REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 45470/2018
REPORTABLE: ***NO***

OF INTEREST TO OTHER JUDGES: ***NO***

REVISED: ***Yes***

19th September 2022

In the matter between:

JAGESUR, NARESH	First Applicant
RAMNARAIN, USHA	Second Applicant
and	
NEDBANK LIMITED	First Respondent
THE SHERIF OF THE HIGH COURT, EKURHULENI	Second Respondent

Heard: 20 April 2022 – The 'virtual hearing' of this opposed application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 19 September 2022 – 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 19 September 2022.

Summary: Civil procedure – judgments and orders – compromise agreement made order of court – rescission in terms of the Uniform Rule 42(1)(c) and the common law – either way, the applicants must show that they have a *bona fide* defence, which *prima facie* has some prospect of success – if not, rescission cannot and should not be granted – application refused.

ORDER

(1) The first respondent's application for an amendment of the draft order dated 28 October 2019, which was made an Order of this Court (per Opperman J) on the said date, succeeds with costs.

(2) The case number '16507/2018' on the said draft order, attached to the final court order, making the said draft order an Order of this Court on 28 October 2019, be and is hereby deleted and replaced with case number '45470/2018'.

(3) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first respondent's costs of its rule 42(1)(b) application on the scale as between attorney and client.

(4) The first and second applicants' application for a rescission of the judgment of this Court dated 28 October 2019, be and is hereby dismissed with costs, to be paid by the first applicant and the second applicant, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

JUDGMENT

Adams J:

[1]. On 28 October 2019 this Court (per Opperman J) granted a judgment, by agreement between the parties, in favour of the first respondent (Nedbank), against the first applicant and the second applicant, for payment of the sum of R892 887, together with interest thereon and costs. The judgment incorporated a foreclosure order in terms of which the applicants' immovable property, namely Portion [....] of Erf [....] B [....] North Extension [....] Township ('the property'), was declared specially executable. It bears emphasising that the first and second applicants, who are married to each other in community of property, apparently consented to the said judgment being granted against them.

[2]. In this opposed application, the applicants apply for a rescission of the said judgment and they allege in their replying affidavit that the rescission application is in terms of the provisions of Uniform Rule of Court 42(1)(c), 'in that there existed common mistakes between the parties', alternatively, in terms of the common law. Therefore, the issue that needs to be decided in this matter is whether the applicants have made out a case for the setting aside of the judgment.

[3]. There is however another aspect of the matter which requires my attention before I deal l with the aforegoing dispute. And that relates to what can best be described as a comedy of errors relating to case numbers. The issue is that there are two case numbers under which Nedbank had instituted two separate applications against the applicants for the exact same relief. This resulted in confusion as to which case number belongs to the application in which the judgment by this Court was granted.

[4]. The official court order by Opperman J – signed by the Registrar of this court – bears the above case number: 45470/2018 and the order simply provides as follows

> 'It is ordered that: -

Draft order marked “X”, signed and dated 28 October 2019, as amended, is made an Order of Court.’

[5]. The draft order, marked ‘X’, referenced in the aforementioned official Court order, however bears case number: 16507/2018. This, Nedbank contends, is a typographical and/or an administrative error, which can and should be corrected in terms of the provisions of rule 42(1)(b). The dispute between it and the applicants, so Nedbank alleges, was litigated under case number 45470/2018, and the order by Opperman J was in fact granted under the latter case number. Nedbank accordingly filed an application for a correction of the draft order and that application was delivered on or about 7 December 2020. Bizarrely, this application is opposed by the applicants and their grounds of opposition are so convoluted that I do not believe it necessary to go into the detail of same – it makes little sense.

[6]. As already indicated, Nedbank’s aforementioned application, which is also presently before me, is in terms of the provisions of rule 42(1)(b), which, in the relevant part, reads 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) … … …

(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;’

[7]. In support of its application, Nedbank explained that they initially issued an application, under case number 16507/2018 on 2 May 2018, against the applicants for the same relief sought in the present case. Although, the applicants opposed the first application, same was not pursued by Nedbank for reasons explained, notably that as a result of recent developments in the law at the time, that application was no longer compliant with the procedural requirements applicable to foreclosure applications. And Nedbank therefore deemed it necessary to commence the legal

process afresh, which was done under the latter case number 45470/2018. That application was served on the applicants during January 2019, and was opposed by them. They filed their answering affidavit in that application, albeit under the earlier case number – erroneously so – on 13 February 2019.

[8]. It was clearly the intention of the applicants to respond to the founding affidavit in case number 45470/2018, as the responses correlate – numerically and in content – exactly to all the paragraphs in the founding affidavit under that case number. Subsequently, Nedbank filed its replying affidavit under case number 45470/2018.

[9]. For all of these reasons, I have no doubt in my mind that the intention of Nedbank, as well as that of the applicants, was to litigate under case number 45470/2018. The reference to the other case number on the draft order therefore, to my mind, was a patent error within the contemplation of rule 42(1)(b) and can and should therefore be corrected in terms of that rule. Moreover, as submitted by Nedbank, at no stage did the applicants raise any argument that the answering affidavit upon which they rely related to the application under the earlier case number.

[10]. The applicants had no reason to oppose Nedbank's rule 42(1)(b) application. What was the point of them opposing the said application, I ask rhetorically? They do not dispute that judgment was granted against them and it matters not that the judgment was granted under either of the two applications. In opposing the said application, the applicants were clearly abusing the processes of the court. Nedbank's application should therefore be granted and the applicants should pay the costs of the said application on the scale as between attorney and client.

[11]. That brings me back to the applicants' main application for rescission of the Court order dated 28 October 2019.

[12]. As a point *in limine*, Nedbank points out that at the hearing of the matter before Opperman J on 28 October 2019, the applicants were legally represented. As already indicated, judgment against them was granted by agreement between the

parties and therefore, so Nedbank contends, it cannot be argued that the judgment was granted by default or in the absence of the applicants. This is a requirement for a rescission in terms of the common law.

[13]. I find myself in agreement with these contentions on behalf of Nedbank. The applicants were legally represented by Counsel and an attorney when the order was granted by Opperman J. On this basis alone, the rescission application in terms of the common law falls to be dismissed.

[14]. However, even if I am wrong about the jurisdictional requirement that the order or judgment should have been granted in the absence of the applicants, the rescission must still fail for the simple reason that a proper case is not made out by the applicants for such relief. I say so for the reasons elaborated upon in the paragraphs which follow. In sum, the reason why the rescission application is doomed is that the applicants have failed to demonstrate that they have a valid and *bona fide* defence to Nedbank's claim.

[15]. Insofar as the rescission application is based on rule 42(1)(c), it may be apposite to have regard to the applicants' case in that regard and the relevant facts, which are set out in the following paragraphs. Rule 42(2)(1) reads 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:
>
> … … …
>
> (c) an order or judgment granted as the result of a mistake common to the parties.'

[16]. The applicants claim that they made payment to a debt counsellor, who in turn failed to make payment to Nedbank of the agreed monthly instalments. In other words, the applicants state that, because they complied fully with their duties and obligations under and in terms of the Kempton Park Magistrates Court order dated 6 May 2009, which placed them under debt counselling, it cannot be said that they

were in breach of the loan agreement with Nedbank and therefore it (Nedbank) was not entitled to foreclose on their property. Therefore, so the applicants contend, Nedbank had no right to 'remove them out of debt review'. In fact, such conduct on the part of Nedbank was unlawful as it ought to have applied for a rescission or a variation of the debt review court order. Incidentally, similar averments were made by the applicants in their replying affidavit in the original application by Nedbank for judgment against them.

[17]. Moreover, so the applicants contend, the amount of R902 940.98, mentioned in the main application as being the sum of the arrears on the applicants' bond account, is incorrect as they have made payment of the total amount of R570 000 towards the bond. Applying some basic arithmetic, it is clear that the applicants' bald statement in that regard cannot be correct.

[18]. Nedbank accepts that the debt counsellor made payment to it. However, such payments were far below the amount provided for in the debt review court order. In particular, during 2017, the monthly instalments payable, in terms of the re-arrangement order, was the sum of R2 999.27, but Nedbank only received the following payments in respect of the following months: for June 2017 – R109.22; for July 2017 – R131.20; and in August 2017 – the amount of R164.26.

[19]. What is more is that as at 27 October 2020, the status of the bond account of the applicants with Nedbank was far from satisfactory, and that would be putting it mildly. The arrears at that point stood at R377 180.92 and the outstanding balance due had increased to R965 318.60, the original amount of the loan being R550 000. Howsoever one views this matter, the applicants are in breach of the loan agreement and the bond with Nedbank.

[20]. This then means that Nedbank was fully within its rights to give notice to the applicants of its termination of the debt review. This they did by invoking the provisions of s 86(10) and 88(3) of the National Credit Act, 34 of 2005 ('the NCA'), which provide that notice shall be given to the consumer, the debt counsellor and the National Credit Regulator. The applicants had defaulted on their payments in terms

of the re-arrangement debt review order, which, in turn, entitled Nedbank to terminated the re-arrangement.

[21]. Section 86(10) of the NCA provides as follows:

> 'If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to
>
> (a) the consumer;
>
> (b) the debt counsellor; and
>
> (c) the National Credit Regulator,
>
> at any time at least 60 business days after the date on which the consumer applied for the debt review.'

[22]. Section 88(3) of the NCA reads as follows:

[23]. Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until

> (a) the consumer is in default under the credit agreement; and
>
> (b) one of the following has occurred:
>
> (i) An event contemplated in subsection (l)(a) through (c); or
>
> (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.'

[24]. Ms Carvalheira, who appeared on behalf of the first respondent, referred me to the unreported judgment of *Wesbank v Coetzer*[1], which is instructive as regards the aforegoing provisions of the NCA. In that matter, in which there was also a rescission application where the debt counsellor had made short payments which resulted in the debt review being terminated, the court held as follows:

> 'The applicant, through the NPDA, in some months made such low payments to the respondent that it bordered on being ridiculous. During the period January 2011 to November 2011 it received instalment payments amounting to some R165. Applicant was in arrears with instalment payments amounting to R79 731.37 when summons was issued. Respondent submits that all the payments were less than the applicant was supposed to pay and as such the respondent was entitled to terminate the applicant's debt review process. I agree with respondent's counsel that this "defence" is without any merit.'

[25]. I find myself in agreement with the sentiments expressed in this judgment.

[26]. As regards s 88(3), this is what the Constitutional Court had to say in *Ferris and Another v FirstRand Bank Ltd and Another*[2],

> '[14] Once the restructuring order had been breached, FirstRand was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Sections 88(3)(b)(ii) does not require further notice – it merely precludes a credit provider from enforcing a debt under debt review unless, amongst other things, the debtor defaults on a debt-restructuring order.'

[27]. With this in mind, it cannot possibly be said that the provisions of Uniform Rule of Court 42(1)(c) finds application – there is no order or judgment which was granted 'as the result of a mistake common to the parties'. Moreover, as

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[1] *Wesbank v Coetzer* (37175/2013) [2013] ZAGPPHC 371 (20 December 2013);
[2] *Ferris and Another v FirstRand Bank Ltd and Another* 2014 (3) SA 39 (CC);

demonstrated in the aforegoing paragraphs, the applicants do not have a defence to the claim by Nedbank on which the order of 28 October 2019 was based.

[28]. Similarly, the applicants' application does not fit the mould for a rescission application under the common law, which requires of the applicants to show 'good cause', which has been held to mean that an applicant must prove: (1) that there is a reasonable explanation for the default; (2) that the applicant must show that the application was made *bona fide*; and (3) that the applicants must show they have a *bona fide* defence, which *prima facie* has some prospect of success. The applicants do not even begin to comply with these requirements, especially not with the requirement that they demonstrate that they have a *bona fide* defence to Nedbank's claim.

[29]. The point is simply that, whether the application for rescission by the applicants is brought in terms of rule 42(1)(c) or in terms of the common law, the applicants fall short in that they are not able to demonstrate that they have a valid and a *bona fide* defence to Nedbank's claim and the relief sought by it in the original application. There is therefore no point in rescinding the judgment only for it to be reinstated later.

[30]. If one does not have a *bona fide* defence to a claim, then one is not entitled to a rescission of a judgment or an order against you. On that basis, the applicants' application should be dismissed. I nevertheless think that it is necessary for me lastly to deal with one more 'defence' raised by the applicants, that being that, whilst they concede and accept that at the hearing of the matter on 28 October 2019 they were legally represented, they contend that their legal representatives at the time 'failed to honour and carry out [their] instructions'.

[31]. This ground for the rescission of the court order of 28 October 2019, is mentioned rather belatedly and for the first time in the applicants' replying affidavit. At paragraph 4.2 of his replying affidavit, the first applicant states the following: -

> 'I submit that, although I was legally represented when the order was granted on the 28th day of October 2019, the judgment or order was granted

> as a result of a mistake common to the parties as it will appear above. My previous legal representation was negligent in consenting to any order without my knowledge.'

[32]. Later on in his replying affidavit the first applicant elaborates on this point and reiterates that they had never consented to any order being made against them and that such consent shall have been made by their previous attorneys. He concludes by submitting that 'such consent was made without my instructions'.

[33]. I understand the applicants case to be that the court order should be rescinded because their legal representatives acted without their authority. And, in any event, even if they did have the authority to consent to the court order, same should nevertheless be set aside because it came about as a result of a mistake common to the parties. I have already dealt with the latter part of the applicant's case, and concluded that there is no merit in it.

[34]. The same applies to the issue whether the legal representatives of the applicants had apparent (or ostensible) authority to consent to the draft order being made an order of court. In that regard, I can do no better than to quote from *Makate v Vodacom (Pty) Ltd*[3], in which the Constitutional Court explained the concept of ostensible authority as follows:

> 'The concept of apparent authority as it appears from the statement by Lord Denning, was introduced into law for purposes of achieving justice in circumstances where a principal had created an impression that its agent has authority to act on its behalf. If this appears to be the position to others and an agreement that accords with that appearance is concluded with the agent, then justice demands that the principal must be held liable in terms of the agreement. . .'

[35]. On the basis of this authority, I am of the view that the applicants cannot disavow the authority of their legal representatives. In the circumstances of this case, the applicants created the impression that their Counsel and attorney, who

[3] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC);

represented them at the material time, had authority to act on their behalf. That then is the end of that issue.

[36]. For all of these reasons, the application of the first and the second applicants falls to be dismissed. And the costs should follow the suit, to be awarded on the scale as between attorney and client as provided for in the agreements between the parties.

Order

[37]. Accordingly, I make the following order: -

(1) The first respondent's application for an amendment of the draft order dated 28 October 2019, which was made an Order of this Court (per Opperman J) on the said date, succeeds with costs.

(2) The case number '16507/2018' on the said draft order, attached to the final court order, making the said draft order an Order of this Court on 28 October 2019, be and is hereby deleted and replaced with case number '45470/2018'.

(3) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first respondent's costs of its rule 42(1)(b) application on the scale as between attorney and client.

(4) The first and second applicants' application for a rescission of the judgment of this Court dated 28 October 2019, be and is hereby dismissed with costs, to be paid by the first applicant and the second applicant, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON: on	20th April 2022 as a videoconference *Microsoft Teams*
JUDGMENT DATE:	19th September 2022
FOR THE FIRST AND SECOND APPLICANTS:	Advocate S Nkuna
INSTRUCTED BY:	G W Mashele Attorneys, Pretoria
FOR THE FIRST RESPONDENT:	Advocate R Carvalheira
INSTRUCTED BY:	EVDM Attorneys, Bedfordview, Johannesburg
FOR THE SECOND RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance