

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 34170/2014

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

.....
DATE

.....
SIGNATURE

In the matter between:

LEWIS MAXWELL MUSASIKE

First Applicant

TSITSI MUSASIKE

Second Applicant

and

STANDARD BANK OF SA LIMITED

Respondent

SUMMARY

Civil Procedure- Default Judgment- Rescission of in terms of the common law- requirement of- "sufficient cause" and "good cause" used interchangeably- Applicants seeking to rescind default judgment under circumstances where the respondent had valid cause of action against them

to apply and obtain judgment- absence of opposition to application for rescission not only ground to grant rescission- application refused.

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] This is an application in which the applicants are applying for the rescission of the default judgment granted against them by the court on 24 February 2017. The application came before me in the unopposed motion court on 21 May 2018.

THE FACTS

[2] Briefly stated, these are the facts: the applicants are a married couple. During 2008 the applicants obtained a bond from Standard Bank of SA Limited (*“the respondent”*) for the purchase of Erf [...] Pecanwood Extension [...] Township, Registration Division I.Q., Province of North West (*“the property”*). Between the period 2014 and February 2017, the applicants started experiencing financial problems in respect of monthly repayments on the bond, in respect of the property. The applicants periodically negotiated with the respondent, and made certain monthly payments. However, all these

payments were insufficient to liquidate the arrears. In the founding papers, paragraph twenty (20), the applicants stated:

“Even though he had made substantial payments to the respondent by 6 July 2015 against the loan account, these payments were not sufficient and in compliance with the written agreement.”

The founding papers proceeded to state in paragraph 26 that:

“Importantly, on the 21st of February 2017 and still prior to the default judgment being granted against us, the respondent’s attorneys responded positively to me advising that even though they were under instructions to proceed with the application before this Honourable Court on the 24th of February 2017, the respondent had instructed them that it was willing to afford us an opportunity to meet and discuss the matter ...”

The respondent subsequently instituted action against the applicants based on their default. The negotiations and short payments continued. The applicants contended that they were under the mistaken belief that “... because of these pending negotiations with the respondent and/or its legal representatives I was not required to file a notice of intention to oppose the application which was set down for the 24th of February 2017, and which failure I admit resulted in a default judgment against my wife and I”. The applicants submitted that they were not in wilful default in any way but laboured under a mistaken and *bona fide* belief. It is not in dispute that at the time of the institution of the application, the applicants were in default and breach of the loan agreement. However, the applicants now allege that the arrears have since been brought up to date. It is equally common cause that

the respondent did not oppose the present application. There are additional common cause facts which require no mention now.

SOME LEGAL PRINCIPLES

[3] The instant application is brought, not in terms of rule 31(2), nor rule 42(1) of the Uniform Rules of Court, but under the common law.

[4] The principles applicable to the adjudication of rescission applications based on the common law have by now become settled and trite, and require no exclusive exposition for present purposes. There is also abundant authority for the proposition that in matters of this nature, the terms “*sufficient cause*” and “*good cause*”, are almost identical or used interchangeably. See *inter alia*, *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) at 9C. The principles are succinctly set out in *Erasmus* (B1-307), that:

“At common law a judgment can be set aside on the following grounds: fraud, justus error (on rare occasions), in certain exceptional circumstances when new documents have been discovered, when judgment had been granted by default and, in the absence between the parties of a valid agreement to support the judgment, on the grounds of justus causa.”

[5] In a Full Court decision in *Vilvanathan and Another v Louw* NO 2010 (5) SA 17, it was held that a final judgment of the High Court cannot be set

aside simply because it has been satisfied in full by the judgment debtor, and the judgment creditor consents to the rescission. It was further held that:

“The Appellate Division and the Supreme Court of Appeal have laid down that at common law ‘it is clear that in principle and in the long-standing practice of our courts’ that there are two ‘essential elements of “sufficient cause” for rescission of a judgment by default’.

These are –

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and*
- (ii) that on the merits (i.e. of the action) such party has a bona fide defence which, prima facie, carries some prospect of success.*

Both these elements must be present.”

A third requirement was also suggested, being that the circumstances which are relied on as a ground of setting aside a final judgment must have existed at the date of the judgment, and not have arisen subsequently (see *RFS Catering Supplies v Bernard Biyara Enterprises CC* 2002 (1) SA 896 (C), which was overruled). See also *Marais v Standard Credit Corporation Ltd* 2002 (4) SA 892 (W), and *National Director of Public Prosecutions v Phillips* 2005 (5) SA 265 (SCA) at paragraph [21] for the proposition that a court may always set aside its own final judgment in certain limited circumstances, as well as the requirements of setting aside a default judgment under the common law.

APPLICATION OF LEGAL PRINCIPLES

[6] In applying the above legal principles to the facts of the instant application, it is plain that the applicants have not met the requirements for the rescission of the default judgment under the common law, nor under the rules of court. At the time of the default judgment, they were in breach of the loan agreement. The respondent had a valid cause of action against them. This much was admitted in closing argument. The applicants knew in advance that the respondent had enrolled the matter for default judgment on 24 February 2017. The fact that the respondent offered no opposition to the rescission application is of no assistance to the applicants, since rescission is not there simply for the taking.

[7] I must mention that in support of their application, the applicants' counsel relied on, *inter alia*, the unreported case of *Teressa Antonette du Plessis and Absa Bank Limited* (Case Number 56974/2013 – delivered in the Gauteng North High Court on 28 November 2017). I have had due regard to that case. It is distinguishable from the facts of the present matter, on several grounds. Firstly, there the applicant was not aware of the launching of the default judgment application, as was the case in the instant matter. Secondly, there were debt review proceedings pending, which was not the case in the present application. Thirdly, in that case, the applicant application for rescission was found to have established a *bona fide* defence to the respondent's (*Absa Bank Limited*), which was clearly not the case in the present matter. The applicants filed no practice notes or written heads of argument.

CONCLUSION

[8] Based on all the circumstances of this matter, as well as the applicable legal principles, I therefore conclude that the applicants have not made out a case for the rescission of the default judgment granted against them on 24 February 2017. There should be no order as to costs.

ORDER

[9] In the result the following order is made:

9.1 The application for rescission is refused.

9.2 There shall be no order as to costs.

**D S S MOSHIDI
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

INSTRUCTED BY	NINGIZA HORNER ATTORNEYS
COUNSEL FOR THE RESPONDENT	JASON MICHAEL SMITH INC
DATE OF HEARING	21 MAY 2018
DATE OF JUDGMENT	31 MAY 2018