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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

CASE NO: 64120/2015

8/8/2019

In the matter between:

SIPHO SLSON NHLENGETHWA

FIRST APPLICANT

(ID No. [...])

JOYCE MARIA NHLENGETHWA

SECOND APPLICANT

(ID No. [...])

and

AGATTU TRADING 191 (PTY) LTD having

substituted BONDPRO FINANCE (PTY) LTD

FIRST RESPONDENT

KOEGELENBERG ATTORNEYS

SECOND RESPONDENT

SEKWATI GABRIEL MOTSEPE

THIRD RESPONDENT

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] This matter concerns an application for rescission of judgment obtained against the applicants by the first respondent when the applicants failed to enter appearance to defend the first respondent's summons served upon them.

[2] The application was initially instituted in the urgent court where it was postponed *sine die* with costs against the applicants. However, when the parties appeared before me the issue of urgency no longer pertained and only the first respondent was opposing the application.

[3] The actual relief sought by the applicants is set down in the notice of motion as follows:

- 3.1 That the judgment granted by the Honourable Court on 18 March 2014, be set aside.
- 3.2 Ordering the first respondent to refund the third respondent the purchase price paid to the first respondent in respect of the property known as Erf [...], pending the rescission application.
- 3.3 Restraining and interdicting the second respondent from transferring the property situated at [...]. to any purchaser pending the rescission application.
- 3.4 Costs of this application.

FACTUAL MATRIX

[4] I pause to set out the salient facts and circumstances Which led to the applicants bringing the application for rescission of the judgment against the respondents. The applicants are the owners of a certain immovable property described in the papers as Erf [...] ("the property"). When It became difficult for the applicants to comply with their financial obligations, having incurred several debts, they approached a certain company called Bondpro Finance (Pty) Ltd ("Bondpro") for assistance. It is common cause that Bondpro undertook to assist the applicants with a loan which would be used to consolidate the applicants' debts. Before the loan was granted, Bondpro conducted an assessment of the applicants' financial status in order to ascertain their indebtedness and ability to pay back its loan. After the assessment, Bondpro offered to lend the applicants an amount of R280 450 (two hundred and eighty thousand, four hundred and fifty rand), which was to be paid back over a period of twelve months. The applicants accepted Bondpro's offer and

entered into a bond loan agreement ("the loan agreement") with Bondpro. In terms of the said agreement the applicants were to pay back the loan amount in monthly instalments of R4106, 24 (four thousand, one hundred and six rand and twenty four cents). As security for the loan a covering mortgage bond was registered in favour of Bondpro against the property.

[5] The applicants defaulted with their obligations in terms of the loan agreement by failing to make payment, as obligated. By the time the period of twelve months, agreed to in the loan agreement, lapsed Bondpro's loan had not been paid off. This resulted in Bondpro instituting action against the applicants in July 2013, for the recovery of the outstanding amount. The summons was duly served upon the applicants on 1 August 2013. The applicants did not defend the matter and on 9 September 2013 and 30 January 2014, respectively, Bondpro caused a notice of application and set down of default judgment to be served on the applicants. A judgment in default was consequently granted against the applicants in favour of Bondpro on 8 March 2015 for the amount of R278 045, 10 (two hundred and eighty seven thousand and forty five rand and ten cents), plus costs of suit on an attorney and client scale as well as an order declaring the mortgaged property executable.

[6] Pursuant to the default judgment, the property was attached by the sheriff to be sold in execution. On or about 8 July 2015, the applicant; received a letter from the first respondents attorneys informing them that the property was to be sold in execution on 31 July 2015. The applicants consulted with their attorney of record on 29 July 2015. An attempt to enter into settlement arrangements with the first respondents' attorneys before the property was sold fell through and on 31 July 2015, the property was sold in execution to the third respondent.

[7] On 12 August 2015 the applicants launched, on an urgent basis, their application for rescission of the default judgment, inclusive of the ancillary relief as stated in paragraph [3] of this judgment. The application was set down for hearing on 14 August 2015. As already stated the application was postponed *sine die* on that date.

[8] In the meanwhile, Bondpro was placed under business rescue. On 6 May 2016, Bondpro, represented by its business rescue practitioner entered into and concluded agreements in terms of which Bondpro ceded all its rights, title and

interest in the bond loan agreements and the covering mortgage bond agreements, which it concluded with various borrowers, including the applicants, to the first respondent. The agreements concluded between Bondpro and the applicants (as pleaded in Bondpro's particulars of claim In respect of the loan agreement and the covering mortgage bond agreement) constitute agreements that were ceded by Bondpro to the first respondent.

[9] On the basis of the ceded agreements, the first respondent launched an application to be substituted as the plaintiff in the action between Bondpro and the applicants and on 6 November 2017 the application for substitution was granted. It was only on 15 May 2018, that the first respondent filed its answering affidavit to the applicants' claim in the application for rescission of judgment.

PRELIMINARY ISSUE

[10] The applicants did not file their replying affidavit to the first respondent's answering affidavit. In their heads of argument and In oral argument in court the applicants applied that the first respondent's answering affidavit be disregarded by this court because it was filed out of time without a substantive application for condonation .

[11] It is common cause that the first respondent's answering affidavit was filed out of time and without a substantive application for condonation. It is, also, not in dispute that the first respondent's substitution was granted on 6 November 2017. The first respondent, having been substituted, was expected to file its answering affidavit within fifteen days after such substitution but the first respondent filed the answering affidavit on or about 23 May 2018 -- more than five months after the application for substitution was granted.

[12] The first respondent in its argument urged the court to exercise its discretion in favour of condoning the first respondent's non compliance with the rules of court. Relying on the judgment in *De Lange and Another v Eskom Holdings Ltd and Others*¹ the first respondent contended that condonation can be granted even where a formal application has not been made, if it is in the interest of justice. Arguing from the bar, and without any reasons proffered for such argument, the first respondent suggested that it was in the interest of justice, in this instance, that condonation be

granted.

[13] It is, however, my view that the case on which the first respondent relies is not authority for the general proposition that condonation should be granted where no formal application has been made. On the contrary, the case establishes the proposition that condonation may be granted where no formal application has been made if it is in the public interest to grant such condonation. The invocation of this principle finds no application on the circumstances of the matter before me as there are no public interest considerations at play.

[14] The general principle is that the court has a Wide discretion to grant condonation on good cause shown. Two requirements in this regard have crystallised, namely, firstly the requirement that the applicant should furnish a sufficient explanation for her or his default to enable the court to understand how it really came about and to assess her or his conduct and motives. Secondly, the requirement that the applicant should satisfy the court that she or he has a *bona fide* defence.² Such requirements can only be satisfied through a substantive application before court. Without such a substantive application I am unable to consider whether or not the first respondent has satisfied the requirements for the granting of condonation, as such, the answering affidavit is *non pro scripto*. What, therefore, constitutes evidence in this matter, is only the founding affidavit of the applicants.

THE ISSUE

[15] The central issue for determination, in this application is whether or not the applicants have satisfied the requirements for the granting of the rescission of judgment.

THE LAW

[16] The requirements for granting rescission of judgment are provided for in Uniform Rule 31 (2) (b). In terms of Uniform Rule 31 (2) (b), a party against whom default judgment has been granted may, within 20 days after she or he has knowledge of that default judgment, apply to court to set that judgment aside. The

¹ (2012) 1 All SA 543 (GSJ) at para 27.

² *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 4611- J and *Kritzinger v Northern Natal Implement Co (Pty) Ltd* 1973 (4) SA 542 (N) at 546.

court may on good cause shown set that judgment aside,

[17] The issue ie, therefore, two pronged. The first part of the issue is whether the application was launched within 20 days after the applicants had knowledge of the default judgment. the second part is whether the applicants have shown good cause hi their application.

DISCUSSION

[18] In regard to the first part of the issue, it is my view that the application was instituted within the prescribed period of 20 days, stipulated in Uniform Rule 31 (2) (b).

[19] It appears from the papers that the applicants became aware of the default judgment when they consulted with their attorney of record on 29 July 2015. On 8 July 2015, the applicants received a letter from the first respondent's attorneys Which Informed them that the property is to 6e sold in execution on 31 July 2015. According to the applicants, they consulted with their attorney of record on 29 July 2015 and launched the application on 14 August 20·15. I would. therefore, infer from these facts that the applicants only became aw re of the default Judgment when they consulted with their attorney. The application was thus, in my view. Filed within the prescribed period of 20 days. There was. as such, no heed for the applicants to apply for condonation, as suggested oy the first respondent, In argument.

[20] In respect of the second part of the issue it established law that courts generally require an application for rescission of judgment to show good cause by (a) giving a reasonable explanation for the default; (b) showing that her/his/its application for rescission is made *bona fide* and not merely with the Intention to delay the plaintiffs claim; (c) showing that she/he/it has a *bona fide* defence to the plaintiffs claim which *prima facie* has some prospects of success. Regarding the last-mentioned requirement, it is trite that an application for rescission of judgment is not required to illustrate a probability of success, but rather an existence of an issue fit for trial.³

[21] Equally trite is the principle that even when all the requirements set out above have been met, it is still within the discretion of the court whether or not to rescind the judgment. That discretion must be exercised judicially in light of all the facts and

circumstances of the case.⁴

[22] I shall, hereunder, deal with the requirements of 'good cause' in relation to the applicants' application for rescission of judgment, in turn.

Reasonable explanation for the default

[23] As already explained earlier in this judgment, the applicants approached their attorney after they were informed of the pending sale in execution of the property. Their attorney was instructed to negotiate Settlement arrangements with the first respondent which negotiations fell through. It is the applicants' contention that the first respondent's attorney gave them the Impression that the first respondent will accept the settlement proposal and that they were not informed that the settlement proposal had been rejected by the first respondent. They, as a result, laboured under the impression that the settlement proposal had been accepted. They only became aware on 31 July 2015 that the first respondent was proceeding with the sale in execution and had in fact proceeded with same.

[24] It is, thus, my view, that based on the aforestated facts the applicants were not in wilful default since they harboured under the impression that the matter would be settled.

Bona fide Defence

[25] It is common cause that the applicants do not deny their indebtedness to the first respondent. They have instead raised a number of technical defences.

[26] The first defence raised is that the first respondent loaned the money to the applicants recklessly without considering the first applicant's source of income and affordability as *per* the requirements of the Consumer Protection Act⁵, given that the first applicant was the only one employed. According to the applicants, the first respondent called them the money well aware of the fact that they would not be able to repay the loan, and overlooked this important aspect to their prejudice.

[27] It is the applicants' submission that when they approached Bondpro for assistance, they were already in debt. The first applicant entered into the loan

³ See *Hassim Hardware v Fab Tanks* (1129/2016) (2017) 7.ASCA 14 (13 bt:tob8r 2017) para 12

⁴ See *Hassim supra* at para 13.

agreement for the purpose of debt consolidation.

[28] The second defence raised by the applicants is that Bondpro, as a credit provider, was not conducting its business according to the law and that there was an investigation that revealed that there were fraud and theft cases opened against Bondpro.

[29] The third defence is that the first respondent failed to adhere to the settlement agreement entered into by the parties on 30 March 2017 which led to the property being sold in execution without the applicants being able to stop the sale.

[30] The last defence is that as *per* paragraph 11 of the first respondent's particulars of claim the applicants are entitled to raise a plea of prescription .

[31] In an application for rescission of judgment, it is expected of the applicant to set out averments which, if established at the trial, would entitle her/him/it to the relief asked for. The applicant need not deal fully with the merits of the case nor produce evidence that shows that the probabilities are actually in her/his/its favour.⁶

[32] In following the decision in *Hassim* on this issue, I cannot at this stage of the proceedings determine whether the third respondent loaned the money to the applicants recklessly or not. All that is expected is to determine whether the averments of the applicants, if established at the trial, would entitle them to the relief asked for. It is not expected, as suggested by the first respondent in its oral argument, for the applicants to deal fully with the merits of the case and produce evidence that shows that the probabilities are actually in their favour.

[33] The first respondent concedes in its heads of argument that the loan granted to the applicants was indeed for the consolidation of their debts. The first respondent submits further in its supplementary submissions that "consolidation loans", like the one granted to the applicants, in terms whereof an over indebted consumer is assisted by a credit provider that loans an amount to that consumer in order to assist the consumer in consolidating and paying off its existing credit agreement debts, with the result that the consumer is no longer over indebted after settling his consolidated credit agreements and is able to pay off the consolidation loan over an agreed period of time, should not constitute reckless credit as these type of loans can be viewed as debt relief measures in themselves in those instances where they cure the

⁵ Act 68 of 2008.

⁶ See *Hassim supra* at para 17 - 18.

consumers over indebtedness.

[34] *Prima facie*, it is evident that there was no way that the applicants would have paid off the loan within a period of twelve months stipulated in the loan agreement with the monthly instalment agreed to by the parties. Without attempting to go into the merits of the main case, it is also evident that the applicants were still over indebted after settling the consolidated debts.

[35] On this defence alone, it is my view that the applicants have raised a *bona fide* defence. The applicants' averments in this regard, if established at the trial would entitle them to the relief asked for the issue is triable.

[36] On the basis of my aforementioned findings, I find it not necessary to deal with the other defences.

Bona fide Application

[37] A very important consideration is said to be that an application for rescission of judgment must be *bona fide* and not be made simply to delay the plaintiff's action.⁷

[38] It is evident from the facts provided by the applicants that they had all the intention to proceed with the application to rescind the judgment granted against them in default, even though it took this long to reach finality.

[39] The applicants instituted the application immediately after they became aware of the default judgment granted against them. Sight should not be lost of the fact that during 2016, Bondpro was placed under business rescue which meant that no legal action against it could be proceeded with. The first respondent's substitution application was granted on 6 November 2017 and its answering affidavit filed on 15 May 2018.

[40] I am, as a result satisfied that the applicants' application for rescission of judgment is *bona fide* and not intended as a delaying tactic. In the circumstances, I opt to exercise my discretion in favour of granting the application.

CONCLUSION

[41] It is, therefore, my conclusion that the applicants have satisfied the requirements for the granting of the rescission of judgment and are, therefore,

⁷ See *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 to 477.

entitled to the relief they seek. The application for the rescission of judgment and the ancillary relief sought ought to be granted.

[42] Even though the applicants are the successful parties, they approached this court seeking and indulgence, as such, they are not entitled to the costs of suit. Costs should, as such, be costs in the cause.

ORDER

[43] In the circumstances, I make the following order

1. The application for rescission of judgment is granted.
2. The default judgment granted on 8 March 2015 is rescinded and set aside.
3. The first and the second applicants are granted leave to defend the matter.
4. The first respondent is ordered to refund the third respondent the purchase price paid to the first respondent in respect of the property Erf [...].
5. The second respondent is interdicted from transferring the property situated at [...] to any purchaser.
6. Costs are costs in the cause

E.M. KUBUSHI
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for Applicant:	Adv. D.Z. Kela
Instructed by:	Mogwerane & Letsoalo Attorneys c/o Thikhathali Attorneys
Counsel for First Respondent:	Adv. J. J. Rysbergen

Instructed by:

**Koegelenberg Attorneys
c/o Hack Stupel & Ross Attorneys**

Date heard:

14 May 2019

Date of Judgment:

8 August 2019