IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

2016.10.04
DATE

SIGNATURE

CASE NUMBER:19618/15

DATE:4October 2016

MOTSEPE: NOBUNTU KANYISA Applicant

V

NEDBANK LIMITED Respondent

JUDGMENT

MABUSE J:

[1] This is an application for rescission of a default judgment. By a notice of motion signed on 16 March 2015 the Applicant, Mrs Nobuntu Kanyisa Motsepe ("Motsepe"), seeks rescission of a default judgment that the Respondent, Nedbank Limited, ("the Bank"), obtained against her and her former husband on 18 July 2007 under case number 26057/07. This application is opposed by the Bank which has, for that purpose, delivered an answering affidavit.

[2] Motsepe described herself as an adult female and the Second Defendant in case number 26057/07. The First Defendant in that matter was one Eugene Tebogo Motsepe. Through the entire judgment that follows I will refer to the said Eugene Tebogo Motsepe as "the First Defendant". Motsepe and the First Defendant were married to each other in community of property on 13 December 2012. Their marriage endured until 19 November 2012when it was terminated by an order of court. Despite the fact that the action in case number 26057/07 was instituted against both Motsepe and the First Defendant, and more importantly, that the impugned judgment was obtained against both of them, the First Defendant plays no role in this application for rescission. This Court will deal with aspect and its effect later in the judgment. The issues to be decided in this matter are:

(a) whether the registrar of court should have referred the Bank's application for default judgment to an open Court so that such an application could be considered by a Judge instead of the Registrar himself granting the judgment;

(b) secondly, whether the Bank was entitled to use a simple summons to enforce its rights arising from a mortgage bond or credit agreement; and thirdly and lastly,

(c) whether it was proper for the registrar to declare a judgment debtor's property executable.

When the matter came before me on 7 June 2016, the Applicant was represented by Mr. Jansen while Mr Minnaar represented the Bank. Heads of argument on behalf of Motsepe had been prepared by a certain Adv. Katlego Mahlase. In such heads he had pointed out that the issues that the Court was called upon to decide were:

"(a) whether or not the Respondent complied with the requirements of s 129 of the National Credit Act 54 (sic) of 2005 prior to issuing summons;

(b) whether the registrar's grant of the default judgment was justifiable in law; and

(c) whether the Applicant meets the jurisdictional fact requirements as set out in the **Gundwana v Steko Developments CC [2011] (3) SA 608**(" Gundwana"), decision so as to declare the

registrar's default judgment of 18 July 2007 under case number 26057/07 retrospectively unconstitutional and therefore of no force or effect".

[3] On 22 June 2007 the Bank, a general bank duly registered and incorporated in accordance with the company and banking laws of this country instituted an action by way of a simple summonsagainst Motsepe and the First Defendant in which it claimed:

3.1 payment of the sum of R716,153.17 ("the amount claimed"), as set out in the certificate of balance. The said amount represented monies due and owing by Motsepe and the First Defendant to the Bank as at 1 June 2007 under Mortgage Bond No. B53083/2005 ("the mortgage bond") registered on 19 July 2005. The said mortgage bond hypothecated Erf 204 Malvern East, Ext 1 Township, Registration Division I.R.,Germiston North, the Province of Gauteng,("the property") in respect of a sum of R696,600.00. The amount claimed represented and included capitalised interest of the balance of monies due and owing from time to time under the said mortgage bond computed up to 1 June 2005. The terms of the mortgage bond and the loan of money by the Bank to Motsepe and the First Defendant appeared to be common cause between Motsepe and the Bank. The amount claimed had become due and payable by Motsepe and the First Defendant to the Bank by reason of their failure, notwithstanding lawful demand by the Bank, to pay the instalments promptly on the due dates;

3.2 payment of interest on the said amount of claim at the rate of 13% per annum calculated and capitalised monthly in advance in terms of the mortgage bond from 1 June 2005 to date of payment;

3.3 an order declaring the aforementioned property executable for the claim plus costs.I wish to pause here and to point out that the said summons contained the following warning:

"The Defendant/s attention is drawn to section 26(1) of the Constitution of the Republic of South Africa that accords to everyone the right to have access to adequate housing. Should the Defendant/s claim that the order of execution will infringe that right, it is

incumbent on the Defendant/s to place the information supporting that claim before the Court."

[4] A copy of the summons was served on the First Defendant on 8 June 2007 at 06h03 at 3 Sandilands Road, Malvern East Ext 1, Germiston North, which address was his chosen *domiciliumcitandi et executandi* by affixing it to the principal door. There is a complaint though byMotsepethatshe was not served with a copy the relevant simple summons. This complaint appeared for the first in her replying affidavit only. I will deal with this aspect later in the course of the judgment. In the meantime in the bunch of papers placed before me titled INDEX 1-RESCISSION APPLICATION UNDER CASE NO. 19618/15 at page 71 there is a copy of the Sheriff's return of service of a copy of the simple summons served on Motsepe on 28 June 2007 at 06h03 at 3 Sandilands Road, Malvern East Ext 1, Germiston North, her *chosen domiciliumcitandi et executandi* by affixing it to the principal door. The case number in the said return of service is 26057/2007.

[5] Having been served with a copies of the summons it was required of both of them, if for whatever valid reasons they disputed the Bank's aforementioned claim and wished to defend the action, to notify it within 10 days of being so served. They were both warned that if they failed to defend the action judgment, as claimed in the summons,may be given against them. Neither of them heeded the warning.

[6] As neither of them had delivered any notice of intention to challenge the Bank's claim, the Bank felt entitled, on 18 July 2007, to approach the registrar of this Court for judgment against both of them as claimed in the summons. Rule 31(5)(a) of the Rules of this Court provided, as at 18 July 2007, as follows:

"Whenever a defendant is in default of delivery of a notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall, where each of the claims is for a

debt or liquidated demand, file with the registrar a written application for judgment against such defendant:....."

As at 18 July 2007 it was a correct procedure for any party that sought payment of a debt or liquidated amount from another to approach the registrar to grant judgment to such party if the other party had not, like in case number 265057/07, delivered any notice of intention to defend after being served with a copy of the summons. As at 18 July 2007, the registrar of court had the authority to grant such relief. Acting in terms of Rule 31(5)(b) as it then, and still does, provided that the registrar may:

"(i) grant judgment as requested."

The purpose at the time of Rule 31(5)(a) was to take the burden off the Judges' shoulders by authorising and empowering the registrar to grant judgments in certain matters including this one. A matter could only be referred to an open court in the event of the registrar having doubtsabout his authority to grant the default judgment. The need to do so fell away once the registrar was satisfied about his authority and powers to do so.

[7] On 18 July 2007 the registrar of this Court, acting in terms of Rule 31(5)(b) granted a judgment by default against both Motsepe and the First Defendant as claimed in the simple summons. It is this default judgment that is the target of the application for rescission. It is this default judgment that Motsepe alone is disgruntled with and for which she now seeks an order to set aside. Simultaneously with the granting of the default judgment, the registrar also declared the property specially executable.Sooner thereafter the registrar authorised the issue of a writ of execution which led to the attachment in execution of the property. In the alternative Motsepe seeks an order of rescission ofthe relevant declaration that the property was specially executable.

[8] In challenging the said default judgment Motsepe has brought an application in terms of Rule 42(1) of the Uniform Rules of Court. According to her founding affidavit thereis only one ground on the basis of which the rescission of the judgment is sought in terms of the notice of motion. That ground is that the relevant default judgment was granted by the registrar of this Court in

circumstances other than in an open Court. She also challenges the declaration by the registrar that the property was speciallyexecutable. Rule 42(1) contains several grounds on the basis of which orders and judgments may be rescinded or varied. It provides as follows:

"1. The Court may, in addition to any other powers it may have, meromotuor upon the application of any party affected, rescind or vary –

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as a result of a mistake common to the parties."

[9] An order is erroneously sought and erroneously granted if there was, as an example, no proper service of a copy of the legal proceedings on the absent party. Regardlessof whether it was correct an orderor judgment granted where there there was no service of a copy of the legal proceedings on the party that was not before court at the granting of the default judgment, is liable to be set aside in terms of Rule 42. A party against whom relief is sought must be notified of any legal proceedings against him or her so as to afford him or her an opportunity to challenge such proceedings. As far as the action against Motsepe and the First Defendant was concerned, there was proper service of copies of the simple summons on both of them.

[10] Furthermore judgment will be deemed to be erroneously sought and erroneously granted where the attorney has failed to carry outthe client's instructions or where it was granted on a summons that did not disclose any cause of action. Over and above such an order or judgment may be rescinded wherethe attorney to a consent order did not have the authority to agree to such an order. An order is erroneously sought and erroneously granted if it was legally incompetent for the Court to grant it; or if there was an irregularity in the proceedings or if the Court was unaware of the facts, if known to it, would have precluded it, from a procedural point of view, of making the

order challenged. If procedurally a party is entitled to judgment it cannot be said that the judgment had been granted erroneously because the Court was unaware of the defence which an applicant could have raised.

[11] In her founding affidavit, Motsepe admitted breach of the credit agreement read with the mortgage bond. Accordingly, the Bank was entitled to enforce its rights in terms of suchcredit agreement and such mortgage bond. As I understand it, it is not Motsepe's case that Rule 35(1)(b) was invalid at the time the impugned judgment was granted and declaration made. While the court accepts that under certain circumstances the registrar has a discretion to refer a matter to an open court, the question is whether the registrar exercised his discretion properly when he decided that he himself would grant the judgment. It is not for this court to substitute its discretion for that of the registrar. This court will only interfere with the judgment or discretion of the registrar if he has erred. In order to succeed on this point the applicant would have to satisfy this court that the registrar should have had a doubt and that because of that doubt he should have considered sending the matter to the open court. In granting the judgment as he did the registrar was merely exercising the authority and powers granted to him at the time by the Rules of Court. The invalidity or irregularity of a conduct is determined according the empowering legislation or rule that was in force at the time of performance. The aforegoing expositon, in my view, answers the question whether the registrar should have referred the bank's application for default judgment to the open court.

[12] Motsepe and the First defendant were married to each other in community of property. For that reason they were jointly and severally liable to the Bank for the monies that the Bank had loaned and advanced to them. The fact that they were divorced and that at the termination of their marriage by a court they entered into a settlement agreement in terms of which Motsepe took the sole responsibility to pay the outstanding balance of the mortgage bond was of no consequence to the Bank or their joint liability to repay the loan or to comply with the terms of the mortgage

bond and any credit agreement they had concluded with the Bank. The Bank was not a party to the said settlement agreement, has not agreed to be bound by it and for those reasons the settlement agreement does not bind it.

[13] The default judgment that Motsepe seeks to rescind and to have set aside was obtained under case number 26057/07 of the then Transvaal Provincial Division, now known as the Gauteng Division of the High Court of South Africa. It was expected of the attorneys who launched these rescission proceedings on behalf of Motsepe that, in all the matters relating to the said case, including this application for rescission, they would bring them under the same case number. This is a well-known convention which the attorneys know or should have known. The application for rescission was, for inexplicable reasons, brought under case number 19618/15. The Bank has complained about that procedure and the Court has noted not only the Bank's complaint but also the source of the complaint. The Court would want to believe that Motsepe would have dealt with this complaint in her replying affidavit but she has failed to do so. In his or her heads of argument Katlego Mahlase down played this irregularity by stating that nothing turned on it. He or she is saying that attorneys may flout the Rules of this court as long as nothing turns on it. In paragraph 17 of the same Gundwana the court had this to say:

"It has become a disturbing feature of litigation in this Court that its rules of practice and procedure are not meticulously adhered to by its litigants. This must stop."

[14] In attacking the default judgment, Mr Jansen relied on what he called several irregularities in the procedure that the respondent followed in its attempt to enforce the terms of the mortgage bond. He had not crafted any heads of argument and for his argument relied entirely on the heads of argument drawn by the said Katlego Mahlase. In the first instance he argued that in commencing its litigation against the applicant and the First Defendant, the Bank failed to comply with the provisions of s 129 of the National Credit Act 34 of 2005 ("the NCA"). There was immediately an objection by Mr Minnaar against the point taken by M. Jansen on the said s 129 of the NCA. I

ruled that I would allow argument on that matter and promised to give reasons with the judgment. Mr Jansen then referred to what he called the second irregularity in respect of which he argued that the Respondent had chosen to use a simple summons to enforce its rights. He developed his argument and contended that the position was that copies of the mortgage bond and the credit agreement were not attached to the summons as required by Rule 17(2) and Form 9. Rule 17(2) provides that:

"(a) In every case where the claim is not for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 10 of the First Scheduleto which summons shall be annexed a statement of the material facts relied upon by the Plaintiff in support of his claim, which statement shall, inter alia, *comply with Rule 18.*

(b) In every case where the claim is for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 9 of the first schedule."

[15] These points that Mr Jansen considered as irregularities that the Bank had committed and on the basis of which he sought, on behalf of the applicant, rescission of the default judgment may not be considered at this stage because they were never raised in her founding affidavit. The general rule is that the applicant must make out his or her case in the founding affidavit. In this regard see the **Director of Hospital Services v Misty 1979(1) SA 6269 (A)**. An applicant must make a *prima facie* case in the founding affidavit. She or he must set forth the facts necessary to establish her or his *prima facie* case in a complete manner as the circumstances or his or her case may demand. Accordingly, an applicant stands or falls by his or her founding affidavit.

"When, as in this case, the proceedings are launched by way of a notice of motion, it is the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J in Pountas' Trustee vs Lahamas 1924 WLD at 68 and as has been said in many other cases:

"...an Applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main

foundation of the application is the allegation of facts stated therein, because those are the facts which the Respondent is called upon either to affirm or deny."

[16] It is the principle of our law that a judicial officer in civil proceedings must resolve the disputes between the parties on issues raised by the parties and confine the enquiry to the facts which the parties have placed before Court. A judicial officer shall not, in resolving a dispute, have regard to extraneous issues or unproved facts. The issues raised in the heads of argument have not been properly raised. Such issues are regarded as extraneous or unproved facts. By raising the aforegoing issues in his heads of argument the applicant's counsel wanted the Court to decide the disputes in this application on issues which were not raised in the founding affidavit. When Mr Minnaar objected to Mr Jansen arguing issues not raised in the founding affidavit, Mr Jansen took the view that it did not mean that the Court could not ignore the irregularity he pointed out. Mr Jansen should have known that if you want to raise a point you must do so in an affidavit and not in your heads of argument. A party must be given an opportunity to agree or disagree with the contents of its opponent's affidavit. Allegations referring to the irregularities should have been contained in the founding affidavit. His argument that the court could not ignore what he called an irregularity raised in the heads of argument was in my view flawed.

[17] Motsepe has raised three more new points in her replying affidavit. Firstly, she stated that she was not personally served with a copy of the summons; secondly, that she was never warned of her Constitutional rights in terms of s 26 of the Constitution; and thirdly and lastly she alleged, for the first time, that the Bank claimed payment in terms of a written agreement but failed to attach copies of the written agreement and mortgage bond to the simple summons. It will be recalled that the last of the three was another point that Mr Jansen regarded as an irregularity. Again these points were not raised in the founding affidavit. *"It is not permissible to make out new grounds for the application in the replying affidavit."* See in this regard the case of **Director of Hospital Services v Misty supra at page 636 paragraph a-b.** This court finds that Motsepe was

properly served with a copy of the simple summons. She was insincere when she testified that she had not been served. Again her attention was indeed drawn in the simple summons to the provisions of s 26 of the Constitution.

[18] Counsel for the applicant referred the Court to the cases of **First National Bank Ltd v Sonja Alfrede Charlotte Hardijzer, case number 08/47568** by BAQWA J; **Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 vCedric Dean Ryneveldt and 26 Others**; and **National Credit Regulator Appeal Number 82A233/2014**, a decision of the Free State Division and **Standard Bank of South Africa Ltd vAbduraouf Dawood Case Number 15438/11**. The court found these cases to be unhelpful to the resolution of the fundamental points raised in this matter. The question being whether or not the applicant has made the necessary allegations in her founding affidavit, the cases that the applicant's counsel relied on did not pertinently address that issue. Accordingly they offer no solution to the dispute at hand.

[19] Again in the applicant's counsel's heads of argument the court was referred to the authority of Gundwana v Steko Developments *supra*. This was in respect of a submission that the registrar should have referred the Bank's application for default judgment to the open court so that a Judge could look into the personal and pertinent aspects of the matter before deciding whether to grant a judgment or not in favour of the plaintiff. In paragraph 55 thereof the Court had the following to say:

"In view of a conclusion that, to the extent that the High Court Rules and Practice allow a registrar to grant the orders declaring immovable property that is person's home executable, they are constitutionally invalid, a declaratory order to that effect must be made."

A declaratory order to that effect was made by the court in paragraph 65(b) of the said authority on page 629.

[20] The authority of Gundwana was not the law on 18 July 2007 when the registrar, acting in terms of the provisions of Rule 31(5), granted a default judgment and when he subsequently made a declaration that the property was executable. Secondly, it does not apply retrospectively. This is clear from paragraph [58] thereof which states as follows:

"There may be a fear that the decision in this matter would lead to large scale- legal uncertainty about its effects on past matters where homes were declared specially executable by the registrar, and sales in execution and transfers followed. The experience following JAFTHA may be an indication that this fear is overstated. It must be remembered that these orders were issued only where default judgments were granted by the registrar. In order to turn the clock back in these cases, aggrieved debtors will first have to apply for original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule under which the property was declared executable is not sufficient to undo everything that followed. In order to do so the debtors will have to explain the reasons for not bringing a rescission application earlier and they will have to set out defence to the claim for judgment against them. It may be that in many cases those aggrieved may find the requirements difficult to fulfil".

The said authority made it clear that the order it made in paragraph 65(b) did not apply to past orders made by the registrar and that the aggrieved parties would have to apply for a rescission.

[21] In summary, the legal principles laid down in Gwundana's case are that:

21. 1 the declaration that it is unconstitutional for the registrar of a High Court to declare immovable property specially executable when ordering default judgment under rule number 31(5)) of the Uniform Rules of Court, to the extent that it permits the sale in execution of the home of a person is not retrospective;

21.2 the declaration in 21.1 *supr*a applies where the default judgment was granted by the registrar;

21.3 the said default judgment may be set aside on application by the aggrieved party;

21.4 the aggrieved party's application to set aside such a default judgment is not there for the

taking. The aggrieved party must still:

21.4.1 explain the delay, where it existed, in bringing the application for rescission;

21.4.2 still set out his defence to the claim for judgment to show the court that she has a bona fide defence and that the application for rescission was not made merely with the intention to frustrate or delay the Bank's claim.

21.4.3 where he or she seeks to set aside the default judgment and the execution order granted against him or her by the registrar shall show, in addition to the normal requirements for rescission, that a court, with full knowledge of all the relevant facts existing at the time of granting of the judgment, would nevertheless have refused leave to execution against specially hypothecated property that is the debtor's home.

[22] The declaration relates only to the order declaring immovable property especially executable when granting default judgment. It does not take away the registrar's powers and authority to grant default judgment and thereafter to declare a certain property specially executable as long as such property is not a person's home. An immovable property belonging to a legal person may still be specially declared executable by the registrar acting in terms of Rule 31(5).

[23] I now turn to the current application. It is common cause between the parties that the default judgement and the order declaring the property in question executable were granted by the registrar. For the aforegoing reason both the default judgment and the resultant order are subject to be set aside on application by the applicant as the aggrieved party. Before this court is such an application. The question now is whether the applicant has complied with the requirements set out in Gwundana for setting aside of the default and the declaration of the property especially executable? Answer is negative.

23.1 firstly, the applicant has not explained the delay in bringing this application for rescission. She has failed to give this Court a reasonable explanation why it took 7 to 8 years to apply for rescission of the default judgment. An application in terms of Rule 42 must be brought within a reasonable time. In my view, the interval that it took Motsepe from the date on which she

became aware of the default judgment to the date on which she launched this application was unreasonably long. There was an unexplained and inordinate delay to bring the application. The founding affidavit does not explain pertinently what took Motsepe so long to do so.

23.2 the applicant has failed to set out her defence against the respondent's claim for judgment. On the contrary she has admitted that she and the first defendant failed to comply with the terms of the mortgage bond and the credit agreement.

[24] Finally there is another hurdle that the Applicant has to cross over. I have dealt with this matter in the preceding paragraphs. The judgment was granted against both the Motsepe and the First Defendant. The First Defendant has not applied for rescission of the said judgment. The default judgment and the declaration that the property was especially executable would remain valid as against the First Defendant even if Motsepe succeeded with her application for rescission. The Bank would be entitled to execute the judgment in respect of the First Defendant. Quite clearly she would be in a sticky situation.

[25] In my view the applicant has not made out a good case for the relief she seeks in the notice of motion. The application cannot succeed.

Accordingly, I make the following order:

1. **The application for rescission, as well as for the relief sought in the alternative, is hereby dismissed with costs.**

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:	*Adv.GF Jansen*
Instructed by:	*MagezaRaffee Mokoena Inc*
	c/o Du Plessis enKruyshaar Inc
Counsel for the respondent:	*Adv.J Minnaar*

Instructed by:	*Hammond Pole MajolaAttorneys*
	c/o Oltmans Attorneys
Date Heard:	*7 June 2016*
Date of Judgment:	*4 October 2016*