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

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED

CASE NO. 68034/2018

In the matter between:

IRWIN RAKGANE MOGOTSI

Applicant

And

ABSA BANK LIMITED

Respondent

JUDGMENT

BARNARDT AJ

1. This is an application for the rescission of a summary judgment granted on 17 April 2019 by Tolmay J. The application is brought by the applicant in person and only consists of an affidavit by Mr. Mogotsi with no Notice of Motion. In the affidavit it is stated that the application is brought in terms of Rule 42(1)(a) of the Uniform Rules of Court.

FACTUAL BACKGROUND

2. Summons in the main action was issued on 17 September 2017, based on the applicant's failure to comply with his obligations in terms of a written loan agreement concluded between the applicant and the respondent during 2011.

3. The summons was served on the applicant on 21 September 2018 and due to his failure to defend the action, the respondent proceeded to apply for default judgment in terms of Rule 31(2)(a) and an order in terms of Rule 46(1)(a)(ii) and Rule 46A of the Uniform Rules of Court on 28 January 2019.

4. On 18 January 2019, the applicant entered a Notice of Intention to Defend and consequently the respondent proceeded to apply for summary judgment. The application for summary judgment was served on the applicant at [...] on 2 February 2019.

5. The applicant did not oppose the summary judgment which was set down for 17 April 2019 and Tolmay J granted the following order:

“1. Payment in the amount of R416 195, 42,

2. Payment of interest on the amount of R416 195. 42 at the agreed rate of 9.45% per annum from 22/08/2018 to date of payment, aforementioned date inclusive,
3. An order declaring:

ERF [...] MEASURING 813 (EIGHT HUNDRED AND THIRTEEN) SQUARE METRES

HELD BY DEED OF TRANSFER T4444/11

SUBJECT TO THE CONDITIONS THEREIN CONTAINED

PHYSICAL ADDRESS [...], specially executable:
4. An order authorizing the issuing of a warrant of execution and directing execution against the immovable property;
5. That the property be sold at a sale in execution with a reserve price set at R650 000, 00.
6. Costs to be taxed."

6. In consequence of the order, the respondent proceeded to arrange a sale in execution to be held on 27 September 2019, but the rescission application *in casu* was served on 26 August 2019.

7. Although the respondent opposed the application, the applicant did not file a replying affidavit and did not pursue the application for rescission.

8. This matter was enrolled on Caselines and set down for hearing on the opposed motion roll by the respondent and no heads of argument or practice note was filed by the applicant.

9. The application was set down on the opposed motion roll of 1 February 2021 and Sardiwalla J ordered as follows:

- “1. The Application is postponed sine die and costs are reserved.
2. The Applicant is to provide the respondent with details of an agreement between himself and the Respondent, in respect of the arrears and future payments.
3. Such agreement is to be filed within 30 days of this order.”

10. On 8 March 2021, the application was argued before me and the applicant appeared in person.

11. On 10 March 2021 I received an e-mail message directly from the applicant (according to the document it was forwarded to a Linah Oyebola and it was also forwarded to counsel for the respondent, Adv Welgemoed at advciwelgemoed@lawcircle.co.za; and the applicant at irwinmogotsi@gmail.com.) stating the following:

“Good Morning

As requested by the court to have an agreement with ABSA, the following:

I agree to the extension of term by 10 years, I will continue to pay an amount of R4000.00 (Four thousand Rands) per month. This agreement can be reviewed in five years if by then the areas are not fully paid or the property is not paid up.

I request that the property and life insurance be cancelled with immediate effect as I have Outsurance to cover that.

Judgment be cancelled and be removed against me, as this is denting my credit record and it is blocking me from making business with other financial institutions.

This will give me an opportunity to sort out other matters with a similar case in Northern Cape.

Be allowed an opportunity to sell my property privet if need be.

I do not agree to taking the responsibility for the Legal costs because I did not take this matter to court, I was always in contact with ABSA regarding this matter, our calls were recorded and falls information was given and when I inquired about my insurance to assist as they promised, the matter was expedited and the next thing my Home was to be sold at an auction. I was never given a change to say my side of the story.

Copies of expenditure to follow.

I trust you find this in order.

Irwin Rakuane Mogotsi”

12. Since the applicant appeared in person and was instructed by Sardiwalla J to provide details of an agreement between himself and the Respondent, I considered the content of his email.

13. This email contains a counterproposal by the applicant in answer to an e-mail dated 9 September 2020, addressed to him by Liana Kilian Eastes, on behalf of the respondent, which was uploaded on Caselines.

“WITHOUT PREJUDICE’

Dear Mr. Mogotsi

We refer to the abovementioned matter as well as your emails to Mr. Khulekani from Absa Bank.

We confirm that we are the attorneys on record for Absa. Kindly send all communication directly to us.

We further confirm that you issued and served an application for rescission of judgment. To date hereof we have not received your heads of argument and you have not applied for a date on the opposed roll. We serve our index, practice note and heads of argument on you.

Although you are dominus litis, our offices proceeded to apply for a date on the opposed roll in order to argue the application for rescission of judgment.

We confirm that no payment arrangement is in place. However should you wish to enter into a settlement agreement with Absa, Absa will accept the following:

1. Payment of R5 000, 00 for the first 6 months;
2. A term extension of 10 years;
3. The above terms is on condition that you withdraw the application for rescission of judgment and tender our clients legal costs.

Kindly revert to us as soon as possible.

Kind regards”

14. It is clear from the above quoted e-mails that there is no agreement between the applicant and the respondent in respect of the arrears and future payments and I will therefore proceed with judgment on the rescission application.

RELIEF CLAIMED

15. I take note of the respondent's point *in limine* that the application should be dismissed since the applicant did not file a notice of motion and therefore did not comply with the provisions of Rule 6(1) of the Uniform Rules of Court.

16. However, since the applicant is pursuing this application in person, and it is possible to establish the relief he applies for from his founding affidavit, I will consider his application for rescission.

17. Although the applicant stated in his affidavit that this is an application in terms of Rule 42(1)(a), he also referred to good cause and it is accepted that he also intended to bring the application in terms of Rule 31(2)(b) or the common law.

RECISSION IN TERMS OF RULE 42(1)(a)

18. Rule 42(1)(a) of the Uniform Rules of Court provide for the rescission and or variation of an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. An order is erroneously granted if it was legally incompetent for the court to have made such an order, if there was an irregularity in the proceedings or if the court was unaware of facts, if known to it, would have precluded it from a procedural point of view from making the order.

19. In the present matter, my view is that the applicant has failed to show that Rule 42(1) applies to this application as there is nothing in his papers that would suggest that there was an error in obtaining the judgment or that it was invalid. I

therefore find that this application could not have been brought in terms of Rule 42(1)(a).

RESCISSION AT COMMON LAW

20. For a rescission of an order in terms of the common law, sufficient cause must be shown. In *Vilvanathan and Another v Louw NO*¹, it was held that:

“The Appellate Division and the Supreme Court of Appeal have laid down that at common law ‘it is clear that in principle and in the long-standing practice of our courts’ that there are two ‘essential elements of “sufficient cause” for rescission of a judgment by default’.

These are –

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits (i.e. of the action) such party has a bona fide defence which, prima facie, carries some prospect of success.

Both these elements must be present.”

21. The applicant did not provide any explanation for his failure to bring the rescission application sooner and stated that he has good cause to have the judgment rescinded, because he is permanently employed since June 2019 and will be able to afford the repayments of the monthly instalments.

¹ [2010 \(5\) SA 17](#) (SCA)

22. He admitted that he was in arrears with his monthly instalments and failed to provide any evidence to show that he has entered into any negotiations with the respondent prior to judgment was granted. He, therefore, has no *bona fide* defence which *prima facie* has some prospects of success

23. Considering the circumstances of this application, the applicant did not meet the requirements for a rescission at common law.

RESCISSION IN TERMS OF RULE 31(2)(b)

24. Rule 31(2)(b) provides that

“A defendant may within twenty days after he or she has knowledge of such judgment apply to court on 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”.

25. In ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)***², the Supreme Court of Appeal confirmed the requirements for a rescission in terms of Rule 31(2)(b):

“The applicant must show cause 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 prospectus

² 2003 (6) SA 1 (SCA) (2003), 2 ALL SA 113 at par 11.

success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgement”.

26. The applicant, in his founding affidavit, claimed that he did not receive the initial summons nor the application for summary judgment, even though both documents were served by the sheriff at the applicant’s chosen *domicilium citandi et executandi* also being the address provided “where all documents in this matter be served” in his notice of intention to oppose the default judgment application.

27. He however, learned about the court order on 9 May 2019 but failed to bring the application within 20 days thereof. This application was only brought on 28 August 2019, being three months later, with no explanation of the lime lapse.

28. As referred to earlier, the applicant admitted that he was in default with his monthly instalments and had no *bona fide* defence.

29. It is therefore evident that the applicant also did not meet the requirements of Rule 31(2)(b) for a rescission of the judgment by Tolmay J on 17 April 2019.

30. In the result I make the following Order:

ORDER:

1. The application for the rescission of the summary judgment order by Tolmay J on 17 April 2019 is dismissed.
2. The applicant is ordered to pay the costs of the application including the costs of 1 February 2021.



ACTING JUDGE JF BARNARDT
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 May 2021.

APPEARANCES

For the applicant: Mr. Irwin Rakgane Mogotsi

In person

For the respondent: Adv. CJ Welgemoed

Instructed by: Delport Van Der Berg Inc.

Date of hearing: 8 March 2021

Date of Judgment: 27 May 2021