

HEARING DATE: 5 JUNE 2019

IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15678/12

In the application between:

DENVER LANGENHOVEN

Applicant

and

THE SHERIFF OF SIMON'S TOWN

First Respondent

DAVID WHELAN

Second Respondent

CAPE TOWN COASTAL PROPERTIES (PTY LTD)  
(Registration number: 2002/029736/07)

Third Respondent

BARNASCHONE ATTORNEYS

Fourth Respondent

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FILING NOTICE

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FILED HEREWITH: Applicant's Heads of Argument

DATED at BELLVILLE on the 22<sup>ND</sup> day of MAY 2019

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**22 MAY 2018**

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**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 15678/2012

In the application between:

**DENVER LANGENHOVEN**

Applicant

and

**THE SHERIFF OF SIMON'S TOWN**

First Respondent & 3

others

**DAVID WHELAN**

Second Respondent

**CAPE TOWN COASTEL PROPERTIES (PTY  
LTD)**

Third Respondent

Registration number: 2002/029736/07)

**BARNASCHONE ATTORNEYS**

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**APPLICANT'S HEADS OF ARGUMENT**

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## Summary Introduction

1. This matter involves part B<sup>1</sup> of the notice of motion in terms of which the applicant seeks specific performance by the first respondent to enable the transfer of certain immovable properties into the applicant's name. The first respondent is required to sign the necessary transfer documents, more particularly the Power of Attorney, and to take all the necessary steps to give effect to the deed of sale, as amended. The applicant also seeks alternative relief in the event that the first respondent persists with its refusal to sign the transfer documents.
2. Two properties are the subject of this application. The first property is more fully described as Erf 1, Simons Town ("property 1") while the second property is more fully described as Erf 3410 ("property 2"). Where necessary property 1 and property 2 will collectively be referred to as "the properties". Property 1 and property 2 are neighbouring properties.
3. The common cause facts that resulted in the current stalemate between the applicant and first respondent originated during August 2012 when Investec Bank Ltd ("Investec") launched an application in the above Honourable Court under case number 15678/2012 against third respondent and one, Martin Kelly ("Kelly"). On or about 19 September 2012 default judgment was granted in favour of Investec against the third respondent and Kelly.

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<sup>1</sup> Part A of the notice of motion sought interim interdictory relief, which the Court ordered by agreement on 31 January 2019. Record: p 126 - 127

4. During May 2013, second respondent also instituted action against third respondent in this Honourable Court under case number 6837/2013 in respect of a different cause of action to that of Investec. The cause of action in that matter arose from a judgment<sup>2</sup> which second respondent obtained against Kelly.
5. Since Investec held security for its debt over property 1, second respondent was unable to execute against third respondent on the judgment it obtained. Investec and the second respondent concluded a cession agreement in terms of which Investec ceded all of its claim and security, it held over property 1, in favour of the second respondent. As a result of the aforementioned agreement, second respondent during November 2013 brought an application, under case number 15678/2012, to substitute Investec with himself as the judgment creditor based on the cession agreement. The substitution order was granted on 28 November 2013.
6. However, prior to the substitution order and on 20 November 2013, the Registrar of the this Honourable Court issued a writ of execution against property 1 in the amounts of R 1 022 817,67 and R 1 139 553, 52, plus interest. As a result property 1 was attached in execution and on or about 5 August 2014 the first respondent published a notice of sale in execution for the sale of property 1. The auction was scheduled to take place on or about 12 August 2014.

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<sup>2</sup> Default judgment in favour of the second respondent, against third respondent was granted on or about 7 June 2013.

7. At the scheduled auction on 12 August 2014 the applicant purchased property 1 for the amount of R 3 200 000.00. **(Record: p 24 – 38)** The applicant paid the first respondent its Sheriff's commission and a 10% deposit as required by the conditions of sale.
  
8. On 13 August 2014, in a further turn of events, an entity by the name of Power Tuning APR CC ("the CC") represented by applicant and the second respondent concluded a deed of sale in terms of which the CC agreed to purchase property 2<sup>3</sup> from the second respondent for the purchase price of R 2 500 000.00.  
**Record: p 39 – 52**
  
9. Clause 4.2.1 of the deed of sale in respect of property 2 contained a clause providing for the payment of the purchase price and delivery of guarantees. Due to financial difficulties the CC failed to comply with its obligations in terms of the financial provisions of the deed of sale in respect of property 2. The applicant also failed to comply with the corresponding provisions contained in the conditions of sale in respect of property 1. Despite the applicant's non-compliance with the respective deeds of sale neither the first or second respondent cancelled their respective deeds of sale.
  
10. Despite managing to make *ad hoc* payments amounting to approximately R 350 000.00 towards the purchase price of property 1 the applicant still failed to comply with the financial provisions in the respective deeds of sale. The

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<sup>3</sup> Since property 1 and property 2 were neighbouring properties the applicant's intention was to create and establish a Khoisan Village on the properties

applicant eventually managed to broker a solution in order to comply with his financial obligations in respect of the concluded deeds of sale.

11. The abovementioned solution entailed the registration of a surety bond for the balance of the purchase price, in respect of the properties, over a further property known as Portion 78 (A Portion of Portion 24) of the farm Morningstar No 141 in the City of Cape Town, which is held by ACACIA TRADING 189 CC ("the Acacia Trading property"). Raycaldo Randel Rowland, a member of Acacia Trading, signed as surety for the CC's and the applicant's indebtedness. **(Record: p 58 – 67).**

12. The second respondent accepted the registration of a surety bond as compliance with the finance provisions in respect of the properties. In order to give effect to the aforementioned the second respondent launched an application under case number 15678/2012 on or about 1 August 2017. The application was for a declaratory order amending the conditions of sale and to substitute it with a provision that is in line with the agreement reached between the parties. The first respondent did not oppose the application and the order, *inter alia* amending the conditions of sale was granted on 17 August 2017. **Record: p 76 - 77.**

13. Pursuant to the amended conditions of sale the applicant has furnished the fourth respondent, with all the information required for the registration process.

14. Despite complying with all his obligations in respect of property 1, the property till date could not be registered in the applicant's name because the fourth respondent was still awaiting the signed Power of Attorney from the first respondent. The first respondent refuses to provide such power of attorney.
15. Despite numerous requests for the first respondent to do the necessary to effect the transfer and registration of the properties, the first respondent has till date failed to do so. The first respondent's refusal resulted in the present application.

#### **The first respondent's opposition**

16. The first respondent is the only respondent opposing the relief. The grounds for opposition are the following:
  - 16.1 That the applicant in actual fact seeks an order for specific performance and since that is so the applicant has failed to comply with his reciprocal duties in terms of clause 4.4 of the order by the Honourable Justice Cloete ("the *Cloete order*"). **Record: p 93 par 9.**
  - 16.2 The applicant's right to claim transfer and registration of property 1 has prescribed in terms of section 11(d) of the Prescription Act, 68 of 1969 as more than three (3) years has lapsed since the sale in execution took place on 14 August 2014. **Record: p 94 par 14**



- 16.3 The applicant's application is premature as payment of the purchase price to the first respondent still had to be made or properly secured before the first respondent can sign the transfer documents. **Record: p 102 – 103 paras 26 - 33**
- 16.4 The applicant has made an error in person regarding the payment of the purchase price. The purchase price is payable to the first respondent and not the second respondent. **Record: p 106 par 35**
- 16.5 A counter-application seeking the rescission of the *Cloete order*. **Record: p 122 - 125**
17. In the paragraphs that follow I will address the above grounds of opposition. It is evident from an analysis of the grounds of opposition that the first respondent actually has no substantive ground in opposition to the relief the applicant seeks. Consequently, in submission, if the applicant can extinguish the first respondent's grounds of opposition it follows that the applicant is entitled to the relief.
- No case made out in founding affidavit
18. This ground is premised on the basis that the applicant did not comply with the *Cloete order* that substituted the provision regulating the financing requirements in DL 3 relating to property 1. It is alleged that the lack of non-compliance is evident if regard is had to the amended clause of the relevant deed of sale that

requires '*...the registration of a surety bond...*', since the applicant has not provided evidence that a surety bond has been registered.

19. These allegations are devoid of any merit if the Court considers that clause 4.4 as amended by the *Cloete order* does not stipulate when the surety bond must be registered. The applicant confirms that the surety bond will be registered simultaneously with the registration of the transfer of the property. **Record: p 146 par 11.4**

20. In submission, the applicant has complied with all of its obligations in terms of the deed of sale in respect of property 1 and is the first respondent required to give transfer of the property.

Prescription of applicant's right to claim transfer

21. This ground of opposition is similarly without merit.

22. To the extent that the first respondent can convince this court that the right to claim transfer of the property constitute a debt as envisaged by the Prescription Act, it is clear that the provisions of section 14(1)&(2) and section 15 of the Prescription Act finds application in this instance.

23. The first respondent cannot gainsay the fact that the second respondent instituted the proceedings that amended the provisions of DL 3 prior to the expiry of the 3-year period. **Record: p 76.** This is clearly a scenario where judicial prescription provided for in section 15 of the Prescription Act applies.

24. In respect of section 14(1) and (2), in submission, the running of prescription is also interrupted by either an express or tacit acknowledgement by the first respondent. This is evident from the following:

24.1 Since 2014 the first respondent has not done anything to enforce its rights in terms of DL 3. In fact, till date of this application no breach notice has been sent to the applicant. This clearly indicates at least a tacit acknowledgment that the applicant is entitled to transfer.

24.2 The first respondent was joined to the proceedings of August 2017 and did not oppose the relief sought by the second respondent. This clearly is both an express and tacit acknowledgement that the applicant is still entitled to transfer of the property.

24.3 Subsequent to the *Cloete order* the applicant has made payment of all the costs of the transfer to the fourth respondent. **Record p 80.** The first respondent was aware of these payments without challenging the legitimacy of the applicant's right to claim transfer. Clearly, the aforementioned conduct amounts to at least a tacit acknowledgment that the applicant is entitled to transfer.

#### Premature nature of application

25. The premature argument revolves around the allegation that the first respondent must receive payment of the purchase price in order for him to fulfil his duties. This contention is clearly misconceived as the first respondent is not the

execution creditor. The first respondent has a duty towards the execution creditor. The first respondent further has a duty to report to the court.

26. In circumstances where the second respondent is satisfied with the security to settle the judgment debt the first respondent's objections on the aspect of payment are immaterial.
27. In submission, there is no merit in this ground of opposition.

The Counter-application seeking rescission

28. As a last gasped attempt the first respondent seeks to rescind the *Cloete order* on the basis that it was erroneously sought and granted as envisaged by Uniform Rule 42(1)(a).
29. The counter-rescission application fails on many levels.
30. Firstly, the rule on which the first respondent relies envisages an order 'granted in the absence of any party affected thereby'. In this matter the first respondent has not advanced any facts to illustrate that he was not aware of the application by the second respondent. The first respondent had legal representation and was for purposes of the sub-rule regarded to be present when the application was granted. The aforementioned submission must be considered together with the principle that acquiescence in a judgment will normally be a bar to an application for rescission of that judgment. *Schmidlin v Multisound (Pty) Ltd* 1991 (2) SA 151 (C).

31. Secondly, the order in this matter does not fall within the category of what can be classified as an erroneous order envisaged by the sub-rule. The principles are well established that an order is erroneously granted:

31.1 If it was legally incompetent for the court to have made such an order. (*Athmaram v Singh* 1989 (3) SA 953 (D) 956D–E);

31.2 If there was an irregularity in the proceedings or if the court was unaware of facts, if known to it, which would have precluded it from a procedural point of view from making the order. *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C); also *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP)

31.3 This is not a case where the application that the second respondent instituted lacked the necessary averments to support the relief sought before Cloete J. *Silver Falcon Trading 333 (Pty) Ltd and Others v Nedbank Ltd* 2012 (3) SA 371 (KZP)

31.4 It cannot be said that the judgment had been granted erroneously because the court was unaware of a defence which the first respondent could have raised but did not. *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA).

- 31.5 *A iustus error*, even if induced by a non-fraudulent misrepresentation by the successful litigant, does not entitle a party to have the judgment set aside. *Mabuza v Nedbank Ltd and Another* 2015 (3) SA 369 (GP)
32. Thirdly, the first respondent does not clear the hurdle that the rescission application has been instituted within a reasonable time. The aforementioned principle has been confirmed in *First National Bank of SA Ltd v Van Rensburg* NO 1994 (1) SA 677 (T).
33. The first respondent has been aware since August 2017 of the *Cloete order*. It has never contemplated instituting any proceedings till date. In fact, the counter-application was only triggered when the applicant launched the present proceedings. The counter-application seeking rescission is clearly not instituted within a reasonable time. Consequently, the counter-application does not clear the reasonable time hurdle and should it be dismissed with costs.
34. In submission, the counter-rescission application fails on any of the grounds foreshadowed above.

#### **Conclusion and proposed order**

35. In submission, the first respondent has no justifiable reason in law to refuse to sign the Power of Attorney to enable fourth respondent to the register property 1 in the applicant's name. Consequently, the following order is proposed:
1. The counter-application is dismissed with costs.

2. The applicant is granted the relief as per the notice of motion.

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**Adrian Montzinger**  
**Chambers, Cape Town**  
**22 May 2019**