REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

17/2/2016

CASE NO: 56511/2014

17/2/2016

In the matter between:

ITUMELENG CHARMAINE LETWABA	**APPLICANT**
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	**RESPONDENT**

JUDGMENT

FOURIE CP, AJ

[1] The Applicant (the Defendant in the action) brought an application for rescission of a default judgment granted in favour of the Respondent (the Plaintiff in the action) on 18 February 2015. For the sake of convenience and clarity, the parties will be referred to as in the action.

[2] The application for rescission is brought in terms of Uniform Rule 31(2)b). The requirements that must be satisfied for rescission of judgment in terms of Uniform Rule 31(2)(b) are well established. Good cause must be shown why the remedy should be granted. That entails:

(a) Giving a reasonable explanation of the default;

(b) Showing that the application is made *bona fide;* and

(c) Showing that there is a *bona fide* defence to the Plaintiff's claim which *prima facie* has some prospect of success.

In addition, the application must be brought within twenty (20) days after the Defendant has obtained knowledge of the judgment. If the application is not brought within twenty (20) days, good cause must also be shown why the time period within which the application could be brought, should be extended.

[3] The Plaintiff and the Defendant entered into a loan agreement secured by a mortgage bond. The Defendant allegedly failed to comply with the terms of the loan agreement, as she fell in arrears with the payment of the monthly instalments. As a result, the Plaintiff instituted action against the Defendant.

[4] The combined summons was served at the Defendant's chosen *domicilium citandi* address on 9 August 2014 at 11:20, by affixing a copy thereof to the principal door. It is common cause that the address of service corresponds with the chosen *domicilium* address chosen by the Defendant. The Defendant did receive the summons and on/or about 26 August 2014 made a payment of R55 000.00 to the Plaintiff and on/or about 7 September 2014 a further payment of R10 000.00 was so made. The Defendant was then advised by the Plaintiff that it has stopped legal action due to the payment received. It appears as if the Defendant was so advised on 1 October 2014.

[5] Before being so advised, the Plaintiff decided to proceed with an application for default judgment. The application is dated 25 August 2014 and was set down for 14 October 2014, but was only served on 1 October 2014, not at the chosen *domicilium* address, but at the bonded property, where one Mr Thulare Twala (family friend) accepted service. According to the return of service, the said Mr Twala confirmed that the Defendant is residing at the given address.

[6] The application for default judgment was removed from the unopposed motion roll for 14 October 2014 and in an affidavit on behalf of the Plaintiff, made on 23 January 2015, the reason for the removal of the application from the unopposed motion roll, was due to the Defendant's payment of R10 000.00 on 8 September

2014. No reference is being made in such affidavit of the earlier payment of R55 000.00 which was also made. In such affidavit it is also alleged that no further payments were made after 8 September 2014.

[7] The Plaintiff proceeded to re-enrol the application for default judgment for 18 February 2015. The notice of re-enrolment dated 16 January 2015 was again served at the bonded property on 6 February 2015: " .... by delivering or leaving a copy ..... to the principal door at the chosen domicilium citandi et executandi of 7 Mahasu Crescent, Tzaneen, being the chosen domicilium." This is however not the chosen *domicilium* address and the chosen *domicilium* address is 19955 Khutsong, Mamelodi East, Pretoria, Gauteng. The return of service further states that the sheriff confirmed the address with a Mrs Botha, the neighbour, who also informed the sheriff that the Defendant is home, but that they refuse to open the door. The Defendant alleges that she only on/or about 27 February 2015 when she went to the bonded property, found the notice of re-enrolment.

[8] On 18 February 2015 default judgment was granted in favour of the Plaintiff against the Defendant for:

(1) Payment of the sum of R831 338.51;

(2) Interest thereon at the rate of 9,35% per annum calculated daily and compounded monthly in arrears from 23 June 2014 to date of final payment, both dates inclusive;

(3) Payment of monthly insurance premiums of R352.37 per month from 23 June 2014, for the full period Plaintiff makes payment of such monthly insurance premiums in relation to the bonded property;

(4) Cost of suit to be taxed on a scale as between attorney and client;

(5) An Order in terms whereof the bonded property is declared executable;

(6) An Order that the Registrar is authorised and directed to issue a writ of execution against the bonded property in accordance with the terms of the judgment.

[9] The amount of R831 338.51 for which default judgment was *inter alia* granted, was for exactly the same amount as claimed in the summons, despite the fact, which is common cause, that an amount totalling R65 000.00 was paid by the Defendant, subsequent to the issuing of summons.

[10] On behalf of the Plaintiff it was argued that this Court may rescind part of the default judgment and that rescission should only be granted in respect of the amount of R65 000.00 and that the Defendant be granted leave to defend the action in respect of the aforesaid amount only.

[11] I am of the view that the application for rescission of the default judgment should have been brought in terms of Uniform Rule 42(1) and in particular Uniform Rule 42(1)(a), as the default judgment was erroneously sought and erroneously granted in the absence of the Defendant. Both counsel for the Plaintiff and the Defendant agreed that this Court may rescind the default judgment in terms of Uniform Rule 42(1), should it be found that the default judgment was erroneously sought or erroneously granted in the absence of the Defendant.

[12] The notice of re-enrolment of the application for default judgment should have been served on the Defendant at her chosen *domicilium* address, which it was not. It was ncessary to serve such notice, as the Defendant was previously advised by

the Plaintiff that it stopped legal action due to the payment received. Nothing prevented the Plaintiff to *ex abudanti* also serve such notice at the bonded property, but the fact that service was not effected at the chosen *domicilium* address, in my view constitutes that there was no proper service on the Defendant.

[13] In addition, judgment should never have been sought for the initial amount claimed of R831 338.51, but for a lesser amount, taking the payment of R65 000.00 into account. Furthermore, judgment for interest calculated from 23 June 2014 should not have been sought as, due to the payments made, the interest should have been calculated from a later date.

[14] The requirements for rescinding a default judgment in terms of Uniform Rule 42(1)(a), which differs significantly from the requirements to be satisfied in terms of Uniform Rule 31(2)(b), are well established and can for purposes hereof, be summarised as follows:

1. Once it is shown that the order was erroneously sought or erroneously granted, the Court will usually rescind or vary the order;

2. Good cause need not be shown. To this end it needs to be mentioned that the Defendant alleges that she never received the Section 129 notice, but during argument the defence of non-compliance by the Plaintiff with the provisions of Section 129 of the National Credit Act, 34 of 2005, was abandoned;

3. The duty to apply is within a reasonable period and not within a specific time limit.

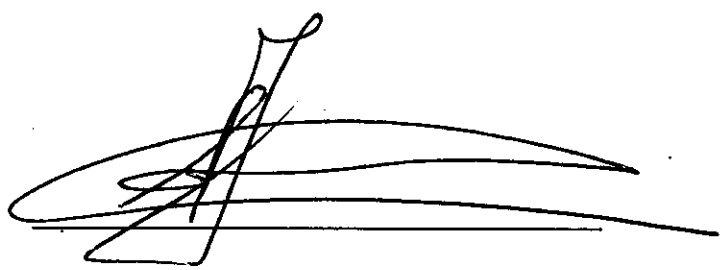
[15] I am of the view that the aforesaid requirements have been satisfied and that the default judgment was erroneously sought and granted and I accordingly exercise my discretion to rescind the default judgment.

[16] Despite the fact that the application was not brought in terms of Uniform Rule 42(1)(a), I am of the view that the Plaintiff's conduct warrants a costs order to be made and that the costs should follow the outcome.

[17] In the result, I make the following order:

1. The default judgment granted on 18 February 2015 is rescinded and set aside;

2. The Respondent is to pay the Applicant's costs of the application.



CP FOURIE

ACTING JUDGE OF GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

For the Applicant:	Adv. M Joubert
	Instructed by:
	Justice Dikgale Attorneys
	Pretoria
For the Respondent:	Adv. M Riley
	Instructed by:
	Strydom Britz Mohulatsi Inc.
	Pretoria

DATE OF HEARING: 10 February 2016

DATE OF JUDGMENT: 17 February 2016