**REPUBLIC OF SOUTH AFRICA**

**THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**DELETE WHICHEVER IS NOT APPLICABLE:**

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO

(3) REVISED:

19 January 2022

DATE [redacted] SIGNATURE

CASE NO: **68888/2016**

In the matter between.

MUVILI SIMBA APPLICANT

and

ABSA BANK LIMITED RESPONDENT

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JUDGEMENT

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**BOKAKO AJ**

**INTRODUCTION**

1. This is an application for rescission of a default judgment granted by this court against the applicant on the 21st of October 2016 and the judgement handed down on the 12th of September 2019. The respondent opposes the relief sought by the applicant.
2. On the 10th of June 2016 the applicant filed a notice of application for leave to appeal the judgment granted by Judge Maumela, the said application for leave to appeal was, however, never served at Court nor prosecuted by the applicant.
3. This is not the first rescission application brought in by the applicant. On the 8th of August 2018, the first rescission application determined therein that the rescission application was dismissed with costs on an attorney and client scale by Cambanis AJ. Subsequently on the 7th of June 2019, the applicant caused an urgent application to be served seeking relief in terms of a Part A and a Part B. Part A being aimed at the suspension of the order granted by the Judge Maumela and the cancellation of the sale in execution that was scheduled for 10 June 2019; and Part B aimed at the rescission of the order granted by Judge Maumela on 26 February 2019 therefore constituting the second rescission application instituted by the applicant.
4. An urgent application was enrolled on 10 June 2019 and culminated therein that an order was granted by Judge Louw, the application was dismissed with costs. This application is the third in series of applications that the applicant has brought for rescission of judgement.

5. In opposition to the relief sought, the respondent raised a point in *limine*, pertaining to *res judicata*, and oppose the rescission application on the merits thereof. In light of the conduct on part of the applicant throughout the lengthy litigious process, the respondent instituted a counter-application aimed at declaring the applicant to be a vexatious litigant as contemplated in terms of Section 2(1)(b) of the Vexatious Proceedings Act, 3 of 1956.

6. The applicant also instituted an application seeking leave to amend and further seeks consolidation of the rescission application and a pending eviction application; and to join to the rescission application Van Zyl le Roux Attorneys; the purchaser of the immovable property (the Mphake Family Trust); and the City of Tshwane.

**FACTUAL MATRIX**

7. The relationship between the respondent and the applicant emanates from a mortgage loan agreement concluded between these parties, the indebtedness of which was secured by the registration of a mortgage bond over an immovable property. The applicant defaulted with the terms of the mortgage loan agreement in that the applicant failed to fully and punctually make payment of the monthly instalments due in terms thereof. Consequently, the respondent began a pre-enforcement notice as contemplated in terms of Section 129 of the National Credit Act, 34 of 2005, dated 15 August 2016, to be dispatched to the applicant. The respondent continued with enforcement steps by institution of the summons under the above case number, which summons was served on the applicant on the 20th of September 2016. At the time of institution of the action, specifically

on 24 June 2016, the applicant was indebted to the respondent in the total amount of R1 306 932.47, of which amount R148 424.82 constituted arrears equal to approximately 8.4 missed instalments.

8. In the current proceedings being the application for rescission of judgment of the orders of previous proceedings. Parties had a mortgage loan agreement in terms of which the principal debt of R1 400 000.00 was advanced to the applicant. As security for the indebtedness amount advanced in terms of the mortgage loan agreement, a mortgage bond was registered in favour of the Respondent over certain immovable property.

9. This is an application for the rescission of judgments which were handed down by Vorster AJ on 21 October 2016 and the judgement handed down on the 12th of September 2019, in terms of which it was determined that the encumbered immovable property should be sold subject to a reserve price of R800 000.00. This order is also sought to be rescinded in terms of the present application for rescission. The application came before me in the opposed motion court on the 24th of August 2021.

10. The respondent initiated an action against the applicant. The action so initiated resulted in a judgment by default for both monetary relief and authority to execute on the encumbered immovable property. The respondent also, in light of the enactment of Rule 46A subsequent to the default judgment order having been obtained, instituted an application for a reserve price to be set and thereafter instituted a further application for the reserve price so set to be reconsidered. The latter process resulted in an order, granted on 12 September 2019, in terms of which it was determined that the encumbered immovable property should be sold subject to a reserve price of R800 000.00. A first rescission application and an urgent

application to stay a sale in execution, which urgent application included a second rescission application, were instituted by the applicant. Both these applications were unsuccessful.

11. The applicant launched his first rescission application under the same case number (the first application). The applicant in his papers stated under oath that he was never aware that there was a default judgement against his name until he saw the sheriff of the court with documents indicating that his property will be judicially attached and be sold. Further stated in his papers that, he was experiencing financial difficulties at the time. Further drew the court`s attention in that the property worth at least R 1 400 000.00 15 years before the Sale in Execution. He does not dispute that he defaulted in terms of the mortgage loan agreement but he did not receive any notice in terms of Section 129 of the National Credit Act in 2016. Further contending that he did not receive any summons in 2016. This was contended in his first application and the court dismissed the first application.

12. The applicant then launched his second rescission application under the same case number (the second application). The applicant continued with the same allegations which were opposed by the respondent. Such was dismissed with costs.

13. The third (current) rescission application: The applicant continues to pursue the court in that the respondent is not responsive, he has made several attempts in communicating and proposing payments arrangements, till date nothing has come to fruition. He further contends that he will be highly prejudiced if the property is sold by the respondent, on the basis that the Writ of Attachment Immovable Property was the first document that he

received and that made him aware of legal proceedings by the respondent and that the rescission of judgment action was not initiated by him on the 18th of May 2017 briefly before the said scheduled Sale in Execution of 22nd May 2017 but he initiated the rescission of judgment on 17 February 2017, shortly after being made aware of the respondent's legal proceedings through the service of the Writ of Execution on 27 January 2017.

14. The main contention of the Applicant is that he relocated to a rural area for a job, in his effort to solve financial problems, he could not follow up the case. As his Attorney was not paid, he did not follow up the case and neglected it. As a result, he later learned that the matter was dismissed. The Applicant submits that justice was not served because of lack of money. Further contending that the Respondent went to court only for the purpose of getting the property sold to the person who bid for only R660 000.00 and that the respondent has desperately tried to convince the court about the reserve price that was not stipulated. Also argued that the respondent is dishonest and is abusing the process, contending that the sale in execution process itself was flawed and that the transfer was done as a result of a fraudulent process.

15. In contrary the respondent submits that the the applicant has been fully aware of the litigation against him, the initial default judgment obtained against him and the indebtedness which is due by him. It was brought to the attention of the court that such is illustrated by the admission on part of the applicant in the first rescission application of his liability, which the applicant stated some four years ago will be repaid within six months. Further contending that the Applicant was not cooperative in respect of

attachment of movable goods, this being despite the Applicant's subsequent contention, in the first rescission application, that he has amassed various movable goods that could have been attached.

16. In respect of allegations made by the applicant in that there was dishonesty and misrepresentation, the respondent contends that at all possible times they followed the correct procedural route and the setting of a reserve price was considered by two judges of this court, both of whom directed a manner in which the sale in execution should be conducted with which manner the Respondent complied. These processes were also conducted with the involvement of the applicant.

17. Further argued that the applicant has simply not made out a case or provided any substantial basis which warrants the conclusion that rescission relief can be sustained in terms of Rule 31(2)(b); Rule 42 or any of the common law grounds, in respect of either of the two orders granted on 21 October 2019 and 12 September 2019, respectively, should be dismissed with costs.

18. The requirements that an application for rescission in terms of rule 31 (2) (b) must satisfy are well established in ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) (2003) 2 ALL SA 113***, at para 11 and other authority cited. "*The applicant must show cause why the remedy should be granted. That entails (a) giving a reasonable explanation of the default; (b) showing that the application is made bona fide; and (c) showing that there is a bona fide defense to the plaintiff's claim which prima facie has some prospectus success. In addition, the application*

*must be brought within 20 days after the defendant has obtained knowledge of the judgement".*

19. In terms of Rule 42 (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:

    (i) an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby;

    (ii) an order or judgement in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; and

    (iii) an order or judgement granted as the result of a mistake common to the parties.

20. The Court in Colyn was concerned with an application for rescission in terms of Rule 42 (1) (a), this applicable approach is the same. For a rescission of an order in terms of the common law sufficient cause must be shown, which means that:

    (i) there must be a reasonable explanation for the default; the applicant must show that the application was made bona fide; and

    (ii) the applicant must show he has a *bona fide* defence which prima facie has some prospect of success.

21. In the current application, the application for rescission of judgement was made by the applicant in terms of common law, in my view, the applicant presented an unreasonable and unacceptable explanation for his failure to repay the respondent.

22. It is stated in applicant's papers that this application for rescission is in terms of the common law, I will proceed to do so. In terms of common law, a court has a discretion to grant rescission of judgment where sufficient good cause has been shown. Though it is clear that in principle and in the long standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such a party has a bona fide defence, which prima facie carries some prospect of success." [***See Chetty v Law Society, Transvaal 1985 [2] SA 756 [A] at 765*** B It is not sufficient if only one of these elements is established – [***see Promedia Drukkers & Uitgewers [Edms] Bpk v Kaimowitz and Others 1996 [4] SA 411 (C) at 418 B].***

**APPLICATION OF LEGAL PRINCIPLES**

23. In applying the above legal principles to the facts of the instant application, it is plain that the applicant has not met the requirements for the rescission of the default judgment under the common law, nor under the rules of court. At the time of the default judgment, the applicant was in breach of the agreement. The respondent had a valid cause of action against him. This much was admitted by the applicant in his papers. The applicant knew in advance that the respondent had enrolled the matter for default judgment.

24. However, in order to succeed in seeking rescission of the default judgement in terms of the sub-rule, the applicant bears the onus of establishing that the default judgement was erroneously granted.

25. It was submitted by the respondent`s Counsel that this application constitutes yet another attempt on the part of the applicant to delay the inevitable. It was also submitted that this application was bordering on an abuse of court process.

26. The applicant who was self-represented during this application, in response to such submissions by the respondent, he explained that he could not pay legal fees of his legal representative, thus he is representing himself. He informed the court that it was not his intentions to delay the court, he has made several attempts in communicating with the respondent in order to make necessary payment agreement but none was coming to fruition and that he will be seriously prejudiced if his property is sold by the respondent.

27. In his submissions, he told the court that, the default judgement should not have been granted, he was then advice to bring this application. It was then submitted by Counsel for the respondent, that this matter had previously been considered by two Judges of this court and as such the matter is *res judicata* and therefore the smatter should not be further entertained by this court. I will deal with the submissions below.

28. The applicant`s contention is that the default judgement was granted in his absence, was erroneously granted, that he was not a willful defaulter and he has a *bona fide* defence.

29. He further avers that at the time when the first respondent issued summons, commencing action, the respondent was aware that the applicant had

payment arrangements in place. He further seeks a determination of the actual amount due and payable.

30. The applicant further avers that he should be afforded the opportunity to satisfy himself regarding the reserve price. Alternatively, that the applicant be allowed to dispose the property on an open market for its market related price.

31. Accordingly, the words erroneously granted means that the court must have committed a mistake in law. An order or judgment is erroneously granted in the absence of a party, if irrespective of whether or not such judgment order is otherwise correct, the absent party was not notified or did not know of the date of hearing. In my view, the applicant presented an unreasonable and unacceptable explanation for his failure to defend the action. It is also clear that the applicant was notified and he did know of the date of the default judgment application, therefore the judgment is not erroneously granted in this respect.

32. The general approach to rescissions at common law having been established, I now turn to consider the two elements of “sufficient cause” I will do so in the light of the explanation proffered for the applicant`s default as well as defense disclosed on behalf of the applicant. It is also clear that the applicant was notified and did know of the date of the default judgment application, therefore the judgment was not erroneously granted in this respect as stated above.

33. This matter deals with the applicant`s claim that he was not aware that there was a default judgement against his name, he saw the sheriff of the court

with documents indicating that his property was to be judicially attached and to be sold in terms of the warrant of execution.

34. The applicant further contended in his papers that he was experiencing financial difficulties at the time. he went to an extend of approaching the respondent`s employees for assistance and the process was still underway.

35. The question arises as to whether the applicant is correct in its contention that the court made mistake in law in granting default judgement: to rescind a judgment under the common law, “sufficient cause” must be shown***. Miller JA in Chetty v Law Society, Transvaal 1985 (2) SA 756, described “sufficient cause” as having two essential elements. Miller JA at 764 I – 765 E said***: *“(I) That the party seeking relief must present a reasonable and acceptable explanation for his default; (ii) that on the merits such party has a bona fide defense which prima facie carries some prospect of success.”*

36. I do conclude that the applicant’s defenses are not sufficient to establish a bona fide defense that prima facie carries some prospect of success. I am content that the applicant has not made out a good case for the relief sought.

37. In the South African case of ***De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E) at p 709***, it was held that even wilful default or gross negligence on the part of an applicant for default does not constitute absolute bar to the grant of rescission, rather it is but a factor, albeit a weighty one to be taken into account together with the merits of the defence raised to the plaintiff's claim, in determination of whether good cause for rescission has been shown.

**WHETHER THE MATTER HAS ALREADY BEEN DETERMINED BY THIS COURT AND WHETHER IT IS RES JUDICATA**

38. At the hearing of this application for rescission, the respondent made submissions in *limine* to the effect that this matter is *res judicata*, in that the applicant has brought two previous failed rescission applications.

39. The respondent submitted that the applicant is abusing the court process by bringing an application which has already been disposed of by this Court.

40. It is a general rule in law that once a court has delivered judgment and reasons for it, it does not itself have authority to alter its judgment. So this court has no jurisdiction to re-open this matter. Whilst taking into cognisance that Section 34 of the Constitution of the Republic of South Africa 1996 provides: '*Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'*. The applicant in this case have fully exercised his rights by bringing the same application for the third time.

41. A party seeking a departure from this rule bears the burden to show why the court should depart from this general rule. With reference to the judgment of ***Trollip JA in the case of Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298***, it is clear that the facts in that case are different from the present case, the principles are the same. The applicant has failed to show this court, why this court should depart from this principle.

42. *Res judicata* is indeed a special plea and implies that same cause has already been tried and decided upon by some other court of competent

jurisdiction, it does not concern the merits of the case. The requirements for this plea are settled. For one to succeed one must show that:

i. The action is between the same parties
ii. The two actions must concern the same subject matter
iii. The actions must be founded upon the same cause of action.

43. In this case, it is a fact that the action is between the same parties and concerns the same subject matter and such is not in dispute this application is a replica of the previous applications filed by the applicant, requesting the court to rescind the two judgement.

44. In ***Van Winsen et al in The Civil Practice of the Supreme Court of South Africa (4th ed) at page 478***, the principle of *res judicata* is fully discussed as 'a plea in abatement, a defence that can be raised to a claim that raises an issue disposed of by a judgment in rem or based upon a judgment in person delivered in a prior action between the same parties concerning the same subject matter and founded on the same cause of action'. In the case of ***Turk v Turk 1954 (3) SA 971 (W),*** this principle was elaborated upon by the learned judge.

> *"Is this the same principle as in the case quoted by the respondent's attorney, i.e. Firestone South Africa (Pty) Ltd v Genticuro (supra). In that case, the principle stated inter alia is that 'once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it'. In that case the applicant sought and obtained judgment costs. The same applicant goes to court to seek an alteration, amendment*

*and clarification to the judgment it obtained: But even in that case, Trollip JA, after extensive analysis of the principles governing such application for alteration and amendments and the exceptions to the rule, and notwithstanding his earlier statement in reference to earlier decided cases, said 'once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio, its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.'. He went on further to ask '... whether the above list of exceptions is exhaustive'. The response was in the negative as he answered. 'A court does retain a general discretion to correct, alter or supplement its judgment or order in appropriate cases other than those listed above.' The above quoted case notwithstanding is not on all fours with the present application but does confirm the court's discretionary powers".*

45. Reasons, weighing the submissions for *res judicata*, I find for *res judicata* for the reasons that follow.

that It is well established that in this case res judicata does not implicates the rights contained in s 34. This court on several occasion, given two judgments issued is not intended to deny the applicant an opportunity to raise a defence, this prima facie extension of *res judicata* does not interfere with the applicant's constitutional right.

**The Respondent instituted a counter-application aimed at declaring the Applicant to be a vexatious litigant as contemplated in terms of Section 2(1)(b) of the Vexatious Proceedings Act, 3 of 1956.**

46. Notwithstanding the fact that the right of access to courts is protected under s34 of the Constitution of the Republic of South Africa Act, No 108 of 1996 (the Constitution), this right can be limited in terms of s36 of the Constitution and justified to protect and secure the right of access for those with meritorious disputes. The respondent submits that the applicant ought to be declared a vexatious litigant in that he persistently initiates legal action for the purposes of harassing or subduing an adversary. It is trite that the victims of these vexatious litigants cannot simply ignore the frivolous legal proceedings instituted and are forced to respond in accordance with the rules of court regardless of how ridiculous the claims may be. The Vexatious Proceedings Act, No 3 of 1956 (the Act) seeks to provide relief to applicants that can demonstrate that a respondent has persistently instituted legal proceedings without reasonable grounds. Furthermore, the Act seeks to protect an applicant who is subjected to costs and unmeritorious litigation as well as the functioning of the courts to proceed unimpeded by groundless proceedings.

47. In ***Beinash and Another v Ernst and Young and Others 1999 (2) SA 116 (CC),*** the court considered the constitutionality of s2(1)(b) of the Act**.** The court confirmed that:

> *"the provision does limit a person's right of access to court. However, such limitation is reasonable and justifiable. While the right of access to*

*court is important, other equally important purposes justify the limitation created by the Act. These purposes include the effective functioning of the courts, the administration of justice, and the interests of innocent parties subjected to vexatious litigation. Such purposes are served by ensuring that the courts are neither swamped by matters without any merit, nor abused in order to victimise other members of society".*

48. In the matter of ***Christensen NO v Richter 2017 JDR 1637 (GP***), an application in terms of s2(1)(b) of the Act was brought to declare the first respondent, a vexatious litigant. The first respondent had launched several applications against the estate. In deciding whether to declare the first respondent a vexatious litigant the court held that:

*"[the first respondent] is, in my view, a vexatious litigant. He should therefore be prevented from instituting any further legal proceedings against the estate and/ or its executors. I am satisfied under the circumstances that the applicants have made out a case for a final interdict. They have established a clear right for the granting of a final interdict. It is clear that the applications launched by the first respondent are vague and not substantiated and the balance of convenience favours the granting of the final interdict. The first respondent cannot continue to litigate as relentlessly as he does, disregarding court orders. This has to stop. I am inclined to accept that the applicants have no alternative remedy to stop him from continuing with his actions."*

49. The mere fact that the applicant was and is an unrepresented litigant does not mean the fundamental principles regarding legal costs should not apply.

This court further notes that the applicant`s application contained a number of vexatious and slanderous statements concerning the respondent. This court chose not to deal with unsubstantiated submissions by the applicant. Though there is a part of me that finds premature to declare the applicant as vexatious, it is clear that the Applicant litigant mistakenly believes that some injustice was done to him, but just as clearly, he has no basis for this belief. He is an unrepresented litigant and he has provided reasons to this court regarding his financial muscle. There is no doubt in my mind in that he is not well vest with court processes and litigation limitations. I'm adamant in that this cannot be the only way to bring some of these matters to a conclusion by declaring the applicant as a vexatious litigant. After all, it simply reinforces their sense of having been persecuted. Therefore, this court is not inclined to declare him as vexatious.

**CONCLUSION**

50. I am in any event not persuaded that a proper case has been made out for the order sought by the Applicant in this matter, the evidence placed before this court does not conclusively satisfy this Court that the evidence adduced by the Applicant on behalf of the Respondent was tainted with fraud.

51. Based on all the circumstances of this matter, as well as the applicable legal principles, I therefore conclude that the applicant has not made out a case for the rescission of the judgements granted against him. In the result, I am of the view that the application should be dismissed.

52. Further concluded that, it is trite that re-litigation is not possible between the same parties in respect of the same subject-matter, but where the parties are different, the same subject matter may be re-litigated without objection.

**COSTS**

53. I turn now to deal with the question of an appropriate cost order to be made. It is trite that costs are within the discretion of the court. In exercising that discretion a court takes into account the circumstances of the matter, the issues adjudicated and the results of such adjudication, the conduct of the parties and what would be fair and just between the parties. Finding of fraud against the respondent is unachievable. The Respondent had no intentions to mislead the court and such was explained succinctly in their papers. The applicant has blatantly refused or is in denial of the execution of judgements for the past five years. These issues were dealt with a number of times. In these circumstances I would have been compelled to consider that it would be appropriate for the applicant to pay costs, but given his financial circumstances this court makes no order regarding cost.

**ORDER**

54. In the result the following order is made:

a. This case is *res judicata* and that the grounds listed by the applicant are a single cause of action.

b. The application for rescission is refused.

c. There shall be no order as to costs.

T.P. BOKAKO, AJ

Date of hearing :24 August 2021

Date of judgment: 19 January 2022

**Appearances**

On behalf of the Applicant: DR MUVILI SIMBA appearing in person

On behalf of the Respondent: ADV CL MARKRAM-JOOSTE instructed by VZLR Incorporated