REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO. 2013/35928

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

10 Oct 2018
DATE SIGNATURE

In the matter between:

DANIEL SEREKWANE	First Applicant
JESSIE THANDI SEREKWANE	Second Applicant

and

ABSA BANK LIMITED	First Respondent
SHERIFF, ROODEPOORT SOUTH	Second Respondent

JUDGMENT

REDMAN AJ

[1] The applicants seek a rescission of the judgment granted against them by default on 24 March 2014 in terms of which they were ordered to make payment of the amount of R330 368,05 and the immovable property described as Erf […] Mmesi Park Township, registration division I.Q., Gauteng Province, ("**the property**")

was declared executable. The applicants also seek to set aside the Order declaring the immovable property executable and the warrant of execution issued pursuant to the default judgment. The application is brought in terms of Rule 42(1)(a) of the Uniform Rules of Court.

[2] In September 2013, the first respondent initiated action proceedings against the applicant based on two mortgage loan agreements concluded between the first respondent and the applicants during 2006 and 2007. Copies of the two loan agreements were not attached to the summons. It is explained in the summons that despite a diligent search the original agreements could not be found and the best available evidence of the terms and conditions contained in the agreements are those recorded in a standard agreement of loan which was used on a regular basis by the first respondent. A copy of this document was attached to the summons.

[3] Further evidence that the loan agreements were concluded can be found in the two mortgage bonds registered over the property in 2006 and 2007. Both of these mortgage bonds were also attached to the summons. The summons alleges that the applicants were in arrears on the payment of the loans and that the amount of R330 368,05 was due and payable.

[4] On receipt of the summons the applicants attended on the first respondent's attorneys and made arrangements to settle their indebtedness in monthly instalments of R5 300,00. They defaulted in payment of the monthly instalments as a result of which the first respondent sought and obtained default judgment on 24 March 2014. On 27 February 2015, the property was sold in execution. The property was transferred to the purchaser on 28 May 2015.

[5] On 24 May 2015, the applicants brought an application for rescission of the default judgment. This application was withdrawn on 15 September 2016. The applicants took no further steps in the litigation until December 2017 when the current rescission application was issued.

[6] The sole basis upon which the applicants seek to rescind the judgment is based on their contention that the summons is excipiable as it disclosed no cause of action. In a nutshell, the applicants contend that because the written loan agreements could not be provided to the Court no cause of action could be sustained.

[7] The provisions of Rule 42(1) are designed to expeditiously correct obviously wrong judgments or orders (cf. *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E-F). The need to expedite an application under Rule 42(1) has been emphasised by the Courts. Eloff JP, in *First National Bank of SA Ltd v Van Rensburg N.O. and Others* 1994 (1) SA 677 (T) at 681C-D described the position as follows:

"Even if it can be said that the Order granted by Coetzee CJ was erroneously sought or contains a patent error, the application should in my view have been dismissed by reason of the long time lapse. As mentioned previously, the appellant's attorney uplifted the order on approximately 10 September 1988. The application in casu was launched on 18 November 1991, more than three years later. Rule 42(1) was designed, as was said in *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E), 'to correct expeditiously an obviously wrong judgment or order. The need to proceed rapidly to correct an order mistakenly granted was mentioned by Trollip JA in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306H."

[8] In the rescission application, the applicants do not disclose when they became aware of the default judgment. The first application for rescission was brought in May 2015. There is no explanation for the delay of two-and-a-half years until December 2017 when the current application was initiated.

[9] I am not persuaded that the failure to attach the written loan agreements to the summons renders the "summons" excipiable. The claim is for a debt or a liquidated amount and the summons accords with Form 9 of

the first schedule to the Rules of Court. Such summons is not a pleading and is not subject to scrutiny under Rule 23. (cf. *Icebreakers No. 83 (Pty) Ltd v Medicross Healthcare Group (Pty) Ltd* 2011 (5) SA 130 (KZD) at 131F-H and 134E-G) The failure to attach the written documentation is explained in the summons. I do not believe such failure renders the default judgment susceptible to a rescission on the basis that it constitutes an irregularity.

[10] It is also incompetent for the applicants to seek to set aside a warrant of execution which has already been carried out, without joining the current owner of the property (being the purchaser at the sale in execution) to these proceedings).

[11] Even if I am incorrect and the provisions of Rule 42(1) are applicable, I am not satisfied that the applicants have brought the application within a reasonable time and on this basis alone the application falls to be dismissed with costs.

[12] The loan agreements include a provision for costs to be paid on a scale as between attorney and client.

[13] In the circumstances I make an order in the following terms:

1. The application for rescission of judgment is dismissed
2. The applicants are to pay the costs of the application, jointly and severally the one paying the other to be absolved on the scale as between attorney and client.

N REDMAN
Acting Judge of the High Court

Heard: ___ October 2018
Judgment delivered: ___ October 2018
Appearances:

For Applicant/Plaintiff: IN PERSON
Attorneys: IN PERSON

For Respondent/ Defendant: ADV VAN DER VYVER
Attorneys