IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST OF OTHER JUDGES: NO
(3) REVISED

18/11/2021
DATE

SIGNITURE

CASE NUMBER: 42209/2016

In the matter of

MATSHEKE HLANGANANI JOCYE **APPLICANT**

and

THE BODY CORPORATE MONTEREY **RESPONDENT**

In re:

THE BODY COPRPORATE OF MONTEREY **PLAINTIFF**

and

MATSHEKE HLANGANANI JOCYE **DEFENDANT**

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This is an application for rescission of a default judgment (money judgment) granted in the absence of the applicant on 25 August 2017.

Background of relevant facts

[2] The applicant is the registered owner of the property, namely Door 32, Unit 16 Monterey, 27 Lily Road, Berea, Johannesburg. The unit forms part of the scheme of the respondent. The applicant utilizes the property as her primary residence.

[3] The respondent alleges that during 2016 the applicant failed to make payments of the monthly levies, special levies and other ancillary charges, incurred in respect of the property. The respondent issued summons against the applicant on 9 November 2016.

[4] On 24 January 2017 the said summons was served on the applicant's chosen *domicilium citandi et executandi*, being the chosen domicilium in terms of Management rules published in annexure "1" under GN R 1231 in GG of 40335, of 7 October 2016[1]. The summons was served in terms of Rule 4(1)(a)(iv)[2].

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[1] Annexure "1" Section 4(5) states:
"*The service address for any legal process or delivery of any other document to a member is the address of the primary section registered in that member's name; provided that a member is entitled by written notice to the body corporate to change that address for purposes as contemplated in subsections 6(3)(c) and 6(4) of the Act to another physical address, postal address or fax in the Republic of South Africa or to an email address, and that the change in the service address of the member is effective when the body corporate receives notice of such a change*. "

[2] 4(1) *(a)* Service of any process of the court directed to the sheriff and subject to the provisions of paragraph *(a*A*)* any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:

(iv) if the person so to be served has chosen a *domicilium citandi*, by delivering or leaving a copy thereof at the *domicilium* so chosen;

[5] No notice to oppose or plea were filed by the applicant.

[6] On 25 August 2017 default judgment was granted as follows;

"Default judgment is granted against the Defendant for:-

i. Payment of the sum of R129 257.70

ii. Interest on R 129 257.70 at the rate of 2% per month compounded monthly from 18 July 2018 to date of final payment.

iii. Costs of suit in the sum of R200.00 plus Sheriffs fees."

Submissions by the applicant

[7] The applicant seeks an order for rescission of the default judgment granted on 25 August 2017 and furthermore that leave be granted to the applicant to defend the respondent's summons in the action. The basis for the application was that the judgment was granted erroneously because the applicant never received the summons pertaining to the main action and as a result thereof no notice to oppose or plea were filed.

[8] Counsel for the applicant raised a *point in limine* in her replying affidavit. It was contended by the applicant that Mr Jan Van Den Bos, who deposed of the answering affidavit on behalf of the respondent had no authority to act in this regard. It was further argued by the applicant that Mr Jan Van Den Bos's appointment as managing agent for the respondent was done illegally. Therefore the rescission application by the applicant should be granted on the basis that no intention to defend was filed.

[9] The applicant further argued that the money judgment was granted erroneously because the applicant did not receive the summons and as such was unable to file notice to defend and a plea.

[10] The reason for the applicant not to receive the summons was due to the fact that the summons was affixed to the door of the applicant's *domicilium citandi et*

executandi, as indicated on the summons served by the Sheriff which states the following;

"On this 24th day of JANUARY 2017 at 12:05 I served this COMBINED SUMMONS AND PARTICULARS OF CLAIM upon MATSHEKE HLANGANANI JOYCE, Defendant, at the chosen domicillium citandi et executandi at UNIT NO.16 (DOOR NO.32) MONTEREY BODY CORPORATE, 27 LlLY ROAD - BEREA, JOHANNESBURG Affix a copy to the door as I found the premises locked at the time of service RULE 4(1)(a)(iv)."

[11] It was argued that the requirements of Rule 4(1)(a)(iv) were not met in the present matter, the reason therefore was that the unit or property is situated in a complex/scheme where numerous other owners or passers-by have access to and therefore the summons could have been removed and as such the applicant did not received the summons. The applicant only became aware of the judgment when the warrant of execution was affixed to the door of the unit on 8 June 2020.

[12] Counsel for the applicant held that on the basis that the applicant proves that the judgment was granted erroneously the court should, without more, grant the order of rescission and the applicant need not to show *"good cause"* as required.

[13] The applicant further argued that she has a *bona fide defence* as the levy statement pertaining to the amount in arrears does not comply with statute and as such the applicant has a reasonable prospect on success if the rescission of the judgment is granted.

Submissions by the respondent

[14] Counsel for the respondent raised three *points in limine*.

First point in limine:

[17] It was argued that the applicant's application did not comply with Rule 6(5)(d) insofar as the Notice of Motion is drafted in short form, the application fails to disclose

the necessary time periods for opposition, nor does it indicate the time period to file opposing papers.

Second point in limine was based on the following five grounds:

[18]

1. The respondent argued that the applicant fails to make out a case for condonation in that the applicant was aware of the judgment debt obtained against her as far back as 13 November 2017, or alternatively 26 March 2020, when a writ of execution was served on the movable property of the applicant.
2. It was argued by the respondent that the applicant furthermore fails to take the court into her confidence by not disclosing that she bears knowledge of the monetary judgment as far back as 2017.
3. The applicant has failed to stipulate whether the present application is launched in terms of Rule 31(2)(b), Rule 42 (1), or the common law.
4. In terms of Rule 31(2)(b), the applicant has 20 days from acquiring knowledge of the judgments, to seek rescission.
5. In terms of Rule 42(1) and the common law, an application for rescission must be launched within a reasonable time.

Therefore the respondent argued that the application should be dismissed as the application is defective.

Third point in limine

[19] The respondent argue that the Notice of Motion and founding affidavit are fatally defective in that the applicant fails to state in terms of which rule or sub-rule of the Rules the application is brought.

Lack of authority Mr Jan Van Den Bos

[20] Counsel for the respondent addressed the court on the issue raised by the applicant that Mr Jan Van Den Bos lacked the necessary authority to depose of the answering affidavit, the main argument was based on the fact that the applicant did not follow rule

7[3] in her attack on the lack of authority. Therefore it was argued that the lack of authority argued by the applicant was not properly placed before court.

[21] It was further contended by the respondent that the issue was previously argued before Windell J in the application in terms of Rule 46A, that application was for the execution of the immovable property concerned. During which proceeding the argument was dismissed on the basis that it had no merit.

[22] It is evident from the facts placed before me that the applicant did not follow Rule 7(1) in disputing the authority of Mr Van Den Bos. This must have been done within ten (10) days on which the applicant became aware of the lack of authority of Mr Van Den Bos. On the version of the applicant she was aware of the *"lack of authority"* prior in bringing the application, therefore the applicant did not follow Rule 7(1) and the argument is not properly placed before me.

[23] The *point in limine* by the applicant relating to lack of authority of Mr Van Den Bos is dismissed.

[24] The respondent argued that it is required that the applicant must show "*good cause"* for an extension or abridging of time in respect of condonation sought which resulted from non-compliance with the Rules, as in the matter rule 27(3)[4].

[25] It was submitted by counsel for the respondent that the applicant needs to explain fully and sufficiently to the court what the reasons for the delay were and furthermore

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[3] Rule 7(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.

[4] Rule 27(3) states the following:
"*The court may, on good cause shown, condone any non-compliance with these Rules*".

the applicant must satisfy the court, on oath, that she has a *bona fide* defence to the respondent's claim.

[26] Counsel for respondent argued that firstly, the applicant failed to seek condonation of the late delivery of the rescission application and secondly, even had the applicant sought condonation, it is submitted that the applicant has failed to establish an entitlement to condonation. The reasons for the argument were;

1. The delay in launching the application for rescission of the judgment granted on 25 August 2017 is substantial,
2. A full and reasonable explanation for the delay has not been forthcoming,
3. The above, coupled with the applicant's lack of a *bona fide defence,* militates against the granting of the condonation sought.

[27] Therefore the respondent argued that on the above mentioned basis the application for rescission should be dismissed.

[28] The respondent stated that on deciding whether the judgment should be rescinded the applicant is required to show good and sufficient cause and this entails that the applicant should show;

1. A reasonable and acceptable explanation for the default,
2. The application is made *bona fide,* and
3. That on the merits, the applicant for rescission has a *bona fide defence,* which *prima facie* carries some prospect of success.

[29] It was argued by the respondent that the applicant never disputes the arrears forming the basis for the money judgment, but based her defence on the fact that the judgment was erroneously granted due to the fact that she did not receive the summons. It was contended by the respondent that on the issue of the arrears the applicant merely states that the respondent lacked accounting to the member of the scheme in terms of relevant legislation. The respondent was therefore of the view that on the arguments

placed before court by the applicant there was no triable dispute and therefore no basis for the rescission of the judgment sought.

[30] Counsel for the respondent argued if the applicant was indeed paying the levies as required and if she was not in arrears, the applicant would have been able to prove the allegation by producing proof of the said payments, which was not done. The contention by the applicant that she was up to date with the levy payments are not true, reason being the respondent provided a payment record and on that basis the default judgment was granted.

Common cause facts

[31] The following facts are *common cause* in the matter;

1. On 25 August 2017 a default judgment was granted which states the following; "*Default judgment is granted against the Defendant for:-*

i) *Payment of the sum of R129 257.70*

ii) *Interest on R 129 257.70 at the rate of 2% per month compounded monthly from 18 July 2018 to date of final payment.*

iii) *Costs of suit in the sum of R200.00 plus Sheriffs fees."*

2. The applicant failed to make payment pertaining to the court order.
3. On 13 November 2017 the sheriff attempt to execute a writ of execution on the applicant, without any success.
4. On 26 March 2020 the sheriff again personally served a writ of execution on the applicant in terms of section 4(1)(a)(i), however the sheriff was unable to satisfy the judgment debt and a *nulla bona* return was issued.

Case law and evaluation

[32] The requirements that an application for rescission in terms of rule 31(2) (b) are well established in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[5] which states.

[5] 2003 (6) SA 1 (SCA), (2003) 2 ALL SA 113, at paragraph 1.

"The applicant must show cause why the remedy should be granted. That entails (a) giving a reasonable explanation of the default; (b) showing that the application is made bona fide; and (c) showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospectus success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgement".

[33] In terms of Rule 42(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 judgement erroneously sought or erroneously granted in the absence of any party affected thereby:
b) an order or judgement 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 judgement granted as the result of a mistake common to the parties.

[34] I accept as argued by the applicant that this application, the application for rescission of judgment was made on basis of Rule 42(1)(a) namely, that the default judgment was granted erroneously in the absence of the applicant affected thereby. Therefore for purposes of the judgment I will discuss an application for rescission in terms of Rule 42(1)(a) of the Rules of Court.

[35] However the court will first discuss the *points in limine* raised by the respondent.

First point in limine- non-compliance of rule 6(5)(d)
[36] Rule 6(5)(a) states;
"Every application other than one brought ex parte shall be brought on notice of motion as near as may be in accordance with Form 2 (a) of the First Schedule and true copies of the notice, and all annexures thereto, shall be served upon every party to whom notice thereof is to be given."

[37] Further rule 6(5)(d) states;

"Any person opposing the grant of an order sought in the notice of motion shall-

(i) within the time stated in the said notice, give applicant notice, in writing, that he intends to oppose the application, and in such notice appoint an address within eight kilometres of the office of the registrar, at which he will accept notice and service of all documents;

(ii) within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents; and

(iii) if he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the preceding sub- paragraph, setting forth such question.

[38] It is common cause that the applicant's application does not comply with Rule 6(5)(a), (b) and (d). It was argued by the applicant that the reason for the default was due to an oversight on part of council appearing for the applicant. The oversight being that in the process of drafting the application it slipped counsel's mind that the details pertaining to Rule 6(a), (b) and (d) were not included in the documents. Furthermore counsel for the applicant was of the opinion that it would be inappropriate to commit the other party to time frames whereas the papers were not ready as it was still being drafted.

[39] When the application was completed council for the applicant uploaded the notice of motion without correcting the deficiencies. It was argued that the even though the notice of motion was lacking averments the respondent answered to the application timeously despite not being directed to do so. Therefore no prejudice was suffered by any party and as such the non-compliance should be condoned by the court.

[40] I am of the view that even though the application lacks in terms of Rule 6(5)(a), (b) and (d) there is no prejudice suffered by any party and therefore the non-compliance in terms of Rule 6(5)(a), (b) and (d) is condoned in terms of Rule 27(3).

Second and third points in limine

[41] It was argued by the respondent that the failure by the applicant to state under which rule or sub-rule the application is sought resulted that the application is fatally defective.

[42] On the other hand the applicant conceded that no mention is made of the rule or sub-rule in terms of which the application is sought, however it was argued that in various paragraph in her founding affidavit it was made clear that the order for rescission is sought on the basis that the order for the money judgment was granted erroneously and therefore the application is brought in terms of Rule 42(1)(a).

[43] I agree with the contentions made by the applicant, it is clear when reading the founding affidavit that the application for rescission of the money judgment is sought in terms of Rule 42(1)(a).

[44] I therefore dismiss the second and third *points in limine* raised by the respondent.

[45] In order to succeed with an application in terms of Rule 42(1)(a) the applicant should satisfy three requirements. Firstly, that the default judgment must have been erroneously sought or erroneously granted, secondly, that such judgment must have been granted in the absence of the applicant and lastly, that the applicant's rights or interest must be affected by the judgment.[6]

[46] In the case of *Bakoven Ltd v GJ Howes (Pty) Ltd*[7] the following was said;

"An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record' (The Shorter

[6] Mutebwa v Mutebwa and Another 2001 (2) SA 193 Tk HC on page 198 at paragraph F.
[7] 1990 (2) Sa 446 on page 471 paragraph E to H.

Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd (supra) at 578F-G; De Wet (2) at 777F-G; Tshabalala and Another v Pierre 1979 (4) SA 27 (T) at 30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission."

[47] The second and third requirements in this matter are obvious and do not warrant further consideration, and can be taken as having been established by the applicant.

[48] However, in order to succeed in seeking rescission of the default judgment in terms of the sub-rule, the applicant bears the *onus* of establishing that the default judgment was erroneously granted. The words "*erroneously granted"* means that the court must have committed a mistake in law, which appears from the proceedings itself.

[49] It was submitted by counsel for the respondent that the application constituted an attempt on the part of the applicant to delay the inevitable, namely the execution of the immovable property, as the money judgment could not be satisfied on the execution of movable property. It was submitted that the application was bordering on an abuse of the process.

[50] The essential question to be answered in the matter is whether the applicant has established that the default judgment was *erroneously* granted.

[51] The basis for the applicant's contention that the default judgment was erroneously granted is that she only obtained knowledge of the default judgment being granted on 8 June 2020. The knowledge was obtained by the applicant due to the fact that the sheriff served a writ of execution on her *domicilium citandi et executandi* by affixing the writ to the main door of the property.

[52] The Supreme Court of Appeal has recently confirmed that the question whether an order is *"erroneously granted"* relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the claim.[8]

[53] In *Lodhi 2 Properties Investments CC v Bondev Developments*[9] the Supreme Court of Appeal held that:

"Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously[10]"

[54] Also see in this regard *Fraind v Nothmann*[11] where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.

[8] Freedom Stationary (Pty) Ltd and Others v Hassam and Others 2019 (4) SA 459 (SCA).
[9] 2007 (6) Sa 87 SCA at paragraph [24].
[10] Clegg v Priestley 1985 (3) SA 950 (W) on page 954C-J also see Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) paragraph 9-10.
[11] 1991 (3) SA 837 (W) on page 839 paragraph H-I.

[55] In the case of *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[12] an application in terms of rule 42(1)(a) for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so because the application had not been brought to the attention of his attorney. The court held, *that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had erroneously been sought or had erroneously been granted by the judge who granted the order*."

[56] In the matter of *Lodhi 2 Properties Investments CC v Bondev Developments(supra),* Streicher JA said that;

"*a court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."*[13]

[57] The applicant disputed the fact that the summons in the main action was served on her on 24 January 2017 at 12h05, by affixing a copy thereof to the door of Unit 16. Monterey Body Corporate, 27 Lily Road, Berea, Johannesburg. Therefore the applicant makes the allegation that she was unaware of the action brought against her as she did not receive the summons.

[58] In the answering affidavit the respondent pertinently set out the details of service, which are in accordance with Rule 4. On the information before me, the address of service was the applicants chosen *domicilium citandi et executandi.* The parties are *ad*

[12] 2003 (6) SA 1 (SCA) at paragraphs 9 – 10.
[13] See paragraph [27].

idem that the service was affected as required in Rule 4(1)(a)(iv), the only contention by the applicant is that she did not receive the summons.

[59] It was argued by the applicant that in the matter of *ABSA Bank Limited v Mare and Others*[14] where the court had to decide whether the provisions of Rule 4(1)(a)(iv) were met where a summons was served by *"affixing"* a copy to the *"grass"* at the chosen *domicilium citandi et executandi,* a smallholding with a dwelling erected on the property, the court stated that;

"In my opinion, even though uniform rule 4(1)(a)(iv) allows for service at a chosen domicilium citandi by delivering or leaving a copy of the process at such address the rule does not, in my view, preclude strict compliance with the rules governing proper and effective service required by the rule. . . . By simply leaving the process to be served at the domicilium citandi, as happened in this instance where the section 129(1) notice was attached to the gate and the summons was affixed to the grass, without taking the necessary precautions that same will come to the notice of the defendant, does not constitute effective service to me."

[60] Further in the said judgment to following was said with regard to the evidential value of a return of service[15];

"A return of service, it is trite, is regarded as prima facie evidence of its content. Indeed, ***s 43(2)*** *of the* ***Superior Courts Act 10 of 2013*** *expressly provides that '[t]he return of the sheriff or a deputy sheriff of what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated'. It follows that such evidence may be challenged by adducing the clearest evidence. (See, for example, Greeff v Firstrand Bank Ltd 2012 (3) SA 157 (NCK), para 10; Deputy Sheriff, Witwatersrand v Goldberg)"*

[61] I am of the view that the facts in this matter before me are not similar to the facts in the matter of *Mare (supra).* The summons in this case was affected by *"affixing"* to

[14] [2020] ZAGPPHC 372 at paragraph 12.
[15] See paragraph [19].

the door of the property owned by the applicant, which property is situated in an enclosed Body Corporate Scheme, namely Monterey Complex. The summons was not *"affixed"* to *"grass"* on a smallholding comprising of 7,3767 hectares of land. The applicant utilizes the property in the matter before me as her primary residence, and the address was also her chosen *domicilium citandi et executandi.*

[62] Furthermore, the applicant clearly fails to take the court into her confidence by stating that the sheriff did not affect the writ of execution on 13 November 2017 at 10h05. The return of service, which is *prima facie* evidence of its contents, states that the *domicilium citandi et executandi* of the applicant was visited on the said date and the applicant refused to open the door, the applicant was "*very arrogant*" after the sheriff explained who he was. The applicant failed to put forward clear evidence that the averments by the sheriff is challenged and not true. Furthermore, of importance is the fact that the writ of execution was served a few months later on the same address where the summons in the main action was served.

[63] It is evident from the facts placed before me that on 26 March 2020 the sheriff served a second writ of execution on the applicant, personally, at the same address and upon demand of payment the applicant informed the sheriff that she has "*no money, jewellery and or immovable goods"* to satisfy the judgment debt, and a *nulla bona* return was forwarded to the respondent. I t seems highly unlikely that the applicant did not receive the summons on 24 January 2017, which was affected at the same address on 13 November 2017 and on 26 March 2020.

[64] Furthermore, it is clear from case law there is no time limits imposed on bringing an application for rescission in terms of Rule 42(1)(a), see *Mutebwa* and *Bakoven* cases. There is no need for the applicant to show *"good cause"* for any default in having brought the application for rescission or that she has a *bona fide* defence, she simply needs to meet the requisites as set out in the sub-rule.

[65] I find that the summons issued was affected on 24 January 2017 in accordance with Rule 4(1)(a)(iv). The relief sought by the respondent in the default judgment application was precisely the relief its counsel requested. The complaint now is that the judgment was granted "*erroneously"*.

[66] I am of the view that Rule 42(1)(a) has operation where the respondent sought an order different from that to which it was entitled under its cause of action as pleaded. It is clear that the respondent was not granted different relief from which was sought in the main action. Therefore, I find that the default judgment granted on 25 August 2017 was not granted erroneously.

Costs

[67] The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted by the court. The court leans against awarding attorney and client costs, and will grant such costs only on "*rare"* occasions.

[68] It is clear that normally the court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present. Where the court would in the light of the other facts not have hesitated to make an award of attorney and client costs, it refused to do so where there were faults on both sides, as it considered itself not justified in penalising one side only.

[69] In *Van Wyk v Millington*[16] it was pointed out that the court's reluctance to award attorney and client costs against a party is based on the right of every person to bring his complaints or his alleged wrongs before the court to get a decision, and he should not be penalised if he is misguided in bringing a hopeless case before the court. If,

[16] 1941 SA 1205 (C), also see Silverstream Investments (Kranskop) CC v Ronbo Automotive CC 1997 (1) SA 107 (D).

however, the court is satisfied that there is an absence of *bona fides* in bringing or defending an action it will not hesitate to award attorney and client costs.

[70] However, in the case before me it is evident that the applicant brought the application for rescission to avoid the execution of the property. The property is situated in a Home Owners Scheme, all owners and occupants residing in the scheme are obliged to pay the levies as prescribe by the Body Corporate. In this instance the applicant did not pay levies and as a result the respondent had to approach court for relief. After the default judgment was granted in March 2017 the applicant persisted in not paying her levies due to the Body Corporate. She approached the court for the rescission of the default judgment which was a futile attempt.

[71] The respondent requested the court to grant costs in the matter on a punitive scale.

[72] Owners and occupants in the scheme who pay their levies should not be punished for the applicant's refusal to pay her levies and they had also incurred further expenses in order to appoint counsel to oppose the application for rescission. Having regard to the weak merits brought forward by the applicant I regard the applicant as being vexatious by putting the respondent to an expense which the respondent ought not to bear.

Order

[73] In the premises the following order is made:

1. It is ordered that the application is dismissed.

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

CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	03 November 2021
Date of judgment:	18 November 2021

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