IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Delete whichever is not applicable

(1) Reportable ~~Yes~~ / No
(2) Of interest to other Judges ~~Yes~~ / No
(3) Revised.

Date: 19 May 2014

Signature.............

15/5/15

CASE NO: 51839/ 2009

In the matter between:

PATRICK MNISI	First Applicant
NKEKOLO NUSTER MNISI	Second Applicant

and

FIRST RAND BANK LIMITED	First Respondent
SEBENZILE HOMES AND ACCOMODATION CC	Second Respondent

JUDGMENT

Ismail J:

[1] This is an application wherein the applicants seek rescission of a judgment which was given against them. The applicants seeks to have a summary judgment order granted against them by Raulinga J, on the 25 April 2014, be rescinded.

[2] The basis that the application for rescission is premised is that the judgment was erroneously granted. See *Custom Credit Corporation (Pty) Ltd v Bruwer and Others* 1969 (4) SA 564 (D) and *Shield Insurance Co Ltd v Van Wyk* 1975 (4) SA 781 (NC)

[3] Heads of arguments were filed on behalf of the parties in this matter and the court is grateful to counsel for the timeous filing thereof.

[4] The applicants contend that the judgment was incorrectly given against them in that there was no notice of re-enrolment advising them that summary judgment application was set down for determination.

[5] The situation prevalent at the time was that Jacob, Moodie & Madeleine Nell Inc were the applicants attorneys of record. A letter dated15 January 2010 from Nel- Erasmus stated:-

" Geliewe daarop te let dat Mdeleine Nel-Erasmus die firma Jacobs, Moodie & Madeleine Nel Inc. verlaat het, en vanaf 1Januarie 2010 praktiseer onder die naam Nel -Erasmus Prokereurs. Geliewe verder daarop te let da tons adres en telefoonnommers verander het.

Ons sal binnekort die Kennisgewing van onttrekking en toetreding as prokereurs van record op u kantore beteken"

No notice of withdrawal from the attorneys of record, Jacobs, Moodie & Madelein Nel Inc, was served and in addition thereto no notice of appointment from attorneys Erasmus –Nel was filed indicating that they were the new attorneys of record of the applicants.

[6] The deponent to the founding affidavit at paragraph 10 stated:

"…. Nothing regarding the notice was communicated to me in any way whatsoever nor did my last attorneys, Nel Erasmus Attorneys who dealt with the matter inform me of any application."

[7] The first respondent contended that it complied with the provisions of Rule 16 in that it served the notice on the appointed attorneys of the applicants, and this ground seeking rescission of judgment does not hold any water, and should be rejected by the court.

[8] The applicants are of the view that the amount for which judgment was granted was incorrect. They aver that in the application for summary judgment an amount of R1 483 162, 80 was sought whereas in another document marked 'RM6', the outstanding amount allegedly due was reflected as R1 382 000. 00. In addition thereto, the applicants are of the view that movable property worth R500 000,00 had been disposed of by the liquidator. This amount should therefore have reduced the figure claimed in the summary judgment application. Had the court been appraised of this fact, summary judgment would not have been granted.

[9] Ms Oschmann acting for the first respondent submitted that this argument had no merit as the applicants themselves are not certain whether the movable assets were sold or not.

[10] A further ground which raised by the applicants, whereby

they sought that the judgment be rescinded was that the deponent of the affidavit supporting the granting of summary judgment , one Robert Freeborough was required to have personal knowledge and not merely required to verify the allegations in terms of Rule 32. It was submitted on behalf of the applicants that Mr Freeborough failed to mention in his affidavit that the applicants, indebtedness stemmed from a suretyship agreement which they signed on behalf of the second respondent.

[11] It was argued before me that the aforementioned argument was without merit as Mr Freeborough in his affidavit stated that he verified the cause of action as well as the amount due by the applicants.

[12] The applicants also submitted that the summons was prematurely issued in that the respondent failed to comply with the provisions of section 129 (1) of the National Credit Act of 2005 [the Act]. The first respondent in opposing this argument submitted that the principal agreement was excluded by the provisions of section 4 of the Act. It was argued that notwithstanding the exclusion in terms of section 4 the Act, first respondent as a matter of caution served a notice in terms of section 129(1) on the applicants.

Mr Korff acting on behalf of the applicants submitted that the section 129 notice was served at 15 Berg Street (pages 95/6) whereas on the suretyship agreement they gave their address as 26 Fiona Crescent, Kempton Park.

Miss Oshmann on behalf of the first respondent submitted that it made no difference where the section 129 notice was delivered as the plaintiff was not obliged not to give notice. This begs the question why then did it do so, and having done so why was it not sent to the correct address. Furthermore they were co-principal debtors.

[13] The applicants contend that two former members of the second respondent namely Ms Mogadi Morata and Mr Johannes Mashapa succeeded in obtaining the judgment taken against them to be set aside by way of rescission and therefore they should also succeed in their application. In my view this argument is fatally flawed as every case must be viewed on its own facts and circumstances. In any events the facts of that matter were not placed before me. I am none the wiser whether the facts in that matter are on all fours or distinguishable from the facts herein.

[14] I am of the view that although the first respondent served the summary judgment application on the applicants nominated attorneys, it was always the applicants intention to oppose the application. The fact that the application for summary judgment was not opposed was not due to any fault on the part of the applicants *per se* but rather to what transpired

with the applicants attorneys. Had the application for summary judgment been opposed, the court might have granted leave to defend on the grounds that the amount claimed was not due and owing, bearing in mind the question of movables which were attached and the issue regarding the certificates of balances which I will deal with hereunder.

[15] Mr Korff argued that the certificate of balance relied upon in the summons was dated 21 June 2009 (page 46) and that the summons was issued on 31 May 2009. He also submitted that the certificate of balances reflected different amounts owed.

[16] Mr Korff submitted that the summary judgment application was not appealable as it was not a final order in effect. In this regard he relied upon the decision of *Marsay v Dilley* [1992] 2All SA 327 (A) where Corbett CJ at para [18] stated:

" The law relating to the appealibility of decisions of a court of a provincial division were re-examined relatively recently by this court in the case of *Van Streepen & Gems (Pty) Ltd v Transvaal Provincial Division* 1987 (4) SA 569 (A). As this judgment shows, this Court has over the years adopted an increasingly flexible approach to the question of appealibility. The general principle which, I think, may be extracted from the judgment is the following: where a trial court has under some competent procedure (such as an application under Rule 33(4)) made an order which has the effect of being a final decision (i e one which cannot be corrected or altered or set aside by the trial Judge at a later stage of the trial) and the decision is definitive of the rights of the parties and has the effect of disposing of a substantial portion of the relief claimed by the plaintiff in the main action, then this order is a judgment (as understood in sec 20(1) of the supreme court Act 59 of 1959) and is appealable, despite the fact that the main action has not been concluded (see also in this connection a recent and as yet unreported judgment of this Court in the matter of *SA Eagle Versekeringsmaatskappy Beperk v Hartford,* 27.3.92

There is no doubt that the Court *a qou* pronounced finally upon the relationship between the parties and upon the extent of the obligation on the part of Dilley to account to Marsey….."

[17] In this application the summary judgment order was given in default, in that the respondents (current applicants) did not 'oppose' the application. The Judge merely had an affidavit of one side to consider and the applicants (respondents in summary judgment application) opposition was not available. Had the respondents affidavit been available and been considered by the court then I am inclined to conclude it would have been a final decision and would have been appealable.

[18] The applicants have given reasons why they should have the order set aside, and that they have a bona fide defence which was not entertained due to the problem with their attorneys practice being split. The

argument advanced was that had they opposed the summary judgment application the judge would have come to a different conclusion as he would have been appraised of further information to the contrary. Therefore Raulinga J's order is not appealable as he made a correct decision on the facts that were before him. Had the judge been aware of their version he would not have given the order. Accordingly the decision which was taken in default was not a final order and consequently it should be set aside by way of rescission .

[19] I am of the view that the application should succeed as the applicants were entitled to oppose the application and they were not in willful default. Although some of their defences appear to be of a technical nature there were conflicting certificates of balances; and the issue of the movables having been attached thereby possibly reducing the amount due was not canvassed.

[20] In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) the court expressed the view that the applicants have to demonstrate that they have a bona fide defence and that where the applicant has set out averments, which if established at the trial would entitle him to the relief applied for.

[21] In the circumstances I make the following order:

The judgment given against the applicants is set aside with cost on a party and party scale.

Ismail J

APPEARANCES :

For the Applicants :	Adv C A Korff instructed by Maodi Attorneys, Kempton Park c/o Molosi attorneys, Pretoria
For the First and Second respondents:	Adv I Oschman instructed by Bezuidenhout van Zyl & Associates, Johannesburg
Date of hearing:	20 April 2015.
Judgment delivered :	19th May 2015