BOX 256

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO 15678/2012

In the matter between:

DENVER LANGENHOVEN — Applicant

and

THE SHERIFF OF SIMON'S TOWN — First Respondent

DAVID WHELAN — Second Respondent

CAPE TOWN COASTAL PROPERTIES (PTY) LTD — Third Respondent

(Registration number 2002/029736/07)

BARNASCHONE ATTORNEYS — Fourth Respondent

FILING NOTICE

Document: First Respondent's Heads of Argument in Counter Application.

DATED at TYGER VALLEY on this 22nd day of MAY 2019.

J C FOURIE: 021 929 2600

COURT ROLL: 5 JUNE 2019

FOURIE BASSON & VELDTMAN

Per:_____

J C FOURIE
First Respondent's Attorneys
Tijger Park 5
Off Willie van Schoor Drive
TYGER VALLEY
(REF: JF/MVH/S1069)
c/o
WALKERS INC.
Ninth Floor
The Terraces
34 Bree Street
CAPE TOWN

TO: THE REGISTRAR
Western Cape Division
The High Court of South Africa
35 Keerom Street
CAPE TOWN

AND TO: YVETTE CLOETE & ASSOCIATES
Applicant's Attorneys
11A Mountain View Office Park
28 Bella Rosa Road
BELLVILLE
(Ref: YC/L026/16)
c/o
DE WAAL BOSHOFF INC
303 The Chambers
50 Keerom Street
CAPE TOWN

DE WAAL BOSHOFF INC.
Received on 21/05/19 at
0124 by

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

Case No: **15678/2012**

In the matter between:

DENVER LANGENHOVEN	Plaintiff
and	
THE SHERIFF OF SIMON'S TOWN	First Defendant
DAVID WHELAN	Second Defendant
CAPE TOWN COASTAL PROPERTIES (PTY) LTD	Third Defendant
BARNASCHONE ATTORNEYS	Fourth Defendant
ACACIA TRADING 189 CC	Fifth Defendant

FIRST RESPONDENT'S HEADS OF ARGUMENT ON COUNTER APPLICATION

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1. These heads are in respect of the first respondent's counter application for rescission of the order granted by the Honourable Ms Justice Cloete ("***Cloete J***") on 17 August 2017.

2. The evidence in support of the rescission application is set out in the first respondent's answering affidavit to the main application at

paragraphs 18 to 25.[1]

3. The application is brought in terms of Rule 42(1)(a) on the basis that the order was erroneously sought for and/or granted in the absence of the first respondent. It is submitted that the firs respondent has also made out a case that the order be rescinded on common law grounds, which requires "good cause" to be established.

4. The counter application is to be heard simultaneously with the main application.

5. These heads of argument are structured as follows:

5.1. Firstly, I will set out the relevant factual matrix for purposes of the counter application;

5.2. Secondly, I shall deal with the legal principles applicable to rescissions in terms of Rule 42(1)(a) and the common law;

5.3. Thirdly, I will deal with the grounds upon which the first respondent contends the order was sought for and/or granted erroneously in terms of Rule 42(1)(a) and stands to be set aside in terms of the common law;

5.4. Lastly, I will deal with the first respondent's reasons for his default and its delay in bringing the counter application.

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[1] Record: pages 96 – 102.

LEGAL PRINCIPLES APPLICABLE TO RULE 42(1)(a) AND COMMON LAW:

6. Rule 42(1)(a) provides as follows:

> "*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;"*

7. In *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk), at 510D-G White J examined various case law on Rule 42(1)(a) and held as follows:

> *"It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment."*

8. In *Bakoven Limited v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E), at 471E-I Erasmus J stated the requirements in terms of Rule 42(1)(a) as follows:

> *"Rule 42(1)(a), it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An*

order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of a 'mistake in a matter of law (or fact) appearing on the proceedings of a Court of record' (The Shorter 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 Peer 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. It is only when he cannot rely on an 'error' that he has to fall back on Rule 31(2)(b) (where he was in default of delivery of a notice of intention to defend or of a plea) or on the common law (in all other cases). In both latter instances he must show 'good cause'."

(own underlining)

9. *Bakoven* has been criticised that the Court is not confined to the record of the proceedings in deciding whether a judgment was erroneously granted.[2]

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[2] *President of The Republic of South Africa v Eisenberg & Associates (minister of Home Affairs Intervening)* 2005 (1) SA 247 (C), at 264G; *Lodhi 2 Prop Inv CC v Bondev Devs (Pty) Ltd* 2007 (6) SA 87 (SCA), at para 24.

10. In *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz & Others* 1996 (4) SA 411 (C), Van Reenen J summarised the circumstances under which relief will be granted under Rule 42(1)(a) as follows at 417G-I:

> *"Relief will be granted under this Rule if there was an irregularity in the proceedings ...; if the Court lacked legal competence to have made the order ...; and if the Court, at the time the order was made, was unaware of facts which, if known to it, would have precluded the granting of the order .... It is not necessary for an applicant to show 'good cause' for the Rule to apply ...."*
>
> (reference to case law omitted)

11. In applications for rescission of judgment brought in terms of Rule 42, an applicant must bring such application within a reasonable time after obtaining knowledge of the judgment, failing which a reasonable explanation should be given for such delay.[3]

12. In order to succeed an applicant for rescission of a default judgment in terms of common law, an applicant must show good cause. Our courts have refrained from attempting an exhaustive definition of the meaning of good cause in order not to abridge or fetter in any way the wide discretion implied by these words. The Court's discretion must be exercised after a proper consideration of all the relevant

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[3] *Firstrand National Bank of South Africa Ltd v Van Rensburg NO & Others* 1994 (1) SA 677 (C), at 681H.

circumstances. The general approach by our Courts is that an applicant must show good cause *(a)* by giving a reasonable explanation of his default; *(b)* by showing that his application is made *bona fide*; and *(c)* by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success.[4]

FACTUAL MATRIX:

6. The order was granted by Cloete J on 17 August 2017 in the absence of the first respondent ("***the Sheriff***"). The application was brought by the second respondent ("***Whelan***") under case no: 15678/2012, being the case wherein he is the execution creditor of the third respondent ("***Cape Town Coastal***").

7. In the application Whelan sought to amend paragraph 4.4 of the Conditions of Sale ("***the Conditions***"). The Conditions was concluded between Langenhoven and the Sheriff on 12 August 2014 pursuant to the sale in execution.

8. The relevant clause that Whelan sought to amend was clause 4.4, which provided as follows:

> "*4.4 The balance of the purchase price shall be paid to the Sheriff against transfer and shall be secured by a bank guarantee, to be approved by the execution creditor's attorney, which shall be furnished to the Sheriff within 21 days after the date of sale.*

[4] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), at para 11.

Should the purchaser fail to furnish to sheriff (sic) *with a bank guarantee within 21 days after the sale of sale, the sheriff* (sic) *may in his/her sole discretion grant the purchaser a 5 day extension within which to provide the required bank guarantee. Should the Purchaser fail to furnish the sheriff* (sic) *with a bank guarantee, which is approved by the execution creditor's attorney, within the required time, the sale may be cancelled."*

9. It is submitted that the purpose of clause 4.4 is twofold:

9.1. First, it provides for the payment of the balance of the purchase price to the Sheriff upon registration; and

9.2. Secondly, it provides the Sheriff with sufficient security for the payment of the balance of the purchase price upon registration of transfer. This is for obvious reasons, so that the Sheriff does not pass transfer of the property and runs the risk of not being paid. This is similar to any normal registration of transfer of property where the purchase price is payable upon registration and the seller requires security in the form of guarantees before registration of transfer.

10. The reasons for the application by Whelan was set out in paragraphs 11 to 35 of his founding affidavit, which may be summarised as follows:

10.1. On 19 September 2012 Investec Bank Limited ("***Investec***") obtained default judgment against, *inter alia*, Cape Town Coastal

under case no: 15678/2012. Investec also obtained an order declaring the two immovable properties of Cape Town Coastal specially executable;

10.2. On 7 June 2013 Whelan obtained his own default judgment against Cape Town Coastal under case no: 6837/2013;

10.3. In or about November 2013, Investec ceded its right, title and interest in its judgment against Cape Town Coastal to Whelan. Accordingly, Whelan was now the judgment creditor in respect of both default judgments granted under case numbers 15678/2012 and 6837/2013. Whelan was also formally substituted as the plaintiff in Investec's default judgment on 28 November 2013;

10.4. Whelan, as the judgment creditor, issued a writ of execution against both properties in respect of the two default judgments. One of the properties, being Erf 1, Simons Town ("***the first property***") – which is the subject-matter of the present application – was sold in execution by the Sheriff to Langenhoven on 12 August 2014 for R3.2 million. Langenhoven paid the Sheriff's commission and 10% deposit to the Sheriff and signed the Conditions on 12 August 2014;

10.5. On the same day, the Sheriff also sold the other property, Erf 3410, Simons Town ("***the second property***") to Whelan, who bought into the property as the execution creditor. (Although, it

is stated that Whelan has complied with his obligations in terms of the conditions of sale, my instructions are that he has not complied with clauses 4.4 of the conditions of sale.)

10.6. Langenhoven failed to comply with his obligations in terms of clause 4.4 of the Conditions;

10.7. Whelen onsold the second property to Power Tuning APR CC ("***the CC***") for the sum of R2.5 million. (See Annexure "NHB8" to the founding affidavit of Whelan in the application for amendment);

10.8. The CC failed to comply with its payment obligations in terms of the Deed of Sale;

10.9. It appeared that Langenhoven purchased the first property and the CC the second property, for the purposes of creating and establishing a Koisan village. For this reason, Whelan granted Langenhoven and the CC latitude to raise the necessary finance to meet their outstanding obligations of R5.38 million;

10.10. Langenhoven (being the purchaser of the first property at the sale in execution) and Whelan subsequently agreed that in lieu of his obligations in terms of clause 4.4 of the Conditions to provide to the Sheriff a bank guarantee for the payment of the balance of the purchase price, an alternative form of security would be provided as follows:

10.10.1. as security for Langenhoven's indebtedness to Whelan, it obtained suretyships by Acacia Trading 189 CC ("***Acacia***") and Raycaldo Roland ("***Roland***"). Acacia also provided a surety bond as further security in respect of its suretyship;

10.10.2. Whelan, as execution creditor, sought an amendment of clause 4.4 of the Conditions that the balance of the purchase price would be secured by the registration of a suretyship bond over the property of Acacia.

11. On 17 August 2017 Cloete J granted an order rectifying paragraph 4.4 of the Conditions.

12. In terms of the draft suretyship bond, Acacia purports to bind itself as surety for *inter alia* Langenhoven's indebtedness towards Whelan. It also records that *inter alia* Langenhoven are truly and lawfully indebted to Whelan. But, this is incorrect. In terms of the Conditions, Langenhoven does not owe Whelan, but rather the Sheriff. In terms of the original clause 4.4, Langenhoven had to pay the balance of the purchase price to the **Sheriff**, not Whelan. This is critical in understanding why the amendment to clause 4.4 was erroneously sought for and granted, which I will return to hereinbelow.

13. Having examined the nature of the transaction, I shall proceed to set out why the order granted by Cloete J was sought for and granted erroneously in terms of Rule 42(1)(a).

MERITS FOR RESCISSION OF ORDER:

Whelan's lack of *locus standi*:

14. Whelan was the applicant in the application for amendment of clause 4.4 of the Conditions. However, Whelan did not have *locus standi* to bring the application as he was neither the seller nor the purchaser of the first property and therefore not a party to the Conditions.

15. Due to Whelan's lack of locus standi, the order was granted erroneously.

Prescription:

16. The execution sale of the first property took place on 14 August 2014, upon which date the applicant obtained the right to claim and procure transfer of the property.

17. More than 3 years lapsed since the date of the sale and the applicant had failed to claim registration of transfer of the immovable property.

18. In the matter of *Desai N.O. v Desai & Others* 1996 (1) SA 141 (A), the Supreme Court of Appeal dealt with an obligation of a party to procure registration of transfer of interests in immovable properties in the context of prescription. Grosskopf JA said at 146G – 147B as follows:

> *"For the reasons which follow I am of the opinion that the appellant's "debt", ie the obligation to procure registration of*

transfer in terms of clause 13(d), was indeed extinguished by prescription. Seeing that this finding is decisive of the case, it is unnecessary to consider the other aspects raised in argument, including the submissions relating to the true nature of the agreement and the applicability of ***s 1(1)*** *of Act 71 of 1969.*

Section 10(1) of the Prescription Act 68 of 1969 ('the Act') lays down that a "debt" shall be extinguished after the lapse of the relevant prescriptive period, which in the instant case was three years (see s 11(d)). The term 'debt' is not defined in the Act, but in the context of s 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something. (See Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd ***1981 (3) SA 340*** *(A) at 344F-G; Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* ***1983 (1) SA 354*** *(A) at 370B.) It follows that the undertaking in clause 13(d) to procure registration of transfer was a "debt" as envisaged in s 10(1).*"

(own underling)

19. Applying the aforesaid legal principles to the present matter, there are two obligations that are relevant:

19.1. First, the obligation by Langenhoven to procure registration of transfer in terms of the conditions of sale; and

19.2. Secondly, the obligation by the Sheriff to pass transfer in terms of the Conditions.

20. On the authority of *Desai*, both the above two obligations constitute a "*debt*" as envisaged in Section 10(1) which may be extinguished by prescription after the lapse of 3 years.

21. In the present matter, Langenhoven's right to claim transfer of registration of the first property and the Sheriff's reciprocal obligation to pass transfer were extinguished by prescription in terms of Section 11(d) of the Prescription Act.

22. The contention by Langenhoven that the running of prescription was interrupted when Whelan's brought the application on 1 August 2017 for the amendment of clause 4.4 is misconceived for the following reasons:[5]

22.1. Langenhoven did not bring the application, Whelan did. Langenhoven was a third respondent in the application. Accordingly, there was no "*acknowledgement of liability*" as contended by him;

22.2. But, even accepting that Langenhoven acknowledged his liability to meet his financial obligations – presumably to interrupt prescription in terms of Section 14(1) of the Prescription Act – it is unrelated to the obligations that have become prescribed.

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[5] Record: page 148, para 17.3.

Section 14 of the Prescription Act deals with the interruption of prescription by acknowledgement of a liability by the debtor. It is not the Sheriff's case that Langenhoven's liability to pay has become prescribed, but rather his obligation to procure registration of transfer was a debt which has prescribed in terms of Section 11 of the Prescription Act. Furthermore, the Sheriff's obligation to pass transfer constitutes a debt within the meaning of Section 11 of the Prescription Act which has become prescribed. Any acknowledgment by Langenhoven of his payment obligations is irrelevant.

23. Put differently, a **creditor** cannot interrupt prescription in terms of Section 14(1) by acknowledging that the **debtor** still owes him money. It is the **debtor** that must acknowledge his liability to pay the creditor. Only then would prescription be interrupted. Applying the aforesaid example to the present matter, when Langenhoven acknowledged his liability to pay, it did not affect the prescription of his obligation to procure registration of transfer and the Sheriff's obligation to pass transfer.

24. Had Cloete J been made aware that the obligations in terms of the Conditions have become prescribed, Cloete J would not have granted the order amending the payment obligations of Langenhoven. The order by Cloete J could not have breathed life into the transaction and obligations that were extinguished by prescription. It is submitted that this constitutes an error as envisaged by Rule 42(1)(a) when the order

was sought for and/or granted, which would have precluded the granting of the order. In addition, the above constitutes a *bona fide* defence to Whelan's application which *prima facie* has some prospect of success.

Rule 46 does not allow for amendment AFTER sale has been concluded:

25. It is submitted that Cloete J did not have the power to amend the Conditions after the conclusion of the sale in execution.

26. Rule 46(8) provides that the conditions of sale must be settled by the Sheriff prior to the date of the sale, including any conditions ordered by the Court and the possible inclusion of amended conditions submitted by an interested party. The Sheriff's position became *functus officio* upon conclusion of the sale and the signing of the Conditions, save for his duty to pass transfer against payment of the purchase price and to do the distribution thereafter, as provided for in Rule 46.

27. After the sale in execution has been concluded, a binding contract is concluded between the purchaser and the Sheriff. It is submitted that the Court had no power in terms of Rule 46, or in terms of common law, to amend the purchaser's payment obligations as set out in the conditions of sale.

28. In addition, it is submitted that the Court did not have inherent jurisdiction to order amendment of the Conditions after the sale had

been concluded. In *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC), at para 13, Makgoro stated as follows:

> "*Execution is a means of enforcing a judgment or order of a court and is incidental to the judicial process. It is regulated by a statute and the Rules of Court and is subject to the supervision of the court which has inherent jurisdiction to stay the execution if the interests of justice so require.*"
>
> (own underlining)

29. The inherent power of the Courts to regulate their own process applies to adjectival or procedural rights and not substantive rights.[6] It is submitted that once the sale in execution was concluded, it created substantive rights and obligations to the contracting parties, i.e. the Sheriff and Langenhoven. Save for the Court's powers specifically provided for in Ruler 46, i.e. to cancel the sale in terms of Rule 46(11) upon the purchaser's non-compliance with the Conditions, the Court has no inherent powers to amend the terms of the Conditions after the sale in execution has been concluded.

30. Furthermore, there is an obvious reason why the parties should not be allowed to amend a purchaser's payment obligations in the conditions of sale. Rule 46(8) provides for the obligation of the execution creditor to prepare the conditions of sale corresponding substantially with Form 21 of the First Schedule. Furthermore, the said rule provides for the

[6] Nampak Glass (Pty) Limited v Vodacom (Pty) Limited and Others (2814/2018) [2018] ZAGPJHC 481; 2019 (1) SA 257 (GJ), at para 10.

inclusion of any further terms ordered by the court or submitted by interested parties to the Sheriff. The Sheriff shall then ultimately settle the conditions of sale in terms of Rule 46(8)(a)(iv). In terms of Rule 46(8)(b), the execution creditor shall thereafter supply the said Sheriff with three copies of the conditions of sale, one of which shall lie for inspection by interested parties at the office of the Sheriff for 15 days prior to the date of sale. In terms of Rule 46(12), the sale shall be conducted upon the conditions of sale stipulated under Rule 46(8) and the immovable property shall be sold to the highest bidder.

31. In the present matter, the sale was conducted on the basis of clause 4.4 – that the balance of the purchase price be paid to the Sheriff against transfer and shall be secured by a bank guarantee to be furnished to the Sheriff within 21 days after the date of sale. These were the terms of the Conditions that laid open for inspection to interested parties and the terms upon which prospective purchasers attended the sale and was willing to bid. Prospective purchasers were not informed that the payment terms of the sale could be complied with in another form, for example by providing a surety bond instead of a payment guarantee. Had interested parties and prospective buyers been aware of this possible alternative form of payment, the sale may have attracted more buyers. In the premise, all interested and prospective buyers of the property, whoever they may be, will clearly be prejudiced if the payment terms of the sale in execution may be amended <u>after</u> the sale in execution. It is submitted that it is exactly for this reason why Rule 46 does not allow for the amendment of the

conditions of sale after the sale. As is the case in the present matter, any interested parties in the sale in execution were clearly prejudiced by the order by Cloete J.

32. For the above reasons, it is submitted that the Court erred in law by amending the payment obligations of Langenhoven by amending clauses 4.4 of the Condition. In addition, the above constitutes a *bona fide* defence to Whelan's application which *prima facie* has some prospect of success.

The proposed amendment of clause 4.4 does not provide for payment and security to the Sheriff:

33. The original clause 4.4 of the Conditions provided that the balance of the purchase price would be payable to the Sheriff against transfer. This is clearly one of the *essentialia* of the Conditions and accords with the Sheriff's obligations in terms of Rule 46(13)(b), namely to give transfer to the purchaser against payment of the purchase money. However, the amended clause 4.4 does not have a similar provision. Clause 4.4 – as it presently reads – does not provide for any obligation by Langenhoven to pay the balance of the purchase price to **the Sheriff**. Neither Rule 46, nor Form 21 of the First Schedule (to which the conditions of sale must substantially correspond) may provide that the purchaser may pay the purchase price to any other party than the Sheriff. This renders the amended clause 4.4 in material conflict with the terms contained in Form 21.

34. Even accepting that it is a tacit or implied term that Langenhoven must pay the balance of the purchase price on transfer, its begs the question to whom he must pay. If one considers the Surety Bond, it appears that Langehoven's indebtedness to pay Whelan is secured. But, in terms of Rule 46 Langenhoven may not pay Whelan directly, he must pay the Sheriff. Furthermore, should Langenhoven fail to pay the balance and the surety bond is called up, all that would happen is that the surety, Acacia, will pay Whelan. But, the balance of the purchase price may not be set-off against the sureties' indebtedness to Whelan. In this regard, a clause in the conditions of sale which purports to set off the purchaser's obligation to pay is *ultra vires* the provisions of Rule 46 and hence invalid.[7]

35. Apart from the purchaser's obligation to pay upon transfer as provided for in clause 4.4, the original clause 4.4 also provided for a mechanism of how the Sheriff would be provided with security to guarantee such payment. It provided that the payment of the purchase price shall be secured by a bank guarantee, to be approved by the execution creditor's attorney, which shall be furnished to the Sheriff within 21 days after the date of sale. However, the amended clause 4.4 provides that the balance of the purchase price shall be secured by the registration of a surety bond. But, the draft surety bond does not provide any security to the Sheriff for the payment of the balance of the purchase price by Langenhoven. What it purports to do is to provide

[7] See unreported Full Bench judgment of this Division of *ABSA Bank Limited v The Sheriff of the High Court Simons Town* (case no: 26018/2010) delivered on 9 May 2011.

security to Whelan for any indebtedness by Langenhoven and the CC. With the amendment of clause 4.4, the Sheriff **has no security** and no protection that Langenhoven would honour his obligations to pay the balance of the purchase price upon registration. This would place the Sheriff at significant risk of non-payment once registration of transfer is effected.

36. In the premise, it is submitted that had Cloete J been informed that the amended clause 4.4 would not afford the Sheriff with any security, Cloete J would not have granted the order. It is submitted that for this reason the order was erroneously sought and/or granted. In addition, the above constitutes a *bona fide* defence to Whelan's application which *prima facie* has some prospect of success.

Further grounds:

37. The Sheriff also submits that the order was erroneously granted for the following reasons:

37.1. Paragraph 1 of the order provides that clause 4.4 of the conditions be "*rectified*". However, no case was made out on the papers for rectification of the conditions of sale; and

37.2. The Sheriff is not reflected as a beneficiary (mortgagee and creditor) under the surety bond and has no right to claim payment in terms thereof. In fact, the surety bond does not even reflect who the mortgagee is. In the premise, the Registrar of

Deeds will refuse to register the surety bond. Accordingly, it would be impossible to give effect to the amended clause 4.4 of the Conditions.

38. The order by Cloete J as it presently reads, provides expressly that the surety bond **annexed to the application as "NB13", shall be registered as security for the balance of the purchase price**. The order stands until amended or set aside. As the order currently reads, it is, with respect, erroneously granted in that it provides for the rectification of the conditions of sale and provides for the registration of Annexure "NB13" which is materially defective. If the applicant seeks authorisation to register a different Surety Bond to the one annexed as Annexure "NB13" to the application, the applicant will have to obtain such authorisation from the court, which it has failed to do.

39. In the premise, it is submitted that the order by Cloete J was erroneously sought for and/or granted and stands to be set aside. In addition, the above constitutes a *bona fide* defence to Whelan's application which *prima facie* has some prospect of success.

REASONS FOR DEFAULT AND EXPLANATION FOR DELAY IN BRINGING APPLICATION:

40. Whelan brought the application to amend clause 4.4 of the conditions of sale during August 2017. The order by Cloete J was granted on 17 August 2017.

41. The reasons why the Sheriff did not oppose the application is set out in paragraphs 21 to 23 which may be summarised as follows:

41.1. The Sheriff believed that his obligation to pass transfer was extinguished by prescription as dealt with above;[8]

41.2. The Sheriff considered himself not legally entitled to partake in the amendment of the conditions of sale after the conclusion of the sale in execution, due to his position having become *functus officio*, save for the duty to pass transfer to the purchaser against proper and timeous compliance by the purchaser with all his obligations and thereafter to deal with the proceeds in terms of Rule 46(14);[9]

41.3. Rule 46 did not afford the Sheriff with any powers to amend or "*settle*" the conditions of sale after the sale in execution. The Sheriff did not have the power to impose material changes to the conditions of sale without the consent of the execution creditor, especially not after the sale.[10] Accordingly, it would have served no purpose in participating in the proceedings;[11]

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[8] Record: page 101, para 21.4.
[9] Record: page 100, para 21.2.
[10] See unreported case of *ABSA Bank Limited v The Sheriff of the High Court Simons Town* (supra), at para 24.
[11] Record: page 100, para 21.3.

41.4. It would have been nonsensical for the Sheriff to engage in such expensive litigation where he had no direct interest or cover for his litigation costs;[12]

42. The Sheriff was compelled to bring the counter application due to the interdictory relief sought against him for specific performance. As dealt with above, should the Sheriff be compelled to pass transfer in terms of the amended clause 4.4, the Sheriff would be exposed to significant risk in that he would have no security for the payment of the balance of the purchase price upon transfer. It is for this reason why it is critical for the order to be rescinded to protect his interests as the order by Cloete J stands until set aside.[13] .

43. It is submitted that the Sheriff has provided an acceptable explanation for his default in opposing the application and his delay for bringing the application to set aside the order by Cloete J at such a late stage.

CONCLUSION:

44. Considering the aforesaid, it is submitted that the Sheriff has made out a case for the order by Cloete J to be rescinded in terms of Rule 42(1)(a), alternatively the common law and moves for an order in terms of paragraphs 2 and 3 of its counter application.

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[12] Record: page 101, para 21.5.
[13] Record: page 101, para 23.

J W JONKER

22 May 2019

Chambers

CAPE TOWN

Tel: 021-4240442

wynand@capebar.co.za

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

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FIRST RESPONDENT'S LIST OF AUTHORITIES

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1. *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk);

2. *Bakoven Limited v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E);

3. *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz & Others* 1996 (4) SA 411 (C);

4. *President of The Republic of South Africa v Eisenberg & Associates (minister of Home Affairs Intervening)* 2005 (1) SA 247 (C);

5. *Lodhi 2 Prop Inv CC v Bondev Devs (Pty) Ltd* 2007 (6) SA 87 (SCA);

6. *Firstrand National Bank of South Africa Ltd v Van Rensburg NO & Others* 1994 (1) SA 677 (C);

7. *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA);

8. *Desai N.O. v Desai & Others* 1996 (1) SA 141 (A);

9. *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC);

10. *Nampak Glass (Pty) Limited v Vodacom (Pty) Limited and Others* (2814/2018) [2018] ZAGPJHC 481; 2019 (1) SA 257 (GJ);

11. *ABSA Bank Limited v The Sheriff of the High Court Simons Town* (case no: 26018/2010) delivered on 9 May 2011.