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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 23762/2013

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

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DATE

.....
SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK

Applicant

And

SHABALALA MBUSISENI THOLITHEMBA BRIGHT

Respondent

JUDGMENT

Delivered on: 05 February 2016

NORMAN AJ:

INTRODUCTION

[1] This is a rescission application wherein the applicant seeks an order rescinding an Order granted by this Court on 29 March 2014 which, *inter alia*, rescinded a default judgment that had been granted against the respondent on 15 October 2013. Incidentally both the default judgment and the Order rescinding it were granted by the same Judge. The application is opposed by the respondent.

[2] The applicant is FirstRand Bank Limited, a company with limited liability duly registered in terms of the Company Laws of the Republic of South Africa.

[3] The respondent is Tholithemba Mbusiseni Bright Shabalala, an adult male who practises as an advocate within the jurisdiction of this Court.

[4] The cause of action arose within the jurisdiction of this Court.

BACKGROUND

[5] The following facts serve as a necessary background:

5.1 On 4 July 2013 the applicant herein who is also the plaintiff in the main action instituted an action against the respondent. It sought judgment in its favour for payment of an amount of R3 180 513.58 being monies lent and advanced to the respondent in terms of a structured facility agreement. The agreement was entered into between the parties on 18 July 2006. As security for the debt a covering bond was registered in favour of the applicant over a certain property described as Erf [8.....] [R.....] Township, Registration Division IQ, measuring one thousand six hundred and thirty six (1 636) square metres(*“the property”*). The property was held under a deed of transfer number [T.....].

5.2 In terms of clause 20 of the structured facility agreement and as agreed between the parties the respondent chose for the purpose of legal proceedings and for the purpose of giving any notices an address being [4.....] [M.....] Road, [R.....], [R.....], 2146. He also chose the mortgaged property as his *domicilium citandi et executandi* in terms of clause 12 of the

bond agreement. The facility sum was R1,9 million. It was payable over a period of 24 months. The respondent's monthly instalment was R17 266.24. The bond registered over the property was for R2 million. The respondent also ceded or pledged a cash investment of R700 000.00. In addition to the R2 million the applicant also held the respondent liable for R400 000.00 being monies in respect of the costs of preserving and realising the mortgaged property including, amongst others, insurance premiums.

5.3 It is not in dispute between the parties that the respondent fell into arrears with his repayments. As a result thereof the main action referred to, above, was instituted against him. The summons was purportedly served on the respondent at [8.....] [K.....] Street, [S.....]. When he failed to enter a notice of intention to defend default judgment was sought and obtained against him on 15 October 2013.

5.4 It appears from the founding affidavit in support of the rescission application that the respondent became aware of the default judgment when a notice of attachment and execution was served on or about 14 February 2014 on him at [4.....] [M.....] Road.

5.5 On 04 March 2014 the respondent brought an application to rescind the default judgment. He also sought leave therein to file a notice of his intention to defend the action and costs of the rescission application. The grounds for the rescission application were that contrary to the agreement between the parties the applicant served the summons on [8.....] [K.....] Street and not on [4.....] [M.....] Road. The respondent placed in full his defence that he had authorised and the applicant had agreed to utilise the investment funds held with the applicant which he estimated to be approximately R1 million to set off the arrears. He also contended that although there was agreement to pay R22 000.00 per month he was paying R30 000.00 per month. He submitted that there was no basis for the applicant to sue him and had the summons been properly served on him he would have defended the action.

5.6 The rescission application was duly served on the applicant's attorneys of record on 04 March 2014. In the notice of motion the applicant was required to notify the respondent's attorneys in writing by 12 March 2014 if it intended to oppose the application. Thereafter and within 15 days of the filing of such notice to file its affidavits. It was also indicated in the notice of motion that should no notice of intention to oppose be given, the application would be made on 28 March 2014 at 10h00.

5.7 The applicant took no steps between 5 March 2014 and 17 March 2014.

5.8 On 17 March 2014, a notice of set down on the unopposed roll was served on the applicant's attorneys. On 18 March 2014 the applicant's attorneys served on the respondent's attorneys a notice to oppose which was later filed on 19 March 2014.

5.9 On 28 March 2014 the matter was before Court and there was no appearance for the applicant. The respondent was represented and the rescission of the default judgment was sought and granted by the Court. This is the Order that the applicant now seeks to rescind.

[6] The only basis upon which the rescission application before me is based is that the Order that rescinded the default judgment was erroneously sought and granted. The applicant contends that the notice to oppose was placed in the court file but right at the back. It submits that the respondent's representatives failed to bring it to the attention of the Court. It further submitted that *"It would seem that the Honourable Justice Makume may not have noted our opposition as it was amongst the papers in the back which include the default judgment application"*.

[7] On this basis the applicant contends that had the Court been aware of the notice to oppose it would not have rescinded the default judgment.

ISSUES

[8] Mr Venter appeared for the applicant and Mr Kela appeared for the respondent.

[9] The application is opposed by the respondent on the following bases:

9.1 Mr Kela raised certain points *in limine*, first, that the applicant failed to apply for condonation for the late filing of the rescission application. He submitted that the application was filed some two and a half months after the granting of the Order sought to be rescinded. Second, that the deponent to the affidavit has no *locus standi* to bring the application as there is no resolution authorizing the launching of the proceedings by the applicant. Third, that the form used by the applicant in bringing the application was not the correct one and that it was contrary to the provisions of Rule 6(5) (b) of the Uniform Rules of Court. Fourth, he submitted that this Court is *functus officio* because the Court had considered the matter when it rescinded default judgment and that it was incompetent for it to deal with the matter for the second time.

[10] He submitted that the notice of intention to oppose was filed out of time. He argued further that the applicant is silent about what its defence is going to be to the rescission application. He submitted that the applicant has failed to make out a case for rescission of the order in that it is speculating in its submissions that the Court may not have seen the notice to oppose

because it was placed at the back in the court file. He submitted that the application should be dismissed with costs.

[11] On the first point *in limine* Mr Kela relied on the judgment of D Pillay J in *Terrance Johan Rossitier and Others v Nedbank Limited* Case No. 8244/10 delivered on 25 February 2013, KZN High Court, Pietermaritzburg. He relied on this judgment for his argument that an application for rescission of a judgment or order, even one erroneously sought or granted, must be brought within a reasonable time of the applicant for rescission becoming aware of the judgment and error. Mr Venter argued that there was no need to file a condonation application because there are authorities that have found that a period of three months is a reasonable period.

[12] It may very well be that a period of two and a half months does not constitute an inordinate delay in certain cases, however, that does not exempt the applicant from applying for condonation.

[13] *In casu*, the applicant's attorneys of record became aware of the rescission of the default judgment on 03 April 2014. The notice of motion before me was signed on 23 May 2014. The founding affidavit was deposed on 6 June 2014. The application was launched on 26 June 2014, some two and a half months later. The applicant's attorneys got to know about the rescission application having been granted on 3 April 2014. I agree with Mr Kela that there is no explanation being given whatsoever for the delay between 4 April 2014 and 26 June 2014 when the application was launched.

[14] On the second point *in limine*, Mr Venter submitted that there was authority when summons was instituted and that suffices. In the founding affidavit the applicant's attorney of record stated "*I am duly authorised to depose to this affidavit and to launch this application and the facts contained herein fall within my own person knowledge and are both true and correct*". In response to these allegations the respondent responded as follows:

"Save to deny that all the facts contained in the affidavit of Blom Andre Uys are within his personal knowledge and are true and correct, I do not dispute the content hereof."

[15] In the answering affidavit the respondent did not challenge the authority of the deponent to the founding affidavit to do so on behalf of the applicant. In argument, Mr Kela argued that the respondent is entitled to raise this issue at any time before judgment. He persisted in his argument that there was no resolution from the applicant authorizing the launch of the proceedings.

[16] In response Mr Venter referred the Court to Erasmus Superior Court Practice, Volume 2, original service 2015 page D1–54 where reference is made therein to *Scott v Hanekom* 1980 (3) SA 1182 (C) at 1188H where the Court held that it is trite law that appropriate allegations to establish the *locus standi* of an applicant should be made in the launching affidavits and not in the replying affidavits. He also relied on *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624 G–H for his submission that the deponent to the

affidavit need not be authorised by the party concerned to depose thereto. It is the institution of the proceedings and prosecution thereof which must be authorized. He submitted that when the action was instituted by way of summons there was authorisation of the action.

[17] The rules of Court make provision for challenges such as those relating to authority on how they should be raised. It is not helpful to the Court that authority is challenged at the hearing of the matter. Rule 7 of the Uniform Rules outlines a procedure to be followed when authority of an attorney or a party is placed in dispute. The respondent should have raised this issue at least within ten (10) days after it came to his notice that the attorneys or the applicant were acting. When he failed to do so he could only raise it with the leave of court on good cause shown at any time before judgment. *In casu* the respondent did not dispute the allegations that the deponent had authority to bring the application. In this regard the remarks of the Court in *Cekeshe and Others v Premier, Eastern Cape, and Others* 1998(4) SA 935 (TkD) at page 951H-I are apposite herein. There are no grounds which have been advanced as constituting good cause which would have made the Court to grant leave for the issue of authority to be disputed. This point must accordingly fail.

[18] The respondent also raised *in limine* the point that the applicant failed to comply with the provisions of Rule 6(5)(b) in that it failed to notify the respondent of the time within which to file his notice to oppose and answering affidavit. I indicated to Mr Kela that this point was moot because both parties had filed the necessary affidavits and there was no complaint relating to non-

compliance with time frames. In any event non-compliance with the provisions of Rule 6(5)(b) would not lead to a dismissal of the application. This point in my view lacks merit.

[19] On the fourth point Mr Kela argued that Court is *functus officio* because it has already made an order and is barred in law from revisiting the order. Mr Venter argued that the Court is at liberty to revisit the decision if it was erroneously sought or granted.

[20] This is a common law proposition as it was found in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A). The position now is that with the provisions of Rule 42 the applicant is able to bring the rescission application. On this basis I find that this point too must fail.

[21] I now proceed to deal with the ground relied upon by the applicant in seeking rescission. The applicant has made it clear in its heads of argument that it was seeking rescission in terms of Rule 42(1) of the Uniform Rules of Court.

[22] Rule 42 (1) provides:

Variation and rescission of orders

“(1) *The court may, in addition to any other powers it may have, mero motu or upon the 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)
- (1)
- (2)
- (3) *The court shall not make any order, rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of order proposed."*

[23] *In casu*, there is no evidence at all that the Judge who presided on 28 March 2014 did not have sight of the notice to oppose. The assumption is made simply because the notice was at the back in the Court file. This is not sufficient to make out a case for rescission.

[24] The applicant also relies on a disputed conversation between the applicant's and respondent's attorneys. The applicant's attorney of record alleges that when he telephoned the respondent's attorney about the order taken although the notice to oppose was filed his response was that he was not aware of it, he apologised for having taken the order and confirmed that had he been aware of it he would have advised his Counsel to bring it to the Court's attention. These allegations are denied by the respondent's attorneys.

[25] In my view, the provisions of Rule 42(3) had been satisfied because the applicant was given sufficient notice of the date of the hearing of the matter both in the notice of motion and in the notice of set down.

[26] Even if one were to assume that the notice escaped the eyes of the Court, a necessary enquiry would be whether that constitutes an “error” as envisaged in Rule 42(1).

[27] In *Nyingwa v Moolman N.O.* 1993 (2) SA 508 (TKGD) at page 510G, the Court held that:

“It therefore seems that a judgment has been 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 he had been aware of it, not to grant the judgment.”

Mr Venter submitted that the practise in this Division is that once a notice to oppose is filed the matter must be adjourned.

[28] In my view, this may be the practice but that practice does not usurp the discretion that a Court has when dealing with a matter before it. There is no evidence that the notice to oppose was not considered by the Court. In the exercise of its discretion the Court decided to rescind the default judgment.

[29] The applicant and her attorneys were aware of the application for rescission, they were even aware of the date of hearing. The Judge would have had regard to the notice of set down and would have established therefrom that it had been served on the applicant’s attorneys. There was no appearance by the applicant’s attorney and no explanation is proffered for their absence at Court on 28 March 2014.

[30] When a Court is faced with a situation where the applicant had sufficient notice of the hearing but elected to do nothing about it, it must come to the aid of the party before it. The applicant cannot therefore seek to rely on the unfounded allegation that the Court did not take into account the existence of a notice to oppose which was already filed by the 28th March 2014.

[31] On the applicant's version its attorneys got to know about the rescission application brought by the respondent timeously, it was aware of the date of hearing but took no steps of ensuring that when the matter was before Court on 28 March 2014, its interests were protected.

[32] In *Mutebwa v Mutebwa and Another* 2001 (2) SA 193 (Tk HC) at 199 para 15F–G, the Court dealt with the prerequisite factors for granting rescission under this Rule as, firstly, the judgment must have been erroneously sought or erroneously granted, secondly such judgment must have been granted in the absence of the applicant, and, lastly, the applicant's rights or interest must be affected by the judgment. Once those three requirements are established, the applicant would ordinarily be entitled to succeed, *cadit quaestio*. The applicant is not required to show good cause in addition thereto.

[33] In *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) Erasmus J interpreted the words “*erroneously granted*” to mean “*the error committed by the Court which granted the order must be in the form of a mistake in law which appears on the record of the proceedings itself. It follows, so he*

continued, that a Court in deciding whether a judgment was erroneously granted is, like a Court of appeal, confined to the record of proceedings”.

[34] The kind of error envisaged in the Rule cannot be equated to what is contended for by the applicant. I fail in the circumstances of this case to find the error relied upon by the applicant.

CONCLUSION

[35] In conclusion the applicant failed to prove that the Court when rescinding default judgment it did not have regard to the notice to oppose. It also failed to prove that the order was erroneously sought or granted as envisaged in Rule 42 (1) .

[36] In the circumstances the application must fail and the applicant should bear the costs thereof.

ORDER

[37] **The application is dismissed with costs.**

T.V. NORMAN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	01 FEBRUARY 2016
DATE OF JUDGMENT	5 FEBRUARY 2016