REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO : **37071/2012**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

SIGNATURE

DATE 21/10/21

In the matter between:

CHEROKEE ROSE PROP 100 CC	First Applicant
WAYDE TREVOR MORSINK	Second Applicant

And

ABSA BANK LIMITED	First Respondent
SHERIFF KEMPTON PARK	Second Respondent
REGISTRAR OF DEEDS, PRETORIA	Third Respondent
HAWK EYE INVESTMENTS (PTY) LIMITED	Fourth Respondent

JUDGMENT

FRANCK AJ:

[1] The Applicants launched an application for the rescission of a default judgment granted against them on 25 October 2012 in terms of Uniform Rule 42(1). The Applicants further sought declaratory relief that the warrant of attachment issued as a consequence of such judgment be declared void and of no force and effect and declaring that the sale in execution of Erf 49, Modderfontein Extension 2 Township, Registration Division IR, Province of Gauteng ("the property") by the Second Respondent to the Fourth Respondent be declared void, that the Third Respondent cancel the registration of transfer of the property and that the Third Respondent re-register the property into the name of the First Applicant. The Applicants also sought costs of the application in the event of opposition.

[2] The application was issued on the 2nd of October 2019, 7 years after the default judgment was granted.

[3] The application was opposed by the First Respondent. The Fourth

Respondent, being the current registered owner of the property, opposed the application and filed an answering affidavit, whereafter the Fourth Respondent filed a notice to abide on the 12th of July 2021.

[4] The Fourth Respondent had applied for the eviction of the Second Applicant. This application had become settled and it was admitted during argument on behalf of the Applicants, that it is common cause that the Second Applicant has vacated the property.

[5] The Applicants filed no replying affidavits.

First Rescission Application

[6] The default judgment was granted against the Applicants on 25 October 2012 following foreclosure proceedings instituted against the Applicants by the First Respondent in terms of which, the First Respondent sought a money judgment as well as an order declaring the property to be specially executable.

[7] The property was sold in execution to the Fourth Respondent on 18 February 2016. On the same day, the Applicants applied for a rescission of the default judgment. This application preceded the current application that is before this Court and will be referred to as

the *"first rescission"* or *"first rescission application"*.

[8] The first rescission application was heard on the 20th of November 2018 and was dismissed by the Honourable Mr Justice Molahlehi in a judgment handed down on 6 February 2019.[1]

[9] From the judgment dismissing the first application for rescission, it is apparent that the Applicants applied for a rescission in terms of Uniform Rule 42 and applied for condonation for the late filing of the first rescission application.

[10] In the judgment, the merits of the application for rescission were considered by the Court. The Court not only considered grounds in terms of Uniform Rule 42, but also considered the application for rescission with reference to common law grounds for rescission, with reference to whether or not the Applicants had shown good cause for a rescission to be granted.

[11] The Second Applicant alleged, in the first application for rescission, that he was unable to defend the matter due to an attack on him by a dog after which he suffered from fatigue. He did not dispute service nor did he dispute that the summons came to his attention. He did not explain his failure to oppose the application, to deliver an answering

affidavit or to appear at the hearing of the application. The court found that the Applicants failed to show an absence of wilfulness in failing to oppose the application.

[12] The Applicants contended in the first application for rescission that the loan agreement stood to be declared reckless lending in terms of Section 80(1) of the National Credit Act ("the National Credit Act") and that ABSA Bank Ltd, (being the only respondent in the first application for rescission) did not have *locus standi* to institute proceedings because it had sold/securitised/ceded all its rights, title and interest to another company known as ABSA Home Loans No. 1 SPV (Pty) Limited. The Court found that the defence relating to the National Credit Act was unsustainable as the National Credit Act excludes credit agreements concluded between juristic persons from the application of the Act. It was furthermore found that the National Credit Act would not apply to the agreement as the turnover of the First Applicant at the time of the conclusion of the agreement exceeded R1 million. The Court accepted the First Respondent's version that the debt owed by the Applicants was never sold or transferred to another entity. As such, in the first application for rescission, the Court considered the application on its merits and dismissed the application with costs.

Second Rescission Application

[13] After the judgment relating to the first application for rescission was handed down, the property was transferred to and registered in the name of the Fourth Respondent on 18 February 2016. On 31 May 2019, the First Applicant was paid an amount of R140 734,58 as a result of the nett proceeds derived from the sale in execution of the property, as the First Applicant's indebtedness with the First Respondent had been settled in full.

[14] The Applicants did not take the judgment by the Honourable Mr Justice Molahlehi on appeal.

[15] Eight months later and during October 2019, the Applicants then launch a second application for rescission of judgment.

[16] In the second application for rescission, the Applicants rely on the provisions of Uniform Rule 42, and during argument, it was indicated on behalf of the Applicants, that they confine their second application for rescission of judgment to the provisions of Uniform Rule 42(1)(a) in that, the Applicants allege that the default judgment granted was erroneously sought or erroneously granted in the absence of the Applicants.

[17] In the second application for rescission, the First Applicant has not tendered repayment of the above amount.

Condonation

[18] In the second application for rescission, the Applicants have not applied for condonation and the Applicants do not state when the judgment came to their attention.

[19] In the Honourable Mr Justice Molahlehi's judgment[2] it is stated that the Applicants became aware when the sheriff attached the property during November 2012. The first rescission application was launched during February 2016, 3½ years after the Applicants became aware of the judgment.

[20] The second rescission application has been launched without any application for condonation, 7 years after the judgment came to the Applicants' attention.

[21] The delay between knowledge of the default judgment and the second application for rescission is excessive and the Applicant has shown no good cause for this. The application has not been launched within a reasonable period of time. Had the Applicants included a prayer for

condonation, they would have failed to make out a case for condonation of the late filing of the second rescission application.

[22] The application stands to fail on this ground alone. There are also no prospects of success in respect of the second application for rescission for reasons which will appear later in this judgment.

[23] The First Respondent raised two points *in limine*. The first point *in limine* is that the second rescission application offends against the principle of *res iudicata*. As a second point *in limine* the First Respondent raises the defence of estoppel, with the First Respondent claiming that the Applicant is estopped from relying upon the defences contained in the second application for rescission and/or interfering with the transfer of the property to the Fourth Respondent.

First point *in limine* : *res iudicata*

[24] The *exceptio rei iudicatae* is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct. This presumption is founded on public policy, which requires that litigation should not be endless, and on the requirements of good faith, which does not permit of the same thing being demanded more than once.[3]

[25] The judgment of the Honourable Mr Justice Molahlehi was final and definitive and the merits of the matter were considered. [4]

[26] The judgment involves the same parties (the Applicants and the First Respondent).

[27] In the second application for rescission of judgment, the Applicants cited the Second, Third and Fourth Respondents, consequent upon the property being transferred after the first rescission application was dismissed. In the second rescission application, apart from the first prayer, which is relief relating to a rescission of the default judgment, the remainder of the relief pertains to the retransfer of the immovable property back into the name of the First Respondent. This ancillary relief is, however, dependant upon the main relief being the rescission of judgment being granted. As such, the Applicants still seek the same relief in the second rescission application, being a rescission of the default judgment granted on 25 October 2012. The cause of action in both rescission applications are thus same and the same substantive relief has been claimed by the Applicants in both cases.[5]

[28] When considering this matter, on its own merits, it would not be equitable or fair to allow the Applicants to proceed with a second application for rescission of judgment in the circumstances.[6]

[29] The doctrine of *res iudicata* is applicable and as such, the Applicants were not entitled to launch a second application for rescission of judgment. The Applicants' claim fails on this ground alone.

Second point *in limine: estoppel*

[30] The *essentialia* to succeed with a defence based on estoppel are:

[30.1] a representation by words or conduct of a certain factual position;

[30.2] that the party acted on the correctness of the facts as represented;

[30.3] that the party so acted or failed to act to its detriment;

[30.4] that the representation was made negligently (although this is not always an essential element);

[30.5] that the person who made the representation could bind the other party by means of such representation.

[31] The First Respondent has not set out which representation by the Applicants, it would rely on in order to establish the defence of estoppel. As such, I am of the view that estoppel is not applicable in this application.

Merits

[32] It is possible in our law for a rescission of judgment to be sought in terms of either Rule 31(2), Rule 42(1) of the Uniform Rules of Court or the common law. The Applicants confined themselves during argument to Rule 42(1) and maintained that the judgment was erroneously sought and granted in their absence.

[33] The purpose of Rule 42 is to correct expeditiously an obviously wrong judgment or order. In the judgment of **Kgomo and Another v Standard Bank of South Africa and Others**[7] it was found that the following principles govern rescission under Rule 42(1)(a):

[33.1] The rule must be understood against its common law background.

[33.2] The basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio* but subject to certain exceptions of which Rule 42(1)(a) is one.

[33.3] The rule caters for a mistake in the proceedings.

[33.4] The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment.

[33.5] A judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment.

[33.6] The error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and

[33.7] The Applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in Rule 31(2)(b).

[34] The Applicants have made out no case in their application to sustain a finding that the default judgment was erroneously sought or granted.

[35] Even if, the Applicants' application is considered with reference to principles applicable to rescissions granted in terms of common law, the Applicants' application does not pass muster. At common law, Applicants, applying for a rescission of judgment are generally expected to show good cause for the rescission by (a) giving a reasonable explanation for their default, (b) showing that the application was made *bona fide* and (c) showing that they had a *bona fide* defence to the Plaintiff's claim which *prima facie* has some prospects of success.[8]

[36] The Applicants offer no reasonable explanation for their default other than vague averments regarding illness at the time that the summons was issued and default judgment was granted.

[37] The issue of lack of wilful default is not dealt with in the Applicants'

heads of argument at all.

[38] The Applicants' defences raised on the merits further have no merit.

[39] The Applicants raise a defence relating to Section 129(1) and Section 130 of the National Credit Act. The Applicants are aware that the National Credit Act is not applicable to the agreement as a result of the findings made in the judgment of the Honourable Mr Justice Mohahlehi.

[40] The second defence on the merits, relates to the computation of the outstanding debt due to the First Respondent as at the date of default judgment. In summary, the Applicants aver that as a result of the "*recapitalisation*" of arrear amounts that are repayable over the remaining term of the loan and changes in interest rate, that the true amount of the arrears as at date of default judgment was in the region of R5 631,04 as opposed to the amount alleged by the First Respondent, being an amount of R55 804,65. During argument, the Applicants submitted that, as a result of *"recapitalisation"*, any arrears due to non-payment would be incorporated in the main debt and *"spread"* over the loan period making the arrears *"disappear"* by adjusting the monthly instalment.

[41] There is no merit in this defence. Furthermore, the Applicants admitted during argument, that it is common cause that there was a breach of the credit agreement as a result of non-payment.

[42] The Applicants' application for rescission was furthermore not *bona fide*.

ORDER

[43] The second rescission application launched by the Applicants fail on all grounds, as set out above. The application constitutes a gross abuse of the process of court and accordingly, the application is dismissed with attorney and client costs.

FRANCK, A J

Date of hearing : 22 July 2021

Date of judgment : 21 October 2021

Legal representation :

For Applicants :	Mr M Webbstock
Attorneys :	Matthew Webbstock Attorneys
For First Respondent :	Advocate D van Niekerk
Attorneys for First Respondent:	Hammond Pole Majola Attorneys

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1 CaseLines 009-57 to 009-69
2 Paragraph 14 of the judgment, CaseLines 009-61
3 **African Farms & Townships Limited v Cape Town Municipality** 1963 (2) SA 555 (A) at 564
4 **African Wanderers Football Club (Pty) Limited v Wanderers Football Club** 1977 (2) SA 38 (A)
5 **National Sorghum Breweries (Pty) Limited t/a Vivo African Breweries v International Liquor Distributors (Pty) Limited** 2001 (2) SA 232 (SCA)
6 **Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk** 1995 (1) SA 653 (A) at 670 I – 676 E
7 2016 (2) SA 184 (GP) at [11]
8 **Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) at [11]