



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 9850/2000

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE: 14 MAY 2021
SIGNATURE 

In the matter between:

ABSA BANK LIMITED

Plaintiff

and

RASIMATE THOMAS BALOYI

First Defendant

JANE MIHLOTI BALOYI

Second Defendant

NEDBANK LIMITED

Third Defendant

J U D G M E N T

This matter has been heard virtually and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

- 1.1 On the unopposed motion court roll of 12 May 2021, the initial plaintiff, Absa Bank Ltd (“Absa”) applied for default judgment in the amount of R 64 020, 95 together with interest and costs, against the Defendants, Mr and Mrs Baloyi. The sum is paltry considering the extent of litigation in this matter, spanning two decades.
- 1.2 At the hearing of 12 May 2021, the Defendants applied for a postponement of the application by way of a substantive application. It is necessary to deal with the litigation history as part of the consideration of the postponement application.
- 1.3 The Plaintiff and the Defendants were represented by their respective counsel, who were heard via the virtual Teams platform.

[2] The litigation history

- 2.1 During 1996, the Defendants bought the immovable property in question, known as No 28 Motlalentwa Street, Mahube Valley, Mamelodi East (the “property”).
- 2.2 In 1997, the Defendants obtained a loan from Absa, secured by a bond over the property, registered as B5652/97.
- 2.3 During the beginning of 2020 the Defendants were so far in arrears on their loan repayments that this prompted Absa to initiate action for the recovery of the outstanding amount and to seek execution of the property.

- 2.4 On 19 May 2000, default judgment was granted in favour of Absa against the Defendants and executability of the property was ordered.
- 2.5 It was only in 2003 and, pursuant to a sale in execution, that the property was sold to a Ms Modisakeng who promptly sold it to a Mr Phoku. Mr Phoku in turn sold the property to a Mr and Mrs Maphuta.
- 2.6 The initial sale in execution resulted in Absa's bond being cancelled and on 8 October 2008 Mr and Mrs Maphuta obtained a new bond, this time from Nedbank Ltd (Nedbank).
- 2.7 The next year, that is more than nine years after the initial judgment, the Defendants launched a rescission application on 18 December 2009 against the judgment granted in favour of Absa.
- 2.8 On 31 January 2012, Bam J granted rescission of the aforementioned judgment but postponed the prayers sought by the Defendants whereby they claimed transfer of the property from the Maphuta's and whereby Nedbank's bond should be cancelled.
- 2.9 Finding out about the above, Nedbank launched an application to intervene, which was granted on 11 November 2013.
- 2.10 On 21 May 2014, the Defendants obtained an order against Absa (for what exactly, no-one has been able to explain) with costs. This was obtained without notice to Absa.
- 2.11 When the Defendants on 23 February 2015 set the matter previously postponed by Bam J down again, Absa got notice hereof and on 20 April 2015 launched an application for the rescission of the order referred to in paragraph 2.10 above.

- 2.12 On 26 October 2016, Teffo J granted Absa's rescission application.
- 2.13 On 20 November 2019, Absa indicated by notice an intention to amend its particulars of claim, reflecting that its bond had been cancelled due to the above events and to reflect some of the relevant subsequent chronology.
- 2.14 The intended amendment was not opposed and on 11 December 2019 Absa delivered its amended pages by way of personal service by sheriff on the Defendants who were, at that stage, unrepresented.
- 2.15 Pursuant to the amendment of its papers and the intention to defend displayed by the Defendants' application for rescission launched in 2009, Absa delivered a notice of bar on 13 July 2020, requiring the Defendants to deliver their plea. The notice of bar was served personally. No plea has to date hereof been delivered.
- 2.16 On 6 November 2020, Absa launched its current application for default judgment, based on the above facts.
- 2.17 On 19 January 2021, the Defendants, once again being represented, delivered a notice of intention to oppose, causing the matter to be removed from the roll of 21 January 2021.
- 2.18 After the aforesaid removal, an intention was apparently expressed by the Defendants to settle the matter, but nothing came of this. No answering affidavit has been delivered since.
- 2.19 Accordingly, the matter was enrolled for hearing of the default judgment application on 12 May 2021. On the morning of the hearing, the Defendants lodged their application for postponement.

[3] The application for postponement

- 3.1 It is trite that an applicant applying for a postponement due to his default, is seeking an indulgence. See Grootboom v NPA 2014 (2) SA 68 (CC) at 75F – G.
- 3.2 The legal principles applicable to such an application have been set out in a host of judgments. See: Van Loggenenberg (ed), Erasmus: Superior Court Practice, vol 2, D1 – 552A at footnote 1.
- 3.3 The principles are, briefly, that an applicant for postponement must show “good and strong reasons”, i.e. he or she must furnish a full and satisfactory explanation for the circumstances that gave rise to the application. In addition to the *bona fides* of such an application, the balance of convenience, the timing of the application and prejudice to the other side, the prospects of success on the merits is also an important factor. See *inter alia* Sekolwane v Minister of Justice and Constitutional Development 2007 (3) BCLR 280 (CC) at para [17].
- 3.4 In the present instance, none of the above factors have been addressed. The only complaint formulated, was that the Plaintiff’s amendment had not been brought about with prior notice. Not only is this allegation factually incorrect, but nothing turns on this. Even if the amended pages are to be ignored, the cause of action based on the Defendants’ breach of contract has remained unaltered since inception of the litigation.
- 3.5 There is no explanation tendered for the Defendants’ long-standing default nor why a plea has never been delivered. There is also no explanation for their default in opposing the current application.

- 3.6 More fundamentally, absolutely no defence to Absa's claim has been disclosed in any manner or fashion. There is simply no prospects of any success on the merits disclosed, despite 20 years of litigation. On all evidence before the court, the Defendants appear to be jointly liable to Absa for the amount claimed.
- 3.7 The only argument raised during the debate of the matter was that the rate of interest proposed was too high. Absa indicated that it would be satisfied with a lower rate of interest, such as that prescribed by the Prescribed Rate of Interest Act, 55 of 1975. In practice, this will make little difference as the total amount of interest will have been capped by the *in duplum* – rule long ago, irrespective of the rate applied. I shall nevertheless take this into consideration in making the order.
- 3.8 It was argued that punitive costs as prayed for by Absa should not be granted. I disagree. Firstly, the scale of costs have been agreed in the initial loan and bond agreements and secondly, the history referred to in paragraph 2 above and the lack of merits in the postponement application, justify such an order.

[4] Order

1. The application for postponement is refused.
2. The Defendants are ordered to pay the amount of R64 020, 95 to the Plaintiff together with interest thereon at the applicable rate of interest from time to time in terms of the Prescribed Rate of Interest Act, 55 of 1975 from 28 March 2000 to date of payment.
3. The Defendants are, jointly and severally, the one to pay, the other to be absolved, ordered to pay the Plaintiff's costs, on the scale as between

attorney and client, including the costs of the application for postponement.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 12 May 2021

Judgment delivered: 14 May 2021

APPEARANCES:

For the Plaintiff:

Attorney for Plaintiff:

Adv. T Raikane

Lowndes Dlamini Attorneys,

Johannesburg,

c/o Riaan Bosch Attorneys, Pretoria

For the 1st & 2nd Defendants:

Attorney for 1st and 2nd Defendants: Modiba (Moeketsi) Attorneys, Pretoria

Adv. F M Masweneng