

**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
(MPUMALANGA DIVISION, MBOMBELA)**

**CASE NO: 1570/2018**

REPORTABLE: NO  
OF INTEREST TO OTHER JUDGES: YES  
REVISED: YES  
18/10/2021

In the matter between:

**ATAICO DIALLO**

Applicant

and

**ABSA BANK LTD**

Respondent

**JUDGMENT**

**MASHILE J:**

**INTRODUCTION**

[1] This is an application for condonation in terms of Uniform Rule of Court 27(3), which provides that: “The Court may, on good cause shown, condone any non-compliance with these Rules.” The Applicant seeks the condonation so that he can

launch another application aimed at rescinding a judgment obtained by the Respondent against him for contravention of payment terms and conditions contained in a loan agreement. Following the conclusion of the aforesaid agreement, The Respondent secured the loan it had advanced to the Applicant by registration of mortgage bond over a certain immovable property belonging to the Respondent described as:

“Erf [...] White River Extension 18 Township, Registration Division J.U., Gauteng Province, measuring 1198 (ONE THOUSAND ONE HUNDRED AND NINETY-EIGHT) square meters and held by Respondent in terms of Deed of Transfer Nr T52280/2001 (“the immovable property”

[2] It is appropriate to mention at this juncture that the papers of the Applicant appear to have been prepared by him. Furthermore, he was self-represented on the day of the hearing. It was manifest from the perusal of the papers and the Applicant’s appearance in court that he did not have a satisfactory grasp of the legal issues and procedures involved in conducting his case. To the extent possible and necessary, the Court endeavoured to assist to facilitate the proceedings but could not do anything with his plainly defective papers.

### **FACTUAL BACKGROUND**

[3] The facts from which this matter arise are that on 6 June 2006, the Respondent concluded a mortgage loan agreement with the Respondent in terms of which the Respondent advanced a mortgage loan to the Applicant in the sum of R960 000.00. The mortgage loan was secured by the registration of the Mortgage bond number B104614/06 over the immovable property described above. The Applicant utilized the loan advanced to him by the Respondent to acquire ownership of the immovable property.

[4] It should suffice to state that the Applicant fell into arrears with his monthly bond payments, which in terms of the loan agreement constituted a breach. The breach of the

loan agreement prompted the Respondent to initiate legal proceedings against the Applicant. Those proceedings culminated on 19 July and 30 September 2016 when the Applicant obtained monetary judgment and authorization to execute against the immovable property respectively.

[5] The immovable property was advertised to go on auction on two occasions. On the first, the sale in execution was marketed for 25 January 2017 but before that date the Respondent accepted a payment plan and gave the Applicant opportunity to rehabilitate his arrears on the account. The Applicant failed to keep to the payment plan as arranged resulting in resumption of legal proceedings. The immovable property was again advertised to go on auction by the sheriff on 8 November 2017. However, on 1 November 2017, the Applicant brought all his arrears on the account up to date. As a result, the mortgage loan agreement was in terms of Section 129(3) read with 129(4) of the National Credit Act 34 of 2005 ("THE NCA") reinstated RENDERING THE JUDGMENT OBTAINED EARLIER INEFFECTIVE FOR PURPOSES OF EXECUTION OF THE IMMOVABLE PROPERTY.

[6] Once the mortgage loan agreement was reinstated, the Applicant again ceased making payments on the account. Naturally, his default caused the Respondent to reignite the legal process. This process concluded in the Respondent obtaining a judgment by default on 30 September 2019. The judgment granted the Respondent monetary relief and declared the immovable property specially executable. Additionally, the Court set a reserve price for the sale of the immovable property in the amount of R1 500 000.00. Subsequently, a sale in execution for the property was scheduled and advertised for 25 November 2020.

[7] The sale in execution proceeded as marketed. A provisional conditions of sale agreement was concluded with the highest bidder for a purchase price amount of R950 000.00. In view of the fact that the purchase price was less than the reserve price initially set in terms of the order of 30 September 2019, the Respondent launched an application as envisaged in Rule 46A(9)(d) and (e) of the Uniform Rules of Court. On 5

March 2021, this Court authorised the conclusion of the conditions of sale agreement with the highest bidder.

[8] The anticipated rescission application by the Applicant is intended to set aside the default order of this Court dated 30 September 2019. There are two grounds on which the Applicant proposes to challenge the order of 30 September 2019 in his rescission application. Firstly, he contends that the deed of transfer of the immovable property and the property description referred to in the particulars of claim do not correspond. Secondly, that he has already repaid the bond registered over the immovable property.

[9] The Respondent has argued that the immovable property has, in terms of the order of this Court dated 5 march 2021, already been confirmed sold to a third party. For that reason, it raises a non-joinder *point in limine* that the purchaser should have been made part of these proceedings because of its direct and substantial interest it has in the matter. The *point in limine*, if upheld, will be dispositive of the whole matter. Thus, it ought to be sensible to attend to it first. That said, I proceed to state the issues hereunder and only thereafter shall I turn to the *point in limine*.

## **ISSUES**

[10] The issues are straight forward and they are:

10.1 Has the Respondent liquidated his entire indebtedness with the Respondent arising in terms of the mortgage loan agreement?

10.2 Is it correct that the Title Deed Number of the immovable property and property description as stated in the particulars of claim do not correspond?

10.3 Should the Applicant have joined the purchaser of the immovable property?

[11] I have already stated *supra* that because of the dispositive nature of the non-joinder issue, it will be constructive to traverse it first. Perhaps I should preface this discussion by stating that it is not any interest that a party might have in a matter that would qualify it to be joined to legal proceedings. In this regard, it could be beneficial to refer to *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd and Another* [1972] 4 All SA 493 (C) where the Court quoted from what was said in an earlier case of *Henri Viljoen (Pty.) Ltd. v Awerbuch Brothers* 1953 (2) S.A. 151 (O). The Court in the latter case following a thoughtful scrutiny of authorities on the meaning of direct and substantial interest, concluded that it entails the following: “. . . an interest in the right which is the subject-matter of the litigation and . . . not merely a financial interest which is only an indirect interest in such litigation”. This legal position holds good to date. See *Absa v Naude case* [2015] JOL 33323 (SCA) and *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para 12.

[12] The immovable property is the subject of a conditions of sale agreement concluded with a third party, the purchaser. As such, any order granting condonation for the late launching of a rescission application will necessarily affect the right and interest of the purchaser who has a direct and substantial interest in the immovable property as it or he or she has a right to registration of transfer of ownership and title into its/his/her name. The Applicant has omitted to join the purchaser to these proceedings. The non-joinder in these circumstances has deadly corollaries. In the circumstances there is no justification to proceed to attend to the other issues when this point alone is dispositive of the whole matter.

## CONCLUSION

[13] In the result, the application fails and I make the following order:

1. The application is dismissed with costs.

**B A MASHILE**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**MPUMALANGA DIVISION, MBOMBELA**

*This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 18 October 2021 at 10:00.*

**APPEARANCES:**

**Counsel for the Applicant:**                      **Mr Diallo in person**  
**Instructed by:**

**Counsel for the Respondents:**              **Mr KW Van Heerden**  
**Instructed by:**                                      **VZLR INCORPORATED**

**Date of Judgment:**                              **18 October 2021**