IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 724/2021

(1) REPORTABLE: YES/NO

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

(3) REVISED.

DATE: 9/6/2023

SIGNATURE

In the application between:

TSAKANE MASULUKE First Applicant

NTHABISENG MASULUKE Second Applicant

and

NEDBANK LIMITED

[Registration No: 1[...]] Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 12 June 2023.

JUDGMENT

LG KILMARTIN, AJ:

INTRODUCTION

[1] This is an application which was instituted in terms of Rule 31(5)(d) wherein the Applicants seek an order in the following terms:

> "*1. That default judgment granted by Honourable Madam Justice Mokose on 7 July 2021 be rescinded.*
>
> *2. That the execution writ authorised by the Registrar on 22 April 2022 against the immovable property in terms of Rule 46(1)(a)(ii) read with Rule 46A(2)(c) be set aside and of no effect.*
>
> *3. The matter and the decisions to declare the immovable property be re-considered by this honourable court.*"

[2] There was no prayer in the notice of motion in respect of costs.

[3] If one has regard to the order granted by her Ladyship Ms Justice Mokose ("Mokose J") on 7 July 2021 ("Mokose J's order"), it appears that it was granted in respect of a summary judgment application and was not a default judgment as indicated in prayer 1 of the notice of motion.

[4] In the circumstances, the reliance on Rule 31(5)(d) is misplaced.

[5] Rule 31(5)(d) which appears under the heading "***Judgment on confession and by default and rescission of judgments***" reads as follows:

> "*(d) Any party dissatisfied with a **judgment granted or direction given by the registrar** may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.*
>
> *(e) The registrar shall grant judgment for costs:*

(i) in accordance with Part II of Table A of Annexure 2 to the Rules for the Magistrates' Courts plus the sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court;"

(Emphasis added)

[6] It is clear that section 31(5)(d) only applies where a judgment is given by the Registrar, which is not the case in this instance.

[7] The recission application ought to have been brought in terms of Rule 42(1) or the common law.

[8] Rule 42(1) reads as follows:

"***42 Variation and rescission of orders***

(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 an 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.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

[9] Generally, a judgment is "*erroneously granted*" if there existed at the time of its issue a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment.[1]

[10] The phrase "*erroneously granted*" relates to the procedure followed to obtain the judgment in the absence of another party.[2]

[11] In terms of the common law, a judgment that was granted by default may be set aside on good and sufficient cause shown.[3]

[12] Our Courts have a wide discretion in evaluating "*good cause*" in order to ensure that justice is done. For this reason, the Courts have refrained from attempting to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of an indulgence, for any attempt to do so would hamper the exercise of the discretion. However, in general, our Courts have accepted that "*good cause*" is established by the applicant for rescission:[4]

[12.1] providing a reasonable explanation for his or her default;

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1 *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP) at 153C; *Rossitter and Others v Nedbank Ltd* (unreported, SCA case number 96/2014, dated 1 December 2015), para 16; and *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC) at 366E-367A.

2 *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at paras 25 – 27; *Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para 6 and 9.

3 *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa*, vol 1, p 938.

4 *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476; and *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300F-301C.

[12.2] showing that the application for rescission is made *bona fide* (and not for some ulterior motive); and

[12.3] showing that he or she has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success.

RELEVANT BACKGROUND FACTS

[13] on 12 September 2017 the parties entered into a loan agreement in respect of an amount of R1 140 000.00, together with interest thereon, and an additional sum of R285 000.00 ("the loan agreement"). The Applicants represented themselves throughout the negotiation of the contract until its conclusion.

[14] As continuing covering security for the payment of the capital, interest and all other costs, charges and future debts generally, which may be claimable by the Respondent under the loan agreement, the Respondent passed a covering bond, Bond No. 4[...], hypothecating Erf 2[...], The O[...], Ext 3 Township, Registration Division J.R. Gauteng Province, measuring 1102 square meters, held by Deed of Transfer, T[...] ("the immovable property").

[15] In terms of the loan agreement, the Applicants were contractually obliged to make monthly payments to the Respondent and they failed to do so. Hence, the Applicants were in breach of the loan agreement.

[16] As at 30 November 2020, the Applicants were in arrears in the amount of R117 629.93 and were indebted to the Respondent and liable for payment of the sum of R 1 225 194.03.

[17] As a result of the Applicants' breach of contract, the Respondent approached the Honourable Court and instituted civil proceedings against the Applicant. After the service of the summons, the Applicants defended the action and filed a notice of intention to defend.

[18] The Applicants did not file their plea within the stipulated time periods and therefore the Respondent served a notice of bar. Subsequent to the notice of bar being filed, the Applicants filed their plea which the Respondent alleges did not raise any triable issues or a *bona fide* defence.

[19] Thereafter, the Respondent brought a summary judgment application and set it down for hearing on 7 July 2021. I note that a notice of set down was served on the Applicants' erstwhile attorneys Gwebu Inc. Attorneys ("Gwebu Inc.") on 22 June 2021.

[20] It further appears that Gwebu Inc. filed a notice of withdrawal on 24 June 2021, some 2 days after receiving the application for summary judgment.

[21] On 29 June 2021, Mokgothu Attorneys, filed a notice of appointment as attorneys of record and it was stipulated that the Applicants' correspondent attorneys were Vhonani Nemakanga Inc. of Premium Towers Building, Office 6[...], 2[...] P[...] & L[...] N[...] Street, Pretoria.

[22] It appears that on 30 June 2021, there was a further attempt to deliver the notice of set down of the summary judgment application but the correspondent had moved from the address provided in the notice of appointment as attorneys of record. A copy of the notice of set down was, hence, emailed to the Applicants' attorneys on 30 June 2021.

[23] At the time when Gwebu Inc. were on record, the notice of set down was properly served on them and therefore the additional attempts at service were unnecessary. In the circumstance, the vexatious allegation in paragraph 6 of the replying affidavit that the Respondent "*fraudulently obtained [the]summary judgment*" can be rejected with the contempt that it deserves.

[24] The application for summary judgment was not opposed and was considered and granted by Mokose J. From the record, I seen nothing that would have precluded Mokose J granting the summary judgment order.

THE MERITS

[25] It appears to be common cause between the parties that: (i) the loan agreement was concluded; (ii) there was indebtedness by the Applicants to the Respondent; (iii) there was a breach of agreement by the Applicants; and (iv) the Applicants are in arrears in respect of their home loan account with the Respondent.

[26] The Respondent submits that none of the requirements to succeed with a recission of judgment have been met and, in particular: (i) there is no explanation from the lengthy delay in bringing the application – it was only brought on 18 May 2022, over 10 months after Mokose J's order was granted; and (ii) the Applicants have not shown that they have a *bona fide* defence and that, if the matter goes on trial, there are good prospects of success.

[27] On 19 April 2022, pursuant to the granting of Mokose J's order, the Registrar was authorised to issue a writ of execution against the immovable property in terms of Rule 46(1)(a)(ii) read with Rule 46A(2)(c).

[28] On 16 May 2022, the Applicants were served with a notice of sale on auction of their immovable property ("notice of sale"). The purported sale on auction was scheduled to take place on 26 August 2022 at 11h00.

[29] On 19 May 2022, 3 days after receiving the notice of sale on auction, the application for rescission was served on the Respondent. On 25 May 2022 the Respondent indicated that it intended to oppose the application.

[30] According to the Applicants, there is a dispute regarding the amounts owing to the Respondent and the amount has been "*over exaggerated*" and failed to take into account the amounts paid by the Applicants towards the arrear amount.

[31] Proof of the payments referred to by the Applicants are attached as annexure "C" to the founding papers and, upon scrutiny thereof, it appears that they are comprised of payments from "*TFN Projects and Service*" on 31 August

2021 in the amount of R9 500.00; 30 October 2021 in the amount of R9 500.00;and 14 December 2021 in the amount of R3 463.94; and a single payment from the First Applicant on 20 February 2022 in the amount of R7 000.00. These payments are clearly insufficient to bring the Applicants' account out of arrears.

[32] In the founding papers, the Applicants refer to *ABSA Bank Ltd v Ntsane*[5] ("*ABSA Bank*") and the fact that the Court held that if an outstanding amount on the bond could be settled by the sale of moveable assets, the bondholder should place facts before the court to establish that no other reasonable alternative exists than the execution of immovable property. It is alleged by the Applicants that there is no evidence that the Respondent had explored options of selling the debtors' moveable assets prior to bringing the application for summary judgment and there was further no explanation why the Respondent had failed to explore this option instead of taking "*such a drastic step*".

[33] The Applicants further allege in the second incorrectly numbered paragraph 6.3 of the founding affidavit (CaseLines 001-8 – 001-9) that "*The Applicants' have sufficient moveable property that far exceed the judgment debt that would ordinarily have the impact of discharging the arrear amount and have the effect of placing the debtors in a position to proceed with discharging their obligation towards servicing their mortgage bond repayment.*" (sic).

[34] As was pointed out by the Respondent, the facts in *ABSA Bank* are distinguishable in that the arrears in that case were R18.00 and the capital sum owed was just over R61 000.00. In this case, the Applicants' arrears are significant and the capital amount outstanding is in excess of R1 000 000.00.

[35] The Applicants also referred to *Nkola v Argent Steel Group (Pty) Ltd t/a Phoenix Steel*[6] ("*Nkola*") where the appellant argued that he had substantial moveable property (largely in the form of shares in companies he controlled but also motor vehicles) and contended that the respondent should seek out the

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5 2007 (3) SA 554 (T).
6 2019 (2) SA 216 (SCA).

moveable property and sell it prior to seeking execution in respect of the immovable properties. According to the Applicants, the SCA held that in executing a judgment, a judgment debtor's moveable property must be attached and sold to satisfy the judgment debt before the judgment creditor can proceed to execute against immoveable property. Furthermore, it was submitted by the Applicants that it is only in the event that there are insufficient moveable assets to fulfil the judgment debt that a judgment creditor may proceed to execute against immovable property.

[36] It was further alleged by the Applicants that "*the Applicants have not acted maliciously in any manner however* [the Respondent*] is hell-bent on executing the Applicants' immovable property that it does not want to explore other avenues to recover the debt owed*". (sic). There does not appear to be any evidence to support the allegations made against the Respondent.

[37] As far as *Nkola* is concerned, the debtor, Mr Nkola, had also alleged that he had sufficient movable property available to satisfy the judgment debt but there was no evidence on the record that movable assets (corporeal or incorporeal) had been pointed out by him to the Sheriff. The SCA stated the following in paragraphs [8] to [12] of the judgment:

> *"[8] There is no evidence on record that any movable assets, corporeal or incorporeal, were pointed out by Mr Nkola to the sheriff. Yet in his answering affidavit in the application, he claims to have 'more than sufficient movable assets of significant value (far in excess of the judgment debt) against which the applicant can execute should it choose to do so, without having to execute against my immovable properties'. Mr Nkola continued:*
>
> > *'I am the shareholder in five active companies . . . . The applicant would be at liberty to execute against any/all of my shares or loan accounts in these companies . . . but which attachment has not been done for reasons which are not apparent to me presently. I have other movables too, which*

should be excussed, over and above my said shares and loan accounts (in four of aforementioned companies these are valued at the sum of R2,763,000.00) These other movables of mine are, inter alia, motor vehicles (valued at R1,597,617.00), furniture and fittings . . . and a Liberty Life retirement annuity policy . . . .'

[9] Mr Nkola went on to say that, although he owned assets of significant value, he could not afford to pay the instalments that he had undertaken to pay under the settlement agreement for various reasons. But, he said, when certain problems had been resolved (which he anticipated would occur in December 2014), he would be able to settle the debt to Argent.

[10] The question that springs to mind immediately is why Mr Nkola, possessed of such wealth, did not dispose of his incorporeal property and pay the admitted debt to Argent. His stance is that Argent must seek out the movables and sell them before attempting to execute against his immovable properties. He would place the duty on the judgment creditor instead of resolving his financial problems himself.

[11] I consider that the common law and the rules place no obligation on a creditor to execute against movable assets where a judgment debtor has failed to point these out and make them available. The sheriff's return read together with Mr Nkola's 'defence' raised in his answering affidavit, show him to be a 'tricky' debtor of the kind referred to by Voet 42.1.42 (in Gane's translation), cited by Wunsh J in Silva v Transcape Transport Consultants and Another 1999 (4) SA 556 (W). Voet wrote:

'Generally the judgment debtor himself is asked to point out to the person making the execution the property which he wishes to be taken and sold off with a view to the securing of a judgment debt. If he refuses to do so or does so in a tricky manner or points out what

is not enough, the court servant himself seizes at his discretion those things from which the money can most readily be made up. He does so up to the limit of the debt.'

[12] Wunsh J held in Silva that rule 45 did not remove the court's discretion. He considered that, because the debtor in that matter had not pointed out movable property that was available to satisfy the judgment debt, he had behaved in a tricky manner, and had deliberately frustrated the creditor's efforts to obtain payment. Wunsh J said (at 563D – E):

'This is pre-eminently a case where the interests of justice do not dictate that the execution of the judgment should be stayed and a case where execution should proceed against the [debtor's] immovable properties.' Silva was endorsed in Tirepoint (Pty) Ltd v Patrew Transport CC and Others [2012] ZAGPJHC 34."

[38] In this case, prior to the filing of the replying affidavit in the rescission application, there was no attempt by the Applicants to point out their movable assets and their reliance on the *Nkola* judgment is misplaced. *Nkola* confirms that there is no obligation on the creditor to execute against the movables of the debtor where the debtor has failed to point the moveable assets out and make them available to satisfy the judgment debt.

[39] In the replying affidavit, there was an attempt by the First Applicant to make disclosure of the Applicants' moveable property. However, the affidavit produced, dated 4 August 2022, merely includes assets to the value of R150 000.00 which is but a drop in the ocean compared to the amount owing to the Respondent.

[40] There are also no proper valuations attached to the Applicants' papers which demonstrate that the value attributed to the assets listed is a true and fair value of the items. In some instances, the values appear to be inflated. For example, a room divider is given a value of R15 000.00 which seems excessive.

[41] In the replying affidavit, it was also stated by the Applicants that the COVID-19 pandemic caused financial misfortunes and that most privately owned businesses were negatively impacted upon as a result. According to the Applicants, their financial situation "*is on the cusp of improving*" in that "*he has already secure some government tenders and will be receiving money for serviced they will be rendering and thus enable the Applicants to discharge their debt, please see annexure 'B' and 'C' for ease of reference*".(sic)

[42] An analysis of the annexures referred to demonstrates that the letters are addressed by Sentech SOC Limited to "*Pundungwana Electrical Projects TFN Projects and Services*". There is no indication of how this business is related to the Applicants and, the fact that someone's financial position is about to improve is not a basis on which the judgment can be rescinded.

[43] In my view: (i) there is no evidence that summary judgment was erroneously sought or granted; (ii) there is no reasonable explanation provided for the Applicants' failure to oppose the summary judgment application; (iii) there is no explanation for the lengthy delay between Mokose J's order being granted and the rescission application being brought; and (iv) the Applicants have not demonstrated that they have a *bona fide* defence which, prima *facie*, has a reasonable prospect of success.

[44] In the circumstances, I find that none of the requirements have been met for a rescission of the judgment under Rule 42(1) or the common law and, hence, the application must fail.

[45] Insofar as the issue of costs is concerned, the Respondent sought the costs on a punitive scale as between attorney and client on the basis that this application is a "*hopeless, frivolous and vexatious application, launched merely to delay the litigious proceedings"*.

[46] As the Applicants have been acting in accordance with legal advice and have set out some grounds which required scrutiny by the Court, I am not of the

view that the application is vexatious. In the circumstances, I am not inclined to grant a punitive cost order.

ORDER

I accordingly make the following order:

1. The application for rescission is dismissed;

2. The Applicants are, jointly and severally, the one paying the other to be absolved, liable for the Respondent's costs in relation to the application for rescission.

LG KILMARTIN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Dates of hearing:	15 March 2023
Date of judgment:	12 June 2023
For the First and Second Applicants:	Mr Mokgothu
Instructed by:	Mokgothu Attorneys
For the Respondent:	Adv H Legoabe
Instructed by:	VDT Attorneys Inc.