REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 73392/2018

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

26/09/2022 .....
DATE SIGNATURE

In the matter between: -

ROOKSANA DHODA **Applicant**

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED **First Respondent**

THE SHERIFF, JOHANNESBURG NORTH **Second Respondent**

In Re:

THE STANDARD BANK OF SOUTH AFRICA LIMITED **Plaintiff**

and

ROOKSANA DHODA **Defendant**

JUDGMENT

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[1] The Applicant is applying for an order rescinding the default judgment granted by the above Honourable Court on the 10 December 2015 under case number 64605/2015. This application is brought on the basis that the default judgment was erroneously sought and granted and that the applicant has good defences to the first respondent's claims. The applicant seeks a costs order against the respondent.

[2] The application is opposed on the following grounds: -

That the applicant is not instituted on a bona fide basis and forms part of a long dilatory litigation against the first respondent. It is contended that the applicant failed to establish the requirements for a rescission under Rule 42 (1) (a) as it is averred by the respondent that the default judgment was erroneously sought and granted. The first respondent further contends that the applicant failed to make out a case for the relief

she seeks and the application's purpose is to merely delay the first respondent's claims.

The first respondent seeks the dismissal of the application with a punitive costs order.

FACTUAL BACKGROUND

[3] The applicant and the first respondent duly represented, concluded a written home loan agreement on 20 December 2005. In terms of the home loan agreement, the first respondent lent and advanced to the applicant the sum of R2.5 million (principal debt). The express terms and conditions of the home loan agreement read with the bond were inter alia the following: -

a) That the principal debt would bear interest at the first respondent's prime rate of interest, which would vary from time to time;
b) That the applicant will effect monthly instalments amount in the sum of R21 854.07;
c) As security for the principal debt, the applicant was required to register a mortgage bond in favour of the first respondent for an amount of R2.5 million (the mortgage bond) over Portion 1 of Erf 793 Forest Township, Registration Division I.R Province of Gauteng measuring 759 square metres. (property)

[4] Pursuant to the conclusion of the home loan agreement, the first respondent advanced the principal debt to the applicant, the applicant passed the mortgage bond over the property as she was obliged to do. The applicant defaulted on the home loan agreement as she failed to maintain monthly instalment as agreed. At the institution of the action by the first respondent in August 2010 under case number 28958/2010, the applicant was in arrears in an amount of R1 121 628.16. The applicant defended the action on the basis that the notice in terms of Section 129 of the NCA had been sent to an incorrect address and disputed that the principal debt had been advanced.

[5] During October 2010 the first respondent withdrew the action under case number 28958/2010. A different firm of attorneys was instructed to commence action against the applicant to avoid becoming embroiled in the dispute in summary judgment relating to whether or not Section 129 of the NCA had been received by the applicant or not. The first respondent reinstituted action against the applicant under case number 48627/2011 and summons was served on the applicant's postal address as the address preferred by the applicant.The action was not defended and the first respondent was granted default judgment against the applicant on 04 November 2011 in the sum of R3 675 205.88 plus interest

and an order declaring the mortgage bond executable.

[6] On 20 December 2011 the applicant applied for the rescission of the default judgment under case number 48627/2011 contending that the summons were not properly served as it was served on a postal address thus infringing upon her right to housing. The application for rescission by the applicant was opposed by the first respondent and the applicant failed to file a replying affidavit to the first respondent's answering affidavit. On 01 October 2012 the applicant's application for rescission was dismissed with costs whereafter the applicant applied for leave to appeal the dismissal of her application. Leave to appeal was also dismissed.The applicant petitioned the Constitutional Court for leave to appeal contending that the service of the summons in the 2011 action was defective. Before judgment for leave to appeal could be delivered by the Constitutional Court, applicant and the first respondent entered into discussions relating to the leave of appeal application launched at the Constitutional Court. The parties herein confirmed that the first respondent would simply abandon the judgment without in any way abandoning its claim or right of action by providing a formal consent to rescind the 2011 default judgment. Despite the applicant and the first respondent agreeing to request the Constitutional Court to pend its decision in respect of the applicant's application for leave to appeal

pending resolution of the matter between the parties, the Constitutional Court dismissed the applicant's application for leave to appeal with costs on 3 December 2014.

[7] Despite the dismissal by the Constitutional Court of the application based on her contention; The first respondent granted the applicant a benefit of doubt regarding her alleged defective summons and instituted action afresh and served the summons on the address the applicant prefers notwithstanding the dismissal of her application by the Constitutional Court. It was expressly stated in writing that the abandonment of the judgment by the Constitutional Court dismissing applicant's application was premised on the understanding that the first respondent's claim or right of action was not abandoned. The first respondent subsequently served the summons on the applicant who failed to defend the action. A default judgment was granted against the applicant on the 10 December 2015 and a sale of the applicant's immovable property was up for execution arranged for 20 October 2016. The applicant launched another application for rescission of the default judgment a day before the sale of her house in execution resulting in the cancellation of the intended sale.

[8] The basis of the application for rescission of the default judgment was based on the following contentions: -

a) That the manner in which the summons was served on the applicant's preferred address was not proper;

b) That the first respondent had abandoned its claim against the applicant by way of notice in 2011 when the first respondent abandoned the judgment by default;

c) That the first respondent's claim had prescribed.

The contentions aforementioned raised as grounds for the application for rescission of the judgment granted in 2016 were abandoned by the applicant. She however disputed the quantum of the 2015 default judgment pertaining to legal costs.

Despite the first respondent having delivered an answering affidavit to the applicant's application for rescission the applicant failed to deliver her replying affidavit.

The applicant's application for rescission was dismissed with a punitive costs order.

[9] As the applicant's application for rescission for judgment (2016) was dismissed, the first respondent arranged for the sale of the applicant's immovable property scheduled for the 11 October 2018. Two days prior to the sale in execution of the applicant's house on the 9 October 2018, the applicant launched the present rescission application.

Issues for determination by the first respondent

[10]

" 3.1 Condonation for the late filing of the first respondent's answering affidavit;

3.2 The bona fides of the application;

3.3 Whether or not the applicant's application is competent;

3.4 Whether the applicant is entitled in law to rely on any aspects of her 2018 rescission, notwithstanding the question concerning the competence of the application;

3.5 The consequences of the applicant's non-compliance with Rule 35 (12)."

According to the applicant, issues to be determined are the following: -

"3.6 Condonation for the late filing of the first respondent's answering affidavit;

3.7 In the event that condonation is granted the Applicant will require an opportunity to deliver a Replying affidavit"

Condonation application by the first respondent

[11] The applicant (Rooksana Dhoda) submitted that the only crisp issue for determination in the application before this court is whether to grant condonation or not for the late filing of the first respondent's answering affidavit. Counsel for the applicant informed this court that her instructions are to argue condonation only and further that if condonation is granted, to apply for a postponement to enable the applicant to file its replying affidavit to the first respondent's answering affidavit. The first

respondent (Standard Bank of SA) contended that it is not common cause that condonation is the only aspect to be determined in this application. Counsel for first respondent is of the view that the entire application including the issue of condonation is to be considered and finalized in the application before this Court.

[12] The grounds for condonation are premised on the following:
The first respondent argued that the sole cause of the delay in delivering the answering affidavit arose out of the applicant's conduct. The applicant's conduct arises from the history of this matter. It is common cause that the legal proceedings between the parties dates back to 2010 and to date according to first respondent, there is no finality envisaged by the applicant. Gleaning from the papers before this court, the application launched various rescission applications and such applications were dismissed by the above Honourable Court including the Constitutional Court as aforementioned. The first respondent submitted that it gave the applicant the benefit of doubt by abandoning the judgment granted in instances where the applicant raised issues of her domicilium address and disputed the correctness thereof and even contesting that in some instance denying that the Sheriff did properly serve the pleadings on the applicant. The first respondent made it very clear that the abandonment of judgment or consent to rescind default judgment in a

particular matter does not mean that the first respondent in any way abandons its claim or right of action. According to the first respondent, the applicant persists in raising issues in the present application which were dealt with in the past applications with the sole purpose of frustrating and delaying the progression of the parties matter to be concluded.

[13] In applying for rescission of default judgment on the eve of the sale in execution of the applicant's house during 2018, applicant contended that she has since discovered letters of the 14 April 2015 wherein she changed her domicilium address and allegedly notified the first respondent and hence her fresh rescission application based on her latest discovery of the letters of the 14 April 2015. The first respondent based on the applicant's past conduct doubting the provenance of the 14 April 2015 letters, called for the production of the 14 April 2015 letters in terms of Rule 35 (12) notice during December 2018.

[14] It is argued by the first respondent that the documents sought are central to the applicant's case and further that the said documents are key to the first respondent filing its answering affidavit as it requires an opportunity to inspect the original documents. The applicant failed to produce the original documents as required in terms of Rule 35 (12). Ultimately the first respondent did file its answering affidavit albeit late. It is the lateness

of the filing of the answering affidavit which is inter alia a highly contentious issue in the condonation application.

[15] The first respondent averred that it compelled the applicant to comply with its Rule 35 (12) notice which application to compel was opposed by the applicant. The notice to compel was later on withdrawn by the first respondent and filed its answering affidavit. It is alleged by the first respondent that the applicant has not as yet delivered her replying affidavit.

[16] The first respondent contends that it was not in wilful non-compliance by not submitting its answering affidavit timeously nor did it act delinquently and intentionally thus wilfully delaying the progression of this matter. The applicant, in the first respondent's view is to shoulder all the blame for delaying the finalization of its claim resorting to endless and baseless applications in order to stave this matter being concluded.

[17] The first respondent argued that the applicant suffers no prejudice by the late filing of the answering affidavit as the applicant is the sole cause of the delay as she failed to comply with Rule 35 (12). The applicant is still in occupation of the bonded property and does not effect any monthly instalments so argued the first respondent. According to the first respondent, the prospects of success tilts in its favour as the applicant

failed to make out a case in this matter. The first Respondent contended that applicant's case highly depended on the alleged letters of 14 April 2015. The applicant's failure to produce the originals of the alleged letters of the 14 April 2015 in the first respondent's view means that there is no case before this court. The first respondent accordingly seeks for the condonation to be granted with a punitive costs order.

[18] The application is opposed on the basis that the delivery of the answering affidavit has been unduly delayed by the first respondent. The applicant contended that the first respondent failed to provide sufficient explanation for the lateness of its answering affidavit. In applicant's view the first respondent did not seek indulgence of the court in being late to deliver its answering affidavit. The applicant submitted that the first Respondent's defence should be struck out due to the following reasons: -

i) The delay on the part of the first respondent of twenty two months in delivering its answering affidavit is extremely excessive, protracted and flagrant.

ii) It is expected of the first respondent to be fully appraised with the Rules of this court and that the first respondent deliberately refrained from providing a reasonable explanation for its delay.

iii) That the first respondent's explanation that it was awaiting the discovery of documents in terms of Rule 35 (12) is unsatisfactory.

iv) The failure of the first respondent to provide a reasonable, satisfactory and acceptable explanation for the delay is fatal to its application.

[19] The applicant submitted that the first respondent flagrantly, recklessly and wilfully breached the Rules of this Court and its failure to provide a reasonable explanation for its delay should result in its application for condonation being refused irrespective of the merits of the matter.
It was further contended by the applicant that the reasonable prospects of success is naturally an important consideration relevant to the granting of condonation, however it is not necessarily decisive in every matter and cannot *per se* be conclusive. The applicant submitted that a bona fide defence and a good prospects of success are not sufficient in the absence of a reasonable explanation for the default.

[20] According to the applicant, what the first respondent tendered as an explanation is merely a delay in finalising its application to compel the applicant to produce documents in terms of Rule 35 (12) of the Rules of court. The applicant argued that the first respondent's failure to provide a satisfactory explanation for each period of delay reveal the first respondent's lackadaisical attitude towards the requisite time limit and the Rules of this Court. The applicant's view is that the application for condonation be refused and that the first respondent's be struck out.

Analysis and legal principles finding application

[21] A court may condone non-compliance of the Rules of the Court in instances where the applicant shows that a valid and justifiable reason exists why non-compliance should be condoned. An applicant is to furnish an explanation of his default sufficiently and fully to enable the court to understand how it really came about and to assess his conduct and motives. The court held in **Federated Employers Fire and General Insurance Co Ltd and Another .V. Mckenzie 1969 (3) SA 360 (A) at 362 F-H** that: -

"In considering petitions for condonations under Rule 13, the factors usually weighed by the Court include the degree of non-compliance, the explanation therefore, the importance of the case, the prospect of success, the respondent's interest in the finality of his judgment, the convenience of Court and the avoidance of unnecessary delay in the administration of justice..." The burden lies with the applicant to prove good cause for the relief it seeks. See also **Silber .V. Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A.**

It was further decided in **Uitenhage Transitional Council .V. SA Revenue Services 2004 (1) SA 292 SCA at P 297 par 6** that:

"... condonation is not to had merely for the asking, a full detailed and

accurate account of the causes of the delay and effects must be furnished so as to enable the court to understand clearly the reasons and assess the responsibility. It must be obvious that, if the non-compliance is time related then the date, duration an extent of any obstacle on which reliance is placed must be spelled out".

Good cause

[22] In considering as to what constitute good cause, the court has a wide discretion and should consider the matter holistically in satisfying itself that there is a full and reasonable explanation as to how non-compliance came about. The court have refrained from attempting to formulate an exhaustive definition of what constitute "good cause".

See **Cape Town City .V. Aurecon SA (Pty) Ltd 2017 (4) SA (cc) at 238 G-H and Du Plooy .V. Anues Motors (Edms) Bpk 1983 (4) SA 212 (O) at 216H-217D.**

[23] The first respondent contended that non-compliance with Rule 35 (12) excused the first respondent from filing any answering affidavit. The purpose for requesting the discovery of the 14 April 2015 letters was to allow the first respondent to check the veracity thereof. The applicant's refusal to produce the letters on the basis that they have been attached on its founding affidavit is not sustainable.The question that needs an answer is why if indeed the applicant is in possession of the original

letters of the 14 April 2015, did not produce same to allow the first respondent to file its answering affidavit? When compelled to produce the letters, the applicant opposes the notice to compel on the eve of delivering and filing of the answering affidavit by the first respondent. The respondent withdrew the notice to compel and filed its answering affidavit in order to see the progression of the matter and to avoid further delay in finalizing the matter. The effect of the withdrawal of the notice to compel and failure to produce the letters of the 14 April 2015 by the applicant meant that the applicant could not use the alleged letters in her possession as the letters do not form part of the papers before the court, a sanction provided by Rule 35 (12) of the Rules of the Court. The subsequent withdrawal of the notice to compel and the delivery of the answering affidavit had no effect on the applicant as she failed to deliver her replying affidavit to date. In my view the refusal and failure to produce the requested letter of the 14 April 2015 resulted in the first respondent not being obliged to deliver and file its answering affidavit.

[24] **The position of our law is the following**: -

Until the original documents (letters of 14 April 2015) are presented for purpose of assessment, the other party may not be heard to compel the production of an answering affidavit to be delivered and the party cannot be told to draft the answering affidavit in the absence of obtaining the

original documents and be entitled to inspect those documents because in inspecting the documents, the defence of the party may come to the fore and it will be a holistic position.

See **Protea Assurance .V. Waverley 194 (3) SA 247 C at 249B**

Unilever .V. Polargic 2001 (2) SA 329 C at 336 C-I

[25] Accordingly I hold that the first respondent has demonstrated that good cause exists for the relief it seeks and has furnished an explanation of his default in delivering its answering affidavit which explanation in my view, is reasonable and acceptable. I find that the non-delivery and filing of the answering affidavit timeously by the first respondent is neither flagrant, reckless and gross to warrant the dismissal of its application for condonation.

Prejudice and interest of justice

[26] It is trite law that the standard for considering an application for condonation is the interest of justice. See **Brummer .V. Gorfil Brother Investments (Pty) Ltd and others 2000 (2) SA 837 (CC) paragraph [3].**

Grootboom .V. National Prosecuting Authority and Another 2014 (2) SA 68 (CC) paragraphs [22] and [23]. Whether it is in the interest of justice to grant condonation depends on the facts and

circumstances of each case and the list of such facts are not exhaustive. The first respondent contended that a reasonable and justifiable explanation as to its delay in delivering its answering affidavit has been fully set out warranting the granting of condonation. The first respondent argued that the sole intention of the applicant in launching endless and numerous applications is to frustrate and delay the finalization of the matter thus causing substantial prejudice to its interests.

[27] It is submitted by the first respondent that the applicant is in no way prejudiced by the late filing of the answering affidavit which is for her own making. The applicant according to the first respondent, intends to delay the conclusion of its claim as long as she could while enjoying the benefits of her occupation of the bonded property without effecting any payments thereof. The first respondent contended that the applicant's application is meritless and its prospects of success in the application are great.

[28] It is the applicant's submission that the delivery of the answering affidavit has been unduly late with a scant and unsatisfactorily explanation provided and as such, the first respondent's defence should be struck out. It is the contention of the applicant that since there is a flagrant and reckless failure on the part of the first respondent to deliver its answering affidavit within the prescribed period, condonation can be declined

without considering the prospects of success.

[29] As alluded above the non-compliance of delivering the answering affidavit within the required time frame cannot be attributed to the first respondent. The first respondent was not obliged to deliver its answering affidavit until the applicant produced the alleged original letters of the 14 April 2015 in terms of Rule 35 (12). I have already found that the first respondent's explanation as to the default is reasonable and acceptable and the contention that its defence be struck out for lack of a satisfactory explanation for the delay is rejected.

[30] Having assessed and evaluated the facts of this matter, the importance of the case, the first respondent's interest in the finality of this application and the avoidance of further delays in the administration of justice and prospect of success, I hold the view that condonation be granted.
I find that the first respondent will suffer great and substantial prejudice if condonation is not granted whereas the applicant will experience no prejudice. It is in the interest of both parties and more particularly in the interest of justice that the condonation be granted and the application be finalized.

[31] A case for condonation is appropriate under the circumstances and the relief sought by the first respondent is granted.

I make the following order: -

1) The application for condonation is hereby granted.

Application for a postponement

[32] The applicant's counsel informed the court that she has only been instructed to argue the issue of condonation and if condonation is granted, the applicant be granted an opportunity to file her replying affidavit as it is in the interest of justice to allow for a replying affidavit at a later stage. The first respondent contended that the applicant failed to bring a proper application for a postponement and counsel for the applicant moved such an application from the bar. An application for the dismissal for a postponement was made on behalf of the first respondent.

[33] I find that there is no reasons or basis whatsoever for the application for a postponement and therefore I am inclined to dismiss the application for a postponement. The following order is made: -

1) The application for a postponement is dismissed.

Rescission application

[34] The applicant avers that the default judgment was erroneously sought as she has good defences to the first respondent's claim. Counsel for the applicant despite having informed the court that she does not have instructions to argue the rescission application before court, made a submission from the bar that the application is brought in terms of the common law. The applicant consequently seeks relief to rescind the default judgment granted on the 10 December 2015.

Applicable legal principles

[35] Rule 42 (1) provides as follows: -

"The court may in addition to any other powers it may have, mero motu or upon 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 an ambiguity or a patent error or omission but only to the effect of such ambiguity, error or omission;

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

In **Monama and Another .V. Nedbank Limited 41092/16 [2020] ZAGPPHC 70** at 18 and 19 the Court referred to Rule 42 (1) (a) as follows:

"Generally speaking a judgment is erroneously granted if there existed at the time of its issue, a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment. An order is also erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the court to have made such order."

See also **Bakoven Ltd .V. GJ Howes (Pty) Ltd 1992 (2) SA 466 (ECD) at 471 E-1.**

In terms of Rule 42 (1) the applicant needs not show good cause. It is expected of the applicant to show that the order or judgment was erroneously sought or erroneously granted to persuade the court to vary or rescind the particular order.

Common law

The application for rescission of judgment in terms of the common law may be brought on the following grounds: -

(1) Fraud;

(2) iustus error;

(3) discovery of new documents only in exceptional circumstances;

(4) in the instance where default judgment was granted by default.

All what the applicant has to show for the judgment or order to be set aside

is that: -

(1) There must be a reasonable explanation for the default;

(2) The applicant must show that the application was made *bona fide*; and

(3) The applicant must show that he has a *bona fide* defence which *prima facie* has some prospect of success. See **Chetty .V. Law Society Transvaal 1985 (2) SA 756 at 764 – 765E**.

Applicant's contention

[36] The applicant submitted that the first respondent has instituted at least four actions relating to the same cause of action against her. The fourth claim is the one presently before this court. The first respondent withdrew the first and second actions under cases numbers 257/2008 and 28968/2010 respectively. An action instituted by the first respondent under case number 4867/2011 was unopposed by the applicant. A default judgment was granted. The first respondent subsequenty abandoned the said judgment as it was alleged that the summons were not properly served and it was served on an incorrect domicilium. The summons (4867/2011) were ultimately served at the preferred address of the applicant during August 2015. As the applicant failed to defend the said action, a default judgment was granted against the applicant. The applicant launched a rescission application during 2016 to

rescind the default judgment. The basis of her opposition were that inter alia a repeat of the grounds raised in her 2011 rescission application which she subsequently abandoned in 2011 application.

[37] The applicant alleged that she has recently discovered two letters dated 14 April 2015 wherein she alerted the first respondent that she has changed her domicilium address. She argued that summons in the 2015 action was not served by the Sheriff as alleged. Consequently according to the applicant, the default judgment ought not to have been granted. The applicant launched rescission application contending that the first respondent has waived its rights to claim against her when it abandoned the 2011 judgment and secondly that the claim has prescribed. The applicant contended that the first respondent failed to comply with the NCA as it served its Section 129 notice at a wrong domicilium as she has changed her address as per the letters of 14 April 2015 addressed to the first respondent. It is the applicant's submission that her application for rescission should succeed as she has raised good defences to the first respondent's claim.

Respondent's argument

[38] Counsel for first respondent contends that the applicant failed to make out a case for rescission. It is argued that the applicant's evidence as per her

affidavits made under oath, shows lack of bona fides on her part and serious challenges on applicant's credibility. The first respondent submitted that the applicant in her rescission application during 2011 contended the summons was not properly served as it was served at an address which was not her domicilium. Her application to rescind the 2011 judgment was dimissed as well as her application for leave to appeal. She attached a copy of a letter which purported that she had changed her address to 10A Torwood Road, Forest Town Johannesburg. The Constitutional Court dismissed her application.

[39] In an attempt to curtail further delays and be involved in further rescission applications, the first respondent and the applicant agreed that summons be served at the new address being 10A Torwood Road, Forest Town, Johannesburg. The applicant raised no objections relating to the domicilium address. As mentioned above in the 2016 rescission application thus confirming its correctness.

[40] It was argued on behalf of the first respondent that despite the applicant having confirmed her domucilium address, she changed her tune in this application and alleges that she actually changed her address as per the letters of 14 April 2015 to 49 Crown Road Fordsburg Johannesburg. It is submitted by the first respondent that the applicant's conduct is the abuse

of the court's process and demonstrates the applicant's lack of bona fides and her credibility. Despite the applicant having abandoned her defences for waiver of a right to claim and prescription, she again raised the same defences in her present rescission application. It is submitted by the first respondent that the aforementioned conduct is an indictment aganst the applicant's bona fides and her lack of credibility. The first respondent contended that the defences raised by the applicant lack merit and are not sustainable.

[41] According to the first respondent the launching of this application and pursuit of further applications by the applicant in instances where the court has already made a determination, the principle of *res jiducata* bars the applicant from endlessly bringing applications on issues already decided by the Court. The first respondent argued that apart from applicant's failure to discover the letters under Rule 35 (12) the applicant is prohibited from raising new defence by the once and for all rule. The contention of the applicant that her new evidence (letters of 14 April 2015) entitles her to bring this application is unfounded in law. It is the first respondent's contention that the applicant's application for rescission is not made in good faith and that it is bad in law. Accordingoly the first respondent prays for the dismissal of the application with costs.

Analysis

[42] It is common cause that the applicant's attempts to rescind the default judgments granted against her relating to the claim by the first respondent were dismissed on three occassions including the ruling against her by the Constitutional Court. Basically the defences raised by the applicant in this application are issues already dealt with and conceded by the applicant in previous applications. The only exception to those issues are the applicant's new defence emanating from the letters dated 14 April 2015 allegedly, she luckily found in her personal file, contends thereof confirming a change of her domicilium address. At a pain of repetition the defences referred above pertains to the first respondent having abandoned its right to claim prescription and the summons having improperly served at a wrong address.

[43] The applicant having formally abandoned her defences of waiver of the first respondent's right to claim, prescription, *res judicata* ad having provided a preferred address for service of summons, laid such defences to rest and in my view cannot be resucitated in this application. It should be mentioned that when abandoning the 2011 default judgment the first respondent specifically made it clear that it is in no way abandoning its claim or right of action. For the applicant to simly persist on this defence speaks volumes of her mala fides. The applicant's conduct in my view, is

nothing else but an abuse of court process which hinders the administration of justice and has to be discouraged.I am of the opinion that the only defence that needs to be considered is that of the newly discovered letters of 14 April 2015. The applicant's contention that by sheer luck while perusing her file, the two letters reffered to were discovered is at most questionable.

[44] It is to be noted that the parties agreed that the first respondent is to institute a new claim which was to be served at the applicant's address as contained in an affidavit delivered at the Constitutional Court. Accordingly and in line with the parties' agreement the summons was issued during August 2015 and served at the given address by the applicant. For the applicant to now disavow what is contained in her affidavit to the Constitutional Court relating to her domicilium address, surely goes to the heart of her credibility and bona fides in this application. The court takes a dim view of the applicant's conduct and the said conduct cannot therefore be condoned.

[45] The first respondent called for the discovery of the two letters of 14 April 2015 in terms of Rule 35 (12) and the applicant refused to comply with her obligations under the Rules of Court to do so. I have to date struggle to find a congent reason from the applicant why she cannot simply

provide the originals of the said letters. As alluded above, the first respondent then became excused from delivering its answering affidavit. However even when the first respondent was not obliged to do so, the answering affidavit was delivered which to date was met with no response from the applicant. The question to be asked is whether under the circumstances of this application, is the applicant entitled to raise her new defence.

[46] In my view, it is impermissible to allow the applicant to introduce new evidence in this application as she is barred by the once and for all rule principle.

The court held in **Henderson .V. Henderson (1843) Hare 100 at page 115** that

"In trying this question I believe that I state the rule of Court correctly when I say that where given matter becomes the subject matter of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence,

inadvertence or even accident omitted part of their case."

Our courts have accordingly adopted the once and for all principle aforementioned in the following cases: -

Bafokeng Tribe .V. Impala Platinum Ltd and others 1999 (3) SA 517 at 562 G-J.

Consol Ltd t/a Glass .V.Twee Jonge Gezellen (Pty) Ltd and Another (2) 2005 (6) SA (c).

[47] The applicant having raised identical issues and having made concession in her previous rescission application is prohibited from embarking *ad infinitum* on such issues raised lest she flouts the *res judicata* principle. The principle of *res judicata* dictates that in instances where the issues raised by the parties in a contest between them were judicially considered by a competent court and a determination made a party is not allowed to proceed against the other party on the same issue and cause of action already determined.

The purpose of the principle is to provide finality to litigation and continued litigation on the same merits already decided upon should be discouraged.

It was held in **Mbatha .V. University of Zululand (2013) ZACC 43**

2014 (2) BCLR 123 (CC) at paragraphs 193-197 that a subsequent attempt by one party to persistently proceed against the other party on the same cause of action on identical issues should be discouraged.

[48] It is settled law that the doctrine of *res judicata* has to be carefully considered in order to avoid actual injustice to the other party and may in appropriate circumstances be adapted and expanded to avoid unacceptable alternative that the courts cling to old doctrines with literal formalism.

i. See **Kommissaris Van Binnelandse Inkomste .V. Absa Bank BPK 1995 (1) SA 653 A t 669 F-H**;

ii. **Bafokeng Tribe .V. Impala Platinum Ltd and others 1999 (3) SA 517(B) at 556 E-F.**

I find that in this application there are no exceptional and special circumstances to deviate from Henderson and *res judicata* principles, in the contrary, I find that the first respondent will suffer actual injustice and further hardship as the applicant has been occupying the property under dispute without effecting any payments whatsoever. I am of the view that it is time that the dispute between the parties that span over a decade and half had to come to a finality.

[49] The applicant (Rooksana Dhoda) premised her application in terms of Rule 42 (1) (i.e the default judgment was erroneously sought and granted).

She further contended that she actually have good defences to the claim against her. It is upon the applicant to establish her bona fide defences which must be sufficiently disclosed including their nature of grounds. Where the applicant relies on Rule 42 (1) and / or common law, such applicant must satisfy the requirements thereof.

[50] The defences relied upon by the applicant (abandonment of the claim by the first respondent, prescription ad that the summons were not properly served at her domicilium address) were abandoned by the applicant herself. A new and fresh defence of discovery of new evidence, (letters of the 14 April 2015) could not be considered by the Court as the applicant refused and failed to take this Court into its confidence in producing the said letters when required to do so. In terms of Rule 35 (12) effectively the alleged original letters of the 14 April 2015 are not before this Court. My earlier finding that the first respondent was not and is not obliged and cannot be compelled to deliver its answering affidavit according to me sounded a death knell to the applicant's defence based on late delivery of the answering affidavit.

[51] An unavoidable question is under the circumstances, which defence(s) are to be considered by this Court as raised by the applicant?
It goes without saying that the brutal truth in my view, is that there are

no longer defences raised by the applicant calling for determination. I find that the applicant has failed to establish any bona fide defences to the claim against her worthy to be ventilated which are competent in law.

[52] The contrary versions contained in the applicant's sworn affidavits and her insistence of rehashing defences already dismissed and finalized by a competent Court, leads in my opinion to only one thing, that is, the applicant had not been candid and her application falls short in showing that the application is made bona fide. See **Naidoo and Another .V. Matlala NO and others 2012 (1) SA 145 GNP at 152 H-I.**

[53] As far as the requirements of Rule 42 (1) are concerned, are conspicuous by their absence in the applicant's papers. It is not sufficient for the applicant to merely allege that the default judgment was sought and granted erroneously.

The applicant has among others, show that at the time of the granting of the judgment the court was not aware of a fact that existed which would precluded the granting of the judgment or if an irregularity existed in the proceedings or if it was not legally competent for the Court to do so. See **Monama and Another .V. Nedbank** cited above.

[54] Regarding the application for rescission of judgment in terms of the common law, the Court in **Naidoo .V. Matlala NO 2021 (1) SATS 143**

at 152 H-I stated that in order for the default judgment to be set aside the applicant has to satisfy the common law elements and must show that sufficient cause for rescission exists.

The onus rest on the applicant to give a reasonable explanation which is acceptable for his default, he must show that her application is made bona fide and then on the merits he has a bona fide defence which prima facie has some prospect of success. The averment that the judgment was erroneously sought and granted is not supported by any evidence.

[55] Having found that there are no bona fide defences and the applicant also having abandoned her defences, the logical conclusion in my view is that there is in fact no case before this Court presented by the applicant.

I am of the view that the numerous and endless rescission application by the applicant are nothing else but an abuse of the Court process with its sole purpose being to frustrate, delay and drag this matter unnecessarily and to greatly prejudice the interest of both the first respondent and administration of justice.

As the adage goes, justice delayed is justice denied. In the premises I hold that the first respondent did not erroneously grant the order and that there are no bona fide defences to the first respondent's claims.

Costs

[56] The first respondent seeks a punitive costs order against the applicant.

It is contended by the first respondent that the sole cause of the delay in this matter lies with the applicant. The conduct of the applicant is not only fraudulent but also an abuse of the court process so argued the first respondent.

It is argued on behalf of the first respondent that the applicant's application is not only mala fide but it is also bad in law.

[57] On the other hand the applicant submitted that in the event the Court granting condonation, the applicant be given an opportunity to deliver its replying affidavit and tendered costs thereof. Should the condonation application be dismissed the first respondent's defence contained in its answering be struck out with costs.

It is generally accepted that costs follow the results. A successful party is therefore entitled to his / her costs unless ordered otherwise by the Court. In **Ferreira .V. Levin NO and Others 1996 (2) SA 621 (cc) at 624 B-C par [3]** the Court held that the award of costs unless otherwise enacted, is the discretion of Court. The facts of each and every case are to be considered by the Court when exercising its discretion and has to be fair and just to all the parties.

[58] Costs on a punitive scale will only be awarded in appropriate and

exceptional circumstances. A punitive costs order may be awarded in the event inter alia, that a litigant has been dishonest, reckless, vexatious frivolous and fraudulent.

[59] Considering the facts of this matter and the conduct of the applicant as described aforementioned, forces this Court to discourage this flagrant, dishonest and fraudulent conduct by the applicant. To simply disregard averments made under oath and contradict this with mala fides and untruths deserve the sanction of such behaviour by the court. This court takes a dim view of the conduct which is unacceptable as displayed by the applicant in her application. It has with respect in my view to be discouraged.

[60] After considering the facts of this matter I find that the Court and the first respondent should not have been put through the full process of this application. The rescission applications on identified issues by the applicant despite the courts having dismissed them are abuse of the court's processes clouded with mala fides and dishonesty. The purpose thereof being to delay the finalization of this matter to the detriment of the first respondent with no adverse consequence to the applicant as she to date occupies and enjoys the benefits of the property at no costs contrary to the parties' loan agreement.

A punitive costs is therefore warranted.

ORDER

I therefore make the following order: -

1. The application for condonation for the late filing of the answering affidavit is granted;
2. The application for rescission of the default judgment is dismissed;
3. The applicant to pay costs on attorney and client's scale.

S S MADIBA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

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DATE OF JUDGMENT:	**26 SEPTEMBER 2022**