REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 47615/2020

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

[redacted]
SIGNATURE

2 July 2024
DATE

In the matter between:

SALAMINAH MPHO MOKGATLE Applicant

And

ALLEGIANCE JHB SOUTH (PTY) LTD Respondent

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 2 July 2024 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file

of this matter on CaseLines. The date for hand-down is deemed to be10h00 on 2 July 2024.

MNISI AJ

INTRODUCTION

[1] This is an opposed application for rescission of the default judgment and order granted against the applicant on 21 May 2021 by Van der Schyff J.

[2] The order sought to be rescinded reads as follows:

> "Default judgment is granted in favour of the Plaintiff against the Defendant for:
>
> "*[1] Rectification of annexure "A" by deleting the words "Malachi Business Enterprise (Pty) Ltd t/a Allegiance Properties CK 2015/26978/07"*
>
> *[2] Payment of the sum of R108 387.50.*
>
> *[3] Interest on the aforesaid amount of R108 387.50, a tempora morae, from date of summons to date of payment.*
>
> *[4] Costs of suit."*

[3] The application is brought in terms Rule 42 (1) (a) of the uninform rules of this court as well as the common law. The respondent opposes the application.

BACKGROUND

[4] The applicant is an adult female employed as a finance and legal advisory. On 14march 2020 she entered into a sale agreement with Jarome Castro and

Cynthia Castro ("the sellers") to purchase a house situated in Johannesburg for an amount of R1 450 000.00. It was agreed that she would pay a deposit amount of R75 000.00 and the balance of the amount would be financed through a Mortgage Bond. She failed to pay the amount as agreed upon due to financial difficulties which led to the property apparently being sold to a third party.

[5] In terms of clause 17.4 of the sale agreement the applicant was liable for the payment of commission to the respondent being R94 250.00 plus VAT. On 16 September 2020 the respondent herein issued summons wherein it sought an order for payment of R108 387.50 resulting from breach of the aforesaid agreement against the applicant.

[6] The applicant does not dispute having received the summons, the application for default judgment and the notice of set down. On 21 May 2021, the respondent took judgment against the applicant before Van Der Schyff J in her absence. However, she states that she only became aware of the court order when it was served upon her together with the writ of execution on 31 March 2022.

[7] What transpired and further engagements between the attorneys is not relevant. Of relevance and importance however is that, being dissatisfied with the judgment by default, the applicant filed an application for rescission of the default judgment which was ultimately launched on 21 April 2022.

ISSUES FOR DETERMINATION

[8] The main issue for determination is firstly whether the applicant has met all the legal requirements either in terms of Rule 42 (1) (a) of the uniform Rules of this court, or at common law, for the rescission of the default judgment.

APPLICABLE LEGAL PRINCIPLES

Rescission of Judgement in Terms of Rule 42 (1) (a)

[9] As indicated earlier, the applicant contends that she is entitled to rescission of the order in terms of either Rule 42 (1) (a) of the Uniform Rules of Court or the Common law. The test for a rescission under Common law is trite, namely that good cause must be shown. In order to establish good cause, an applicant must set forth a reasonable explanation for the default and a *bona fide* defence/s. Regarding the issue of 'good cause shown' in an application for rescission, the following dictum in the matter of *Chetty v Law Society, Transvaal*[1], is apposite:

> "The Appellant's claim for rescission of judgment confirming the *rule nisi* cannot be brought under Rule 31 (2) or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefore has been shown. (See *De Wet and Others v Western Bank* **1979 (2) SA 1031** (A) at 1042 and *Childerly Estate Stores v Standard Bank SA Ltd* **1924 OPD 163.)**
>
> The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors are required to be considered (See *Cairn's Executors v Gaarn* **1912 AD 181** at 186 per Innes JA), but it is clear that in principle and in the long-standing practice of our courts two essential elements "sufficient cause" "for rescission of a judgment by default" are:
>
> (i) that the party seeking relief must present a reasonable and acceptabl e explanation for his default; and
>
> (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success (*De Wet's* case supra at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* **1980 (4) SA 799** (A); *Smith N O v*

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[1] *Chetty v Law Society, Transvaal* **1985 (2) SA 756** (A) **1985 (2) SA 746J** to 765 C;

Brummer N O and Another; Smith N O v Brummer **1954 (3)** SA 352 (O) at 357-8)."

[10] In Zuma *v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*[2], the Constitutional Court restated the two requirements for the granting of an application for rescission that need to be satisfied under the common law as being the following:

> *"First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a bona fide defence which prima facie carries some prospect of success on the merits. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind."*

[11] *Silber v Ozen Wholesalers*[3] remains authority for the proposition that an applicant's explanation must be sufficiently full to enable the court to understand how the default came about and assess the applicant's conduct.

[12] An element of the explanation for the default is that the applicant must show that he or she was not in wilful default. If the case the applicant makes out on wilful default is not persuasive, that is not the end of the enquiry – the applicant's case may be rescued if a *bona fide* defence is demonstrated.[4]

[13] It is trite that the defences raised must not only be decided against the backdrop of the full context of the case but must also be *bona fide* and the nature of the

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2 [2021] ZACC 28.

3 *Silber v Ozen Wholesalers* **1954 (2) SA 345** (A) at 353.

4 *Harris v ABSA Bank Ltd t/a Volkskas* **2006 (4) SA 527** (T) at [8] – [10], *Melane v Santam Insurance Co Ltd* **1962 (4) SA 531** (A) at 532C-F.

grounds of the defence and the material facts relied upon must be fully disclosed.[5]

[14] It is also trite that the court has the power to rescind its orders or judgment in terms of rule 42 (1) (a), which provides as follows:

'**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) ... ...'.

[15] The import of Rule 42 was explained by the Constitutional Court in the *Zuma* matter supra, in the following terms:

> *"[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court "may", not "must", rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."*

[16] As stated in the *Zuma* matter, to satisfy the requirements of Rule 42(1)(a), the applicant must show the existence of both the requirements that the order or judgment was granted in his or her absence and that it was erroneously granted

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[5] *Standard Bank of SA Ltd v El-Naddaf* **1999 (4) SA 779** (W) at 784 D-F.

or sought. However, the court retains the discretion to grant or refuse the rescission of an order having regard to fairness and justice.

Explanation of Default

[17] As pointed out earlier in this judgment, the applicant does not deny receiving the summons from the respondent. She did not oppose the proceedings because she was under the impression that they were issued in error. She only participated in the proceedings by applying for a rescission of judgment after having been served with the writ of execution by the sheriff.

[18] In considering whether the applicant was in wilful default, I bear in mind what was said in *Harris v ABSA Bank Ltd Volkskas*[6] that:

> *"[8] Before an applicant in a rescission of judgment application can be said to be in "wilful default" he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to reform from filing a notice to defend or a plea or from appearing would ordinarily weigh heavily against an Applicant required to establish sufficient cause."*

[19] In Zuma (supra) the court summarized the legal position and correct approach as follows:

> *"It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that the court "may", not "must", rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."*

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6 *Harris v ABSA Bank Ltd Volkskas* 2006 (4) SA 527 (T).

[20] In Zuma (supra) the court drew a distinction between two litigants: In the first place, there is a litigant who was physically absent because he or she was not present in court on the day the judgment was granted. In the second place there is a litigant whose absence she or he chose or elected. Accepting this approach, the court held that on the facts, Mr. Zuma was given notice of the case against him and also, sufficient opportunity to participate in the matter by opposing same if he wanted to. He deliberately chose not to participate. The court therefore found that a litigant who elects not to participate in despite knowledge of legal proceedings against him or her is not absent within the meaning of Rule 42 (1) (a) In other words, the court emphasized that the word "absence" in the rule,

> *"...exists to protect litigants whose presence was precluded, not those whose absence was elected."*

[21] It is quite apparent from the facts of this case that the applicant did receive the summons and the application for default judgment. In the circumstances, I find that the applicant was in wilful default by not entering an appearance to defend.

Bona fide Defence

[22] The second stage of the inquiry is whether the applicant has raised a *bona fide* defence to the respondent's claim against her. In the *Harris* decision (*supra*), Moseneke J (as he then was) stated thus:

> *'[10] 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"."

[23] It is the applicant's case that she has a *bona fide* defence with a reasonable prospect of success. The applicant raised two defences in namely that there was a supervening impossibility of performance due to the imposition of hard lockdown that not only affected the applicant but the country at large.

[24] In developing this argument, the applicant referred to the case of *Frajenron (Pty) Ltd v Metcash* where Vally J stated at para 4 as follows:

"Our law of impossibility of performance evolved on a similar footing. As noted above, it commenced with a dictum (quoted in [10] above) in Peters, Flamman & Co. By that dictum the two factors or circumstances that would excuse the non-performance are vis major and casus fortuitous. As the law evolved it was clarified that not every vis major or fortuitous will excuse the non-performance. Facts specific to a case will determine whether the non-performance should be excused. These would include the nature, terms and context of the contract, the nature of the parties, their relationship and the nature of the impossibility relied upon. No party is allowed to rely on an impossibility caused by its own act or omission – there should be no fault or neglect on its part in the creation of the impossibility. The impossibility must be absolute and not relative and it must be applicable to everyone and not personal to the defendant, i.e it must be objective."

[25] The applicant also argues that there was a second agreement of sale where the respondent made an undertaking to abandon its legal action. The respondent on the other hand disputes the existence of a 'second agreement', and sadly there is no evidence before this court to support the applicant's contention in this regard. All the applicant argues is that this issue can be ventilated at court where a certain Sibongile can bring the required

evidence. This, in my view does not assist the applicant's case in the current proceedings.

ANALYSIS

[26] It is trite that an applicant for rescission must demonstrate an existence of a substantial defence and not necessarily a probability of success. It is sufficient that in his evidence he shows a *prima facie* case which raises triable issue. The applicant in this matter has failed to fully and sufficiently explain any defence which is plausible in law. The defences raised by the applicant do not, in my view raise any triable issues. My view is fortified by what was said In *Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 446 (ECD)* the court explained the position as follows:

> *"An order or judgment is 'erroneously granted' when the court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record'. It follows that in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings."* (at page 47 F)

[27] Similarly in *Rossitter v* ***Nedbank*** *[2015] ZASCA 196* at paragraph 16, the Supreme Court of Appeal held:

> *"The law governing an application for rescission under uniform rule 42 (1) (a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted".*
>
> *"Our jurisprudence is clear: where a litigant, given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42 (1) (a). And it certainly cannot have the effect of having an order granted in absentia, into one erroneously granted."*

[28] From the totality of evidence on affidavits, annexures and all of the documents filed with the application, it has always been the respondent's case that the applicant is indebted to it. The applicant has also failed to show that she has a *bona fide* defence to the relief sought against her. The mere fact she intended to purchase another property from the same agent is irrelevant and in my view cannot serve as a *bona fide* defence.

CONCLUSION

[29] Taking into account the totality of the evidentiary material, applicable legal principles as well as case law, I am of view that the applicant has failed to prove all the elements and the requirements, for the rescission of judgment, either in terms of Rule 42 (1) (a) or at common law.

Order

Consequently, I make the following order:

[1] The application for rescission of judgment, is dismissed with costs.

[2] Such costs shall be taxed or agreed, on party and party scale.

[redacted]

J Mnisi

Acting Judge of the High Court

For the Applicant: Adv Z. Gontsana

Instructed by: Mdhluli Pearce Mdzikwa & Associates

For the Respondent: Adv W.J. Prinsloo

Instructed by: Mills & Groenewald Attorneys