

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

Case No. **35877/2018**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: 14/8/2023

DATE: 16 August 2023

SIGNATURE

In the matter between:

MOTSEPE BANAKILE PEAR TETE

APPLICANT

and

NEDBANK LIMITED

RESPONDENT

JUDGMENT

YENDE AJ

NATURE OF THE PROCEEDINGS

[1] This is an opposed application for the rescission of a default judgment granted by Swanepoel Acting Judge on 19 August 2019. The application is in terms of Rule

42(1)(a) of the High Court Rules, which provides that a court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind, or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. The applicant contends that the judgment was erroneously sought or erroneously granted. Generally, an order will be erroneously granted if there existed at the time of its issue, a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment¹; or if there was an irregularity in the proceedings².

[2] The applicant is **MOTSEPE BANAKILE PEAR TETE** an adult female **businesswoman** residing at no [...] C[...], S[...] Extension 4, Pretoria, Gauteng Province.

[3] The respondent is **NEDBANK LIMITED** (registration number:.....), a duly registered credit provider with registration number: NCRCP 16, a public company duly registered and incorporated in accordance with the Company Laws of the Republic of South Africa; and also trading as a deposit taking institution in terms of the Banks Act, 94 of 1990 (previously the Deposit Taking Institutions Act) and having its principle place of business at Nedbank, 1[...] R[...] Campus, 1[...] R[...], Sandown, Sandton, Johannesburg, Gauteng.

EPHEMERAL FACTUAL MATRIX

[4] During or about **7 December 2015** the applicant (acting personally) and the respondent (represented by a duly authorized official) concluded written agreement of loan (“the loan agreement “).The applicant’s indebtedness in terms of home loan agreement was secured by registration of a mortgage bond (under mortgage bond **B4060/2016**) over certain immovable property with property description:

¹ **Nyingwa v Moolman NO**, 1993 (2) SA 508 (TKGD) at 510

² **De Wet v Western Bank Ltd**, 1979 (2) SA 1031 (A) at 1038

[ERF...] S[...], EXTENSION 4 TOWNSHIP, REGISTRATION DIVISION J.R; PROVINCE OF GAUTENG. MEASURING 1020 (ONE THOUSAND AND TWENTY) SQUARE METRES. LOCAL AUTHORITY: CITY OF TSHWANE METROPOLITAN MUNICIPALITY;

Held by Deed of Transfer number T[...], subject to the conditions contained therein and especially to the reservation of rights to minerals (hereinafter referred to as the immovable property.

[5] The respondent issued summons against the applicant on 23 May 2018, which summons was duly served on the applicant on **5 June 2018**. The *dies* for entering appearance to defend expired on 19 June 2018. The respondent launched an application for default judgment and an application in terms of Rule 46A on the 25 September 2018. Owing to repayment negotiations the matter was postponed *sine die*. On 16 April 2018 at the time Section 129 notice was sent³, the applicant was in arrears with instalments in the amount of R 33 051.18, the arrears status has escalated to some R 120, 683.90 as of 26 April 2022⁴.

[6] On 25 April 2019 the matter was re-enrolled owing to applicant's request for indulgence for further settlement arrangements the matter was postponed *sine die*. The last payment received by applicant was on 29 June 2019 in the amount of R 11 156.89. The regular bond repayment of the applicant is an amount of R 11 156.89. At the time the applicant was 6.60 months in arrears with her home loan repayment⁵.

[6] On 30 July 2019 the matter was re-enrolled and on 19 August 2019 default judgment was granted in favour of the respondent⁶. On the strength of the default

³ The relevant part of section 129 provides that if a consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose various options to resolve the problem and may not commence any legal proceedings to enforce the agreement without first providing that notice.

⁴ See caselines paginated pgs. 004-5

⁵ See caselines paginated pgs. 008-5 to 008-6

⁶ See caselines paginated pgs. 015-1 to 015-3.

judgment a warrant of attachment was issued in this Court on 12 September 2019⁷. On 16 September 2019 the Sheriff of this Court received the warrant of attachment and attended on judicial attachment of the applicant's property on 17 September 2019⁸. The immovable property was attached on 27 September 2019. The sale in execution was scheduled for the 29 May 2019 and same was cancelled due to applicant's request for payments arrangements. The applicant having failed to arrest the arrears and normalising her home loan account making same to be uptodate. On 29 April 2022 the property was put back on sale in execution⁹.

[7] Aggrieved by the judicial attachment of her property, on 20 April 2022 the applicant brought this present application to rescind the default judgment granted by the Swanepoel Acting Judge on 19 August 2019. This application is ostensibly brought in terms of Rule 42(1)(a) of the High Court Rules¹⁰.

Evidence

Applicant's case

[8] For purposes of this judgment only the main relevant averments and /or contentions raised by applicant in its papers and the submissions made by her counsel in support of this application are restated.

[9] The applicant contends that the default judgment application was erroneously sought, and the same was erroneously granted. The applicant premised this contention on the fact that on 16 April 2018 the respondent dispatched a letter in terms of section 129(1) of the NCA alleging that she was in arrears in the sum of R33 051.18. The applicant had previously on 10 April 2018 made payment to her arrear home loan account in the amount of R 11078.97¹¹. According to the applicant by making part payment in response to the respondent's Section 129 notice, the respondent could and/or should not have used the same Section 129 notice as the basis for issuing

⁷ See caselines paginated pgs. 003-11 to 003-18.

⁸ See caselines paginated pgs. 002-5 to 002-7.

⁹ See caselines paginated pgs. 015-1 to 015-2

¹⁰ See caselines paginated pgs. 002-14.

¹¹ See caselines paginated pgs. 025-3

summons against the applicant¹² more over that the applicant was not in default for more than 20 days prior to the issuing of summons. The applicant avers further that the respondent did not comply with the provisions of the National Credit Act, Act 34 of 2005 this being *inter alia* reason for the current rescission application.

[10] The applicant further contends that it had made several payments to her mortgage loan account with the respondent on 10 April 2018, 12 May 2018, and 10 July 2018 – the total amount paid being approximately R28 900-00. According to the applicant when default judgement was issued, a year later, the applicant had paid to the respondent approximately R150 000-00¹³.

[11] Counsel for the applicant contends that the applicant had satisfied and complied with the respondent's section 129(1) notice, that at the time that the respondent sought default judgment, the applicant was no longer in arrears as alleged in section 129(1) notice.

[12] Accordingly, it was erroneous of the court to grant default judgment some 15 months after the issuing of the summons without enquiring into what had transpired in between that period. The judgment the respondent sought trumped the applicant's socio – economic right.¹⁴

[13] The applicant submits that she has made out a case for granting the rescission application. Rule 42(1)(a) affords this Court wide discretion to deal with applications such as the instant one in an expeditious and cost – effective manner¹⁵.

¹² **Starita v Absa Bank Limited and Another** (745/2009) [2010]ZAGPJHC 13; 2010 (3) SA 443 (GSJ) (26 March 2010) at par 10

¹³ See caselines paginated pgs. 003-12 to 003-17.

¹⁴ **Occupiers of Erven 87 and 88 Berea v De Wet N.O.** and Another 2017 (5) SA 346 (CC) at par 65.

¹⁵ **Zweni v Minister of Law and Order** 1993 (1) SA 523 (AD) at 531 and **Tshivhase Royal Council v Tshivhase** 1992 (4) SA 852 (A) at 862J – 863A.

[14] The applicant's counsel submitted that this honourable court is empowered to rescind its own judgments where it is just and equitable in the interest of justice. Section 173 of the Constitution empowers the courts to regulate their own affairs¹⁶.

Respondent's case

[15]] For purposes of this judgment only the main relevant averments and /or contentions raised by respondent in its papers and the submissions made by counsel in opposing this application are restated.

[16] The respondent is vehemently opposed to this rescission application on the basis that this application is wholly unmeritorious in that it does not fall within the ambit of Rule 42, and it is a clear attempt to circumvent insurmountable hurdles that the applicant would face with an ordinary rescission application within the ambit of Rule 31(2) or the common law. The core undeniably fact is that the applicant was unable to meet her monthly home loan obligations and her position of default has worsened or increased rather than decreased.

[17] The respondent avers that this rescission application was issued on 21 April 2022, nearly three (3) years after the default judgment was granted being the 19 August 2019. The current application is consequently wholly out of time in terms of Rule 31(2) of the Uniform Rules of Court or otherwise in terms of common law. It is far outside the 20-day period as envisaged in the Rules for a rescission application and also far exceeds a "*reasonable time*" in terms of the common law in order to bring such an application once the aggrieved party becomes aware of same. In this instance, the applicant had been aware of the proceedings since the very onset, some more than three (3) years ago¹⁷.

Legal framework pertaining to Rule 42 Orders

¹⁶ **Zondi v MEC, Traditional and local Government Affairs** 2006 (3) SA 1 (CC) at paras 31, 32 & 35.

¹⁷ See caselines paginated pgs. 004-4

[18] This rule caters for mistake.¹⁸ The Court does not have the inherent power to set aside its judgments.¹⁹

[19] The general rule is that, once judgment is given, the Court is *functus officio*.²⁰

[20] This does not apply to interlocutory orders.²¹ This rule is subject to certain exceptions,²² but these exceptions are very narrow.²³

[21] An application for rescission of judgment may be launched despite the fact that judgment was granted pursuant to the party being barred from pleading in terms of the notice of bar.²⁴ A Court may:

[21.1] correct clerical errors in its order of judgment;²⁵

[21.2] amend or supplement a judgment, provided the sense or substance is not affected by the change.²⁶

[22] Parties may also agree to add something to the order granted.²⁷

[23] This application must be brought on the long form of motion.²⁸ The Applicant must show that he has a direct and substantial interest in the subject matter of the judgment or order.²⁹

¹⁸ **Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape)**, 2003 (6) SA 1 (SCA) at para.3

¹⁹ **Colyn** *supra* at para.4

²⁰ **Firestone SA Ltd v Gentiruco AG**, 1977 (4) SA 298 (A) at 306; Applied to Constitutional Court judgment ; **Minister of Justice v Ntuli**, 1997 (3) SA 772 (CC), at 780-782; **Ex parte Woman's Legal Centre: In re Moise v Greater Germiston Transitional Council**, 2001 (4) SA 1288 (CC)

²¹ **Brown and Others v Yebba CC t/a Remax Tricolour**, 2009 (1) SA 519 (D)

²² **Firestone SA Ltd** *supra* at para.5

²³ **Firestone SA Ltd** *supra* at para.5; **Thompson v South African Broadcasting Corporation**, 2001 (3) SA 746 (SCA) at para. 5

²⁴ **Securiforce CC v Ruiters**, 2012 (4) SA 252 (NCK)

²⁵ **Isaacs v Williams**, 1983 (2) SA 723 (NC) at 727

²⁶ **Mostert v Old Mutual Life Assurance CO (SA) Ltd**, [2002] 2 ALL SA 101 (A) at para. 5

²⁷ **Transvaal Canoe Union v Butgereit**, 1999 (3) SA 389 (T) at 404

²⁸ Form 2(a)

[24] The Court has a discretion whether to grant an order.³⁰ The Court's discretion is limited to the circumstances outlined in the rule.³¹ The discretion must be exercised judicially.³²

[25] Rule 42(1)(a), which the Applicant relies on herein,³³ generally applies to *ex parte* applications or other matters where a party is absent.³⁴

[26] This rule does not apply where a legal representative was present when judgment was granted.³⁵

[27] The rule applies, for example, when:

[27.1] the order was granted on a summons that did not disclose a cause of action;³⁶

[27.2] the order was consented to by an attorney without authority to do so;³⁷

[27.3] the order does not reflect its intention and this must be obvious;³⁸

[27.4] it was legally incompetent for the Court to make the order.³⁹

²⁹ **United Watch & Dimond Co (Pty) Ltd v Disa Hotels Ltd**, 1972 (4) SA 409 (C) at 414; **Parkview Properties (Pty) Ltd v Haven Holdings (Pty) Ltd**, 1981 (2) SA 52 (T) at 54

³⁰ **Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz**, 1996 (4) SA 411 (C) at 416-417; **Muteba v Muteba**, 2001 (2) SA 193 (Tk) at 198C-E

³¹ **Van der Merwe v Bonaero Park (Edms) Bpk**, 1998 (1) SA 697 (T) at 702H; **Swart v ABSA Bank Ltd**, 2009 (5) SA 219 (C)

³² **Theron NO v United Democratic Front (Western Cape Region)**, 1984 (2) SA 532 (C) at 536G

³³ Para. 26, Founding affidavit

³⁴ **Ex parte Jooste**, 1968 (4) SA 437 (O) at 439

³⁵ **De Allende v Baraldi t/a Embassy Drive Medical Centre**, 2000 (1) SA 390 (T) at 395A-C

³⁶ **Marias v Standard Credit Corporation Ltd**, 2002 (4) SA 892 (W) at 897; **Silver Falcon Trading 333(Pty) Ltd and Others v Nedbank Ltd**, 2012 (3) SA 371 (KZP)

³⁷ **Ntlabezo v MEC for Education, Culture and Sport Eastern Cape**, 2001 (2) SA 1073 (Tk) at 1078-1079

³⁸ **First National Bank of SA Ltd v Van Rensburg NO**, 1994 (1) SA (T) at 680

³⁹ **Athmaran v Singh**, 1989 (3) SA 953 (D) at 956D-E; **Van der Merwe v Firstrand Bank Ltd t/a Wesbank and Barloworld Equipment Finance**, 2012 (1) SA 480 (ECG)

[28] The fact that a judgment was discharged is not a ground for setting it aside.⁴⁰

[29] A judgment to which a party is procedurally entitled is not considered to be erroneously granted by reason of facts of which the judge who granted the judgment was unaware.⁴¹

[30] Similarly, a judgment to which a Plaintiff is procedurally entitled in the absence of the Defendant, cannot be said to have been granted erroneously, in light of a subsequently disclosed defence.⁴²

[31] Once it is shown that the order was erroneously sought or erroneously granted, the Court will usually rescind or vary the order.⁴³

[32] A party need not show good cause.⁴⁴

[33] The negligence of the Applicant's attorneys is not, in itself, a ground for rescission.⁴⁵

[34] The Court considering the rescission is entitled to have regard to facts that did not appear from the record of proceedings and of which the Court granting the order was unaware.⁴⁶

⁴⁰ **Weare v Absa Bank Ltd**, 1997 (2) SA 212 (E) at 216

⁴¹ **Lodhi 2 Properties Investments C C and Another v Bondev Developments (Pty) Ltd**, 2007 (6) SA 87 (SCA)

⁴² **Lodhi 2 Properties Investments C C and Another** *supra*

⁴³ **Tshabalala v Peer**, 1979 (4) SA 27 (T) at 30D; **Bokoven Ltd v GJ Howes (Pty) Ltd**, 1992 (SA) 466 (E) at 471, where it was stated that the applicant is then entitled to a rescission; but see: **Van der Merwe v Bonaero Park (Edms) Bpk**, 1998 (1) SA 687 (T) at 702G-I

⁴⁴ **Topal and Others v LS Group Management Services (Pty) Ltd**, 1998 (1) SA 639 (W) at 650D-J; **Metubwa v Metubwa**, 2001 (2) SA 193 (Tk) at 199E-H; **National Pride Trading 452 v Media 24**, 2010 (6) SA 587 (ECP)

⁴⁵ **De Wet and Others v Western Bank Ltd**, 1977 (4) SA 770 (T); **Tshabalala v Peer** *supra*; but see **De Sousa v Kerr**, 1978 (3) SA 635 (W); **Topal and Others v LS Group Management Services (Pty) Ltd** *supra*

[35] This rule may be invoked in circumstances where material facts were withheld from, or deliberately misrepresented to the Court or where an order was sought without notice to an interested party.⁴⁷

Discussion and application of the law.

[37] When considering the ephemeral factual matrix *supra*, and the totality of submissions made by both counsels in this matter, the Court cannot be faulted in upholding that the respondent has complied with the provisions of the National Credit Act, Act 34 of 2005 prior to issuing of summons. In fact, the applicant conceded that the letter dispatched to her on 16 April 2018 in terms of section 129(1) of the NCA she was in arrears in the sum of R33 051.18. Fortuitously on 10 April 2018 she made payment to her arrear home loan account in the amount of R 11078.97. To which, the counsel for the Applicant conceded that it did not extinguish the entire arrears as per the section 129 notice let alone to make the mortgage loan account to be up to date.

[38] The Court is of the firm view that the decision in **Starita case mentioned *supra***⁴⁸ does not assist the applicant in its rescission application. It is undisputed and common cause facts that the applicant and the respondent concluded a loan agreement, indebtedness of which was secured by registration of a mortgage bond over the immovable property as mentioned *supra* in this judgment. The National Credit Act, 34 of 2005, is applicable to the home loan agreement. The respondent has complied with the terms of the home loan agreement.

[39] The applicant had been aware of the proceedings for more than three (3) years. A perfunctory reading of the applicant's founding affidavit reveals that :

⁴⁶ *Stander v ABSA Bank Ltd*, 1977 (4) SA 873 (E) at 884D-E; but see : **Bakoven Ltd *supra*** at 471E-I:- the Court is confined to the record; **President of the Republic v Eisenberg and Associates (Minister of Home Affairs intervening)**, 2005 (1) SA 247 (C) at 264

⁴⁷ **Naidoo and Another v Matlala NO and Others**, 2012 (10) SA 143 (GNP)

⁴⁸ See footnote 12 *supra*

[39.1] She does not contest having full knowledge of the application from the very onset and that she chose not to defend the summons issued on 5 June 2018 and also not to oppose the judgment by default that was successfully granted on the 19 August 2019 .

[39.2] She was at all material times granted indulgence by the respondent to try and remedy her loan account which has been in arrears from an amount of R 33,051.18 on 16 April 2018 to have monotonously escalated to some R120,683.96 as of 26 April 2022.

[39.3] Having received the Section 129(1) notice she chose not to take up the invitation in the Section 129 letter by approaching a debt counsellor, alternatively dispute resolution agent, Consumer Court, or bank ombudsman .

[39.4] Since 17 September 2019, the applicant was afforded numerous opportunities in terms of addressing her indebtedness and escalating arrears this had the effect in the respondent cancelling the sale in execution that was scheduled for 29 May 2020. The payment history of the applicant also reveals her inability to settle her arrears and to maintain her loan account to be up to date.

[39.5] The applicant has had ample opportunity, in fact some more than four (4) years since the initial Section 129 notice was forwarded to her in order to rectify her default status⁴⁹.

[40] The applicant has failed dismally to demonstrate her financial ability to keep up with her legal obligations in terms of servicing her home loan agreement. Her assertion that she fell “ *into serious health, emotional and financial crisis* ” is bald , generally vague, and sketchy uninformative averments which does not take the matter any further. Her further assertion that she paid “ *whatever monies I could to save my house*” does not in any form, shape and/or guise translate to full settlement of the arrears.

⁴⁹ See caselines paginated pgs. 002-1 to 002-8.

[41] No cogent reasons are proffered by the applicant as to why this rescission application was issued on 21 April 2022 almost three (3) years after the default judgment was granted on 19 August 2019.

[42] In light of the ephemeral factual matrix *supra*, the respective submissions by both counsels for the applicant and for the respondent I found no fault and / or error in the default judgment that was granted on 19 August 2019 by Acting Judge Swanepoel Acting Judge (as he was then).

[43] The Court find that the applicant's application as premised on Rule 42(1)(a) of the High Court Rules is ill-conceived stratagem, wholly unmeritorious and a clear attempt to circumvent the otherwise applicable time periods which have not been met in this instance. That the applicant has also failed to produce any substantive grounds for rescission of the said default judgment and consequently condonation in the circumstances is not justified on the fact presented and argued before Court .

[44] The Court find further that the applicant has failed dismally to make out a clear case for rescission of judgment in terms of Rule 42 of the Uniform Rules of Court and / or otherwise in terms of Common law.

[45] Moreover, the applicant did not prosecute this application expeditiously.

[46] As the consequent, the application is dismissed with cost on attorney and own - client scale.

J YENDE

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

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Heard:

29 May 2023

Judgment:

16 August 2023