REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 40804/2012

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

29 March 2021
DATE

.....
SIGNATURE

In the matter between:

ABEL MKHWANAZI **FIRST APPLICANT**

MASIDEESA LYDIA MKHWANAZI **SECOND APPLICANT**

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED **RESPONDENT**

JUDGMENT

MOGALE, AJ

INTRODUCTION

[1] This is an application for the rescission of judgment granted by Madam Justice Janse van Niuwenhuizen on the 18th November 2014 in favor of the respondent in default against both applicants

[2] The applicants contend that notwithstanding the notice of set down having been served, indicating that the matter was set down for hearing on the 18th November 2014, the matter did not appear on any of the rolls for that week and reasons only known to the respondent, the default judgment was granted on the 18th November 2014

[3] The applicant submits that the judgment was obtained in an unlawful and or an improper manner and further that the application should succeed. The application is opposed.

ISSUES THAT ARE COMMON COURSE

[4] The respondent served the applicants with notice of set down for the hearing on the 18th November 2014 for the arrear amount towards their home loan account.

[5] The applicants failed to file a notice of intention to oppose the application. The applicants opted to attend court as per the notice of set down.

[6] On the 18th November 2014, the applicants attended court, unfortunately, the matter was not appearing on the court roll for that week. The applicants approached the Registrar who also assisted the applicants to locate the matter but nothing was found. The applicants were issued a letter stating that the matter was not appearing on any of the court rolls.

[7] The respondents confirmed that there was a typo with the case number 40804/2014 and the matter was allocated under the name First Rand Bank Limited v Add X Trading 106 CC and Another under case Number 4084/2012.

[8] Applicants became aware of the writ of execution accompanied by the default judgment on 08 April 2015.

ISSUES TO BE DETERMINED

[9] The court has to determine whether the default judgment was obtained in an unlawful and or an improper manner. Whether the applicants satisfied the requirements for a rescission of judgment to be granted. The court also needs to determine whether the applicant established an entitlement for rescission

DEFAULT JUDGMENT ORDER

[10] The applicants were present in court on the 18th November 2014 after being served with notice of set down. The applicants did not file an opposing affidavit or notice of intention to defend as they had intentions of being in court on the day in question to negotiate with the attorney handling their matter. After a diligent search, it was discovered that their matter was not appearing on the court roll for the week of the 18th November 2014. The registrar also confirmed that their matter was not appearing on any of the court rolls by issuing a confirmation letter to the applicants (See annexure AB3). The applicants were only made aware of the default judgment when the sheriff served them with the writ of execution accompanied by the default judgment order which was granted on the 18th November 2014 by Justice Janse van Niuwenhuizen on the 08 April 2015.

[11] The respondent acknowledged that the matter was indeed enrolled as item number 138 before Justice Janse van Nieuwenhuizen. The respondent further accepted that there was a typo in the relation to the information contained on the court file on 18 November 2014 when the matter was before the court.
" No 138 First Rand Bank Limited vs ADD X Trading 106 CC +, case number 4084/2012"

[12] It is undisputed that both the case number and the names of the parties to the proceedings were incorrectly written or endorsed on the file. The names of the

applicants are not appearing on the file. The respondent submits that the correct file was before court as the respondent had appropriately rectified the erroneous court roll in an open court during the hearing of the matter. The applicants' names were called out loud in an open court but there was no answer. There was no opposing affidavit or notice of intention to defend from the applicants and the court was informed of such failure. Subsequent to that, a default judgment was duly granted after the respondent established a proper case to the satisfaction of the presiding Judge.

RELIEF SOUGHT FOR CONDONATION

[13] The respondent submitted that the rescission application was issued 5 months after the order was granted and the applicants failed to file condonation for late filing. That this application is defective as it does not comply with the Uniform Rules. This court has the discretion to grant condonation for non-compliance only if the applicants have shown good cause and the court is satisfied that it is in the best interest of justice to do so.

[14] The applicants on the other hand contended that they only became aware of the writ of execution accompanied by the default judgment on the 08th April 2015 which the sale was to take place on the 09th April 2015. On the 09th April 2015, the applicant's previous attorneys drafted and prepared the application for rescission of judgment and the respondent's attorneys were served on the same day. On the 16th of April 2015, the respondents were to file a notice of intention to oppose but that was only done on the 25th of October 2019. The applicants previous attorneys of record attempted to draw a court file to set the matter down for rescission of judgment but the court file was missing as a result, this coursed a delay in bringing the application for rescission of judgment to court (See Annexure AB6)

COMPLIANCE WITH THE COURT ORDER

[15] On the 6th October, 2020 parties appeared before Honourable Justice Fourie whereby the respondent was ordered to file a supplementary opposing

affidavit within 5 days of the order and applicants to file their replying affidavits and heads of arguments if any, 10 days thereafter.

[16] The respondent argued that they filed their supplementary opposing affidavit by 13th October 2020. The applicants omitted to file their replying affidavit within the stipulated time frame, as a result, the respondent argued that their version stands uncontested and must be accepted but the court.

[17] Applicants accept that they failed to file their replying affidavit within 10days as ordered by the court, further that they failed to file condonation for late filing after serving their replying affidavit on the 1st December 2020. The applicant submitted that they wrote the letter to the respondents asking the indulgence but the respondents never responded. They further argued that the respondents are raising this issue from the bar and had never raised it on their answering affidavit.

NON-JOINDER

[18] The respondent submitted that the property in issue has now been purchased by either Moeketsi or Nomfuyo. That the applicant failed to notify the new purchaser of their intention to rescind the judgment, neither before nor after the issuing of this application. The new owner(s) has a direct and substantial interest in the relief sought but the applicant neglected to join the registrar of deeds as a party to these proceedings. The applicant referred the court to the case of **Knox NO v Mofokeng**[1] *that in the event of a valid judgment being rescinded, after the sale in execution and transfer thereof, the property cannot be vindicated from the bonafide purchaser who had taken transfer of the property merely on the ground that the judgment has been rescinded.*

[19] Applicants' contents that at the time of issuing of this application, the property in question was still registered under the applicants. The property is now registered under Mr. Mooketsi.

---

[1] 2013(4) SA 46 (GSJ)

EVALUATION OF EVIDENCE

[20] The first issue to be determined is whether the default judgment was obtained in an unlawful and or an improper manner. It is trite that default judgment is granted against a party who failed to defend the action. It is common cause that the applicants in this matter failed to either file notice to oppose or notice to defend. The basis for default is founded in **Fattis's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd**[2] where it was held that:

the defendant is in default and that it is reasonable to suppose in the majority of cases that the defendant is not disputing the claim or the amount.

[21] Considering the matter before this court, it is common cause that the applicants were aware of the notice of set down. On the 18th November 2014, they attended court as per set down, intending to negotiate with the attorney handling the matter as they were disputing the amount claimed by the respondent but the matter was not appearing on any of the court rolls for that week.

[22] I find that even though the applicants failed to file their notice to defend, their presence in court on that day of trial and the efforts they took to locate the court file or the court where their matter ought to be adjudicated, in my opinion, proves that they were there to dispute the claim or the amount and that they were also interested in the matter. What made it difficult for them to access the court or attorney who was dealing with their matter, is the fact that their matter was not on the roll. That was also conceded by the respondents that the court roll particularly concerning the applicant's matter was in a state of a mess, the names of the applicants were not written on the court roll and the case number was wrongly entered.

[23] As a result, I find that it was going to be difficult for the applicants to trace the correct court after the court roll being rectified and be able to answer when

---

[2] 1962(1) SA 736 (T) at 739B-C

their names were called out, therefore, I accept that applicants have given a reasonable explanation of their default. I am also persuaded that the Default judgment was granted by the court

[24] In determining the relief sought for condonation, this court has to consider what instant application was brought about by the applicants. Applicants' contents that their instant application was not brought in terms of Rule 31(2) nor Rule 42(1) of the Uniform Rules of the court but under common law.

[25] Rule 32(2)(b) provides that a defendant may within 20days after acquiring knowledge of such judgment apply to the court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit. The principles applicable to adjudicate rescission applications based on common law are trite and require no exclusive exposition. **In Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)**[3] it was held that:

the applicant must show cause why the remedy should be granted. That entails giving (a) a reasonable explanation of the default; (b) showing that the application is made bona fide; (c) showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospectus success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgment.

[26] The applicants became aware of the writ of execution accompanied by the default judgment on 08th April 2015. On the 09th April 2015, the applicant's previous attorneys drafted and prepared the application for rescission of judgment and the respondent's attorneys were served on the same day.

[27] I find that the applicants showed that the application was made bona fide and further that it was brought under common law. Within 20 days after they had obtained knowledge of the judgment they brought the application, therefore

---

[3] 2003(6) SA 1 (SCA) (2003) 2 ALL SA 113 at para 11

there was no need for condonation. The submission made by the respondent in terms of Rule 31(2) and Rule 42(1) is not the basis for the applicant's application

[28] With the issue of compliance with the court order dated 06 October 2020 this court has to determine whether the applicant's omission to file their replying affidavit within the stipulated time frame, should render their version to stand uncontested and must be accepted but the court. The applicant acknowledge the delay and gave an explanation for the failure to submit timeously and the respondent was notified of the same. It is trite law that the rules of court must be complied with. In **Charsley v Avbob Bpk**[4] it was held that:

"If there is a material defect in any of the formalities required by the rules of court, the court should not readily grant summary judgment. On the other hand, where it is clear that the rules have substantially been complied with and there is no prejudice to the defendant, the court should condone a failure to comply with the technical requirements of the rule"

In **Tran-African Insurance Co Ltd v Maluleka**[5] it was held that:

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the rules, which are of an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps would not be permitted, to interfere with the expeditious and if possible, inexpensive decision of their real merits"

[29] After evaluating the issue raised, I am satisfied that the respondent was not prejudiced by the applicant's late filing of their replying affidavit. The respondent was notified prior about the delay caused

[30] The final issue to be determined is the issue of non-joinder. The matter of **Knox NO v Mofokeng** *supra* that was quoted by the respondents *that in the event of a valid judgment being rescinded, after the sale in execution and transfer thereof, the property cannot be vindicated from the bonafide*

[4] 1975(1) SA 891 (E) 893 (C_D)
[5] 1956(2) SA 273 (A)

purchaser who had taken transfer of the property merely on the ground that the judgment has been rescinded. The issue to be evaluated by this court is whether or not the same principles are applicable in the present matter. Whether or not the applicants were owners of the property in issue on 09 April 2015 and whether the new owner(s) has a direct and substantial interest in the relief sought but the applicant neglected to join the registrar of deeds as a party to these proceedings.

[31] According to common law, a party seeking to raise a point of non-joinder at least place argument which proves that the third party or parties not joined to the proceedings do not only have interest in the case, see **Judicial Service Commission v Cape Bar Council**[6] but that their interest is (a) *direct* and (b) *substantial in the issues to be adjudicated by the court*

[32] I am inclined to agree with the submissions made by the respondent that the laid out in Knox supra, applies in the matter before this court. The applicant's submission is that at the time of issuing this application, the property in question was still registered under the applicant's.
According to (Annexure SOA4) Ngcephe Nomfuyo purchased the property on 24 April 2015 and it was registered under his name on 08 October 2015.

[33] The application before this court is the application for rescission of judgment granted on the 18th November 2014 whereby the applicants were still lawful owners of the property in question. Application for rescission of judgment was issued on the 09th April 2015 whereby the applicants were still lawful owners of the property in issue. I, therefore, find that there is no third party who has a direct and substantial interest in the issues to be adjudicated by the court.

[34] Having assessed all the circumstances of this case; the circumstances in which the default judgment was granted and the fact that the applicant brought the application for rescission within the prescribed period, I am

---

[6] 2013(1) SA 170 (SCA) at par 1761-177A

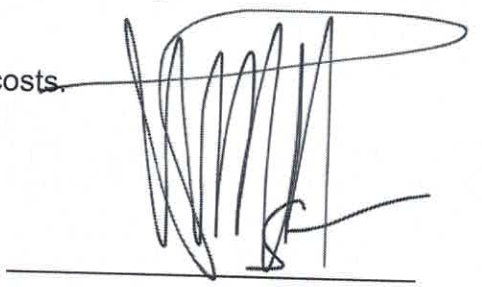
persuaded that the applicant has shown or establish the ground on a bona fide basis for rescission

[35] In so far as costs are concerned, it should follow the result and be awarded in favor of the applicants.

Consequently, the following order is made:

[35.1] The application for rescission of judgment is granted

[35.2] The defendant is ordered to pay costs.



K J MOGALE

ACTING JUDGE OF THE
GAUTENG DIVISION,
PRETORA

Electronically submitted.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 29 March 2021.

Date of hearing: The matter was heard by way of video conferencing or otherwise, the matter may be determined accordingly. The matter was set down for a court date of 15 March 2021.

Date of judgment: 29 March 2021

Heard on	: 15 March 2021
For the Applicants	: Adv WB Ndlovu
Instructed by	: Peter Zwane Attorneys
For the Respondent	: Adv DJ van Heerden
Instructed by	: Hannes Gouws & Partners Inc
Date of Judgment	: 29 February 2021