IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: **2073/2019**

In the Application between:

KEABETSWE SUZAN MOLOI Applicant

and

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK 1st Respondent

JOFANI DISTRIBUTORS CC 2nd Respondent

FANI PETROS MOLOI 3rd Respondent

HEARD ON: 15 September 2022

JUDGMENT BY: KHOOE, AJ

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 17 APRIL 2023.

INTRODUCTION

[1] The applicant applies for a rescission of a default judgment of this court granted against the second and third respondent on 17 January 2019, which was an action instituted by the first respondent against second and third respondent. The second and third respondents did not oppose this application.

[2] The applicant is married to the third respondent in community of property. She was not a party to the action instituted by the first respondent, in which the first respondent was the plaintiff, the second respondent was the first defendant and the third respondent was the second defendant.

BACKGROUND AND FACTS

[3] The facts of this matter are to a large extent common cause. According to the particulars of claim, on or about 5 April 2016 and at Centurion, a written loan agreement was concluded between the plaintiff and defendants. In terms of that loan agreement, the plaintiff would loan the first defendant an amount of R134 000.00, which amount would be repaid in 48 monthly instalments at a prime interest rate of 6.59%. A copy of the said loan agreement was annexed to the particulars of claim.

[4] It was further averred in the particulars of claim that on or about 18 June 2018 at Bloemfontein, the plaintiff and the first defendant entered into a written facility agreement. In terms of that agreement, the plaintiff granted the first defendant a short term facility to the amount of R1 200 000.00 at prime interest rate plus 3%. A copy of that agreement was also annexed to the particulars of claim.

[5] Several suretyship agreements were also annexed to the particulars of claim. In terms of the suretyship agreements, the second defendant bound himself jointly and severally in solidum for due performance of all obligations of the first defendant towards the plaintiff arising. The suretyship agreements bore the applicant's signature for purposes of consent as she was not included as a surety in any of the suretyship agreements.

[6] Since first defendant defaulted on its obligations towards the plaintiff in terms of the agreements, the plaintiff then instituted proceedings against the defendants. The first and second defendant did not enter appearance to defend the action and default judgment was granted against them, jointly and severally, the one to pay the other to be absolved.

[7] The applicant approaches the court for rescission of the default judgment on the grounds that it was erroneously granted in her absence for the purposes of Rule 42 (1) (a) in that she is affected by the order. This, she contends is so because the plaintiff has a pending application in which it seeks an order declaring immovable properties of the second defendant and herself specifically executable.

ISSUES TO BE DECIDED

[8] The issue is whether or not the default judgment was erroneously granted in the absence of the applicant for purposes of Rule 42 (1) (a).

SUBMISSIONS

[9] Counsel for the applicant submitted that the applicant ought to have been cited as party to the proceedings as she is married in community of property to the second defendant. He further submitted that the applicant is an affected party according to the rule as there is a pending application wherein the plaintiff is seeking to declare the immovable property of the joint estate of the applicant and second defendant specially executable.

[10] Although it was not raised anywhere in his founding papers, nor in his heads of argument, counsel for the applicant argued that the applicant had also signed the suretyship agreements, therefore she ought to have been cited in the action proceedings as she was a co-surety. Counsel concluded his submission by submitting that the court a quo would not have granted default judgment had it been aware that the parties were married in community of property.

[11] Counsel for the plaintiff submitted that the applicant did not have any direct and substantial interest in the subject matter of the main action. The action was for payments sounding in money owed to the plaintiff by the first defendant as principal debtor and the second defendant as surety and co-principal debtor. He further argued that the applicant does not have any direct and substantial interest in the matter of the main action but rather a financial interest which is not enough

to establish locus standi for purposes of Rule 42(1) (a). Counsel argued that even if the debt sued upon to the main action is regarded as having been recoverable from the joint estate of the applicant and second defendant, **Section 17 (5)** of the **Matrimonial Property Act 88 of 1984**, permits the creditor to sue the spouse who incurred the debt in his own name without it being necessary for such a creditor to join both spouses married in community of property. Counsel pointed to **Zake v Nedcor Bank Limited and Another**[1] for that submission.

[12] Section 17(5) of the Matrimonial Property Act states:

'Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally therefor.'

As this debt was recoverable from the joint estate, the plaintiff had a right to sue the spouse who incurred the debt as one in the main action. I agree with this submission.

[13] Counsel further submitted that applicant signed the suretyship agreement to give consent to her spouse as required by law and was in fact not a surety. He referred me to clause 37 of the suretyship agreement marked PC8, dated 14 April 2016, wherein the second defendant confirmed that the suretyship was given by him in the ordinary course of his trade, profession or business and declared that the consent of the applicant was not required.

[14] Rule 42(1) (a) of the Uniform Rules of Court provides that:

"(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";

[15] Southwood J, in **Naidoo v Matlala NO 2012 (1) SA 143 (GNP**) pointed out that, in general terms a judgment is 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,

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[1] 1999 (3) SA 767 (SE)

not to grant the judgment. An example is where material facts are not disclosed in an ex *parte* application, or where facts are deliberately misrepresented to the court. In the present matter, it is the applicant's case that the order was erroneously granted due to the fact that she was neither cited nor was she served with the papers. However, as stated in Zake *supra*, the creditor may sue one or both spouses.

[16] In **Bakoven Ltd v GJ Howes (Pty) Ltd 1990 (2) SA 446 at page 471E to H** the following was said:

"An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings."

[17] In my view, the order of Daffue J dated 17 October 2019 was not granted erroneously when taking into account the following:

17.1 When the application for default judgment came before court, the record of the proceedings included the particulars of claim together with the annexures which were all placed before the judge. The annexures to the particulars of claim included the suretyship agreements PC5 and PC6 signed by both the second defendant and the applicant. Those two agreements state clearly that the second defendant is the surety and the applicant signed to give the second defendant consent.

17.2 Annexures PC7 and PC8 clearly state that the sureties are given by the second defendant in the ordinary course of trading and business, which confirms that the consent of the applicant was not required.

17.3 The annexures further included a confirmation of marital status form which clearly showed that the second defendant is married in community of property.

17.4 The plaintiff opted to sue the one and not both the spouses as the law entitles it to do.

17.5 I am therefore not convinced that the default judgment was erroneously granted. Wherefore I make the following order;

ORDER

1. The application for rescission is dismissed with costs.

[redacted]

NJ KHOOE, AJ

On behalf of Applicant:	Mr N W Phalatsi
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