IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 49255/08

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

07/04/14
DATE

SIGNATURE

In the matter between:

7/4/2014

MUNTU INDUSTRIES CC	**Applicant**
AND	
KSO FINANCIAL SERVICES (PTY) LTD	**Respondent**
IN RE	
KSO FINANCIAL SERVICES (PTY) LTD	**Plaintiff**
AND	
SFILILE, KHAN VUYOLWETHU	**First Defendant**
MABELANE, LEBOGANG ANTHONY	**Second Defendant**
MUNTU INDUSTRIES CC	**Third Defendant**

JUDGMENT

TEFFO, J :

[1] On or about 1 September 2006 and at Dunkeld West Sandton the plaintiff (respondent) and the defendants concluded a loan agreement in terms of which the plaintiff loaned to the defendants a capital amount of R450 000,00. Interest was to be charged on the capital amount at a rate of 5% per month alternatively the maximum interest rate legally allowable, whichever is the lower from 30 September 2006. The first payment was to be effected on 30 September 2006. The defendants agreed to pay the total outstanding amount owed to the plaintiff by 28 February 2007. In the event of the defendants failing to perform in terms of the agreement, the plaintiff would have the right to claim immediate payment of all amounts due to it.

[2] The plaintiff duly performed in terms of the agreement. The defendants failed to make payments in terms of the agreement. Despite demand the defendants failed to pay the outstanding amount of R484 353,75 to the plaintiff.

[3] A mortgage bond was registered as security for all amounts owed to the plaintiff in respect of Portion 36 of Erf 934 Sunninghill Extension 26 Township Registration Division I.R Registration The province of Gauteng, measuring 321 square metres, held under deed of transfer T 122994/2001 herein after referred to as the property.

[4] As a result of the defendants' failure to pay the outstanding amount, the plaintiff then issued summons on 22 October 2008 which were served at the defendants' *domicilium citandi* on 24 October 2008.

[5] No appearance to defend was entered by the defendants and the *dies induciae* expired on 7 November 2008.

[6] On 25 November 2008 the plaintiff obtained default judgment against the defendants for payment of the sum of R484 353,75 plus interest on the aforesaid amount at the rate of 24% per annum from 27 August 2008 to date of final payment, costs and an order declaring the property specially executable.

[7] The applicant, Muntu Industries CC, now seeks an order rescinding and setting aside the above order granted against it and the first and second defendants.

[8] The application is opposed.

[9] The applicant alleges that since the commencement of the agreement between the parties it paid an amount of R22 500,00 in 20 (twenty) instalments in the total amount of R450 000,00 for the capital debt. The only amount that was due and payable to the respondent was R34 353,75 which comprised the interest portion.

[10] According to it when the summons was issued, the respondent claimed an amount of R484 353,75 which was not correct because at that time it already paid an amount of R450 000,00.

[11] After obtaining default judgment the respondent attempted to sell the property in order to recover the aforesaid amount of R484 353,75 claimed in the summons.

[12] The applicant and its members appointed an attorney to stop the sale in execution. Its attorney engaged with the respondent's attorney and it was agreed that the applicant should pay an amount of R200 000,00 for the outstanding interest and legal costs. The applicant as a result thereof paid an amount of R200 000,00 to the respondent and the threatened sale in execution was abandoned.

[13] It further avers that as at July 2009 it had paid the respondent a total amount of R650 000,00 comprising of an amount of R450 000,00 for the capital amount plus R200 000,00 which was for interest and legal fees.

[14] According to the applicant it innocently believed after the above payment of R200 000,00 that the matter had been laid to rest as it no longer owed the respondent any amount of money. It therefore did not rescind the order in issue.

[15] It was advised on or about 25 February 2012 when it consulted with its current legal representatives that there was a second threat by the respondent to auction the property on 13 March 2012 and that its innocent belief that the matter was resolved was wrong in law as the order ought to have been rescinded.

[16] It alleged that it and its members were not aware of this fact and took it for granted, erroneously so, that since there was no litigation with anyone anymore all the disputes had been resolved.

[17] It was shocked to learn around February 2012 (two years after the fact) that it still owed the respondent an amount of R616 816,22 arising from the 2006 loan agreement concluded with the respondent.

[18] It contends that in terms of the spread sheet, the respondent appears to have disregarded the amount of R450 000,00 which it had paid from November 2006 when it determined the amount owed to it.

[19] The respondent insists that it owes it an amount of R616 816, 22. It had instructed its recovery agents and the sheriff to proceed with an auction of the applicant and its members' properties. It does not know what the amount of R616 816,22 is for. According to it the respondent cannot justify and explain the aforesaid amount. It has fully complied with its obligations in terms of the loan agreement. It does not owe the respondent anything.

[20] It has been advised that the respondent seeks to violate the *in duplum* rule which provides that no person could, in a loan agreement, charge interest that is more than the capital amount.

[21] It contends that it had paid an amount of R650 000,00. It cannot therefore be forced to make a further payment of R616 816,22 for the same old loan agreement where it loaned a capital amount of R450 000,00.

[22] It had not received a full history of reconciliation of the payment it had made from the respondent.

[23] It was submitted that the applicant and its members were not aware of the action that led to the default judgment that it seeks to rescind as it never received the summons.

[24] The first time it became aware of the summons, the default judgment and the warrant of execution was in 2009/2010 when it received them from the respondent with the notice of sale in execution of the property through the post.

[25] Had the respondent insisted in 2009/2010 that it was owed any other amount than the R450 000,00 and the R200 000,00, it would have then had a reason to promptly apply for rescission. It thought that there was no need to apply for rescission as the order granted did not affect the way it conducted its business.

[26] It was submitted on behalf of the applicant that the order sought to be rescinded pursuant to the default judgment was erroneously granted as at the time the summons was issued, the amount owing by the applicant was different from the one claimed by the respondent. It owed the amount of R34 353,75 which was for the interest portion and the respondent claimed an amount of R484 353,75 being the capital amount and interest.

[27] The respondent did not disclose to the court that it had paid it an amount of R450 000,00 in terms of the loan agreement. Had the respondent disclosed its payment of R450 000,00 at the time judgment was obtained, the court would not have granted the default judgment.

[28] It has reasonable prospects of success against the respondent in the main action as it has a *bona fide* defence.

[29] Although the respondent concedes that the applicant paid an amount of R450 000,00 to it since the commencement of the agreement between the parties which consisted of 20 (twenty) monthly instalments of R22 5000,00, it denies that the applicant had repaid the capital amount in full. It contends that in terms of the acknowledgement of debt signed by the applicant, it was agreed that all payments received should first be apportioned against interest due and thereafter capital.

[30] The respondent also disputes that the amount R34 353,75 was the only amount outstanding at the time when the summons was issued.

[31] The respondent maintains that despite payment by the applicant, an amount of R484 353,75 was still outstanding, due and payable to it.

[32] The respondent further contends that it is negligent to contend that a facility of R450 000,00 would attract interest of only R34 353,75 over a period of two years.

[33] It referred the court to annexure "RA2" which is a settlement agreement signed by the parties on 6 April 2009. This agreement was signed at the time when the applicant was threatened with a sale in execution of the property.

[34] It was submitted that in terms of the settlement agreement an amount of R250 000,00 was to be paid in order to stay the execution but only an amount of R200 000,00 was received and despite this the sale was cancelled. The respondent reiterates that in the light of the settlement agreement the applicant had full knowledge of the outstanding amount it owed to the respondent and after paying the amount of R 200 000,00 it cannot be said that its indebtedness towards the plaintiff was settled in full.

[35] The respondent disputes that in terms of the spread sheet "SV26" it has failed to include the amount of R450 000,00 the applicant had paid when it determined the amount the applicant owed to it. It explained that the spread sheet "SV26" merely indicated the calculation of interest after judgment was granted and it also incorporated the payment of R200 000,00 that it received from the applicant.

[36] It also contends that it is entitled to auction its security to satisfy a judgment given in its favour.

[37] The respondent submitted that the applicant has full knowledge of how the amount of R616 812,22 was calculated because the spread sheet "SV26" detailing the amount was sent to it. It further submitted that the fact that judgment was obtained resets the interest calculation. Therefore the interest portion in no way exceeds the capital portion due and payable.

[38] It denies that the applicant and its members were not aware of the action that led to the default judgment it seeks to rescind.

[39] It maintains that it never provided the applicant with a letter indicating that its indebtedness has been extinguished, nor did the applicant seek it.

[40] In the applicant's heads of argument an issue was raised that the respondent filed its opposing affidavit outside the 10 (ten) day period and that it failed to apply for condonation of the late filing of its opposing affidavit. When the matter was argued the issue was not raised. I have considered the matter and in the interests of justice I condoned the late filing of the respondent's opposing affidavit to allow the parties to ventilate all the issues so that the court could arrive at a proper decision on what is before it.

[41] The issue for determination is whether the applicant is entitled to rescission in terms of Rule 42 (1) of the Uniform Rules of court.

[42] Rule 42 (1) of the Uniform Rules of court provides as follows:

" (1) The court may in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) An order or judgment in which there is ambiguity or a patent error or omission but only to the extent of such ambiguity, error or omission;

(c) An order or judgment granted as the result of a mistake common to the parties.

[43] In order to obtain a rescission under this subrule the applicant must show that the prior order was "erroneously sought or erroneously granted." Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order and it is not necessary for the party to show good cause for the subrule to apply (Tshabalala v Peer 1979 (4) SA 27 (T) at 30D; Topol v LS Group Management Services (Pty) (Ltd 1988 (1) SA 639 W at 650 D-J, Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C)].

[44] A judgment is erroneously granted if there existed at the time of its issue a fact which the judge was unaware of, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment (Naidoo v Matlala NO 2012 (1) SA 143 (GNP) at 153C.

[45] In Mutebwa v Mutebwa and Another 2001 (2) SA 193 (Tk) the court held that there are three ways in which a judgment taken in the absence of one of the parties may be set aside, viz, in terms of Rule 31 (2) (b) or Rule 42 (1) of the Uniform Rules of court, or at the common law. It was also held that the fact that an application is brought in terms of one rule does not mean that it cannot be entertained in terms of another or under common law provided the requirements therefore are met.

[46] In Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others referred to *supra* the court held that it had a discretion to grant rescission of judgment where sufficient or good cause is shown. It then pointed out two essential elements of sufficient cause, viz;

46.1 A party seeking relief to present reasonable and acceptable explanation for his default; and

46.2 On merits such party having a *bona fide* defence or claim which *prima facie* carries some prospects of success (Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA).

[47] In Harris V Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 the following was said:

" A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation. Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole. The presence of wilful default does not necessarily negative the establishment of a just or sufficient cause. Even in the fact of finding a wilful default,

the court is enjoined to exercise whether the defence raised by the person who seeks the relief shows the existence of an issue which is fit for trial".

[48] In Dalhouzie v Bruwer 1970 (4) SA 566 (c) at 571 F, 572 C the court pointed out two principal requirements for the favourable exercise of the court's discretion in considering what is "good cause", namely:

48.1 The applicant should file an affidavit satisfactorily explaining the delay. In this regard it had been held that the defendant must at least furnish an explanation of his or her default sufficiently full to enable the court to understand how it really came about, and to assess his or her conduct and motives.

48.2 The applicant should satisfy the court on oath that he or she has a *bona fide* defence.

[49] According to the applicant when the respondent obtained default judgment against it, it did not disclose to the court that it had already paid an amount of R450 000,00 which amount it paid in 20 (twenty) monthly instalments of R22 500,00. It disputes that at that time it owed the respondent an amount of R484 353,75. According to it it has already settled the capital amount of R450 000,00 and the only amount that was due and payable was an amount of R34 353,75. The applicant further submitted that the alleged failure by the respondent to disclose to the court the amount it had already paid before judgment was taken renders the granting of that judgment erroneous in that had the court been placed with the correct facts before it, it would not have granted that judgment which it seeks to rescind. The applicant also alleges that it did not receive the summons.

[50] In terms of the loan agreement concluded by the parties (see para 1 *supra*) interest was to be charged on the capital amount of R450 000,00 at a rate of 5% per month. A calculation of 5% of the capital amount of R450 000,00 is R22 500,00. 20 (twenty) paid instalments of R22 500,00 equals to R450 000,00.

[51] In terms of clause 5.2 of the loan agreement all payments made by the defendants would first be apportioned against any outstanding interest and thereafter in the reduction of the capital outstanding amount.

[52] It is common cause between the parties that after the commencement of the agreement, the only amount that the applicants paid to the respondent was an amount of R450 000,00 as explained *supra*. The applicant then defaulted with its payments in terms of the agreement

[53] It is clear from the breakdown of the amounts paid by the applicant that when it defaulted with its payments as required of it in terms of the agreement, it had not at all started paying any amount which resulted in the reduction of the capital amount of R450 000,00. The reason being that all payments as per the agreement were first apportioned against any outstanding interest and thereafter in the reduction of the capital outstanding amount. The amount of R22 500,00 paid by the applicant equals to 5% interest per month of the capital amount of R450 000,00.

[54] According to the respondent when summons was issued the applicant owed it an amount of R484 353,75 which comprised R450 000,00 capital and R34 353,75 interest.

[55] Summons was issued in October 2008 and the contract between the parties was concluded on 1 September 2006. It makes sense that from the time of the commencement of the agreement to the time of issuing summons a period of 20 (twenty) months has passed and if the applicant only paid R22 500,00 as alleged, that amount only went to the interest portion and could not have reduced the capital amount. From what I have highlighted *supra* I find that in the calculation of the amount claimed in the summons, viz, R484 353, 75 the amount of R450 000-00 paid by the applicant was taken into account. The submission that when judgment was taken the respondent did not disclose payment of the amount of R450 000,00 by the applicant is therefore rejected as it is without merit.

[56] I therefore find that the judgment granted was not erroneously obtained.

[57] In terms of the returns of service attached to the papers, summons were served upon the applicant and its members on 24 October 2008 at their *domicilium* addresses by affixing them to the principal door.

[58] According to the applicant it only became aware of the judgment after the summons, the judgment, the warrant of execution and the notice of sale of the property was sent to it by the respondent by post. It did nothing until on the date of sale when it paid an amount of R200 000,00, which according to it was for interest and the respondent's legal fees, and which resulted in the abandonment of the sale in execution. The founding affidavit in support of this application was signed on 7 March 2012 after the applicant became aware of the judgment it sought to rescind in March/April 2009. The applicant contends that because it had paid the capital amount of R450 000,00 in full, it believed and maintains that the amount of R200 000,00 that it paid on 6 April 2009 discharged its debt in favour of the plaintiff. It is adamant that it had complied with its obligations in terms of the agreement with the respondent. It argues that it cannot be expected to pay more than the R650 000,00 that it had paid for a debt of R450 000,00. According to it the respondent had breached the *in duplum* rule. The applicant submitted that because after paying the R200 000,00 it took it that it had discharged its obligations towards the respondent, it did not find it necessary to apply for rescission of judgment as the judgment did not affect the way it conducted its business. It was only alerted and advised by the respondent's agents and its current attorneys of record when it was threatened with a second sale in execution of the property on 25 February 2012 of the alleged outstanding amount of R616 816,22 and the fact that it should have applied for rescission of judgment.

[59] It appears from the papers filed by the respondent in this application that the applicant's members through its attorneys signed a settlement agreement with it on 6 April 2009 stating the following:

"Whereas KSO Financial Services (Pty) (Ltd) has instituted proceedings in the High Court of South Africa, North Gauteng High Court under case number 49255/2008 and whereas the said plaintiff has obtained judgment against the defendants, jointly and severally, for:

a) *Payment in the amount of R484 353,75,*

b) *Interest on the amount of R484 353,75 at the rate of 24% per annum from 27 August 2008 to date of payment; and whereas the defendants are desirous to settle the above matter, now therefore the parties agree as follows:*

1. *The defendants acknowledge that they are jointly and severally indebted to the plaintiff in the amount of R560 069,65 (five hundred and sixty thousand and sixty nine rand sixty five cents) as at 6 April 2009 in respect of monies lent and advanced by the plaintiff, interest thereon at a rate of 24% per annum and legal costs, taxed on 6 March 2009 in the amount of R4 865,44 (four thousand eight hundred and sixty five rand forty four cents).*

2. *The aforesaid amount of R560 069,65 (five hundred and sixty thousand and sixty nine rand sixty five cents) interest thereon at 24% per annum and legal costs will be payable by the defendants to the plaintiff as follows:*

    2.1 The amount of R250 000,00 payable on or before close of business on Wednesday, 8 April 2009;

    2.2 An amount of R100 000,00 every month thereafter, payable on the 1st day of every subsequent month, until the full capital amount, interest and legal fees have been paid by the debtors;

    2.3 Interest shall be charged monthly in arrears on the outstanding balance at 24% per annum;

3. If any of the aforesaid payments are not made on due date, the full amount of R560 069,65 (five hundred and sixty thousand and sixty nine rand sixty five cents) alternatively the balance of the outstanding amount will become immediately due and payable.

4. The plaintiff hereby undertakes not to proceed with the execution of the judgment against the defendants for so long as the said defendants duly comply with the above payment undertakings.

5. In the event of default by the defendants with any of their obligations in terms of this agreement the plaintiff will be entitled to:

> *5.1 proceed with the execution of the judgment against the defendants for the full balance of the amounts owing at that time to the plaintiff by the defendants; and more specifically;*
>
> *5.2 cause to sell on public auction the immovable property more fully described as Portion 36 of Erf 934 Sunninghill Extension 26 Township Registration Division I.R. The Province of Gauteng, measuring 321 square metres held under deed of transfer T122994/2001".*

[60] On 6 April 2009 the applicant through its attorneys managed to stop the sale. I find it difficult to accept that if indeed the applicant had an issue with the judgment why did it not apply for rescission at that time when the sale was stopped. The reasons given by the applicant for its failure to challenge the judgment granted against it when it stopped the sale in execution and to wait for more than two years before it could do so, are not convincing at all. If one looks at the contents of the settlement agreement signed by the parties on 6 April 2009 it cannot be correct to say that after the payment of R200 000,00 by the applicant the debt had been fully paid. In terms of clause 2.2 of the settlement agreement the applicant agreed to pay an amount of R100 000,00 per month on the 1st day of every subsequent month after the payment of R250 000,00 until the full capital amount, interest and legal fees have been paid. The applicant was legally represented at the time of concluding and signing the settlement agreement. It never at that time had an issue with the judgment granted against it which it seeks to rescind . Further to this it acknowledged its indebtedness to the plaintiff in the amount of R560 069,65 together with interest and costs. Now the applicant comes to court and contends that the settlement agreement which it failed to mention in its application for rescission, which came to the court's attention through the respondent, should be disregarded for the purposes of this application.

That contention is without merit. There is no way in which the court can disregard the settlement agreement as it is part and parcel of the judgment that it seeks to rescind. When it was concluded the applicant was trying to stop the sale which the respondent was entitled to proceed with, in execution of the judgment it obtained against the applicant. It cannot therefore be said that the settlement agreement constitutes a new cause of action.

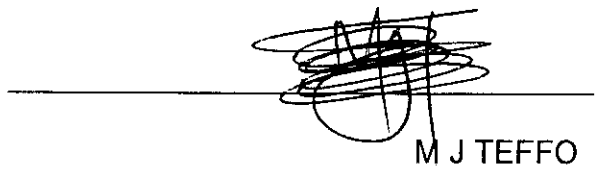
[61] I am of the view that the applicant's explanation for the delay in bringing the application is not reasonable, adequate and convincing. I find the applicant to have been in wilful default of not defending the action against it by the respondent. There was just no reason for the applicant not to challenge or rescind the judgment if there was something wrong with it. Strange enough the applicant continued to sign the settlement agreement where it acknowledged its indebtedness to the plaintiff in respect of the judgment debt plus interest. Despite the fact that the applicant through its members signed a settlement agreement as a result of which the sale was abandoned, the applicant did not fulfil its obligations in terms of the settlement agreement. It paid R200 000,00 instead of the agreed R 250 000,00. From that payment of R200 000,00 it was clear from the applicant that the full amount of the judgment debt was not paid. Instead the applicant fully aware that it had not fully paid the amount agreed upon when the settlement agreement was concluded decided to sit back and not pay its debt. A period of more than two years lapsed and only in 2012 when it was threatened with the second sale, it decided to challenge the judgment, part of which it had already complied with. To now argue that the respondent has breached the in duplum rule is senseless. I am not persuaded that the applicant has a defence in law which is sufficient or carries with it the prospects of success in the action by the respondent against it.

[62] Borrowing from the words used by the court in Harris v Absa Bank Ltd t/a Volkskas referred to *supra* the defence raised by the applicant does not show the existence of an issue which is fit for trial.

[63] It is my view that the applicant has not shown good cause for bringing this application.

[64] In the result I make the following order:

64.1 The application is therefore dismissed with costs.



M J TEFFO
JUDGE OF THE HIGH COURT NORTH
GAUTENG PRETORIA

On behalf of the APPLICANT : T J MACHABA
Instructed by : NTANGA NKUHLU
C/O MABUELA INC

On behalf of the RESPONDENT : S McTURK
INSTRUCTED : KISSONDUTH ATTORNEYS

DATE OF HEARING : 11 APRIL 2013
DATE OF JUDGMENT : 7 APRIL 2014