IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA

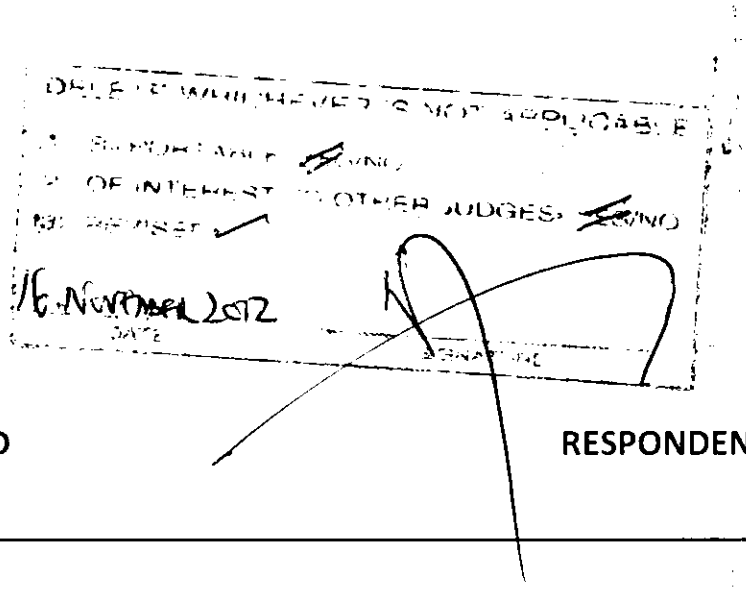
16/11/12.

CASE NO: 47132/2009

In the matter between:

MONDLI LELIE MOPHULENG 1ST APPLICANT

NTOMBIZODWA A. ZIQUBU (MOPULENG) 2ND APPLICANT



And

FIRSTRAND BANK LIMITED RESPONDENT

JUDGMENT

MSIMEKI J

INTRODUCTION

[1] On 17 May 2008 the two Applicants passed a bond, namely, a covering mortage bond no B043243/08 over their property known as Erf 7838 Cosmo City Extention 6 Township which is held under Deed of Transfer No. T035109/08 in favour of Firstrand Finance Company Limited for the amount of R317.690.88 and an additional amount of R52.948.48 as security for the loan amount which Firstrand Finance Company Limited gave them. On 21 May 2009 Firstrand Finance Company Limited ceded its right title and interest in and to the said bond unto and in favour of Firstrand Bank Limited in accordance with cession of a bond number BC 000021104/2009. The two Applicants defaulted with their bond repayment and this resulted in the cessionary taking judgment by default against both of them on 9 March 2010. On 27 October 2011, DJP Van der Merwe granted an order against the Applicants declaring their immovable property specially executable. The Second Applicant has brought an application for the rescission of the judgment that was granted on 9 March 2010 and the order of 27 October 2011. The application is opposed by the Respondent, Firstrand Bank Limited.

BRIEF FACTS

[2] The first and the second Applicants were married to each other. They are now divorced. They both appeared to have wanted to have the judgment and order rescinded. Only the second Applicant attended court when the matter was to be argued. She was to present the case herself. Mr Mokoena, an attorney with the right of appearance in the High Court who happened to be at court, kindly agreed to assist the second Applicant and argue her case. He argued that the second Applicant was entitled to an order condoning her late application to have the judgment and the order rescinded. He submitted that the property which the Applicants had bought had some defects which the bank and the developer should have fixed. His further submission was that the second Applicant had a *bona fide* defence in the matter. Mr Foden for the Respondent disagreed and profferred a number of submissions.

THE ISSUE

[3] The issue to be determined by the court is whether the second Applicant has made out a proper case to be entitled to the relief that she seeks.

[4] Mr Foden, at the outset of the matter, pointed out that there were a number of problems in the matter. These were:

1. That the uniform rules of court had not been complied with. He, however, was not going to take technical points because of the problem.
2. That the second Applicant in prayer 2 sought rescission of the default judgment that was granted against her on 27 October 2011. This was in fact the order of the Deputy Judge President and not the default judgment of 9 March 2010.
3. Again Mr Foden had no objection that an application for an amendment be granted for the prayer to properly refer to the default judgment of 9 March 2010. The application was duly granted.

4. Certain documents had not been annexed to the relevant affidavits. These could be annexed.

[5] Mr Mokoena requested that the parties be allowed to deal with the matter in its entirety. Mr Foden had no objection to the request and the parties were so permitted.

[6] Mr Mokoena submitted that the second Applicant had demonstrated no willful default. The property, according to him, had been defective and the second Applicnat had done everything to have the matter amicably resolved. The second Applicant's problem is that she did not enter any appearance to defend the matter. The combined summons clearly states that the second Applicant should, within 10 days of her receipt of the summons, have filed with the Registrar of the court, a notice of her intention to defend the matter and served a copy thereof on the Respondent's attorneys. This, the second Applicant, did not do. She sought assistance from Wits Law Clinic and the law firm of Negota Inc. The lawyers, no doubt, should have informed her that applications of this

nature are supposed to be brought within the prescribed time limits. The matter dragged on for a long time while the Applicants were not servicing the bond. It, indeed, would have been unreasonable to expect the Respondent not to do anything when it had given money to the Applicants who, according to the agreement, had to repay. It, indeed, was incumbent upon the Applicants to ensure that they reacted to the summons failing which legal proceedings would go on as stated in the summons. To say that the Respondent, through its officers, had undertaken not to proceed with the matter would definitely need some qualification. The Respondent could not be expected to hold the matter in abeyance indefinitely as it had parted with money which needed to be repaid. It will be remembered that the developer built the house. The Respondent merely provided the money. If there were problems relating to the quality of the house, that had something to do with the developer and not the Respondent. The Registrar of the court could have explained the procedure that the second Applicant needed to follow in case she approached him or her wanting to defend the action. The Registrar could again have explained the consequences of failing to enter an appearance to defend to the second

Applicant . This, the second Applicant did not do. She did not approach the Registrar with regard to the procedure that she ought to have followed.

[7] The second Applicant contended that she has a *bona fide* defence in this matter in that :

1. FirstRand Finance Company Limited granted her the loan while Firstrand Bank limited initiated the action against her.

2. The Plaintiff (Respondent) does not have *locus standi* to institute the action.

3. The notices that were sent to them in terms of the National Credit Act 34 of 2005 were sent by Firstrand Bank Limited and not Firstrand Finance Company Limited, an entity that they entered into the credit agreement with.

4. The Applicants had been in communication with the bank which had assured them that legal steps would be held in abeyance. The summons, according to the second Applicant, was therefore prematurely issued.

5. They were not notified that judgment would be taken against them before same was taken against them. The summons, itself, gives this warning in the event where the second Applicant failed to enter appearance to defend the matter. It specifically spelt out that judgment would in that event be given against them "without further notice." It was therefore their responsibility to keep on reminding whoever assisted them about this warning. The second Applicant does not say that her legal advisers informed her that the Respondent would not take judgment against her and her ex-husband.
6. The Respondent and/or the company working with the Respondent failed to inspect the property. The inspection, according to them, could have revealed the defects in the property which could have been attended to and thereby avoiding the current situation.
7. The developer and the credit provider had a duty or assumed responsibility to ensure that the Applicants were provided with a home that was built in accordance with the building plans that complied with good practices in the industry. This, according to them, did not happen as they were provided with a house of less value than they anticipated.

8. She has a valid counter claim against the Respondent and a valid claim against the developer, Firstrand Finance Company Limited, the City of Johannesburg and the NHBRC. She contends that the current structure will have to come down and it will cost her R295.000.00 to correct the situation.
9. Her home could be taken away from her unfairly and without a valid reason.
10. She has a 6 year old daughter she is looking after as the head of the household.
11. She has a right to have access to adequate housing which includes the right to live in a satisfactory and a decent house.

[8] Mr Mokoena for the second Applicant, submitted that the second Applicant had not been served with the National Credit Act notice while she alleged that she received the notices in terms of the requirements of the National Credit Act 34 of 2005. She only regarded the notices as null and void due to the fact that the notices should have been given by Firstrand Finance

Company Limited and not the Respondent as is the case in the current matter.

[9] The second Applicant and Mr Mokoena hold the view that the Respondent has no *locus standi* to institute the current action. The view cannot be correct as there has been a valid cession of rights, title and interests in the bond by the cedent to the cessionary that I have referred to above. The valid cession presupposes that the notices in terms of the National Credit Act are also valid as they did not have to be given by the cedent but by the cessionary.

[10] Mr Foden submitted that the Respondent could not property deal with the issues raised by the second Applicant who failed to annex the relevant documents to her founding affidavit. Indeed, the annexures that she refers to in her founding affidavit were never annexed. Mr Foden further submitted that the founding affidavit is also replete with irrelevant information. It is indeed so.

[11] The service of the writ of execution on the second Applicant on 30 March 2010, according to the Respondent and Mr Foden, is a clear indication that negotiations had failed and that the matter had to be brought to finality. This is understandable. The second Applicant as far back as July 2010, discovered that the papers that had been drawn for her had not been drawn in accordance with her instructions. She terminated her mandate on 5 July 2010 and still did not pursue the rescission application which was only initiated on 31 January 2012. The rescission application was initiated almost two years after the granting of the default judgment on 9 March 2010. That was way out of time if regard is had to the time limit within which the application is to be launched if it is to be done in good time.

[12] The Second Applicant contends that they did not believe that they were obliged to make payment when the Respondent had paid out the funds against her instructions. This, in any event, could not help them as that amounted to a clear default regarding the monthly bond repayments which

were falling due, owing and payable on a monthly basis. The developer had to remedy the defects and not the Respondent.

[13] The Respondent contended that the second Applicant was in willful default when she failed to enter an appearance to defend. If regard is had to what the summons says, the contention has merit. It is the Respondent's further contention that the Applicants "have yet to pay or offer to pay a single cent towards their bond." It is not the second Applicant's case that they did not receive the money from the Respondent. Indeed, the money was used to pay for the house. The Respondent only had to ensure that there was enough security to cover the money that had been advanced to the Applicants by the Respondent. This is borne out by the documents that the Respondent has referred to in the answering affidavit. The Respondent contended, correctly in my view, that the second letter of demand and the issue of the summons failed to get the second Applicant to protect her rights or to institute any claim which she alleges she has.

[14] The cession which Mr Mokoena submitted had not been valid was and is indeed valid. There is nothing wrong therewith. The cession establishes the Respondent's *locus standi*. Unlike Mr Mokoena's submission, that there is no averment relating to the cession in the particulars of claim, the cession has duly been referred to in paragraph 4 of the particulars of claim and is an annexure thereto. Mr Mokoena's submission that Kerrindran Govender, the deponent to the Respondent's answering affidavit had no authority to depose thereto has no merit. A consideration of the delegation of authority clearly demonstrates this.

[15] An undertaking that legal steps would be held in abeyance, according to Mr Foden, never meant that the second Applicant could be entitled to indefinitely stop paying the bond. Neither did it mean that legal action would be stayed in perpetuity. There is merit in the submission as the Respondent, in the absence of a written settlement or payment from the second Applicant, was free to resume its rights of recourse against the second Applicant. The summons was served on 14 August 2009. On 21 August 2009, according to the second Applicant, the issue of the legal steps

being held in abeyance took place. The contention therefore that the summons was issued prematurely cannot be correct.

[16] The Respondent contends that the second Applicant does not have a *bona fide* defence; has not offered to pay a reduced sum or any sum at all; has lived in the house without paying a cent to the Respondent; has never suggested that she is not the owner of the property or that the property should never have been transferred to her or that the agreement be cancelled. She never repaired the defects and claimed recompense from the developers. This, according the Respondent, demonstrates an act of *mala fides* on the part of the second Applicant. The contention, in my view, is sound and has merit.

[17] The Respondent contended that it took the second Applicant a year and a half before she applied for rescission. In fact she was forced to do so by the Rule 46 application which was postponed *sine die* by Mavundla J when he stipulated that the second Applicant had "to serve and file an application for rescission of Judgment in accordance with Rule 6 of the uniform Rules

and the Practice Directive of this Honourable Court on or before 31 January 2012".

[18] The Respondent averred that any claims that the second Applicant might have had against the developer and the Respondent have prescribed. It denied that it was obliged to inspect the property. The developer had to provide the second Applicant with a satisfactory and a decent house not the Respondent which only had to provide the money to buy the house.

[19] The Respondent admits that the Applicant's home would not be taken away from her unfairly and without a valid reason. It however, contends that the same Applicant used the property for 3 years without paying for it; that the second Applicant is more than 30 installments in arrears; that the second Applicant shows no sign of committing herself to repay the arrears or to bring the account up to date; that no possibility exists that the second Applicant will be able to pay the Respondent what is owed within a reasonable period without the Respondent having to execute against the property and that the Respondent should not be expected to finance the

primary residences of customers who should not be expected to repay the money in accordance with the written loan agreements which they concluded.

[20] The Respondent concedes that the needs of the second Applicant and her 6 year old child should be considered. The Respondent, however, contends that "the second Applicant has taken advantage" of the Respondent "for a long time". The value of the property, according to the Respondent, does not prevent the second Applicant from obtaining adequate accommodation elsewhere. Further, the right to adequate housing, according to the Respondent, does not mean that the second Applicant has a right to live in a house valued at R320.000.00 for free and at the expense of the Respondent. The Respondent's contention has substance.

[21] Rule 31 (2)(a) of the Uniform Rules of Court provides:

"2(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and the defendant

is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet".

Rule 31 (2)(b) provides:

"(b) A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

For good cause to be shown wilfulness should be absent **(Maujean t/a Audio Video Agencies v Standard Bank of SA LTD 1994(3) SA 801 (c) at 803J)**

The Applicant in a rescission application needs to:

1. Give a reasonable explanation of his default. The Applicant should not expect assistance from the court where the default was wilful or due to gross negligence.

2. Show that the application is *bona fide* and not merely made to delay the Plaintiff's claim.
3. Show that he or she has a *bona fide* defence to Plaintiff's claim. The Applicant need only make out a *prima facie* defence by setting out averments which, if established at the trial, would entitle him or her to the relief asked for. He or She does not have to produce evidence that the probabilities are actually in his or her favour. He or She need not deal fully with the merits.

In exercising its discretion to determine whether or not good cause has been shown the wilful or negligent nature of the Defendant's default is one of the considerations taken into account by the court **(Harris v Absa Bank Ltd t/a Volkskas 2006(4) SA 527(T) at 530b-531B)**

The following must be shown before a party can be said to be in wilful default:

1. The knowledge that an action is being brought against him or her;
2. A deliberate refraining from entering an appearance, though free to do so; and
3. A certain mental attitude towards the consequences of the default.

"Good cause" in **Siber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 (A) at 352** was held to be satisfied only if there was evidence of the existence of a substantial defence and the *bona fide* presently held desire on the part of the Applicant for relief actually to raise the defence concerned in the event of the judgment being rescinded. Good cause for a rescission needs to be proved and not to be alleged **(Siber v Ozen Wholesalers (Pty) Ltd (*supra*) at 352 G-H) and De Vos v Cooper and Ferreira 1999(4) SA 1290 (SCA) at 1304 H and Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd 2011(3) SA 477 (KZP) at 485 A-C)**

[22] The second Applicant became aware that the action was being brought against her. She was free to enter an appearance to defend the action and the summons clearly deals with this and warns her in so many words of the consequences of failing to do that. The second Applicant's failure to enter an appearance to defend the action, indeed, resulted in what the summons said would happen. Default judgment was taken against her. The second Applicant's failure to enter the appearance was, indeed, deliberate. It was

a known fact that failure to enter an appearance would lead to judgment by default. The second Applicant, this notwithstanding, did not enter an appearance to defend. This also entailed a certain mental attitude towards the consequences of the default.

[23] A consideration of all that I have said above demonstrates that the second Applicant has not made out a proper case to be entitled to the relief that she seeks. The application for the rescission of the default judgment of 9 March 2010 and the order of the court of 27 November 2011, in my view, should fail.

[24] I, in the result, make the following order:

The application is dismissed with costs.

M W MSIMEKI

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	: 16 NOVEMBER 2012
APPLICANT'S ATTORNEYS	: COETZER & PARTNERS
APPLICANT'S ADVOCATE	: ATTORNEY MOKOENA
1ST RESPONDENT'S ATT	: M L MOPHULENG
RESPONDENT'S ADVOCATE	: ADV R A FODEN