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:

14 JULY 2022 ……..

DATE SIGNATURE

CASE NO: **68888/2016**

In the matter between.

MUVILI SIMBA APPLICANT

and

ABSA BANK LIMITED RESPONDENT

JUDGEMENT FOR LEAVE OF APPEAL

BOKAKO AJ

INTRODUCTION

1. The applicant applies for leave to appeal against the whole of the judgment and order granted by me. In terms of that order the applicant's rescission application was dismissed with costs.
2. My judgment is comprehensive. I have considered the papers filed of record and the grounds set out in the applicant's application for leave to appeal as well as the parties' arguments for and against the granting of leave to appeal. I have further considered the submissions made in the parties' respective heads of argument and the authorities referred to by the respective parties.
3. The Applicant is the owner of the subject property. He had a mortgage bond with the Respondent, and defaulted on his payments. The Respondent obtained default judgment against the Applicant, and served a writ and notice of attachment on him. The Respondent was served with a notice of sale, and then instituted an application for rescission.
4. The applicant raised several proposed appeal grounds against my judgment which I do not intend to repeat here as they appear from the notice of application. The respondents opposed the application on the basis essentially that a successful recession order is generally not appealable because it is not final in effect.

5. It must be considered whether there is a sound and rational basis for reaching a conclusion that there are prospects of success on appeal[1], considering the higher threshold test envisaged by section 17 of the Superior Courts Act3 ("the Act").
6. This emanates from 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. Noting that 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.
7. 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.
8. 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 leave of appeal is birth by the third application in series of applications that the applicant has brought for rescission of judgement.

[1] Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) at para 34

9. Leave to appeal may only be granted where the Judge or Judges concerned are of the opinion that:

> (a) the appeal would have a reasonable prospect of success; or there is some other compelling reason why the appeal should be heard, including the conflicting judgments under consideration;
>
> (b) With regard to the word 'would' in s 17 of the Superior Courts Act 10 of 2012 (the Act) sub-section 17(1)(a)(i) above, the Supreme Court of Appeal has found that the use of the word in the section imposes a more stringent threshold in terms of the Act, compared to the provisions of the repealed Supreme Court Act 59 of 1959.

10. See Notshokovu v S [2016] ZASCA 112 at (2). In Acting National Director of Public Prosecutions and Others V Democratic Alliance in Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others [2016] ZAGPPHC 489 at (25) the court endorsed the notion of a higher threshold stating: 'The Superior Courts Act has raised the bar for granting leave to appeal.' In The Mont Chevaux Trust [IT2012/28) v Tina Goosen & 18 Others [LCC14R/2014, an unreported judgment from the Land Claims Court], Bertelsmann J held that:

> "It is evident that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion". See Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H.

11. The sequence of events which led to the present application went as follows : 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.

12. 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 favor of the Respondent over certain immovable property.

13. 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. 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.

14. I was not persuaded by the applicant in that Vorster AJ and Cambanis AJ. we're not aware of certain facts or that they would have precluded the granting of the 2016 and 2019 orders, but even if I erred in this regard, the enquiry does not stop there. In terms of rule 42(1), "the court may … rescind or vary" an order, giving the court a discretion whether or not to grant a rescission.

15. Accordingly, even if the applicant proved the requirements of rule 42(1)(a), the court has a discretion, particularly in respect of the time within which the rescission application was launched. Unlike rule 31(2)(b), rule 42, similar to the common law, does not specify a period within which a rescission application in terms thereof should be launched. However, a rescission application in terms of rule 42 or the common law must be launched within a reasonable period. What is a reasonable period depends upon the facts of each case[2]. The purpose of rule 42 is to correct expeditiously an obviously wrong judgement or order[3]

[2] Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C) at 421G
[3] Bakoven Ltd v G J Howes (Pty) Ltd 1992 (2) SA 466 (E) at 471E–F; Promedia Drukkers & Uitgewers (Edms)Bpk v Kaimowitz 1996 (4) SA 411 (C) at 417B–I

16. Therefore, I am not persuaded that there is a reasonable prospect of success on the grounds set out above in his application for leave to appeal.

17. Mr. Simba submitted further that I failed to properly deal with the applicant's amendment application papers which should have happened before I heard the main application. In this regard I mention that I did consider his amendment application.

18. Grounds of appeal emanates from this court`s judgement regarding the rescission application that came before me in the opposed motion court on the 24th of August 2021. The Applicant contends that on the day of the hearing, he explained to the court that he was there for an interlocutory application, contrary to what he believed why they were in court, the Respondent made submissions on both the Interlocutory and the Main Applications to be heard.

19. Further contending that he informed the court that he did not submit Heads or Arguments for the Main Application reason being it was. not possible for him to prepare Heads of Arguments for the Main application without knowing whether the amendments were authorized or not. The Respondent continued to deal with the interlocutory application and the main application. It is important to emphasize that the Applicant made submissions relating to the main application. His purpose alone was to seek rescission of previous judgements pronounced by this court, of which the said anticipated Respondents were not primary nor relevant to the matter at hand. Inclusion of the said anticipated Respondents would not have changed the facts of the matter.

20. Further contending that the court erred in not making any difference between the reasons given for the rescission of the order of 12th September 2019 by Mabuse J where the Applicant was present in Court, and the reasons for the rescission of the order of 25th. October 2016 by Vorster J which was a default judgment.

21. Consequently, I am not persuaded that there is a reasonable prospect of success on the ground set out in these paragraph of the application for leave to appeal.

22. The Applicant submitted that the court erred in applying the general principles of common law to the default Judgment of 21st October 2016. This is an error because it is the specific principle of fraud under common law that has to be applied to the judgment of 12 September 2019, which judgment was not a default one. The common law principle he submitted was specific under fraud, and it applies to the court proceedings of 12th September 2019 where he was present, not to the default judgment of 2016 and that the default judgment order that was granted as far back as October 2016" is the one that gave way to the Sale in Execution of 2020. Further contending that, If the agreement of 2019 was enforced as understood, there would not have been any sale in execution.

23. The applicant did not advance any evidence to refute the Respondent's evidence in this regard.

24. The Applicant further argued that the Applicant's main application is not res judicata reason being it has a different cause of action of fraud. It does not comply with the last requirement, regardless of Res Judicata, fraud is. This court found that the Applicant had simply failed to make out a proper case in his interlocutory and rescission application in his papers. I considered that the factual allegations

relied on were, for the most part, incorrect and unsubstantiated. The Applicant`s contentions were accordingly dismissed for the reasons set out in the main judgment. Despite the difficulties in the papers and my misgivings about the applicants' prospects, I have listened intently to the submissions advanced by both the Applicant and Counsel for the Respondent in the present application.

25. It is not in dispute that 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 contending that he did not receive any summons in 2016. This was contended in his first application and the court dismissed the first application. He pursued to launch his second rescission application under the same case number on the same facts. The applicant continued with the same allegations which were opposed by the respondent. Such was again dismissed with costs. This being the third rescission application: The applicant continues to pursue similar argument as per the first and the second application.

26. In any event, I am not persuaded that any new information or anticipated amendment by the Applicant creates a reasonable prospect of success for the application for leave to appeal.

27. The Respondent still 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 and knowledge of the Applicant.

28. Further contending that this matter had previously been considered by two Judges and as such the matter is res judicata and therefore the matter should not be further entertained by this court.

29. This court is still adamant that the Applicant has 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 ground. in my view, the applicant presented an unreasonable and unacceptable explanation for his failure to repay the Respondent. In applying 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.

30. Rule 42 of the Uniform Rules of Court however caters for a completely different situation in this court and provides for its own requirements. Rule 42 (1) (a) is a procedural measure designed to rectify a procedural error. It is a remedy distinctly different from the relief allowed under the common law.

31. The court found in National Pride Trading 452 v Media 24[4] that the requirements of Rule 42 are prescribed by the wording of the rule itself and are not imported from the common-law. Hence there is no requirement under Rule 42 (1)(a) that the showing of "sufficient cause" by such an applicant is a necessary requirement.

32. The court does find that submissions made by the Applicant are framed in diffuse and ambiguous sweeping terms. The court agrees with the Respondent's contentions that the application is vague, ambiguous, and confusing to the extent that the Respondent was not properly informed of the grounds of appeal.

33. The Applicant further raised a ground that pertains to Rule 42 and common law principle. The one piece which runs like a golden thread through all the decided cases on the common law grounds for rescission, is that its historical origin lies in the remedy of restitutio in integrum. Its aim is to correct an injustice and to place the aggrieved party in the same position in which he was before the error or fraud or other form of injustice was committed. Although Rule 42 provides for a different mechanism, namely to set aside a procedural irregularity, its aim is the same as that of the common law, namely to restore the applicant in its previous position before the irregularity occurred. And it is in this context, against the background of the common law, that the words of Jones AJA in Colyn (supra) must be read and understood where he stated (at 7B-C (para 6)): "…It (Rule42 (1)(a)) is, for the most part of any rate, a restatement of the common law. It does not purport to amend or extend the common law, …"

[4] 2010 (6) SA 587 at [54].

34. Among the grounds advanced, were that of fraud, with allegations of misrepresentation of facts made against the Respondent. Not only was that issue not raised at the material time, but the onus of establishing fraud was not discharged. The Applicant did not specify what acts formed the basis of his complaint.

35. I can find no fault in the reasoning of the court. In the context of this application for leave to appeal, the question is whether there are reasonable prospects of success on appeal. The traditional test in deciding whether leave to appeal should be granted was whether there is a reasonable prospect that another court may come to a different conclusion to that reached by the trial court in its judgment. Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which came into operation on the 23rd of August 2013, provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that 'the appeal would have a reasonable prospect of success'. For the reasons mentioned above, I do not believe that the appeal has a reasonable prospect of success.

36. I do not believe that the appeal has a reasonable prospect of success. Another court is, in my view, is unlikely to come to a conclusion different than this one. Upon consideration of the issues raised, I conclude that the appeal would not have a reasonable prospect of success as contemplated in section 17(1)(a) of the Act.

37. In the circumstances I make the following order:

Order

38. The application for leave to appeal is dismissed with costs.

T.P. BOKAKO, AJ

Date of Judgement: 14 July 2022

On behalf of the Applicant: DR MUVILI SIMBA

On behalf of the Respondent: ADV CL MARKRAM-JOOSTE