respondent's Rule 46 application the 1st Respondent indicated to the court that the property was indeed the primary residence of the Applicant. The 1st respondent played open cards with the Court.

[55] Having read the applicant's founding affidavit in total one cannot find even where she deals with the aspect that she suffered or will suffer prejudice.

Order

The application for rescission dismissed with costs.

J M MATSEMELA

Acting Judge of the Gauteng High Court, Pretoria

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 22 November 2024

HEARD ON THE 12/9/2024

FOR THE APPLICANT

SB MONYELA

INSTRUCTED BY

SE KHANYILE ATTORNEYS

FOR THE RESPONDENTS

PT OOSTHUIZEN

INSTRUCTED BY

VELILE TINTO