

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 1023/2018

Heard on: 12/11/2021

Delivered on: 19/11/2021

Reportable: No

Circulate to Judges: No

Circulate to Magistrates: No

In the matter between:

ROGER GERALD FREDERICK MAFARO

(I.D. No: [...])

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED

(Registration No: 1962/000738/06)

Respondent

JUDGMENT

ERASMUS, AJ

[1] This is an application for rescission of a default judgment granted by the Registrar of this Court on 20 June 2018 under case number 1023/2018. A copy of the order is attached as Annexure 'RGFM' to the founding affidavit.

[2] The application for rescission was launched on 3 October 2018.

According to the Applicant he had allegedly obtained knowledge of the judgment on 15 August 2018. He sought legal advice, and a copy of the summons was obtained by his attorneys on 18 September 2018. Although the Applicant avers that proof thereof is attached as Annexure 'RGM9 to the founding affidavit, the said annexure is a return of service in respect of service of the summons. There is also no confirmatory affidavit by his attorney of record.

[3] The rescission application was enrolled for 26 October 2018. The Respondent gave notice of its intention to oppose on 4 October 2018. The rescission application was postponed *sine die*, and it was ordered that costs would be costs in the application. The Applicant took no further action. The Respondent eventually filed its answering affidavit, together with an application for condonation for the late filing thereof on 17 August 2021. The Applicant did not oppose the condonation application, and has not filed a replying affidavit in the rescission application.

[4] The application was enrolled by the Respondent and set down for hearing 12 November 2021. The Respondent filed heads of argument and Adv Olivier appeared at the hearing of the Application. Despite the notice of set-down having been served on the Applicant's attorneys, no heads of argument were filed on behalf of the Applicant and there was no appearance on his behalf and he also did not appear in person.

[5] The ground for the rescission of the judgment, proffered by the Applicant, is that he never received notice in terms of section 129 of the National Credit Act, No 34 of 2005. I pause to mention that notices in terms of the said section were dispatched to him; one on 19 February 2018, sent to him to his chosen *domicilium citandi et executandi*, and for which he acknowledged receipt by signing the courier's delivery note on 21 February 2018, and then also a notice sent by registered mail to what appears to be his residential address at which he also resided at the time of his deposed to the founding affidavit. The Applicant did not respond to the notices.

[6] Summons was issued on 3 May 2018 and served by affixing a copy at his chosen *domicilium* address on 18 May 2018. The Applicant also avers that he did not receive the summons.

[7] The only defences raised in respect of the claim against him are that he would have settled the arrears that were claimed therein to avoid legal costs and cancellation of the agreement, and that he would also have attended to a request to have his account restructured. Despite having acknowledged receipt of the notice in terms of section 129 of the NCA, the Applicant did nothing to remedy his default. Summons was only issued approximately two and a half months later. He did not provide any details of how he intended to settle or restructure the debt.

[8] The common law and rule 42(1)(a) do not find application in this rescission application. In terms of rule 31(2)(b) an applicant must apply for rescission of a default judgment within 21 days of having obtained knowledge of such judgment. The court may, upon good cause shown, set aside a default judgment on such terms as to it seems meet. When deciding whether an applicant has shown good cause, I must consider whether the Applicant has given a reasonable explanation of his default, whether his application is *bona fide* and not made with intention of merely delaying the plaintiff's claim and, lastly, whether he has shown that he has a bona fide defence to the claim.

[9] The explanation of the default must be set out sufficiently to enable the court to understand how it really came about and to assess the Applicant's conduct and motives. Good cause includes the existence of a substantial defence.¹

[10] The Applicant has not explained his default sufficiently and, more so, has not raised a *bona fide* defence. He has not set out sufficient information to satisfy me that he has any defence to the claim.

[11] From the history of this matter, as set out above, and further, the fact that the Applicant

11.1 has not, since 2018, enrolled the application,

11.2 not filed a replying affidavit, and

11.3 has not filed heads of argument, despite the fact that the notice of set down was served on the Applicant's attorneys of record lead me to believe that his application is not *bona fide* and that it was made purely with the intention to delay the plaintiff's claim.

Wherefore the following order is made:

1. The application for rescission of the default judgment granted by the Registrar of this Court on 20 June 2018 under case number 1023/2018, is dismissed.

2. The Applicant in the rescission application is ordered to pay the costs of the application.

ERASMUS SL

ACTING JUDGE; NORTHERN CAPE DIVISION

For the applicant: No appearance

Instructed by:

For the Respondent: Adv CJ Olivier

Instructed by: Van de Wall Inc. (oio Strauss Daly, Bfn)

¹ Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 (A) at 352 and 353A