



IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 7543/2013

In the matter between:

PHILIP ROBERT HARRISON  
PAMELA HARRISON

FIRST APPLICANT  
SECOND APPLICANT

and

ABSA BANK LIMITED

RESPONDENT

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ORDER

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- (a) The application for rescission is dismissed.
- (b) The first and second applicants are ordered to pay the respondent's costs of the application including the appearance on 2 June 2016, such costs to be paid on an attorney and client scale.
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## JUDGMENT

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**SEEGOBIN J:**

### INTRODUCTION

[1] This is an application for rescission of a default judgment granted against the first and second applicants ('the applicants') by Kruger J on 16 November 2015. The application was opposed by the respondent herein which is Absa Bank Limited.

[2] In their founding affidavit the applicants based their application for rescission purely on common law grounds. This was the case which the respondent met in its answering affidavit. However, in the heads of argument and in oral submissions made before me on 2 June 2016, *Mr Flemming* who appeared on behalf of the applicants relied solely on the provisions of Rule 42(1)(a) of the Uniform Rules of Court. No other ground was relied upon nor alluded to in argument.

[3] Rule 42(1)(a) provides as follows:

“42(1) The court may, in addition to any other powers it may have, *mero motu* or on the application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) ...
- (c) ...
- (1) ...

(2) ...

(3) ...”

[4] In order to succeed under Rule 42(1)(a) an applicant is not required to show good cause (including a *bona fide* defence) as under the common law or the provisions of Rule 31<sup>1</sup>. The only requirement for rescission of a default judgment under the sub-rule is that the judgment must have been ‘erroneously sought or erroneously granted<sup>2</sup>. Southwood J in *Naidoo v Matlala NO*<sup>3</sup> pointed out that in general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment<sup>4</sup>.

## BACKGROUND AND COMMON CAUSE FACTS

[5] The following facts which are common cause and/or not seriously disputed emerge from the applicants founding papers and the respondents answering affidavit:

[5.1] At all material times hereto, the applicants were under debt review and acted on the advice of their duly appointed debt counsellors known as SS Debt Counsellors. In particular, they acted on the advice of one *Christiaan Ferdinand Koen* (Koen) who is the so-called legal advisor of SS Debt Counsellors.

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<sup>1</sup> *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003(6) SA 1 (SCA) ([2003] 2 All SA 113; [2003] ZASCA 36) paras 8-9; *Mutebwa v Mutebwa and Another* 2001(2) SA 193 (Tkh) ([2001] 1 All SA 83) para 16; and *Topol and Others v LS Group Management Services (Pty) Ltd* 1988(1) SA 639 (W) at 650I-J.

<sup>2</sup> *Ferris and Another v Firststrand Bank Ltd* 2014(3) SA 39 (CC) at para [13].

<sup>3</sup> 2012(1) SA 143 (GNP).

<sup>4</sup> See also: *Nyingwa v Moolman NO* 1993(2) SA 508 (TK) at 510 D-G; *Herbstein & Van Winsen* vol 1 at 931.

[5.2] On 9 April 2010 the debt counsellors obtained a consent order in the Alberton Magistrate's Court in terms of which the applicants were declared to be over-indebted and a re-arrangement of their debts was made. The full terms of the order read as follows:

- “1. It is ordered:-
  - a. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents found to be over-indebted.
  - b. That payments of debt to creditors be rescheduled as per Annexure “A” – summary of payments to creditors.
  - c. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are herewith ordered to pay an amount of R15000 monthly to the National Payment Distribution Agency registered with the National Credit Regulator (DCM) in respect of the debt listed in Annexure “A”. First payment on or before 30/4/2010 and monthly thereafter on or before the LAST day of each and every month.
  - d. That the amount increases annually in October by R400 pm.
  - e. That the debt counsellor ensures that the matter is reviewed annually.
  - f. That none of the existing respective rights and obligations of the original credit agreement/loan agreement is herewith waived or amended.
  - g. That the rights and obligations as referred to in (e) above will be reviewed and be fully enforceable should the 1<sup>st</sup> and 2<sup>nd</sup> Respondents default in terms of this Consent Order.”

[5.3] By letter dated 14 June 2013 the respondent notified the applicants that they were in arrears with their home loan account held with the respondent in an amount of R57402,71. They were further notified that since they were in default with their obligations in terms of their credit agreement with the respondent and since more than sixty (60) days had elapsed since the applicants had applied for debt review, the respondent

was terminating the debt review in terms of section 86(10) of the National Credit Act 34 of 2005 with immediate effect.

[5.4] The applicants having raised no dispute regarding the termination of the debt review, the respondent instituted an action under Case No.7543/2013 for payment of the amount owing and for an order declaring the immovable property specially executable. This action was defended by the applicants through their debt counsellors in conjunction with attorneys Shepstone and Wylie.

[5.5] There is no dispute that a notice of set down of the above trial was served on the applicant's attorneys on 13 April 2015. In terms of the notice of set down the applicants were notified that the trial was set down on 16 November 2015.

[5.6] On 13 November 2015 (three days before the trial) the applicant's attorney sent an email to the respondents' attorneys in which they sought an adjournment of the matter with a tender of costs.

[5.7] In response to this email, the respondents attorneys informed the applicant's attorneys that the bank would not agree to an adjournment without the applicants or their debt counsellors providing a detailed and plausible reason why the matter needs to be adjourned.

[5.8] On the same day Koen sent an email to the applicant's attorneys in which he, *inter alia*, stated the following:

“ . . .

Nevertheless, please serve and file a notice of withdrawal as attorneys of record, then we can apply again for the rescission of the judgment after 16<sup>th</sup>,

since I only became aware of the court date yesterday and the client today, after I got hold of him.”

[5.9] No appearance having been made either by the applicants attorneys, or the applicants themselves, or the debt counsellors, on the 16 November 2015, default judgment was taken against the applicants.

[5.10] The default judgment granted by Kruger J on 16 November 2015 was in the following terms:

- “(a) Payment of R631 617.67;
- (b) Interest thereon at the legal rate of 9% per annum, capitalized monthly, from 20 June 2013 to date of final payment, both days inclusive;
- (c) Costs of suite on the scale as between attorney and client;
- (d) The following immovable property:  
A UNIT CONSISTING OF –
  - (a) SECTION NO. 37 AS SHOWN AND MORE FULLY DESCRIBED ON SECTIONAL P L AN NO. SS311/1995, IN THE SCHEME KNOWN AS SURREY LANE IN RESPECT OF THE LAND AND BUILDING OR BUILDINGS SITUATE AT AMANZIMTOTI IN THE ETHEKWINI MUNICIPALITY AREA OF WHICH SECTION THE FLOOR AREA, ACCORDING TO THE SAID SECTIONAL PLAN IS 78 (SEVENTY EIGHT) SQUARE METRES IN EXTENT; AND
  - (b) AN UNDIVIDED SHARE IN THE COMMON PROPERTY IN THE SCHEME APPORTIONED TO THE SAID SECTION IN ACCORDANCE WITH THE PARTICIPATING QUOTA AS ENDORSED ON THE SAID SECTIONAL PLAN.  
HELD BY DEEN OF TRANSFER NO. ST 57518/2003  
be and is hereby declared executable.”

[5.11] It is this judgment which the applicants seek a rescission of. The application for rescission was launched on 17 December 2015.

## FINDINGS

[6] The only issue to consider is whether the default judgment granted on 16 November 2015 was done so erroneously. In my view it was not. I base this finding on the following facts:

[6.1] *First*, in terms of prayer 1(c) of the debt review order, the applicants were ordered to pay an amount of R15000,00 monthly to the National Payment Distribution Agency registered with the National Credit Regulator in respect of the debts listed in Annexure to the Order. The first payment was to be made on or before 30 April 2010 and monthly thereafter on or before the last day of each and every month. In terms of prayer 1(d) the above amount was to increase annually in October by R400 per month. While the respondent admits receiving an amount of R112810,00 over the period 30 April 2010 to 30 June 2013, it avers that if the annual escalation is taken into account these payments do not exceed the amount due in terms of the order (as escalated).

[6.2] *Second*, the respondent avers that the applicants have in fact failed to make any payments in terms of the debt review order for the months of June 2011, June 2012 and July 2012. The applicants admit this.

[6.3] *Third*, the respondent points out that the applicants failed to make a single payment in terms of the debt review order since November 2013. The applicants, whilst admitting that they failed to make certain payments to the respondent since the action was instituted, deny that they failed to make a single payment since 2013, as alleged.

[6.4] *Fourth*, as I pointed out already, as at 14 June 2013 the applicants were in arrears in an amount of R57 402,71. This, in my view, is a clear indication that the applicants were finding it difficult to comply with their obligations both in terms of the loan agreement with the respondent and in terms of the restructuring order made in 2016.

[7] I agree with *Mr Hoar* on behalf of the respondent that once the applicants had breached the restructuring order, the bank was entitled to enforce the loan without any further notice. This is apparent from the wording of the relevant sections of the Act. Section 88(3)(b)(ii)<sup>5</sup> does not require further notice – it merely precludes a credit provider from enforcing a debt under review unless, among other things, the debtor defaults on a debt-restructuring order. Additionally, s129(2) expressly stipulates that the requirement to send a notice under s 129(1) is not applicable to debts subject to debt-restructuring orders<sup>6</sup>.

[8] Sub-para 1(g) of the debt review order itself provides that the rights and obligations referred to (e) of the order will be reviewed and be fully enforceable should the applicants default in terms of the order. Sub-para (e) provides that the debt counselor is to ensure that the matter is reviewed annually.

[9] In *Firststrand Bank v Fillis*<sup>7</sup>, Eksteen J held as follows in para [16]:

“It follows, in my view, as a matter of interpretation, that once the jurisdictional requirement set out in s88(3)(a) co-exists with any one of

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<sup>5</sup> The relevant part of section 88(3) provides, in relevant part:

“(3) Subject to section 86(9) and (10), a credit provider who receive notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until –

(a) the consumer is in default under the credit agreement; and

(b) one of the following has occurred:

(ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.”

<sup>6</sup> *Ferris and Another v Firststrand Bank Ltd*, supra, at para [14].

<sup>7</sup> 2010(6) SA 565 (ECP).

the jurisdictional requirements set out in s88(3)(b), the credit provider is at liberty to proceed and to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement, without further notice.”

[10] Mr Flemming on behalf of the applicants contended that as at the time when the action was instituted by the bank, the applicants were not in default of the debt re-structuring order. In the alternative, he submitted that even if the applicants were previously in default of the credit agreement, once all arrears were paid, the credit agreement is automatically re-instated. In such circumstances the applicants were not entitled to issue summons. In support of the latter contention in this regard, Mr Flemming placed reliance on the judgment of the Constitutional Court in the matter of *Nkata v Firststrand Bank Limited and Others* (CC) (Case No. CC73/15) which was handed down on 21 April 2016.

[11] I find no merit in Mr Flemming’s submission for the simple reason that on the applicant’s own version they had failed to pay at least three instalments to the bank even after the restructuring order was made. Furthermore, after judgment was granted against them in November 2015, no payments were made. As for Mr Flemming’s reliance on the *Nkata* judgment is concerned, I consider such reliance to be misplaced. That matter dealt essentially with the re-instatement of a credit agreement once all the debtors obligations which comprise the payment of all arrears, permissible default charges and legal costs have been fulfilled. This does not apply in the present matter where the applicants have defaulted and continue to default in the obligations with their bank.

[12] I was assured by Mr Hoar that when judgment was sought before Kruger J, the learned Judge was fully apprised of all the facts pertaining to the bank's claim and the failure on the part of the applicants to meet their obligations in terms of the re-structuring order. In these circumstances it can hardly be suggested that the judgment was 'erroneously granted' justifying a rescission under the provisions of rule 42(1)(a).

[13] In my view, the applicants are the authors of their own misfortune. They were fully aware of the fact that the trial was set down for hearing on 16 November 2015. They did nothing to ensure their attendance at court even if it was only to seek a postponement. Instead they seemed prepared to follow the incorrect advice given by Koen who instructed their attorneys to file a notice of withdrawal in order to provide them with an opportunity to apply for a rescission. This was a situation clearly engineered by Koen to the detriment of the applicants.

[14] All in all, I am not persuaded that the applicants have made out a case for rescission under rule 42(1)(a). It follows that the application must be dismissed.

## ORDER

[15] I grant the following order:

(c) The application for rescission is dismissed.

(d) The first and second applicants are ordered to pay the respondent's costs of the application including the appearance on 2 June 2016, such costs to be paid on an attorney and client scale.

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|------------------------|---|-------------------------------------------------------|
| Date of Hearing        | : | 2 June 2016                                           |
| Date of Judgment       | : | 17 June 2016                                          |
| Counsel for Applicants | : | G Flemming                                            |
| Instructed by          | : | Shepstone & Wylie Attorneys                           |
| Counsel for Respondent | : | S Hoar                                                |
| Instructed by          | : | Geyser Du Toit Louw & Kitching<br>c/o Venns Attorneys |