IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 3964/2010

24/3/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
DATE: 23 May 2016
SIGNATURE: Jansen

In the matter between:

BOTHA TOZAMILE Applicant

and

RMB PRIVATE BANK (A DIVISION FOR FIRSTRAND BANK LIMITED) Respondent

---

JUDGMENT

JANSEN J

Background:

[1] This matter is an opposed application wherein the rescission of an order in terms of rule 46(1)(a)(ii) is sought.

[2] The applicant became aware of the judgment granted against him on 23 September 2014 when a letter from the respondent's attorneys was received. The applicant delivered the application for rescission on 9 March 2015. The respondent makes no point of the hiatus period between 23 September 2014 to 9 March 2015 and the court needs not address this issue.

Common cause facts:

[3] The applicant fell into arrears regarding the payment of his monthly instalments in terms of a loan agreement and mortgage bond entered into during or about November 2007.

[4] Default judgment was granted against the applicant on 13 October 2010.

[5] The respondent then brought an application in terms of rule 46(1)(a)(ii), which was granted on 8 May 2014.

[6] Apparently a postponement of this matter was granted on 8 May 2014. Whether the respondent knew of this application for postponement is in dispute.

[7] On 10 July 2014 there was yet another postponement of this matter sought by the applicant. Apparently, an oversight occurred in the respondent's attorney of record's offices regarding the second postponement as a result of which the applicant filed an opposing affidavit to the rule 46(11)(a)(ii) notice and the respondent filed a replying affidavit wherein no mention was made of the fact that the rule 46(1)(a)(ii) application was already granted on 8 May 2014.

The matters in dispute:

[8] Hence the matters in dispute are: —

[8.1] Did the applicant seek a postponement of the rule 46(1)(a)(ii) application on 8 May 2014?

[8.2] Was the respondent aware of this application for postponement.

[8.3] Should the applicant should be held liable for the oversight on the part of the respondent's attorneys with regards the further postponement of the matter and exchange of affidavits between the parties, given that the rule 46(1)(a)(ii) application had already been heard on the 8th of May 2014.

The applicant's version:

[9] During or about November 2007 the applicant and the respondent entered into a structured facility loan agreement in terms of which the respondent lent and advanced monies to the applicant, which loan was secured by a registered bond over certain immovable property. The applicant fell into arrears with payments and the respondent issued summons against the applicant on or about 11 May 2010.

[10] As stated, default judgment against the applicant was granted on 13 October 2010.

[11] The respondent enrolled the rule 46(1)(a)(ii) matter for 8 May 2014. The applicant was under the impression that a postponement of the matter was sought on 8 May 2014 and on 10 July 2014 successfully argued a further postponement in order for it to file an answering affidavit.

[12] On 23 September 2014, more than four months after the postponement sought by the applicant was granted, the respondent's attorneys of record sent a letter to the applicant informing him, deadpan, that the rule 46(1)(a)(ii) application had been granted on 8 May 2014.

[13] Precisely how this imbroglio occurred is unclear to the court.

[14] The applicant, in his argument, emphasised that for the proper assessment of a rule 46(1)(a)(ii) notice, the applicant's relevant circumstances should be taken into account – clearly the reason why the applicant filed an

opposing affidavit. Judicial oversight is required, particularly where the immovable property is the primary residence of the judgment debtor (the applicant) as prescribed by section 26(1) of the Constitution and the various cases dealing with this point such as ***First Rand Bank v Fölscher and Another*** **2011 (4) SA 314 (GNP)** at 328H–I.

[15] The applicant contends that in accordance with the principle applied in ***Concor Holdings (Pty) Ltd v Potgieter*** **2004 6 SA 491 (SCA)** at 495: —

> ***"Our law is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if in addition the representee acted reasonably in construing the representation in the sense in which the representee did so."***

[16] On the evidence presented, the applicant acted reasonably at all times. In ***Van Ryn Wine and Spirit Co v Chandos Bar*** **1928 TPD** 417 at 423 the following was held: —

> ***"It is for the Court in each case to have regard to all the circumstances and to decide whether the person sought to be bound has rendered himself liable by his unreasonable conduct."***

The respondent's version:

[17] The respondent relied on a point in *limine*, namely that it was unclear whether the application for rescission was brought in terms of rule 31(2)(b), rule 42 or the common law. It can safely be accepted that the application was brought in terms of rule 42.

[18] Apparently the misunderstanding regarding the postponement on 8 May 2014 occurred because two matters should have been postponed on 8 May 2014 (the other matter with case no 71447/2009). The applicant was advised that both matters had been postponed whereas, in actual fact, the current rule 46(1)(a)(ii) application was granted. This fact was conveyed to the applicant about four months after the grant of the application and after an answering and replying affidavit in this rule 46(1)(a)(ii) matter had been filed and a postponement of this self-same matter had been sought by the applicant and granted to the applicant by the respondent on 10 July 2014.

[19] The respondent summarised the issues to be determined in this rescission application as follows: —

[19.1] Was the order granted on 8 May 2014 valid.

[19.2] If valid, was the order invalidated by the respondent's conduct as a result of a miscommunication in the respondent's attorneys of record's office.

[19.3] Has the applicant made out a case for rescission.

[20] The mainstay of the respondent's argument was that the application of 8 May 2014, granted in open court before his Lordship Mr Justice Tuchten, was valid, as the applicant had never sought to rescind the 13 October 2010 default judgment and further, because the applicant has not advanced any reasons to this court as to why the application of 8 May 2014 should not have been granted.

[21] This stance adopted by the respondent is opportunistic. First, given the hiatus period between 13 October 2010 and 8 May 2014, a notice of set down of the application was called for. Furthermore, both parties laboured under the common mistake that the matter had been postponed and the parties were *ad idem* that the matter be postponed on 8 May 2014. That this was the attitude of the respondent is borne out by the fact that it allowed the applicant the opportunity to file an answering affidavit and that it filed a replying affidavit.

[22] It would be unconscionable for the respondent to rely on an order which was apparently erroneously sought on 8 May 2014. The respondent surmises that the applicant would or should have had a representative in court and asserts that there was no agreement that the rule 46(1)(a)(ii) application would be postponed. The respondent's stance is that because the applicant had somebody in court to argue the postponement of matter

number 71447/2009, the applicant should also have had a legal representative at court on 8 May 2014 for the second application.

[23] The respondent further avers that even though the applicant might have an explanation for not being in court as set out in its founding affidavit, it has not set out any *bona fide* defence.

[24] The court was referred to various cases such as ***Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*** **2007 (6) SA 87 (SCA)** in order to demonstrate that where there has been no procedural irregularity which appears from the record which served before the judge granting an order in the absence of a party, a rule 42 application cannot succeed (***Bakoven Ltd v GJ Howes (Pty) Ltd*** **1992 (2) SA 466 (E)** at 472 D). In the cases of ***Nyingwa v Moolman NO*** **1993 (2) SA 508 (Tk)** and ***Stander and Another v Absa Bank*** **1997 (4) SA 873 (E)** it was, however, held that in certain circumstances a judge may have regard to circumstances of which a judge granting a default order was unaware in order to decide whether the order was granted erroneously.

[25] It was held in the ***Lodhi 2*** judgment *supra* that where a judgment was granted in circumstances where a plaintiff was procedurally entitled thereto, it was valid and could not be invalidated because a defence was subsequently disclosed. It was held that a defence on the merits was irrelevant if subsequently disclosed and could not transform a validly obtained judgment into an erroneous judgment.

[26] The respondent's reliance on this case is misplaced. It cannot be stated that the application was procedurally correctly granted on 8 May 2014. Had the judge been aware of the fact that the parties were *ad idem* that a postponement should be granted he would not, procedurally, have granted the order. Any doubt in a judge's mind as to whether the respondent is in wilful default of appearance taints the proceedings. Hence, in the specific circumstances of this case, it cannot be stated that the application was procedurally correctly granted on 8 May 2014.

[27] The respondent is clutching at a bargain. Instead of abandoning the order which was obtained due to a miscommunication, which is fully borne out by the fact that the respondent allowed the applicant to file an opposing affidavit and that it filed a replying affidavit itself, it persists in its stance that the order of 8 May 2014 was validly obtained.

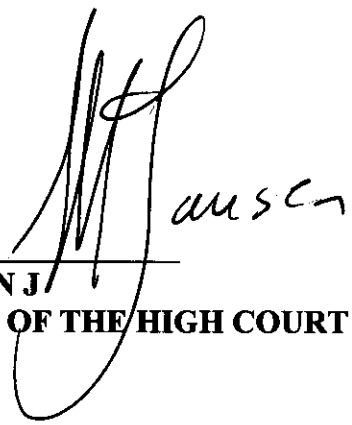
[28] In the premises it is held that the application for rescission should be granted and that the respondent should be punished with a punitive costs order for its opportunistic conduct.

[29] In the result, the following order is made: —

Order

1. The order granted under the above case number on 8 May 2014 is rescinded.

2. The respondent is to pay the costs of the application on an attorney and client scale.



JANSEN J
JUDGE OF THE HIGH COURT

For the Applicant **Advocate JA Sanders**
Instructed by **Hugo & Ngwenya Inc** (012-665 2997) (Ref: Mr Ngwenya/N329/Rumbi)

For the Respondent **Advocate ASL Van Wyk** (076 367 6478/012 303 7782)
Instructed by **Tim Du Toit & Co Inc** (012 470 7542) (Ref: MW LETSOALO/mo/PR1875)