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

DELETE WHICHEVER IS NOT APPLICABLE
(1)REPORTABLE: ~~YES~~/NO
(2)OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3)REVISED

9/12/2014
DATE SIGNATURE

CASE NO: 73147/2013

9/12/2014

In the matter between:

| | |
|---|---|
| **PAULOS CHRISTIAAN NKOSI** | Applicant |
| **And** | |
| **ABSA BANK LIMITED** | First Respondent |
| **REGISTRAR OF DEEDS, PRETORIA** | Second Respondent |
| **SHERIFF OF THE HIGH COURT, EVANDER, MPUMALANGA** | Third Respondent |
| **ANDREW JAMES** | Fourth Respondent |

**AND** CASE NO:61861/2011

In the matter between:

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| **IVAILO IVANOV** | Applicant |
| **And** | |
| **ABSA BANK LIMITED** | First Respondent |
| **REGISTRAR OF DEEDS ,PRETORIA** | Second Respondent |
| **SHERRIF OF THE HIGH COURT,TSHWANE SOUTH EAST** | Third Respondent |

## JUDGMENT

**STRAUSS, AJ:**

**INTRODUCTION**

1. The applicants Mr Nkosi and Mr Ivanov brought applications for rescission of default judgment granted in terms of Rule 31(2)(a) by the court. The same attorney acts on behalf of both the applicants on these applications. Both these applications were to be heard on the opposed motion court roll by me, after the first respondents enrolled them due to failure of the applicants in both matters to reply to the opposition of the first respondents, and failed to file heads of argument.

2. The first respondents opposes the application on the basis that the applicants had failed to show good cause for condonation, being in wilful default, and that the applicants had failed to demonstrate a *bona fide* defence to the first respondents claims. The first respondents also seeks a costs order on client and attorney scale against both applicants.

3. On the date of hearing of the applications the same counsel appeared for the applicants and first respondents. Counsel for the applicants handed up to the Court two notices of withdrawal of the applications, and tendered the wasted costs of the first respondents in both matters.

4. Counsel for the first respondents indicated that the first respondents does not accept the notice's of withdrawal, and that in terms of Rule 41(a) "*subsequent to the set down of a matter a notice of withdrawal may only be filed by consent between the parties or leave from the Court.*" The first respondent's attorneys have not consented to the application being withdrawn, and request the court not to grant leave to withdraw the

applications, but request that the applications must be dismissed with costs on attorney and client scale.

5. I agree with this stance of the first respondents as being the correct consequences in terms of Rule 41(a) and I will therefore have to deal with the merits of these applications and costs.

6. Counsel for the respondents also argued that the cost should be given on a punitive scale as the founding affidavits of the applicants in both these matters, are *verbatim* the same, and all the law pleaded in the founding papers are copied and inserted and do not differ in any form, and set out exactly the same defective defences. It is also argued that even the reasons for condonation given by the applicants, are *verbatim* the same. The founding papers therefore suffered scrutiny by the court as to their truthfulness and *bona fides*.

**FACTS DETERMINED FROM THE AFFIDAVITS**

7. In regards to Mr. Nkosi; the summons was served on the main gate of the chosen *domicilium citandi ex executandi,* on 18 December 2013. Default judgment was granted on 14 February 2014. The writ of execution was authorised by the Registrar on 24 February 2014, and the Sheriff, Evander attached the property on 1 March 2014, and served the attachment by hand on Mr Nkosi at the immovable property being, Erf 4725, Embahlenhle Extension 9 Township, Mpumalanga.

8. Subsequent to the aforesaid attachment a sale in execution was arranged and held on 28 May 2014, and the property was sold. Mr. Nkosi set out in

his founding affidavit that he applied for debt counselling with SS Debt Counsellors, however, no proof hereof was attached. He also stated that he had effected payments in the amount of R1, 200.00 towards the immovable property on a monthly basis under this unsubstantiated debt review. The rescission application of Mr. Nkosi was brought on 18 August 2014.

9. In regards to Mr. Ivanov; the summons had been served on the *domicilium* on 8 November 2011 by affixing it to the gate of the chosen *domicilium.* Application for default judgment was served on 21 February 2013 personally on Mr Ivanov. On 11 March 2013, default judgment was granted by Raulinga J, in the amount of R1, 215. 412.23, as well as interest on the said amount. In terms of Rule 46 the property was declared specially executable, but the authorisation of the writ was not granted and postponed sine die. The first respondent brought an application for the authorisation of the writ and served this application by email on Mr Ivanov on 2 April 2013. The court granted a writ of execution on 7 May 2013 to attach the immovable property. The writ was served on the domicilium, the immovable property on 20 May 2013, by attaching it to the principal door.

10. Subsequent to the aforesaid attachment a sale in execution was arranged for 8 July 2014, but the sale was cancelled due to the rescission application of Mr Ivanov. The rescission application of Mr. Ivanov was brought on 2 July 2014.

11. It is common cause and also evident from the applicant's own averments in their founding papers that the applicants do not dispute their indebtedness

to the first respondents. They admit lack of proper repayment and that they were indeed in arrears with the monthly repayments. In the matter of Mr Ivanov , the first respondent on 7 March 2013, kept the matter in abeyance to sell the property, on the condition that Mr. Ivanov pays R12,500 per month from 15 March 2013. Mr. Ivanov did not keep to the arrangement and the first respondents therefore made application for the execution of the writ.

12. The applicants both seek condonation for the late filing of the applications for rescission, and Mr. Nkosi seeks that the warrant of execution as well as subsequent sale in execution which took place on 28 May 2014, be set aside. Mr. Ivanov seeks that the warrant be set aside and that the sale in execution is stayed.

13. Both summonses were served on the domicilium address, in both applications the first respondents dispatched letters in terms of Section 129 to the applicants addresses as given in the loan agreement, and track and trace reports were also attached indicating, notification to the applicants.

**VERBATIM FACTS FOUND FROM THE AFFIDAVITS**

14. From the founding papers as set out, their defences rests on three pillars being (a) the first respondent's non-compliance with the National Credit Act, (b) the defence regarding payments made to a debt counsellor by Nkosi and (c) the defence regarding lack of consideration of Section 26 of the Constitution of the Republic of South Africa and other case law.

15. Both applicants stated that they never received the Section 129 notice in terms of the NCA, that the summons was not served upon them personally, but not disputing service on their *domicile*. They stated that they only became aware of the judgments when their attorney consulted with them in regards to the sale in execution, and explained their remedies to them.

16. The applicants defences in terms of Section 26 of the Constitution were that they had the right to adequate housing and submitted that the National Credit Act renders it *ultra vires* for the Honourable Court to have declared the immovable property specially executable in terms of Rule 46 of the Uniform Rules of Court. The applicants alleged that the first respondent failed to comply with the strict provision of section 26 of the Constitution.

17. The only reasons provided by the applicants in respect of condonation for the late filing of their applications, were that they did not receive the notice in terms of Section 129, and only became aware of judgment when their attorney consulted with them in regards to the sale of execution and they were only able to instruct their attorney to make application when they were able to obtain the necessary funds.

18. Both Mr. Nkosi and Mr Ivanov stated that they were only in a position to obtain the funds in June 2014, and Mr Nkosi therefore brought his application in August 2014 and Mr. Ivanov brought the application in July 2014.

19. Mr. Nkosi does not explain his default from attachment of the property on 1 March 2014, to when on his version he consulted with his attorney on 22

May 2014, and only then became aware of the default judgment. He also does not explain his failure why he only brought the application for rescission in August 2014.

20. Mr Ivanov does not explain why after service of the default judgment on him personally in February 2013, he did not bring an application for rescission, and also after a further indulgement from the first respondent in March 2013, he did not make payment of the amount agreed from March 2013, or then bring an application for rescission.

21. On the applicants own version they admitted that they fell in arrears with their monthly payments. It was also evident that the applicants effected irregular and erratic payments.

22. The applicants in setting up a defences referred to recent developments in the law relating to immovable property in general necessitating consideration and research and resulting in the late filing of the application.

23. The applicants seems to say that the law in regards to mortgage agreements in respect of immovable property and the sale of such immovable property had been changing since 2005 with the ***Jafhta v Schoeman*** decision.

24. The applicants further stated that since judgment had been granted a variety of case law had been brought under their attention by their attorney. They confirmed knowledge of the amendment of Rule 46(1) which took effect from 24 December 2010, which required a judicial evaluation of the

circumstances before a writ of attachment is issued against a debtor's primary residence.

25. The applicants went on further to quote the ***Gundwana v Steko Development CC*** case in full, as well as the decision of ***First National Bank v Folscher 2011 (4) SA 314 (GNP)*** a judgment by a full bench of his Honourable Court.

26. The applicants thus seems to argue that the case law as referred to in their founding papers obliged the Court to act with due consideration and have regard to all the factors as set out in these two judgments before ordering immovable property executable when granting default judgment.

27. The applicants further stated they are being discriminated against and the real agreement between the parties being to secure payment of the credit agreement to ensure eventual satisfaction of the debt would not be achieved. The applicants stated that they would be left with a short fall after sale in execution, and they would not be able to repay the short fall without being over indebted.

28. They both claim that the property would and had been sold in Mr. Nkosi's case for a lesser amount than the value of the property, they also both failed to attach proof of the value of the property on their version.

29. The applicants also submitted that they were discriminated against and that if the sale was confirmed they would lose their primary residence.

30. The applicants further went on to quote Section 131 of the National Credit Act as well as Section 127 and various other sections of the National

Credit Act, without once referring to the factual matrix on which judgment was granted by this Honourable Court. The applicants therefore set out no facts in its defences that pointed to either an irregular application of the NCA, or that the Court, when granting default judgment, did not consider the factors as set out in the various decisions, especially the ***Folscher*** decision. Their founding affidavits were pleadings in law instead of facts.

**THE LAW**

31. In terms of Rule 31(2)(b) the Rules, once default judgment is granted a defendant may within 20 days after he or she has knowledge of such judgment apply to Court upon notice to the plaintiff to set aside such judgment and the Court may upon good cause shown set aside the default judgment on such terms as it deems meet.

32. It is further trite that under common law the Court has the power to rescind a default judgment, provided the applicant provides (a) a reasonable and acceptable explanation for his default and (b) that the applicant must have a *bona fide* defence, which on the face of it there are prospects of success.

33. When a litigant applies for condonation of the late filing of an application he or she merely approaches the Court with hat in hand for the Court's indulgence for non-compliance with the rules of Court. It is settled law that in considering the application for condonation the Court has a discretion that must be exercised judicially upon good cause shown of all the facts.

34. The Court usually considers, amongst others, the degree of the lateness, its explanation, the prospects of success in the main action and importance of the case to both parties.

35. It is set out in the applicant's founding affidavit that the applicant's delay in bringing this application is premised on the applicant's ignorance of their rights until such time as they consulted with their attorney of record.

**CONDONATION**

36. Considering the applicants founding papers, it seems that the applicants relied on the point of law prevalent with regard to the amendment of Rule 46(1) of the Uniform Rules of Court, which was effective from 24 December 2010. The judgment requires judicial evaluation of all the circumstances surrounding the debtor before a writ of attachment is issued against a debtor's primary residence.

37. The applicants in their founding papers stated that they only became aware of their rights pertaining to the sale in execution of the primary residence when they consulted with their attorney in 2014. This creates doubt to its correctness. In fact, the applicants on their own version contradicts their preferred explanation. The applicants do not explain and also do not take the Court into his confidence to deny that the summons was served on the *domicilium* address, and that prior to the sale in execution they must have been aware of the first respondent's intent to seek default judgment. The personal service of the default judgement application on Mr. Ivanov is not addressed at all. They also do not explain

that the circumstances before the attachment of the property, and before approaching their attorneys.

38. The two reasons, i.e. that they did not have sufficient funds from when they became aware of their rights up until bringing their applications, to my mind does not suffice and is not good cause shown to bring the application for rescission of judgment. Mr Nkosi brought this application nearly six months after default judgment was granted, this is substantial delay, having regard to the flimsy reasons for his delay. Mr. Ivanov brought this application a year after default judgement was granted in March 2013, and also a after he had entered into a repayment arrangement with the first respondent, which he did not honour.

**BONA FIDE DEFENCES**

39. The question to be determined next is whether there exists a bona fide defence in the main action in respect of the judgment debt.

40. In their founding affidavits the applicants pleaded mostly the law in relation to the aspect of non-compliance with Rule 46(1) of the Uniform Rules versus the section 26 of the Constitution of the Republic of South Africa and emphatically relied on ***Gondwana, Jafta*** and the ***Folscher*** decision.

41. The purpose of amending Rule 46(1) to give effect to judicial oversight is to caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. The applicants

sets out no facts in their founding affidavit why this principle should apply to them.

42. It is evident further from the record and facts set out that there are no other proportionate means available at the first respondent's disposal to exact payment of the judgment debt other than to execute on the properties of the applicants. In fact, the execution in Nkosi matter has been effected and the property has already been sold. In both summons and subsequent application for default judgment the first respondents pleaded the rights afforded in terms of Section 26, and the factors as set out in ***Folsher***.

43. Both applications were brought on the premise, that had the Court been aware of the circumstances that prevailed when judgment was taken, the Court would not have granted the default judgment.

**DISCUSSION**

44. It is clear that the applicants in these cases did not pass the rescission of judgment mark and they failed to show good cause and set out a *bona fide* defence for the granting of rescission of judgment.

45. Further to that, as set out *supra*, the applicants attempted to withdraw their applications on the date of hearing of their applications.

46. Both these applications were brought by Lombard's Attorneys, the attorney instructed the same counsel for the applicants to hand up a notice of withdrawal of the application and tendered the wasted costs of the first respondents.

47. Counsel for the first respondents also made me aware of a judgment by **Phatudi, J** dismissing an application for rescission on 5 November 2014. With reference to this matter: ***Tseding Winton Rakolota v First National Bank and Others, case number 7896/2000.*** The same attorneys, Lombard's Attorneys, also brought and application for rescission of default judgment. Once again in this application the same reasons for the late filing of the application were raised and once again the same defences of non-compliance with Rule 46 and Section 26 of the constitution, and non compliance with the National Credit Act were raised.

48. I was also provided with a copy of the founding affidavit of the applicant's application in the matter of ***Rakolota*** *supra*, and the Court, after having read same, finds that it is verbatim the same, it contains exactly the same defences in law as to ***Gondwana*** and Section 26 of the Constitution. **Phatudi, J** found in the circumstances that the applicant had failed to set out facts in the rescission application, and that the application only dealt with issues in law, and therefore dismissed the applicant's application with costs.

49. After this information came to the Court's attention the Court directed a question to both counsel on the costs to be awarded. In the circumstance if the court was not to make an order *de bonis propriis*, having regard to the blatant unscrupulousness of the attorney acting on behalf of the two applicants.

50. The first respondent called for a costs order against the applicant on an attorney and own client basis and the Court needs to consider the grounds

on which this Court may make such an order. It is normally made in circumstances that the applicant has been guilty of dishonesty or fraud or had vexatious, reckless and malicious or frivolous motives or committed a grave misconduct, either in the transaction under enquiry or in the conduct of this case.

51. The Court's discretion to order the payment of attorney and client costs is not, however, restricted to cases of dishonest, improper or fraudulent conduct. It includes cases in which special circumstances or considerations justify the granting of such an order. Attorney and client costs have also been awarded where the defence was frivolous and was taken for the sole purpose of gaining time and where the defendant produced a plethora of unmerited defences and where the defendant was in default and it seemed to the Court that the defence was dilatory and not *bona fide*, as set out in ***Suzman v Pather & Sons 1957 (4) SA 690 (D).***

52. I raised the question why the applicant must be saddled with the costs, especially if one accepts on the face value of the founding affidavits that no facts were set out by them, and the founding affidavit consisted of 98% pleaded law and that the applicants in the circumstances were not the authors of the law as pleaded in their founding affidavits. The attorney was the only person who could in fact have alluded to such law in the founding papers.

53. Further to that the affidavits were set out in different typing fonts , but in each application the paragraphs in which the font differed they were in substance the same content, used in each application, on the face of it was

a copy and paste exercise when drafting the application, Further even the spelling mistakes were verbatim the same. On a cursory glance the court could see that the founding affidavits were not linked with the facts of each case and was a mere regurgitation of case law and of a previously drafted affidavit, having regards also to the affidavit in the ***Rakolota*** matter.

54. Counsel for the first respondent agreed with the Court that a costs order against the attorney would be more appropriate. As no such costs order was asked in the initial opposition to the matter and in the application to dismiss the application, the Court had to give direction in this regard to call on the attorney acting on behalf of the applicant to give reasons why a costs order should not be granted *de bonis propriis*.

55. Counsel for the applicants had no instruction and conceded that if such an order is made it should be brought under the attorney's attention for him to provide reasons why such an costs order should not be granted.

56. I have regard to the fact that an order *de bonis propriis* will not be made lightly and mere errors of judgment on the attorney's side will not be sufficient and that it has been held that such an order should not be granted in the absence of some really improper conduct, and that the fairness or unfairness of proceedings honestly brought should not be scrutinised too closely.

57. The criteria that has been stated to be actual misconduct of any sort or recklessness and the reasonableness of the conduct should be judged from the point of view of the person of ordinary ability bringing an average

intelligence to bear on the issues in question and not from that of a trained lawyer.

58. Normally costs *de bonis propriis* should be asked for at the hearing but the Court may entertain a subsequent application if made within a reasonable period. The subsequent application has now been made by counsel appearing for the first respondents, provided that the attorney is called on to provide reasons why such costs order should not be made. Legal practitioners have been ordered to pay costs where the practitioner had acted in an irresponsible and grossly negligent or reckless manner and has misled the Court in causing prejudice to the other party. Also where the conduct was unreasonable and negligent in handling of the client's case, was slack and apparently characterised by lack of concern. Generally speaking, costs *de bonis propriis* will be ordered against attorneys only in reasonable serious cases as set out in ***Waar v Louw 1977 (3) SA 297 (O)*** and ***Clemson v Clemson 2001 All SA 622 (W) at 627.***

59. I therefore find, that the attorney *prima facie* in my view, has acted in a grossly negligent and reckless manner and has brought applications that plead the law instead of facts. Secondly, similar applications that are verbatim the same, were brought by the same attorney within a relatively short time span. If one has regards to the reasons provided in all three applications (also having regard to the ***Rakolota*** matter) for condonation, and the reasons provided for wilful default, they are virtually materially the same.

**In light thereof I make the following order:**

1. **The applications for rescission of both applicants are dismissed with costs.**

2. **The scale and order of costs, are postponed sine die, to be enrolled by way of motion as set out in prayer 3 – 7 herein-under.**

3. **The first respondent will make application by notice of motion for costs *de bonis propriis* against Lombard's Attorneys acting on behalf of the applicants, within 30 days from date of this order.**

4. **Such application to be served on Lombard's attorneys.**

5. **After receipt of the application for cost, Lombard's Attorneys, may advance reasons under oath why costs of these applications should not be awarded on a *de bonis propriis* scale.**

6. **The application for cost may after date of close of filing of all affidavits, be enrolled in terms of the practice directive of this court as a opposed or unopposed motion, whatever the case may be.**

7. **The Court further orders that the applications for the costs orders should be simultaneously heard in regards to both matters.**

**S STRAUSS,**

**ACTING JUDGE OF THE HIGH COURT, PRETORIA**

**HEARD ON: 4 DECEMBER 2014**

**JUDGMENT DELIVERED ON: ~~10~~ 9 DECEMBER 2014**

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