REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 47219/2007

21/2/2017

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

SIGNATURE DATE 21.02.2017

MOTHABELA KGOLO EPHRAIM MAKGATO	1st Applicant
THIZWILONDI SHARON MAKGATO	

and

ABSA BANK LIMITED	1st Respondent
SHAMMY LUVENGO	2nd Respondent
THE REGISTRAR OF DEEDS	3rd Respondent

JUDGMENT

AC BASSON, J

[1] The applicants in the rescission application are Mr and Mrs Makgato (married in community of property). They are referred to as "the applicants" or as "Mr or Mrs Makgatho" where applicable. The first respondent is ABSA Bank ("ABSA") and the second respondent is Mr Luvengo. ("Luvengo"). The third respondent is the Registrar of Deeds.

[2] The following applications are before the court:

(i) The applicants' Rule 6(15) application. This application is to strike out the entire paragraph [13] of Luvengo's answering affidavit in the interlocutory condonation application. This application is no longer before court

(ii) The applicants' condonation application. The rescission application has been postponed on a previous occasion to allow the applicants to bring a condonation application to explain the delay in bringing the rescission application. This application only deals with an application for condonation for the period 17 February 2015 (which is the date upon which the applicants allege they became aware of the default judgment) and 7 April 2015 (which is the date on which the rescission application was launched). This application is opposed by Luvengo. His opposing affidavit was filed 1½ days late. I will refer to his application for condonation for the late filing of his opposing affidavit in the next paragraph. ABSA did not oppose the grating of condonation for this period but persisted with its argument that the appellants knew long before 17 February 2015 of the existence of the default judgment and that the application for rescission is in fact approximately six years late. I will refer to ABSA's submissions in more detail herein below where I deal with the facts pertaining to the rescission application. Suffice to point out that the only condonation application in respect of the rescission application before this court is the condonation application for the period 17 February 2015 up until 6 April 2015.

(iii) I have already referred to Luvengo's condonation application for the late filing of his answering affidavit in the interlocutory condonation application. The affidavit was filed one and a half day late. Despite the fact that the delay in the delivery of Luvengo's answering affidavit was not significant and the fact that no real prejudice is alleged by the applicants, the attorneys acting on behalf of the applicants have nonetheless insisted that Luvengo must bring a substantive condonation application for the late filing of his answering affidavit in the interlocutory condonation application. The court was, however, informed at the commencement of the proceedings that this application is no longer before court.

(iv) The applicants' rescission application.

[3] It is not clear from the founding affidavit on what basis the rescission application is brought. From the latest set of heads of argument filed on behalf of the applicants, the applicants now seem to premise the rescission application firstly on the ground that the judgment falls to be rescinded in terms of Rule 42(1)(a) in that ABSA's summons was expiable and in the alternative, (secondly) that the judgment falls to be rescinded on the basis that ABSA's claim was settled prior to the execution of the judgment, alternatively that ABSA had abandoned and/or elected not to proceed with the default judgment. The factual basis upon which the applicants now seem to seek an order to rescind the default judgment is not set out in the founding affidavit.

<u>Applicants' application for condonation for the late filing of their rescission application</u>

[4] The applicants provide an explanation for their failure to launch the rescission application for the period between 17 February 2015 (the date on which Mr Makgato became aware of the sale in execution) and 7 April 2015 (which is the date on which the applicants' application for rescission was

launched). The applicants' application for condonation for this specific period is not opposed by ABSA.

[5] I have considered the application for condonation and I am satisfied that the applicants have adequately explained the delay for the period 17 February to 7 April 2015.

[6] Whether or not this is the only period for which condonation ought to have been applied for will be considered herein below.

Main application

[7] There are two immovable properties relevant to this application. Both properties are owned by the applicants. The facts in respect of the two immovable properties are to some extent intertwined. Both properties are bonded with ABSA.

(i) The first is portion 498 (a portion of portion 338) of the farm Doringkloof no 391. This property is the subject matter of case number 47219/07 (the present application). This property is also known as Erf 498, Cornwall Hill Estate (hereinafter referred to as "the Doornkloof property"). The applicants bought the property during 2003 and entered into a mortgage loan agreement with ABSA. An initial amount of R 1 300 000.00 was advanced to the applicants in respect of this property and later an additional amount of R 260 000.00 was advanced in respect of costs and further expenses. The Doornkloof property is an underdeveloped plot and is the second property and therefore not the applicants' place of residence.

(i) The second is Erf 1214, Irene Extension 44 which is the subject matter of case number 4812/07 (hereinafter referred to as the "Irene property"). The Irene property is the applicants' place of residence.

[8] It is common cause that the applicants defaulted with payment of the required monthly instalments payable in terms of the mortgage loan agreement. Mr Makgato contended that the late payments were caused because he works on a contract basis and clients often pay him late. ABSA submitted that these facts cannot detract from the fact of default on the part of the applicants.

[9] Default judgment was taken against both properties. This application for rescission only deals with the rescission of the Doornkloof property and not with the Irene property.

[10] On 18 October 2007 ABSA issued and served Simple Summons against the applicants in respect of the Doornkloof property at their *domicilium citandi et executandi* after the applicants defaulted with payment of instalments on the said property. The summons was served at the property by placing the summons under a rock. The Doornkloof property was declared specifically executable in terms of a court order dated 24 January 2008 for a sum of R884 599.44 with further interest and costs. A writ of attachment was issued and the mortgaged property was attached during February 2008. The auction was arranged for 7 May 2008.

[11] On 20 November 2007 – a few days after the summons was served - a note was made on ABSA's computer system indicating that Mr Makgato contacted ABSA with an undertaking to make payment of the arrears. In this regard it was submitted on behalf of ABSA that on the probabilities it must be accepted that the applicants no later than 20 November 2007, were fully aware of the summons issued and served.

[12] A few days before the action was to be held Mr Makgato proposed to ABSA in a letter dated 3 April 2008 to pay the outstanding amount in four payments: R 50 000.00 on 10 April 2008; R 30 000.00 on 21 April 2008; R 50 000.00 on 12 May 2008 and R 25 000.00 on 23 May 2008. This proposal was made in an e-mail to ABSA dated 3 April 2008. Mr Makgato specifically requested ABSA to stop the sale and "rescind the judgment". At the time of

the outstanding arrears on instalments amounted to R125 986.11. R 80 000.00 was paid by 7 May 2008 and the auction arranged for 7 May 2008 was cancelled. Unfortunately the applicants did not make any further payments as per their undertaking in the email. On 6 August 2008 the arrears on the account amounted to R79 064.50.

[13] ABSA is adamant that they at no stage waived their rights which they had obtained in terms of the judgment. ABSA further submitted that at no stage did the applicants launch a rescission application.

[14] A further sale in execution was arranged for 6 August 2008 but the applicants, following the same strategy, made a payment on 31 July 2008 in the amount of R 79 000.00. The sale in execution arranged for 6 August 2007 was also cancelled.

[15] The applicants again fell in arrears and a further sale in execution was arranged for 16 January 2013. On 8 January 2013 the arrear amount was paid and the auction sale was again cancelled.

[16] According to ABSA this strategy to make a payment shortly before an execution sale was to take place was persisted in respect of both the Doornkloof and the Irene property.

[17] In respect of the Doornkloof property the applicants again failed to keep up the instalments relating to the property and by 17 December 2014 they were in arrears in an amount of R 57 105.53. ABSA again instructed their attorneys to arrange for a sale in execution. The sale in execution was arranged for 11 February 2015. Because the applicants have not, as in the past, paid the arrear amount owing, the sale of execution proceeded and the property was sold to Luvengo.

[18] According to ABSA the applicants made further payments on their mortgage account after the sale in execution and attempted to persuade ABSA to cancel the sale in execution.

[19] According to ABSA the applicants must at least have been fully aware of the judgment (at best) as far back as in April 2008 but have done nothing until now to rescind the judgment.

[20] I have already referred to the fact that Mr Makgato alleged that he only learned about the sale in execution during or about February 2015 whilst being busy with litigation against Luvengo regarding the sale agreement of the property. The litigation was conducted under case number 81772/2014. In those proceedings Luvengo in his opposing affidavit stated that he purchased the property from ABSA on 11 February 2015. According to Mr Makgato he was surprised and instructed his attorneys to investigate the matter. When the file was located (on 31 April 2015) he noted copies of the summons. The return of service is attached to the papers and indicate that the summons was served by placing same under a rock. According to Mr Makgato he would have defended the matter had he been aware thereof. In order to explain the delay in bringing the rescission application after he had allegedly only learned of the existence of the default judgment on 17 February 2015, the applicants then had to bring an application for condonation. I have already dealt with the application for condonation for the period 17 February 2015 until 7 April 2015.

[21] Were the applicants aware of the summons and were they aware of the default judgment that had been granted against the Doornkloof (and Irene) property? I have already pointed out that Mr Makgato alleged that he only learned of the sale in execution during February 2015. This cannot be so for the following reasons: (i) The summons was served on the applicants (by placing it under a rock) on 18 October 2007. Already on 20 November 2007 a note was made on ABSA's computer system indicating that Mr Makgato had contacted ABSA with an undertaking to make payments of the arrears. On the probabilities it must in my view by accepted that the applicants were fully aware of the summons as far back as November 2007. No steps were taken at the time to defend the matter. (ii) Default judgment was granted on 24 January 2008 and the Doornkloof property was declared specifically

executable. (iii) The first sale in execution (which can only follow where a property has specifically been declared executable) was arranged for 7 May 2008. On 7 May 2008 Mr Makgato made certain payments towards the outstanding amounts and the sale in execution was cancelled. It is inconceivable that the applicants could not have been aware of the sale in execution hence their attempts to settle the outstanding amounts shortly before the sale in execution. (iv) More in particular, in April 2008 Mr Makgato contacted ABSA with the aim of arranging to pay the outstanding amounts in instalments. In this letter Mr Makgato specifically requested ABSA to "rescind the judgment". The same happened in respect of the sale in execution that was arranged for 6 August. The applicants, again following the same *modus operandi*, made a payment on 31 July 2008. Again the sale in execution was cancelled. (v) A further sale in execution was arranged for 16 January 2013. On 8 January 2013 the arrear amount was paid and the auction sale was again cancelled. (vi) The applicants again fell in arrears and because no payments have been made, the sale in execution proceeded on 11 February 2015. (vii) Furthermore, in October 2009 Mr Makgato in an email from ABSA was informed that ABSA has obtained two default judgments against him (and Mrs Makgato) and that ABSA will not, in light of the then (current) status of the loan account, oppose an application for rescission. Despite this letter and despite various attempts to arrange for a sale in execution the applicants have done nothing to rescind the judgment

[22] In light of the above I am of the view that the applicants knew about the default judgment as far back as November 2007 but have taken no steps to either defend the matter nor to rescind the default judgment. This application is years out of time. I do not accept that the applicants have not been aware of the default judgment in light of the facts that I have referred to. Furthermore, the loan account is in arrears and it is not disputed by the applicants in their application for rescission. If regard is had to the replying affidavit, there can be no doubt that the applicants were aware of the two default judgments: In this regard Mr Makgato specifically confirmed that he was informed by ABSA that ABSA does not intend proceeding with legal action should he pay all the arrears. What Mr Makgato does not tell the court

is the fact that the applicants have not paid the entire outstanding amount at the stage and only made one payment. Soon thereafter the applicants again fell in arrears with their payments.

[23] I am therefore not persuaded that the applicants were not aware of the default judgment in light of the facts as set out hereinabove. The application for rescission is therefore at least six years out of time. For the period preceding 17 February 2015 no explanation has been tendered for the extraordinary delay in bringing the rescission application.

[24] What further complicates the matter for the applicants is the fact that Mr Makgato completely destroys his version (namely that he only became aware of the default judgment in February 2015) advanced in the founding affidavit in the rescission application and the application for condonation by admitting (in the replying affidavit) that an employee of ABSA told him in that "the matter would be settled if I paid the arrear amount in full".

[25] In terms of Rule 31(2)(b) the rescission ought to have been launched within 20 days after the applicants have obtained knowledge of the judgment. In this regard I reiterate that I do not accept, for the reasons set out hereinabove, that the applicants only became aware of the default judgment during 2015. Furthermore, the consecutive execution sales arranged by ABSA over the years could not have left the applicants in any doubt that ABSA did not abandon the judgment that was granted in their favour or that ABSA have waived its rights in terms of the default judgment. The present application was launched more than six years after the applicants had obtained knowledge of the judgment and in the absence of any application for condonation the application cannot be heard as one in terms of Rule 31(2)(b).

[26] The application for rescission can further also not be founded upon Rule 42 of the Rules. The purpose of Rule 42 is to correct expeditiously an obvious wrong judgment or order. See *Bakoven Ltd v G J Howes*: [1]

[1] 1992 (2) SA 466 (E).

"Rule 42(1)*(a)*, it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of a 'mistake in a matter of law (or fact) appearing on the proceedings of a Court of record' (*The Shorter Oxford Dictionary*). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)*(b)* or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a *bona fide* defence (*Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd (supra* at 578F-G); *De Wet* (2) at 777F-G; *Tshabalala and Another v Peer* 1979 (4) SA 27 (T) at 30C-D). Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission. It is only when he cannot rely on an 'error' that he has to fall back on Rule 31(2)*(b)* (where he was in default of delivery of a notice of intention to defend or of a plea) or on the common law (in all other cases). In both latter instances he must show 'good cause'. This pattern emerges from the decided cases."

[27] I am not persuaded that there was an irregularity in the proceedings nor that the court lacked competence to make the order. Lastly no facts were placed before the court that the court, at the time the order was made, was unaware of facts which, if known to it, would have precluded the granting of the order.

[28] I am likewise also of the view that the applicants have not made out a case for the rescission of the default judgment in terms of the common law. There is no question of fraud in this matter and no such an allegation is made. Furthermore, in so far as there may exists sufficient cause for the rescission of the default judgment, the applicants have not presented a reasonable and acceptable explanation for the default and have not placed such facts before the court upon which it can be concluded that the applicants have a *bona fide* defence which *prima facie* carries some prospect of success. See in this regard: *Chetty v Law Society, Transvaal*:[2]

[2] 1985 (2) SA 756 (A).

"The appellant's claim for rescission of the judgment confirming the rule *nisi* cannot be brought under Rule 31 (2) *(b)* or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. (See *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 and *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163.) The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 *per* INNES JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success. (*De Wet's case supra* at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357 - 8.)

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule *nisi* issued on 22 April 1980."

[29] In conclusion: If regard is had to the founding affidavit it is patently clear that there simply is no defence to ABSA's claim. Furthermore, in as far as a suggestion has been made that ABSA had somehow settled the dispute

between them, there simply do not exist any facts on which a compromise as belatedly alleged by the applicants have been established. In order to establish the existence of such a compromise agreement between the applicants and ABSA all the facts must be considered: The fact that ABSA had arranged various consecutive execution sales could not have left the applicants in any doubt that ABSA did not waive its rights obtained in the default judgment. Furthermore, if regard is had to the letter in which ABSA indicated that the applicants are free to bring a rescission application it simply cannot serve as the foundation of a new agreement in terms of which ABSA had waived the default judgment especially in light of the fact that the applicants have not proceeded with an application for rescission at the time.

[30] In the event the following order is made:

1. The application for condonation for the late filing of the rescission application for the period 17 February 2015 up until 7 April 2015 is granted.

2. The application to rescind the default judgment granted on 24 January 2008 is dismissed.

3. The applicants are ordered jointly and severally the one paying the other to be absolved to pay the first respondent's costs.

AC BASSON
JUDGE OF THE HIGH COURT

Appearances:

On behalf of the applicant
Adv CA da Silva SC
Instructed by: Van Zyl'z Inc

On behalf of the first respondent
Adv JG Bergentuin SC
Instructed by: Van Zyl Le Roux Inc