IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 2022-020649

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

In the matter between:

RODNEY JOHNNY MELLA	First Applicant
EBENISE BERNADETTE MELLA	Second Applicant
and	
FIRSTRAND MORTGAGE COMPANY (RF) LIMITED	First Respondent
THE SHERIFF OF BOKSBURG	Second Respondent
In re:	
FIRSTRAND MORTGAGE COMPANY (RF) LIMITED	Plaintiff
and	
RODNEY JOHNNY MELLA	Defendant

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by e-mail. The date for the handing down of the judgment shall be deemed to be 8 April 2025.

JUDGMENT

LG KILMARTIN, AJ:

A. INTRODUCTION:

[1] In this matter, two applications were before me, namely:

[1.1] an application brought by the first and second applicants (collectively referred to as "the applicant*s*" for rescission of a summary judgment order granted by her Ladyship Ms Acting Justice Chabedi ("Chabedi AJ") on 9 February 2024, in terms of which she also granted relief in terms of Rule 46(1) and Rule 46A in favour of the first respondent; and

[1.2] an application which was initially brought as an urgent application to interdict the first and second respondents (collectively referred to as "the respondents") from executing the order of Chabedi AJ pending the outcome of the rescission application (referred to below as "the interdict application").

[2] According to the founding affidavit in the rescission application, it was brought on the basis of Rule 42(1) "*read together with Rule 31(2)(b)*" and the common law.

[3] At the commencement of the hearing, the Court explained to Mr Faku, who appeared on behalf of the applicants, that Rule 31(2)(b) was not applicable as it relates to default judgment applications and in this instance we are dealing with a rescission of a summary judgment order. Accordingly, Mr Faku proceeded to argue the rescission application on the basis of Rule 42(1) and the common

law. According to the applicants, the order was "*erroneously sought or erroneously granted*" as envisaged in Rule 42(1)(a).

[4] The interdict application had been struck from the urgent roll by his Lordship Mr Justice Baqwa ("Baqwa J") on 7 May 2024 due to lack of urgency and the applicants were ordered to pay the costs on a party and party basis on scale B.

[5] The parties failed to hold a joint conference as required in terms of the Practice Directives and, as a result, the Court was not advised by the parties jointly of what issues were before it. According to the first respondent, who was represented by Ms S Venter, both the rescission application and the interdict application had been enrolled for hearing by the first respondent as a result of the applicants failing to set the matters down. Mr Faku was asked what the applicants intended to do regarding the interdict application and he advised that he would obtain instructions. However, Mr Faku was unable to obtain instructions during the course of the hearing and then advised that the applicants would leave the matter in the hands of the Court. As both applications were enrolled, I will deal with both applications.

B. RESCISSION APPLICATION:

(a) Introduction:

[6] As far as the merits of the rescission application are concerned, Mr Faku contended that:

[6.1] Ebenise Bernadette Mella ("Mrs Mella"), the second applicant, was not cited as a party in the main action (despite her allegedly having been married to the first applicant in community of property – an aspect which I will deal with in further detail below) and Chabedi AJ could not have granted an order in respect of property that she was a "*co-owner*" of; and

[6.2] If the rescission relief was granted, the applicants required an opportunity to answer the summary judgment application.

[7] The fact that the second applicant was cited as a party in the rescission application does not make her a party in the main action and, for reasons explained below, there was no need for her to be joined as a party in the main action.

[8] At the outset, it is important to point out that the relevant agreements in this matter were signed by the first applicant and the debt is due and payable by the first applicant. Furthermore, the first applicant is the sole owner of the immovable property in respect of which orders were made and the second applicant is not a "*co-owner*" of the property as Mr Faku contended. In addition, the first applicant, at all material times, represented to the first respondent that he was unmarried.

(b) <u>Relevant legal provisions and authorities</u>:

[9] Rule 42 is titled "*Variation and rescission of orders*" and Rules 42(1)(a), 42(2) and 42(3) read as follows:

> "*(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****;*
>
> *...*
>
> *(2) Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interest 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.*"

[10] In order to succeed with an application based on Rule 42(1)(a), there are 3 requirements that must be met, namely:

[10.1] The judgment must have been erroneously sought or erroneously granted;

[10.2] The judgment must have been granted in the absence of the applicant; and

[10.3] The applicant's rights or interests must be affected by the judgment.

[11] Once the three requirements of Rule 42(1)(a) are established, an applicant would ordinarily be entitled to succeed and would not be required to show good cause in addition thereto.[1]

[12] The Constitutional Court has confirmed that Uniform Rule 42 is an empowering provision for the Court to rescind a judgment. 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 stated the following:

"*It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with the 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.*"

[13] As far as rescission under the common law is concerned, the requirements which need to be met were described in *Hetty v Law Society, Transvaal*.[3] In this regard, there are two requirements that need to be met, namely:

[13.1] The applicant must furnish a reasonable and satisfactory explanation for its default; and

[13.2] It must be shown that on the merits it has a *bona fide* defence which *prima facie* carries some prospects of success.

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1 *Hard Road (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) at 578 (G).
2 [2021] ZACC 28, para [53].
3 1985 (2) SA 756 (A) at 765 A-E.

[14] 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.[4]

[15] An order or judgment was erroneously granted where:

[15.1] There was an irregularity in the proceedings;[5]

[15.2] If it was not legally competent for the Court to have made such an order.[6]

(c) <u>Relevant background facts</u>:

[16] On 8 April 2022, summons was issued by the first respondent against the first applicant.

[17] On 2 June 2022, a notice of intention to defend was served by the first respondent.

[18] On 19 July 2022, a notice of bar was served and filed.

[19] On 6 September 2022, Mr Faku was invited to CaseLines at 10h24.

[20] The first applicant's plea was served and uploaded by Mr Faku on CaseLines at 15h24 on 14 September 2022.

[21] On 26 September 2022, the application for summary judgment was delivered by hand and via email.

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4 *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at 366 E – 367 A.
5 *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038 D.
6 *Athmaram v Singh* 1989 (3) SA 953 (D) at 956 D and 956 I.

[22] On 15 August 2023, the summary judgment and Rule 46(1) and 46A application ("Rule 46 application") was served on Mr Faku's offices with a set down date of 2 October 2023.

[23] On 8 September 2023 Mr Faku appears to have been automatically removed from CaseLines at 01h01. The first respondent is not aware of how this happened.

[24] On 2 October 2023, a new date was obtained for the hearing of the application for summary judgment and Rule 46 application.

[25] On 22 January 2024, a notice of set down for the application of summary judgment and Rule 46 application on the roll of 9 February 2024 was served on Mr Faku's offices.

[26] On 9 February 2024 at 00h04 the first applicant served a Rule 30(2)(b) notice ("the Rule 30 notice"). On that same day, the summary judgment and Rule 46 application were argued before Chabedi AJ.

[27] Importantly, Mr Faku was present at the hearing and argued on behalf of the first applicant. Hence, the order was not granted in the first applicant's absence as required by Rule 42(1)(a).

[28] The order of Chabedi AJ which is sought to be set aside reads as follows:

> "***SUMMARY JUDGMENT IS GRANTED IN FAVOUR OF THE APPLICANT AGAINST THE RESPONDENT IN THE FOLLOWING TERMS:***
>
> *1. Payment of the sum of **R1 189 473.09**;*
>
> *2. Payment of interest on the abovementioned amount at a variable rate of 7.60% nominal per annum calculated daily and compounded monthly from 7 MARCH 2022 to the date of payment, in accordance with Regulation 40 of the National Credit Act, No. 34 of 2005, as amended;*

3. An order declaring the Defendant's immovable property described as

ERF 6[…] I[…] P[…] T[…],

REGISTRATION DIVISION I.R., PROVINCE OF GAUTENG; MEASURING: 1027 SQUARE METERS,

HELD BY DEED OF TRANSFER NR: T[…]0

specially executable;

4. Costs of suit, on the attorney and client scale, to be taxed.

AN ORDER IN TERMS OF THE APPLICATION IN TERMS OF RULE 46(1) AND RULE 46A:

5. An order authorizing and directing the Registrar of this Honourable Court to issue a writ against the immovable property of the Respondent described above;

6. An order authorizing the sale in execution of the Respondent's immovable property the Sheriff, through a public auction, to the highest bidder for a reserved price of R1,200,000.00;

7. Costs of suit, on the attorney and client scale, to be taxed."

[29] Summary judgment was granted in favour of the first respondent against the first applicant as the first applicant's plea failed to disclose any triable issue and did not disclose a *bona fide* defence. Although no opposing affidavit was filed by the first respondent, Chabedi AJ did hear argument and the fact that the the first respondent had served the Rule 30 notice in the early hours of the morning was brought to her attention.

[30] The Rule 30 notice is dated 8 February 2024 and reads as follows:

"***TAKE NOTICE THAT*** *the Respondent hereby advises the Applicant that the steps being taken by them of making an application in terms of Rule 46(1) and Rule 46A herein is an irregular steps* (sic) *and that they* (sic) *are given 10 (ten) days upon which to remedy that irregularity.*

TAKE NOTICE FURTHER THAT *the grounds upon which the Respondent is raising the irregular steps* (sic) *are as follows:*

1 That there is NO Judgment Creditor and Judgment Debtor as required by the Rule in that no decision has been taken by the Honourable Court in terms of awarding the damages in favour of any one. (sic)

2 That the Applicants are put the cut before houses (sic) *in that, they are required to firstly finalise the summary judgment application which is guaranteed that they would be successful.*

3 The Applicants are required to withdraw the Application in terms of Rule 46(1) and Rule 46A.

4 That Rule 46(1) and Rule 46A are only required to be requested once there is a nulla bona *return after the judgment is given in favour of the Judgment Creditor.*

5 It is submitted that, the sheriff has not issued a nulla bona *return because there is no judgment against the Respondent.*"

[31] On 5 March 2024, the application for rescission of judgment was served and filed.

[32] On 24 April 2024, the interdict application was launched by the applicants for an interdict to stop the execution proceedings.

[33] As mentioned above, on 7 May 2024, Baqwa J struck the urgent application from the roll.

(d) <u>Discussion of the merits</u>:

[34] As far as the applicants rely on Rule 42(1)(a), the summary judgment was not granted in the first respondent's absence and, therefore, this Rule cannot be relied upon. Even if 42(1)(a) was applicable (which it is not), I am of the view that the order before Chabedi AJ was not erroneously sought or granted.

[35] Chabedi AJ was well aware of the Rule 30 notice and this did not preclude her from granting the order she did.

[36] Turning to the common law, Mr Faku argued that: (i) there had been non-joinder of the second applicant; and (ii) he had not had access to CaseLines at all relevant times.

[37] It is common cause that the first time that the applicants have mentioned the issue of non-joinder was in the application for rescission of judgment. This issue was not raised in the plea at all and was not before Chabedi AJ. In any event, the evidence in this regard is that:

[37.1] At the time that the relevant home loan agreement was entered into, the first respondent did not know, and could not reasonably have known, that the first applicant was married in community of property (as suddenly alleged – but not proven - by him in the founding affidavit in the rescission application);

[37.2] In the home loan application which was signed by the first applicant on 4 October 2019 he indicated that his marital status was "*single*". Furthermore, the question was asked "*if married ANC register both names?*" and the answer was "*no*";

[37.3] In an affidavit which was completed by the first applicant titled "*Information required by Bond Attorney to comply with Financial Intelligent Centre Act, No. 38 of 2001*", the first applicant also stated "*I am single*"; and

[37.4] In an antenuptial contract which was obtained by the first respondent, it appears that an antenuptial contract with the exclusion of the accrual system, in terms of the Matrimonial Property Act, 88 of 1984 ("the Matrimonial Property Act") was registered with the Registrar of Deeds on 14 October 2019 ("the ANC").

[38] The ANC states, *inter alia*, the following:

"***RODNEY JOHNNY MELLA***

IDENTITY NUMBER: 7[…]
UNMARRIED
-and-
EBENISE BERNADETTE JACOBS
IDENTITY NUMBER: 8[…]
UNMARRIED
(Hereinafter referred to as 'The Parties')
AND the Parties have declared that, whereas the said Rodney Johnny Mella and Ebenise Bernadette Jacobs, have agreed to get married to one another, and is intended to be solemnised between them and their, intention is that insofar as the marriage between them is concerned they have agreed and now contract with each other as follow (sic)*:-*

1 That there shall be no community of property and no community of profit and loss between them in respect of their marriage;

2 The accrual system referred to in Chapter 1 of the Matrimonial Property Act, 88 of 1984 ('the Act') shall not apply to their intended marriage;

***UPON** which conditions and stipulations the Parties declared it to be their intention to solemnise their intended marriage and mutually promised and agreed to allow such other full force and effect thereof under obligation of their persons and property according to law.*" (sic)

[39] The parties also signed the ANC under the descriptions "*Intended Husband*" and "*Intended Wife*", respectively.

[40] Mr Faku suggested that the ANC had been fabricated but there is no basis to say this. In an attempt to demonstrate this, he repeatedly referred the Court to a copy of a marriage certificate which was attached to the replying affidavit dated 30 November 2013. However, that marriage certificate does not confirm what matrimonial property regime applied. Mr Faku further argued that the bank systems are connected to Home Affairs and the bank should have been able to investigate what the position was.

[41] It is clear that from the above that, until the filing of the rescission application, the first respondent represented that he was unmarried.

[42] However, even if the first applicant had been married in community of property when he concluded the agreement (which has not been proven and is not admitted by the first respondent), it is clear from the founding affidavit that the first applicant signed the agreement with the support and consent of the second applicant. This is confirmed in paragraph 18 of the founding affidavit at CaseLines 007-10.

[43] Sections 15(1), (2)(a) and (9) of the Matrimonial Property Act provides as follows:

> "***15 Powers of spouses***
>
> *(1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.*
>
> *(2) Such a spouse shall not without the written consent of the other spouse-*
>
> *(a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;*
>
> *…*
>
> *(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and-*
>
> *(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;*
>
> *(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case*

may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate."

[44] Based on the facts of this case, even if the parties were married in community of property (which I reiterate has not been proven by the applicants), in terms of the provisions of section 15(9)(a) of the Matrimonial Property Act, it is deemed that the agreement was entered into by the first applicant with the consent of the second applicant and is accordingly valid and enforceable.

[45] The first applicant also referred to section 17 of the Matrimonial Property Act which provides as follows:

"***17 Litigation by or against spouses***

(1) A spouse married in community of property shall not without the written consent of the other spouse institute legal proceedings against another person or defend legal proceedings instituted by another person, except legal proceedings-

(a) in respect of his separate property;

(b) for the recovery of damages, other than damages for patrimonial loss, by reason of the commission of a delict against him;

(c) in respect of a matter relating to his profession, trade or business.

(2) A party to legal proceedings instituted or defended by a spouse may not challenge the validity of the proceedings on the ground of want of the consent required in terms of subsection (1).

…

(5) Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally therefor."

[46] In terms of the provisions of section 17(2) of the Matrimonial Property Act, the second applicant may not challenge the validity of the proceedings

against the first applicant on the ground that she did not give written consent to the first applicant to defend the first respondent's legal action.

[47] Also, having regard to section 17(5) of the Matrimonial Property Act, the first respondent would have been entitled to recover the debt from the first applicant as he incurred the debt.

[48] In my view, there is no basis to claim that the second applicant had to be joined in the main action proceedings instituted by the first respondent against the applicant. In this regard, the first respondent's counsel pointed out that the Windeed search report also confirms that the first applicant is registered as the owner of the property and therefore the submission that the second applicant was a "*co-owner*" is incorrect.

[49] Turning to Mr Faku's complaint about his lack of access to CaseLines, all of the documents were properly served at Mr Faku's offices and he did not need access to CaseLines to be aware of what was transpiring in the matter. The fact that he was present when the matter was argued before Chabedi AJ shows that he was acutely aware of the status of the matter and was able to make representations to the Court regarding the Rule 30 notice. The CaseLines audit report also shows that Mr Faku did have access to CaseLines between 8 September 2022 and 8 September 2023 when he was automatically removed.

[50] Mr Faku argued that, in the light of the service of the Rule 30 notice, Chabedi AJ was not able to proceed to hear the summary judgment application as she had to wait for the ten (10) day period referred to therein to lapse and then the first applicant would have brought a Rule 30 application. I do not agree. The Rule 30 notice is not an application and, in any event, the submissions made therein are flawed in law.

[51] As a result of the Full Bench judgment in *ABSA Bank Limited v Mokebe and Related Cases*,[7] it is necessary for the entire claim (i.e. the monetary

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7 2018 (6) SA 492 (GJ).

judgment as well as the relief declaring the immovable property specially executable) to be adjudicated at the same time when foreclosing mortgages in respect of primary residences. This is precisely what happened in this case and there was therefore no basis for the objection in the Rule 30 notice.

[52] Mr Faku referred the Court in paragraph 41 of his heads of argument, to *Kgomo and Another v Standard Bank of South Africa and Others*,[8] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[9] and *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*[10] as support for his argument that Chabedi AJ was incorrect in proceeding with the summary judgment application in the face of the Rule 30 notice. None of the aforesaid cases support this submission.

[53] In the light of the above, I am not satisfied that there is any basis to grant the rescission relief under the common law as no good cause has been shown as to why the judgment of Chabedi AJ should be rescinded and no *bona fide* defence has been raised in the plea.

[54] As far as the interdict application is concerned, it was argued that the matter had become moot. However, bearing in mind that the order is sought pending the outcome of this application (which could be the subject of an application for leave to appeal), I am also dealing with the merits thereof. In my view the interdict application was brought prematurely, there is no merit in it and it falls to be dismissed with costs. The order of Baqwa J relates to the costs of the urgent hearing and, hence, it is necessary to make a cost order in respect of the further costs relating thereto. I note that Baqwa J granted costs on party and party scale B and the same scale of costs will be awarded by this Court.

[55] As far as the scale of costs in respect of the rescission application is concerned, the agreement provides for attorney and client costs in paragraph 2.16.2 thereof.

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8 2016 (2) SA 184 (GP).
9 2003 (6) SA 1 (SCA).
10 2007 (6) SA 87 (SCA).

ORDER

In the circumstances, I make the following order:

(a) Rescission application:

1. The application for rescission of judgment is dismissed;

2. The applicants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the first respondent on the attorney and client scale;

(b) Interdict application:

1. The interdict application is dismissed;

2. The applicants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the first Respondent on party and party scale B.

LG KILMARTIN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Dates of hearing:	19 March 2025
Date of judgment:	8 April 2025
For the Applicants:	Mr T Faku
Instructed by:	T Faku Attorneys Inc.
For the First Respondent:	PDR Attorneys Inc.
Counsel for the First Respondent:	Adv S Venter