REPUBLIC OF SOUTH AFRICA

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

CASE NO: 9850/2000

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

26/10/16
DATE

SIGNATURE

26/10/2016

In the matter between:

ABSA BANK LIMITED	Applicant
and	
BALOYI RASIMATE THOMAS	First Respondent
BALOYI JANE MIHLOTI	Second Respondent

In re the action:

ABSA BANK LIMITED	Plaintiff
and	
BALOYI RASIMATE THOMAS	First Defendant
BALOYI JANE MIHLOTI	Second Defendant
NEDBANK LIMITED	Third Defendant

JUDGMENT

TEFFO, J:

[1] The applicant instituted an action ("*the main action*") against the first and second respondents during the year 2000 for payment of an amount of R64 020,95. The claim arose pursuant to an alleged breach of a loan agreement concluded between the parties and a subsequent mortgage bond registered over Erf 28 Mahube Valley Township ("*the property*") as security in favour of the applicant.

[2] The respondents did not defend the action and on 19 May 2000 the applicant obtained default judgment against them and an order declaring the hypothecated property executable. In execution of the judgment the property was sold to Mr and Mrs Maphutha and eventually registered in their names. At some stage Mr and Mrs Maphutha concluded a loan agreement with Nedbank Limited in terms of which it advanced funds to them.

[3] Nine years later and on 19 December 2009 the respondents launched an application for the rescission of the default judgment obtained against them by the applicant. The respondents also sought orders against the Registrar of Deeds, Pretoria to restore the registration of the transfer of the property into their names and to cancel the registration of the mortgage bond registered in favour of Nedbank Ltd. The applicant did not oppose the rescission

application by the respondents. On 31 January 2013 Bam J granted judgment in favour of the respondents whereby he rescinded the default judgment obtained against them on 19 May 2000 and postponed the two other prayers against the Registrar of Deeds *sine die* pending the trial court's final determination of the matter. It appears that in the process the third defendant (Nedbank Limited) prior to the judgment, had applied for and was granted leave to intervene in the proceedings as a defendant in the matter for the reasons advanced above.

[4] Subsequent thereto on 16 April 2013 an application for a trial date was served on Nedbank's attorneys of record by the respondents' attorneys of record. The respondents are alleged to have failed to serve the application for a trial date on the applicant and/or its attorneys of record at the time, Hogan Lovells, or a notice of set down on it and/or its attorneys. The matter was heard on 21 May 2014 and judgment was granted in the respondents' favour against the applicant with costs including costs of two counsels.

[5] The applicant seeks to rescind the judgment that was granted against it on 21 May 2014 in terms of Uniform Rule 42(1) of the Rules of Court alternatively under common law. It contends that the judgment was erroneously sought and granted in that the notice of set down in respect of the proceedings that resulted in the order was not served on it and it therefore did not have knowledge of the proceedings. It was also contended that there is good and/or sufficient cause for the court to grant the rescission of the judgment.

[6] The application is opposed.

[7] The respondents raised the following points *in limine.* In paragraph 1 of the founding affidavit the deponent states that she is a female person but the Commissioner of Oaths certified that she is a male person. The founding affidavit was not properly commissioned, it is not an affidavit as required by law and accordingly the application should be dismissed with costs, so it was contended. The applicant disagreed. It was also contended that Mr and Mrs Maphutha, who are the current registered owners of the property, should have been joined in the application. Accordingly, so the contention went, the application should be dismissed with costs for failure to cite and serve them with the application. The applicant did not agree. It contended that it only seeks rescission of the judgment that was granted in its absence on 21 May 2014 and that Mr and Mrs Maphutha have never been parties to the action instituted by it against the respondents. It denied that they have a substantial and direct interest in the rescission application. In an affidavit deposed to by Mrs Maphutha which has been annexed to the papers, she stated that she and Mr Maphutha were aware of the application for rescission of the judgment by the applicant, they do not wish to be joined in the application. She further stated that the application can proceed and be determined in their absence. I have not seen the confirmatory affidavit of Mr Maphutha. In any event the decision whether they should have been joined in the application is in the hands of the court. The respondents futher contended that the applicant had failed to annex a resolution authorising the deponent to the founding affidavit

to sign and launch the application on its behalf. This aspect has been resolved.

[8] Coupled with the above points *in limine* the respondents deny that they are the defendants in the main action because the original and/or copy of the summons which were allegedly issued by the applicant against them are not available. It is common cause between the parties that the original and/or copy of the summons cannot be found. As regards the allegation that the applicant and/ or its attorneys have not been served with a notice of set down for the proceedings of 21 May 2014, it was submitted that the respondents understood the practice to be that when the Registrar of Court enrols a matter for hearing on the trial roll, the notification is dispatched to all the relevant parties in the matter as their attorneys of record had received the notification from the Registrar. It was argued on their behalf that they reasonably anticipated that all other parties including the applicant, would have also received such a notification from the Registrar. It was also contended that the application for a trial date was served upon the applicant's former attorneys of record, Van Zyl Le Roux Attorneys, on 16 April 2013 as the notice of substitution and appointment as attorneys of record for the applicant by Hogan Lovells (South Africa) was only served on 29 September 2014. The respondents further deny that the action by the applicant did take place in the absence of the summons. They also dispute the mortgage bond annexed to the application because of its illegibility. The applicant on the other hand argued that the respondents failed to produce a mortgage bond registered in its favour as agreed between the parties and without its production thereof,

they cannot dispute the one produced by it as it was the only one registered by the parties. It denied that no action took place between the parties given the judgment the respondents rescinded as per the judgment of Bam J on 31 January 2013. The applicant reiterated that the respondents have failed to comply with Transvaal Rule 7 read with paragraph 6.15 of the Practice Manual of this division in that they failed to deliver the required notice of set down to it.

[9] I will first deal with the points *in limine* raised in the application:

Reference to the deponent as a female person in the founding affidavit and a male person in the certification by the Commissioner of Oaths.

I was referred to a judgment from this division in *Absa Bank Ltd v Botha NO and Others* 2013 (5) by Kathree-Setiloane J which also dealt with the issue. In that matter the defendant objected to the plaintiff's verifying affidavit in support of the application for summary judgment in that although the deponent was a female, the Commissioner of Oaths certified that she was a male. The defendant filed a notice in terms of Rule 30 objecting to the filing of the affidavit as an irregular step. The learned Judge upheld the objection. In *Macsteel Service Centres SA (Pty) Ltd v Profin Trading 35 CC and Others* [2016] ZAGPPHC 446 Rachod J who was also faced with the same issue and referred to the decision of Kathree-Setiloane J in *Absa Bank Ltd v Botha NO and Others (supra),* distinguished the matter before him from *Absa Bank Ltd v Botha NO and Others* and held as follows:

> "*In my view the Absa case, in so far as it dealt with a defective affidavit by the plaintiff is concerned, can be distinguished from the instant case where the defendant's affidavit is defective in the manner referred to earlier. To close the doors of the court to the defendant in these circumstances would mean adopting a highly technical approach to the affidavit (W M Mentz & Seuns (Edms) Bpk & Katzake 1969 (3) SA 306. In any event, the third respondent says in his affidavit that he is a male and has signed it as such. It is the Commissioner of oaths who made the error.*"

[10] While I have my reservations with regard to the judgment in *Absa Bank Ltd v Botha NO and Others (supra)*, it is also my view that the case is distinguishable from the application before me in that there is no Rule 30 application objecting to the Founding Affidavit except to say that the issue was raised in the respondents' affidavit opposing the rescission application. The applicant addressed the issue in its replying affidavit. The deponent in the replying and founding affidavits is the same person. She explained that the use of the words "*he*" instead of "*she*" and "*his*" instead of "*hers*" in the certificate by the Commissioner of Oaths are typographical errors which have no bearing on the merits and outcome of the application. She has signed the founding affidavit wherein she states that she is a female person. It is the Commissioner of Oaths who made the error in the certification. The defect in the certification in my view does not affect the body of the affidavit. To hold otherwise will be adopting a highly technical approach to the affidavit and thereby closing the doors for the applicant while there are matters of substance that can be dealt with. In my view the explanation given is reasonable and the most plausible in the circumstances. It therefore cures the defect that is in the founding affidavit.

Failure to join Mr and Mrs Maphutha in the application.

[11] I do not agree that the application should be dismissed because the registered owners of the property have not been joined in the application. The application seeks to rescind a default judgment in an action that was instituted by the applicant against the respondents for their failure to meet their obligations in terms of the loan agreement entered into between the parties. I agree that both the registered owners of the property and Nedbank did not feature as parties in the action. Nedbank intervened as a defendant in the action on application to oppose the rescission application by the respondents of the default judgment against them in favour of the applicant. The issue at hand does not involve the new owners of the property. In any event Mrs Maphutha filed an affidavit in which she states that she and her husband do not wish to be joined in these proceedings, they are aware of the proceedings and will abide by the court's decision. In my view they do not have a direct and substantial interest in the action between the applicant and the respondents.

[12] This takes me to the application. The issue for determination is whether the applicant is entitled to rescission.

[13] Rule 42(1)(a) reads as follows:

> "*(1) The court may, in addition to any powers it may have, mero motu or upon application of any party affected, rescind or vary:*

(a) An order or judgment erroneously sought or granted in the absence of any party affected thereby."

[14] In order to obtain a rescission under this subrule the applicant must show that the prior order was "*erroneously sought or granted*". Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order and it is not necessary for the party to show good cause for the subrule to apply (*Tshabalala v Peer* 1979 (4) SA 27 (T) at 30D, *Topol v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650D-J, *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C)).

[15] In *Topol and Others v L S Group Management Services (Pty) Ltd* above, the court dealt with an application for rescission of judgment refusing leave to appeal against an earlier order of court. It found on the probabilities that the applicants had at all times intended proceeding with their application for leave to appeal and that the reason why they had not been represented at the application for leave to appeal was because they had no knowledge of the set down of that application. The Judge refusing leave to appeal had proceeded on the basis that notice had been given and that the applicants were in default. The court held that the judgment refusing leave to appeal was "*erroneously*" given within the meaning of Rule 42(1)(a).

[16] In *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) judgment was rescinded in terms of Rule 42(1)(a) where the parties were not represented at

the hearing of the application because they had no knowledge of the set down of the application.

[17] It is common cause that between the parties that the applicant was not represented at the hearing on 21 May 2014 when default judgment was obtained against it by the respondents. It is further common cause that the applicant did not receive a set down of the hearing of 21 May 2014. The respondents understood the practice to be that when the Registrar of Court enrols a matter for hearing on the trial roll, the notification is dispatched to all the relevant parties in the matter as their attorneys of record had received the notification from the Registrar, so it was argued. According to the respondents, the application for a trial date was served on the applicant's attorneys of record at the time (Van Zyl le Roux) on 16 April 2013.

[18] Transvaal Rule 7 read with paragraph 6.15 of the Practice Manual of this division provides that when pleadings in any trial action have been closed by the plaintiff, or if he fails to do so within six weeks after the close of pleadings, the defendant may set down the case on the roll and such plaintiff or defendant shall forthwith give the other party written notice that this has been done; and every party to an action who receives notice of the trial date shall forthwith and in any event not later than seven days after receipt of such a notice, give notice in writing to every other party or his or her attorney of the date which was allocated by the registrar for the hearing.

[19] The respondents applied for a trial date from the Registrar of Court. After receipt of the date allocated by the Registrar, they did not give notice in writing to the applicant and/or its attorneys of the set down for trial. They therefore did not comply with the above rule which is peremptory. Service of the application for a trial date to the other party on its own is not sufficient. The respondents should have also served the applicant with the notice of set down after obtaining a date of trial from the Registrar. The hearing on 21 May 2014 therefore proceeded in the absence of the applicant who did not have knowledge of the trial date. I am persuaded that the application falls squarely under the provisions of Rule 42(1)(a) and the judgment thereof falls to be rescinded as the requirements thereof under the rule have been met.

[20] Various issues have been raised relating to the fact that summons have been misplaced therefore there is no case against the respondents, the denial by the respondents of the action by the applicant, the dispute around the mortgage bond given its illegibility, etc. All these issues are in my view irrelevant in this application. The applicant in my view has succeeded in establishing that the judgment of 21 May 2014 was "*erroneously sought or granted*". Once I have found that the judgment was "*erroneously sought or granted*" it is not necessary for the applicant to show good cause for the subrule to apply (*Tshabalala v Peer (supra); Topol v L S Group Management Services (Pty) Ltd (supra)*). In my view those issues are issues that have to be dealt with by the trial court.

[21] In the result I make the following order:

21.1 The default judgment granted on 21 May 2014 against the applicant is hereby rescinded and the respondents are ordered to pay the costs of the application.

MJ TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE APPLICANT	G STEYN
INSTRUCTED BY	LOWNDES DLAMINI ATTORNEYS
FOR THE RESPONDENTS	B P GEACH SC & M SNYMAN
INSTRUCTED BY	KABINI & ASSOCIATES INC
HANDED DOWN ON	26 OCTOBER 2016