

**THE REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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| (1) | REPORTABLE: <b>NO</b>                  |
| (2) | OF INTEREST TO OTHER JUDGES: <b>NO</b> |
| (3) | REVISED:                               |

Date: **29<sup>th</sup> November 2021** Signature: \_\_\_\_\_

A handwritten signature in black ink, appearing to be "P. M. M.", is written over the signature line.

**CASE NO:** 39610/2020

**DATE:** 29<sup>th</sup> NOVEMBER 2021

In the matter between:

**FIRSTRAND BANK LIMITED**

Applicant

and

**MORIPANE CONSTRUCTION & PROJECTS CC**

First Respondent

**MORENA, VINCENT PHOSO**

Second Respondent

**Coram:** Adams J

**Heard on:** 22 November 2021 – The 'virtual hearing' of the Opposed Application was conducted as a videoconference on *Microsoft Teams*.

**Delivered:** 29 November 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to *SAFLII*. The date and time for hand-down is deemed to be 10:00 on 29 November 2021.

**Summary:** Civil procedure – application for rescission of default judgment – principles and requirements for the granting of rescission discussed – whether defence *prima facie* established – application for rescission refused.

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### ORDER

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- (1) The first and second respondents' application to rescind and set aside the default judgment granted against them by this Court (per Senyatsi J) on 25 February 2021, be and is hereby dismissed with costs.
  - (2) The first and second respondents' application to stay the warrant of execution issued against their property on 8 March 2021, be and is hereby dismissed with costs.
  - (3) The first and second respondents jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this rescission application, on the scale as between attorney and client.
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### JUDGMENT

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**Adams J:**

[1]. On 25 February 2021 this Court (per Senyatsi J) granted default judgment in favour of the applicant against the first and second respondents for payment of the sum of R1 074 373.22, together with interest thereon and costs of suit. The applicant's claim and the said judgment were based on a credit facility granted by the applicant in favour of the first respondent. The second respondent signed a suretyship in favour of the applicant in terms of which he stood as surety and co-principal debtor in respect of the first respondent's indebtedness to the applicant. In response to a warrant of execution issued against their property by the registrar of this court on 8 March 2021, the first and second respondents launched this application for a rescission of the default judgment. The application is opposed by the applicant.

[2]. The default judgment was obtained against the first and second respondents, jointly and severally, due to their failure to deliver notice of intention to oppose an application by the applicant, which application was duly served on the first respondent on 15 January 2021 by affixing a copy thereof to the outer door at its domicilium and on the second defendant on 21 January 2021 also by 'affixing' at his place of residence. Curiously, the sheriff's return of service relating to the second respondent contains the following remark:

'Affixed in the presence of the minor daughter of the respondent, Kathlego. Defendant (sic) said he is busy; he cannot see me'.

[3]. The central issues in this opposed application are (1) Did the respondents show good cause to have the default judgment rescinded? (2) Is a reasonable explanation given for the default? And (3) Did the respondents in this application for rescission disclose a *bona fide* defence to the applicant's claim? Put another way, the last enquiry is whether the respondents have set out averments, which, if established, would entitle them to a dismissal of the applicant's main application.

[4]. As indicated above, the main application is premised upon an overdraft (facility) agreement concluded on 20 August 2018 between the applicant and the first respondent. The second respondent executed a deed of suretyship in favour of the applicant on the same day. During 2019 the bank called up the facility as a result of the first respondent's breach thereof. It had fallen into arrears with payment towards the debt as provided for in the written agreement. On 3 July 2019 the parties concluded an agreement in terms of which, *inter alia*, the respondents acknowledged their indebtedness to the bank and undertook to settle same by making various payments as provided for in the 'repayment agreement'.

[5]. The respondents breached this agreement too, resulting in the institution of the main application.

[6]. In this application for rescission, the respondents explain that they were in default because the application 'was not served on them'. However, as correctly pointed out by Mr De Oliveira, Counsel for the applicant, the main application was

indeed served on the respondents' chosen domicilium address by affixing same to the outer door. The respondents do not, however, explain why they did not, or would not, have received the papers. Moreover, the second respondent does not even begin to explain why the application, which was served at his place of residence – in the presence of his minor daughter – did not come to his attention,

[7]. For these reasons, it was submitted, on behalf of the applicant, that the respondents were in wilful default. Their application, so the applicant contended, should be dismissed with costs on this basis alone.

[8]. As for the requirement that the respondents should demonstrate a *bona fide* defence to the applicant's claim, the second respondent, in the Founding Affidavit, states that they were complying with the loan agreement until '[the first respondent] was embarrassed by financial difficulties as a direct consequence of the current catastrophe of global proportions called Covid-19'. Regrettable as this may be, as correctly pointed out by Mr De Oliveira, this does not amount to a defence – far from it.

[9]. The applicant therefore submits that the respondents have failed to raise a defence to the Bank's claim, let alone a *bona fide* one. I find myself in agreement with this submission.

[10]. All of the foregoing translate into the inescapable conclusion that the first and second respondents had failed to show *good cause* why the default judgment should be rescinded. The respondents simply did not advance any other good reason why the default judgment granted against them should be set aside.

[11]. In all the circumstances, I am not persuaded that the first and second respondents made out a proper case for a rescission of the default judgment, and the application therefore stands to be dismissed.

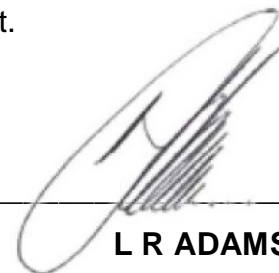
[12]. As regards costs, the general rule is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why this general rule should be departed from in this application. I therefore intend granting the applicant the costs of this application on the scale as between attorney and client, which is

provided for in the overdraft agreement which forms the basis of the applicant's case against the respondents.

### **Order**

In the result, the following order is made: -

- (1) The first and second respondents' application to rescind and set aside the default judgment granted against them by this Court (per Senyatsi J) on 25 February 2021, be and is hereby dismissed with costs.
- (2) The first and second respondents' application to stay the warrant of execution issued against their property on 8 March 2021, be and is hereby dismissed with costs.
- (3) The first and second respondents jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this rescission application on the scale as between attorney and client.



**L R ADAMS**

*Judge of the High Court*

*Gauteng Local Division, Johannesburg*

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| HEARD ON:                             | 22 <sup>nd</sup> November 2021 – as a videoconference on <i>Microsoft Teams</i> . |
| JUDGMENT DATE:                        | 29 <sup>th</sup> November 2021 – judgment handed down electronically              |
| FOR THE APPLICANT:                    | Advocate M De Oliveira  |
| INSTRUCTED BY:                        | Jason Michael Smith Incorporated, Rosebank, Johannesburg.                         |
| FOR THE FIRST AND SECOND RESPONDENTS: | Mr M V Mangwale   |
| INSTRUCTED BY:                        | Monageng Mangwale Attorneys, Kempton Park   |