REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG, PRETORIA

DATE: 24/2/17

CASE NO: 81006/2015

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

In the matter between:

TIBANE MASHIANOKE TRADING **APPLICANT**

and

ANTON RAS **1ST RESPONDENT**

JUDITH RAS **2ND RESPONDENT**

Delivered **24 February 2017**

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to rescind the default judgment made by Louw J dated 18 February 2016. The application is brought in terms of rule 31(2)(b) of the Uniform Rules of the Court (the Rules).

[2] The claim of the respondents that resulted in the default judgment which is the subject of this rescission application is based on two oral agreements concluded with the applicant. Both oral agreements were according to the respondents concluded during

2014. The oral agreements were also reduced to writing.

[3] The respondents further state that during the same period, July 2014, a mortgage bond was registered over the applicant's property being portion 61 **ERF** [....] N. E. of the Township, in the Province of Limpopo in their favour. The applicant was according to the respondent obliged to make certain payments arising from the agreement including the amount of R800 000, which was to be paid within four months calculated from the date that the amount of the loan was paid to it. The same applied to the second agreement which involved the payment of R40 000 00.

Background Facts

[4] It is common course that the respondents instituted an action against the applicant on the 7 October 2015 for the payment of the amount of R840 000. The claim was instituted on the basis that the applicant had failed to comply with the terms of the loan agreement.

[5] The case of the applicant is that the reason for not entering an appearance to oppose the claim was because the summonses were never served on it.

[6] The first service of the summons by the Sheriff was affected at [....] G. V. S., Polokwane. The sheriff then served at [....] E. D., Koro Creek Nylstroom where the service was effected by way of fixing the summons to the gate as there were no other methods of service possible according to the respondents

[7] The applicant disputed that service could be effected in the manner stated by the Sheriff because the property on which the service is alleged to have been effected does not have a gate. The property according to the applicant is in a Golf Estate where there are no walls or fnces for the house therein. This includes number [....] E. D. Koro Creek. According to the applicant, the only gate for the property is the main gate of the entrance of the estate.

[8] The deponent to the founding affidavit states that the applicants became aware of the claim when the Sheriff served the warrant of execution on the same property

[9] As concerning *bona fide* defence the applicant disputes the agreements which the respondent relied on in obtaining the default judgment. It is further contended that there is no prove that the applicant received the amount of R500 000 00 as alleged by the respondent.

Evaluation

[10] The applicant's application is based on the provisions of rule 31 (2) (b) of the Rules. It follows therefore that in order to succeed the applicant has to show good cause. The requirements of good cause for the purpose of a rescission application are set out in **Grant v Plumbers (Pty) Ltd,**[1] and can be summarised as follows:

(a) The applicant must give a reasonable explanation for his/her default.

(b) The court should refuse to grant the rescission if the default was willful or due to gross negligence.

(c) The application must be bona fide and not be made for the purpose of delaying the plaintiffs claim.

(c) The applicant must show that he/she has a bona fide defence to the plaintiffs claim.

[11] It is trite that in considering whether to grant or refuse an application for rescission of an order or judgment, the court has a wide discretion to exercise. In exercising its discretion the court is enjoined to make sure that justice is done to both parties. In this respect, the Court in considering good cause in an application for rescission of a judgment need to balance that with the provisions of s34 of the Constitution. In this respect it was stated in **RGS Properties (Pty) Ltd v Ethekwini Municipality,**[2] that a default judgment: "... is inherently contrary to the provisions of s34 of the Constitution. The section provides that everyone has a right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Therefore, in my view, in weighing up facts for rescission,

the court must on the one hand balance the need of an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default being granted in the first instance. In its deliberation the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that while among others this requirement incorporates showing the existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That said however, the nature advanced must not be such that it prima facie amounts to nothing more than a delaying tactic on the part of the applicant."

[12] The requirements of good cause does not, as a matter of principle, require the applicant to show that the balance of probabilities will favour him or her once rescission is granted or when the main case is considered. All that the applicant needs to show is that he or she has a defence which has *prima facie* prospects of success and that the application is not a mere delaying stratagem. The reason for this low standard is to avert an injustice occurring in the context where the default judgment may have unjustifiably denied the respondent access to the court. As stated in **Harris v ABSA Bank Ltd t/a Volkskas:**[3]

> "Even in the face of wilful default, in my view, the Court is enjoined to examine whether the defence raised by the person who seeks the relief shows the existence of an issue which is fit for trial."

[13] The applicant's case is that it was not in wilful default in not entering notice of opposition to the respondents' claim. It further contends that it has a *bona fide* defence which entitles it to the grant of the rescission application. In this respect it denies ever entering into an oral agreement with the defendants, and further that the amount which is the subject of the claim was not paid into its account.

[14] The other point raised by the respondent is that the amount was transferred before the expiry of the 5 day period as provided for in the agreement.

[15] In my view the applicant's case is unsustainable when regard is had to the objective facts. Firstly, in relation to the service of the summons commencing the proceedings, the respondent states in their answering affidavit that all attempts were made to ensure proper service was effected on the applicant. The service was thereafter served at the chosen *domi cilium* as indicated in the "Memorandum of Agreement" and the registered mortgage bond.

[16] In terms of section 43 (2) the Superior Court Act 10 of 2013 the Sheriffs return of service is *prima facie* evidence of what is stated therein. The return of service of the Sheriff in the present matter indicates that the summons, were served at the chosen *domi cilium* and in addition the Deputy Sheriff attested to the affidavit which is attached to the answering affidavit of the respondents concerning his efforts at serving the summons on the applicant. He states in the affidavit that he attempted to serve the applicant on two occasions to no avail. On the second occasion he was informed by the person at the premises that the applicant had moved to an unknown address.

[17] The case of the applicant would still remain unsustainable even if its version regarding the service of the summons on it was to be accepted. The case would be unsustainable because the applicant has failed to make out a case for a *bona fide* defence. There are also no prospects of success in as far the alleged defence is concerned. In this respect the applicant denies the existence of the oral loan agreement and ever meeting with the respondents on the dates on which the respondents contended that the agreement was concluded. It further denies that the oral agreement of the 28 March 2014 was reduced to writing during May 2014. The deponent to the founding affidavit in support of the rescission application states that the signature on the Memorandum of Agreement looks similar to his but that he never signed the document in question. He does not, however, say under what

circumstances his signature came to appear on the document in question.

[18] It is trite that in order to have a mortgage bond registered with the deeds office, the mortgagor has to sign the powers of attorneys for an agent that shall be responsible to pass the mortgage bond in favour of the mortgagee, in this instance it was the respondents. This means that the mortgage bond cannot be passed over a property in favour of the mortgagee unless the powers of attorney has been executed by the mortgagor directing that the property be registered in favour of the mortgagee.

[19] In the present instance the denial of the existence of the agreement does not assist the applicant because it does not explain how in the absence of the agreement it passed the mortgage bond in favour of the respondents in the amount of R1.2 million as security for the loan that the respondents had advanced to it.

[20] It is important to note that the mortgage bond confirms the oral agreement which as stated above the applicant denies. The applicant makes no reference to the mortgage bond in its papers neither does it deny its existence which means the most reasonable inference to draw is that the mortgage bond was registered in favour of the respondents as security to the loan which they had made to the applicant. This is further supported by the fact that the deponent to the founding affidavit is the sole director and also that he does not deny the signature on the document in question but simply say that the signature looks like his.

[21] In light of the above, I am of the opinion that the applicant has failed to make out a case for the rescission of the default judgment. Accordingly the rescission application stands to fail. I see no reason why costs should not follow the results.

<u>Order</u>

[22] The applicant's application to rescind the default judgment made on 18 February 2016 is dismissed with costs.

E.M MOLAHLEHI

JUDGE OF THE HIGH COURT; PRETORIA

Appearances:

For the Applicant: A M Malesa Attorneys

For the Respondent: Steyn Kinnear Inc

[1] **1949 (2) SA 470 (O).**

[2] 2010 (6) SA 572 (KZD).

[3] **2006 (4) SA 527** (T).