REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 5118/2017

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE..... SIGNATURE:.....

In the matter between:

DLAMINI MTHUNZI SHAKES **APPLICANT**

And

NEDBANK LIMITED **FIRST RESPONDENT**

THE SHERIFF POLOKWANE **SECOND RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The first respondent had issued combined summons against the applicant on 19th July 2017 for cancelation of the instalment sale agreement and return of the goods. The summons was served on the applicant by affixing to the main principal door on 28th July 2018 at 28 C[…] Street S[…] V[..], Polokwane. The first respondent obtained a default order on 5th December 2017 since the applicant had failed to enter an appearance to defend the first respondent's action.

[2] The applicant represented by Mpho Mokhithi Attorneys launched the first rescission application on 19th October 2018. In the first rescission application, the applicant alleges that on 27th September 2017, he became aware of the default order that was granted on 14th September 2017 when he was contacted by the tracer. In that rescission application, the applicant has stated he had no knowledge of 28 C[…] street, and had never resided at that address as when he entered into the instalment sale agreement with the first respondent he was renting at 7[…] C[…] street S[…] V[…]. In his founding affidavit the applicant has stated that he is currently residing at 7[…] A[…] E[…], B[…]. The first respondent had opposed the applicant's first rescission application.

[3] Mpho Mokhithi attorneys did not take steps to set down the rescission application and the first respondent set the matter for the 8th June 2020. Mpho

Mokhithi attorneys withdrew as the applicant's attorneys of record before the rescission application could be heard. In its notice of withdrawal as attorneys of record, Mpho Mokhithi attorneys have stated that the last known address of the applicant was 28 C[…] street Se[...] V[…], Polokwane. After the withdrawal of Mpho Mokhithi attorneys, the first respondent served the notice of set down by the sheriff at 20 C[…] street S[…] V[…], Polokwane. On 8th June 2020 the applicant was in default and his application for rescission was dismissed.

[4] On 8th April 2021 the applicant launched the second rescission application seeking orders that the order of the 8th June 2020 be rescinded and set aside, and that any other execution step made or to be made against the applicant's property be stayed pending the finalization of the rescission application. In the second rescission application the applicant has stated that he was not aware that his erstwhile attorneys have withdrawn as his attorneys of record as the notice of withdrawal was served at the wrong address despite they been aware of his correct address.

[5] On the prospects of success the applicant has stated that the credit agreement that he had signed with the first respondent was unlawful in that it did not comply with section 92(3) of the National Credit Act 34 of 2005. The applicant alleges that the purported agreement was entered into on the same date on which the pre-agreement and quotation were presented to him. Further that the date on which the applicant went to the dealer, which is the date on which he had signed the pre-agreement, is the date not permitted by the Act for a credit agreement to be entered into.

[6] The first respondent is opposing the applicant's second application for rescission of the order of 8th June 2020. The first respondent has raised a point *in limine* and has submitted that the order of 20th June 2020 constitutes a final order, and is therefore not capable of review or rescission. It is the first respondent's contention that the appropriate remedy for the applicant was to seek leave to appeal the dismissal order.

[7] On the merits of the application the first respondent has stated that the applicant in the credit agreement had chosen S[…] V[…] as the *domicilium* address, and that the applicant never alleged that he had amended such address as provided in the credit agreement. That in the main application for rescission no defence existed hence the application was dismissed. That the applicant did not have a bona fide defence to the first respondent's claim. That the applicant is relying on section 92(3) of the National Credit Act, but has failed to provide any evidence of the alleged unlawfulness of the credit agreement or the extension of reckless credit to the applicant as presented before this court for consideration.

[8] For the applicant to succeed with a rescission of judgment under common law the applicant must show good cause. Rule 42(1) provides that the High Court may in addition to any powers it may have, *mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or granted in the absence of a party thereby. (See *Colyn v Tiger Food Industries Ltd t/a Meadow Mills (Cape)*[1]). In terms of Rule 31(2) a party wishing to apply for rescission of judgment must do so with 20 days of acquiring knowledge of the judgment upon good cause shown.

[1] 2003 (6) SA 1 (SCA)

[9] In *Chetty v Law Society, Transvaal*[2] Miller JA said:

> "But it is clear that in principle and in the long standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:
>
> (i)that the party seeking relief must present a reasonable and acceptable explanation for his default; and
>
> "(ii)that on the merits such a party has a bona fide defence, which prima facie carries some prospects of success."

[10] The first issue which this court must determine is whether the dismissal order of the 8th June 2020 was final, and that the applicant was precluded from bringing a rescission application. When the applicant's first rescission application was dismissed, the merits of the application were not dealt with. It was dismissed on the basis that the applicant was in default. Therefore, the dismissal order was granted in the absence of the applicant and it remains a default order which the applicant may bring a rescission application. On that basis, the first respondent's point *in limine* has no merit and stand to be dismissed.

[11] Turning to the merits of the application, the applicant had instructed his erstwhile attorneys to bring a rescission application. In the first rescission application, the applicant had stated that he did not receive the summons which was served at 28 C[…] street S[…] V[…], which address was unknown to him. The applicant avers that he used to rent at 7[…] C[…] street S[…] V[…], but has since moved out and that he is currently residing at 7[…] A[…] E[…], B[…], Polokwane.

---

[2] 1985 (2) SA 756 (A) at 765B-C

[12] The applicant's erstwhile attorneys withdrew as his attorneys of record before the rescission application could be finalised. In their notice of withdrawal as attorneys of record, the erstwhile attorneys strangely gave the first respondent's attorneys the address of 28 C[…] street as the last known address of the applicant despite the applicant having stated in his founding affidavit that the said address was unknown to him. According to the applicant he did not receive the notice of withdrawal from his erstwhile attorneys. To complicate the matter, when the second respondent served the notice of set down for the 8th June 2020, it was served at 20 C[…] street S[…] V[…] and not at no 28. The applicant had at not stage resided at 20 C[…] street. It is clear that the second respondent had served the set down at the wrong address, and it never came to the attention of the applicant.

[13] When this court dismissed the applicant's rescission application, it was not aware that the applicant was not aware that his erstwhile attorneys have withdrawn as his attorneys of record, and that the notice of set down has been served at a wrong address. Had this information been brought to the attention of the court, the court would not have dismissed that applicant's rescission application in his absence. It is trite that once the court makes a finding that the material facts were not disclosed, then it follows that the judgment had been erroneously sought or granted. (See *Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd*[3]). This court is therefore satisfied that the order of the 8th June 2020 has been erroneously granted in the absence of the applicant.

[14] In the result I make the following order:

---

[3] 2019 ZASCA 61 (20 May 2019) at para 3

14.1 The order of the 8th June 2020 is rescinded and set aside.

14.2 The first respondent to pay the applicant's costs on party and party scale.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

Counsel for the applicant	**: M Chidi**
Instructed by	**: Chidi Attorneys**
Counsel for first respondent	**: Adv PP Baloyi**
Instructed by	**: Vezi De Beer Attorneys**
Date heard	**: 24th November 2022**
Electronically circulated on	**: 19th January 2023**