

VRYSTAAT HOË HOF, BLOEMFONTEIN

REPUBLIEK VAN SUID AFRIKA

Case Number: 4882/2011

In the matter between:-

BOGATSU DAVID RAMOLIBE

First Applicant

MARIA RAMOLIBE

Second Applicant

and

NUSUN DEVELOPMENT (PTY) LTD

First Respondent

HSU-LIEH HO: Manager-Nusun

Second Respondent

DELIVERED BY: SNELLENBURG, AJ

HEARD: 19 APRIL 2012

DELIVERED: 24 MAY 2012

[1] This is an application for rescission of a default judgment granted in terms of Uniform rule 31(5)(b)(i) and (ii).

[2] The first respondent, Nusun Development (Pty) Ltd, summonsed the first and second applicants, Mr and Mrs Ramolibe for payment of the amount of R186 674,28; interest thereon at the rate of 15 percent from 4 August 2010 to date of payment in full; an order to

have certain immovable property declared specially executable and costs on the scale as between attorney and own client.

[3] The first respondent's cause of action is based the breach by the applicants of a written loan agreement entered into and concluded between it and the applicants on 15 October 2009 at Bloemfontein in terms whereof the first respondent extended a loan in the amount of R164 750,00 to the applicants, subject to the terms and conditions contained in the agreement and secured by a second mortgage bond registered over some immovable property. According to the allegations in the summons the applicants had defaulted in their monthly payments as result whereof the total outstanding balance as on 3 August 2011, in the amount of R186 674,28, became immediately due and payable.

[4] The first respondent applied for default judgment against the applicants in terms of the provisions of Uniform rule 31(5), the same which was duly granted by the court registrar on 22 December 2011.

- [5] It is this judgment that the applicants seek to set aside.
- [6] The first respondent did not file an answering affidavit and elected to argue the matter on the applicants' version as set out in the founding affidavit. The second respondent has not opposed the application and the applicants have abandoned their prayer for costs against this respondent.
- [7] The applicants rely on the provisions of Uniform rule 31(2)(b) to set aside the default judgment.
- [8] Rule 31(2)(b) is applicable only when a default judgment is granted by a court in terms of the provisions of rule 31(2)(a). That much is clear from the rule:

“(2)(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and the defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant

judgment against the defendant or make such order as to it seems meet.

2(b) A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.” As substituted by GN 417 of 14 March 1997.]

[9] The reference in subrule 2(b) to ‘*such judgment*’ clearly refers to a judgment granted in terms of subrule 2(a).

[10] In this matter the judgment was granted in terms of rule 31(5)(b)(i) and (ii), in as much as the registrar only awarded costs on the scale as between party and party contrary to the first respondent’s request for costs on the scale as between attorney and own client. The request for default judgment did not include a prayer to have the immovable property declared specially executable. It is now settled that the court registrar cannot grant such an order where the immovable property is the primary residence of the judgment debtor. Only the court may grant such order after having

considered all relevant circumstances.¹

[11] The question that must be answered is on what basis the applicants could or should have approached the court to set aside the judgment, which was granted in their absence.

[12] Rule 31(5)(d) provides that:

“Any party, dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.”

[13] In **Bloemfontein Board Nominees Ltd v Benbrook** 1996 (1) SA 631 (O) at 633H, Hancke J held that ‘*reconsideration by the court*’ of a default judgment granted by the registrar in terms of rule 31(5)(d) does not mean that the court substitutes its discretion for that of the registrar, but that the court will only interfere with the judgment of the registrar if it is of the opinion that the registrar has erred.

¹ Uniform rule 46(1)(a)(ii); *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC); *Mkhize v Umvoti Municipality and Others* 2012 (1) SA 1 (SCA).

[14] In the *Pansolutions Holdings Ltd v P & G General Dealers & Repairers CC* 2011 (5) SA 608 (KZD), Swain J however disagreed with the finding in *Benbrook supra*, and refused to follow it. Swain J held that reconsideration by the court as referred to in rule 31(5)(d) means the exact opposite (as opposed to the finding in *Benbrook*), namely that the court is empowered to substitute its discretion for that of the registrar. The court held that the anomalous position arises on the clear wording of the relevant rules that a different standard applies when a default judgment granted by the court is sought to be set aside, as opposed to a default judgment granted by the registrar.

[15] With reference to what it means to 'reconsider' as used in Uniform rule 6(12)(c), Swain J held that when a rescission of a default judgment granted by the registrar is to be reconsidered in terms of rule 31(5)(d), the underlying need for the grant of such a power is equally the absence of the aggrieved party at the time the judgment was granted; that the object is equally to obtain redress against an injustice, or an imbalance created by the judgment and that of importance will also be factors relating to the reasons for

the absence of the aggrieved party, as well as the period the judgment has been in existence without challenge.

[16] Swain J therefore held that a court, in deciding whether to reconsider, in terms of rule 31(5)(d), a default judgment granted by the registrar would cause no affront to the provisions of this rule if it applied the criteria enunciated by the courts over many years, in determining whether an applicant has established 'good cause' for the rescission of a judgment granted by the court. It was further held that such an approach has the merit of removing any unwarranted distinction between the criteria, which are to be satisfied to achieve success in either instance.

[17] I respectfully disagree with the well reasoned findings of Swain J.

[18] Rule 31(2), as originally published on 12 January 1965, was amended to its present form (by substitution) by GN R417 of 14 March 1997. Prior to the amendment rule 31(2) read as follows:

“(2)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (4) for default judgment and the court may, where the claim is for a debt or liquidated demand, without hearing evidence, and in the case of any other claim, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.

(b) A defendant may within twenty-one days after he has knowledge of such judgment apply to court upon notice the plaintiff to set aside such judgment and the court may upon good cause shown and upon the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of such application to a maximum of R20, set aside the default judgment on such terms as to it seems meet.”

[19] The present rule as quoted in paragraph [8] above, as stated, was introduced on 14 March 1997.

[20] Rule 31(5) was first inserted by GN R2365 of 10 December 1993 and came into operation on 10 January 1994.

[21] Rule 31(5)(a) was then amended by the very same notice that introduced the present sub-rule 2(a) and (b) [GN R417 of 14 March 1997].

[22] If the intention of the Rules Board for Courts of Law was to have the same standard apply in cases where the default judgment was granted by a court as when the registrar entered judgment in terms of rule 31(5), then the rule would have been amended to provide expressly for this. No cogent reason comes to mind that would justify the rule maker to expressly word the two sub-rules differently if it intended the same standard to apply, as Swain J proposes. The judgment under consideration acknowledges the clear differences between the sub-rules. The different wording of the relevant sub-rules under consideration must be taken to be deliberate.

[23] Although it is a well recognised principle of interpretation of statutes that there is generally speaking a presumption that the same words and expressions in the same Act are intended to bear

the same meaning when used [Consolidated Textile Mills Ltd v President of the Industrial Court and Others 1989 (1) SA 302 (A) at 308C], this is not an immutable rule as appears from the latter judgment. Whether the word bears the same meaning will depend on the specific context within the act [rule] it is used in. The same will apply to interpretation of the Uniform rules of court.

- [24] Definitions of words in dictionaries are often of fundamental importance in the judicial interpretation of that word in a statute or in a contract or in a will. The task of interpretation is however not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of that word in its particular context in the enactment or contract or other document. **Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd** 1984 (3) SA 834 (W) at 846G. The latter case conveniently summarises the applicable principles regarding the use of dictionaries in judicial interpretation. In **S v Collop** 1981 (1) SA 150 (A) it was held [at 161E-F], that although often a useful tool in judicial interpretation, dictionaries do not always provide the answer to the problem of construction. In **De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka** 1980 (2) SA 191 (T), which is apposite to the issue under consideration,

the court per Nicholas J (at 196E) held:

“A dictionary meaning of a word cannot govern the interpretation. It can only afford a guide. And where a word has more than one meaning, the dictionary does not, indeed it cannot, prescribe priorities of meaning. The question is, what is the meaning applicable in the context of the particular document [*rule*] under consideration.” My inclusion.

[25] In the Pansolutions case it was held, after considering the dictionary meaning of ‘reconsider’ as dealt with in **Lourenco and Others v Ferela (Pty) Ltd and Others (No 1)** 1998 (3) SA 281 (T) [at 290D], with reference to the power to ‘*reconsider*’ provided for in rule 6(12)(c), that the underlying need for the grant of such a power in rule 31(5)(d) is equally the absence of the aggrieved party at the time the judgment was granted. To my mind this finding does not acknowledge the fundamental distinction between the two rules. The pivotal consideration in rule 6(12)(c) is not default of a party in isolation, but the interrelation of the said sub-rule with the preceding sub-rules. The court or judge hearing the urgent application may dispense with forms and service and may

in general dispense with the matter (as far as practicable in terms of the rules) in any manner it seems meet. The same considerations do not apply to default judgments granted by the court registrar.

[26] The sub-rule must be considered in context as is the case with rule 6(12)(c). In *Standard Bank of SA Ltd v Ngobeni* 1995 (3) SA 234 (V) at 235C-E the following was said regarding the purpose of the sub-rule under consideration:

“The purpose of the amended Rule was clearly to relieve the burden resting on the Judges of the Supreme Court by delegating to the Registrar the right (and duty) to grant or refuse judgment in uncomplicated default matters where he simply checks that all administrative and formal steps have been taken to justify a judgment. He is not expected to decide extraordinary or obscure points of law or fact. The golden rule is: If the Registrar has any legitimate doubt whether judgment should be granted or not, it is his duty to refer the matter for hearing in terms of Rule 31(5)(b)(vi).”

Nedbank v Mortinson 2005 (6) SA 462 (W) at 472B–D.

In *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) para 24 the Supreme Court of Appeal defined the function of the Registrar as:

“All that is required of the Registrar is a formal evaluation of whether the summons discloses a proper cause of action - that is a task quite distinct from evaluation of the kind reserved for a court and does not involve the Registrar in performing a judicial function.”

[27] The sub-rule does not purport to provide a general remedy for the rescission of default judgments simply because it was granted by the registrar in terms of rule 31(5). It is evident from the purpose of rule 31(5)(d) and the functions that the Registrar performs, that what is indeed intended is not for the court reconsidering the order or decision by the registrar, to substitute its discretion for that of the Registrar, but that the court will only interfere with the judgment of the registrar if it is of the opinion that the registrar has erred. A striking example for reconsideration by the court in terms of the sub-rule would be the granting of a judgment by the registrar for a claim that is not for a debt or liquidated demand.

[28] If the purpose of the rule was different it would have expressly provided for that.

[29] That does not mean that the party against who the default judgment was granted in terms of rule 31(5) has no remedy or is subject to a different standard.

[30] In the Pansolutions case the parties accepted that the matter had to be argued and considered on the same basis as in rule 31(2)(b), albeit in terms of Rule 31(5)(d). The parties in that matter were *ad idem* that the good cause standard should apply when an aggrieved party seeks to set aside an order granted in terms of rule 31(5). I agree, but to my mind the answer is not to read more into rule 31(5)(d) than what it is clearly intended for.

[31] The court has always had the power to rescind a judgment granted in absence of a party at common law. **De Wet v Western Bank Ltd** 1979 (2) SA 1031 (A); **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A) at 764I-J. This would include

judgments granted in terms of rule 31(5). Such party will also have the advantage that he (or she) is not subject to the time limit of 20 days, subject thereto that such party must approach the court without undue delay. Any inordinate delay may influence the court's overriding discretion when it considers whether to grant the relief, or not.

- [32] An applicant for rescission at common law must show good cause. The requirements for good cause were restated by the Supreme Court of Appeal in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) para 11:

“With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success (*Grant v Plumbers (Pty) Ltd*, 20 *HDS Construction (Pty) Ltd v Wait supra*, 21 *Chetty v Law Society, Transvaal*).”

- [33] The requirements evidently corresponds with what is expected of

an applicant in terms of rule 31(2)(b).

[34] It is therefore unnecessary to import the meaning of words used in other rules to cater for a remedy where the sub-rule itself does not provide for it and a suitable remedy all ready exists.

[35] In light of the afore-mentioned a party against who default judgment is granted in terms of rule 31(5)(d) is in no worse position than a party against who a court granted judgment, nor is there any substance in the complaint that different standards will apply. The same standard eventually applies whether the party is obliged to apply for rescission in terms of rule 31(2)(b) or the common law.

[36] In the present matter the applicants cannot apply in terms of rule 31(2)(b) as they purport to do. If the registrar did not err in granting the judgment, they are also *non* suited in terms of the provisions of rule 31(5)(d). They can however apply for rescission in terms of the common law. Whether the applicants have made a proper case for the rescission is a different matter, which will be evaluated hereunder.

[37] The mere fact that an applicant approaches a court for rescission in terms of a specific rule - in this instance erroneously in terms of rule 31(2)(b) - does not bar the court hearing the application from entertaining it in terms of another rule or the common law, provided that such applicant has met the requirements thereof. **De Wet v Western Bank Ltd**, 1977 (4) SA 770 (T) at 780H–781A. **Swart v Absa Bank Ltd**, 2009 (5) SA 219 (C).

[38] What remains is to consider whether the applicants have met the requirements to rescind the judgment granted in their absence by the registrar, either in terms of rule 31(5)(d) if the registrar erred or the common law. As the registrar has not erred the matter is evaluated in terms of the common law standard.

[39] For the reasons that follow it will serve no purpose in light of the facts of the present matter to evaluate the three requirements for good cause individually. In absence of a *bona fide* defence to the plaintiff's claim, which *prima facie* has some prospect of success, the application stands to be dismissed.

[40] The uncontested evidence of the applicants show that they resided at 19 Doringboom Street, Mandela View, Bloemfontein [the domicilium address] until they purchased the immovable property better known as 20 Doringboom Street, Edenpark, Mandela View, Bloemfontein [the property]. Both the afore-mentioned properties belonged to the first respondent, at least until the applicants' purchased the property from first respondent.

[41] In order to purchase the immovable property the applicants loaned an amount of R740 581.00 from Nedbank. The loan was secured by a first mortgage bond registered in favour of the Nedbank over the property. The applicants do not state the exact date when the agreement was concluded, but it can be safely be inferred to be a few days after 13 October 2009, being the date reflected on the pre-agreement statement from Nedbank to the applicants.

[42] The first respondent's case as set out in the summons, as stated, is that a loan, secured by a second mortgage bond over the property, was advanced to the applicants in terms of a written

agreement on 15 October 2009.

[43] The applicants deny that such loan agreement was indeed concluded.

[44] To this end the applicants' *bona fide* defence is tersely stated in the founding affidavit to be:

“ . . . the purported document relied upon was not presented to me as a contract but as a quotation as the heading of the document which reads as PRE-AGREEMENT STATEMENT AND QUOTATION FOR INTERMEDIATE & LARGE CREDIT AGREEMENTS suggests. For ease of reference the Honourable Court is referred to the attached document marked as annexure “AB3” .”

[45] Annexure AB3 contains the said heading to ‘Part 1’ of the document as the applicants contend for. The document however exists of part 1 and part 2. The parts are clearly distinguished. Part 2 has the heading “**TERMS AND CONDITIONS FOR THE INTERMEDIATE MORTGAGE AGREEMENT**”. On page 8 in bold

highlighted capital letters, the following heading appears, **“ACCEPTANCE BY THE CONSUMER CONSTITUTING THE PROPOSED AGREEMENT”**. The said chapter then continues (I quote only the relevant parts):

“1. I confirm that:

1.1 the quotation/pre-agreement statement (Part 1) and the terms and conditions (Part 2) have been explained to me and that I understand my rights and obligations, and the risks and costs of the loan.

1.2 I have been informed that I can refer any further questions I may have to the credit provider at any time.

1.3 I accept the offer of the loan contained in Part 1 and the related terms and conditions in Part 2, and confirm that:

1.3.1 ...;

1.3.2 This acceptance read with Part 1 and Part 2, constituted a binding agreement, being the whole of the Agreement between myself and the credit provider.

2. ...;

3. ...;

4. I am aware that I must not accept this Agreement unless I

understand my rights and obligations and the risks and costs of the loan.”

[46] The applicants not only initialled every page of the document but the document provides for the full signature of the consumer (applicants) both at the end of Part 1 and again in Part 2, immediately underneath paragraph 4 (as quoted) of the acceptance by the consumer constituting the proposed agreement part. Both applicants’ full signatures appear at both the designated places as well as signatures of a witness and the representative of the first respondent.

[47] It is not clear whether the applicants purport to rely on an *iustus error* brought about by a misrepresentation by the first respondent regarding the document, or whether it is their case that the document itself constitutes a misrepresentation, which induced an *iustus error* or excusable mistake. A document can constitute a misrepresentation in certain circumstances. **Brink v Humphries & Jewell (Pty) Ltd** 2005 (2) SA 419 (SCA). The document in question is however not misleading. The applicants simply fail to deal with Part 2 of the document. They do not explain how it came

about that they initialled all the pages and why they signed the document or, for that matter, how they could labour under any mistaken impression as to what they were signing bearing in mind the content of Part 2 and the acceptance clause. The applicants have failed to set out averments which, if established at the trial, would entitle them to the relief they ask for.

[48] Save for the afore-mentioned, the applicants' have a much more fundamental problem with their version. The loan agreement is subject to the registration of a second mortgage bond. The applicants indeed registered the second mortgage bond in favour of the first respondent as continuing covering security for due compliance by them with their obligations in terms of the loan agreement. The exact amount of the loan which was extended by the first respondent – which formed the subject-matter of the action with regards whereto the default judgment was granted - is admitted in the bond to be due, owing and payable by the applicants to the first respondent. The applicants have significantly failed to deal with the said bond, notwithstanding that it is specifically pleaded in the summons. The applicants have clearly been less than frank.

[49] It is necessary to deal with the applicants' averments that no proper service of the summons took place. The summons was served on both the applicants respectively at 19 Doringboom Street, Edenpark, Mandela View, Bloemfontein by service on Me M Maila, a domestic worker, ostensible a responsible person and not less than 16 years of age, of and in control of the chosen *domicilium citandi et executandi* in the applicants' absence.

[50] The applicants' submission regarding the alleged invalid service is premised on two grounds.

[51] Firstly, the applicants contend that no agreement came into existence and thus the parties did not chose domicilium addresses for service of legal process or notices. The applicants argue that the service was accordingly invalid. This ground has effectively been disposed of by my findings that an agreement was concluded and the applicants have failed to show any prima facie ground that would entitle them to be released from the agreement. The argument also fails to take into consideration that the same

address where service was effected was also chosen as domicilium address for purpose of service of legal process and all notices (in terms of the bond) in the second mortgage bond that was registered in favour of the first respondent by the applicants.

[52] The second ground entails that the first respondent was *mala fide* to have the summons served at the chosen domicilium address when its manager, the second respondent, knew or ought to have known that the applicants no longer resided at the said address.

[53] The applicants appointed the domicilium address in the loan agreement as well as in the second mortgage bond, as stated. The applicants never changed the address, notwithstanding that they were entitled to do so in writing.

[54] The said address was agreed to by the parties to be the address where the applicants would accept service of all notices in terms of the agreement and the second mortgage bond as well as the service of legal process in connection with the agreement and/or the bond.

[55] Rule 4(1)(a)(iv) authorises service on a chosen *domicilium citandi et executandi* by delivering or leaving a copy at the domicilium so chosen. Where a *domicilium* was chosen, service there will be adequate even though the defendant, the applicants *in casu*, are known not be living there anymore. **Gerber v Stolze and Others** 1951 (2) SA 166 (T) at 170D–G. **Prudential Building Society v Bothma** 1953 (3) SA 887 (W). **Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd**, 1984 (3) SA 834 (W).

[56] It follows that the service was proper and lawful.

[57] The applicants have failed to advance a *bona fide* defence with some prospects of success. The application can never be said to have been made *bona fide*.

[58] I am therefore of the view that the applicants have failed to show good cause for rescission of the judgment and as such the application stands to be dismissed with costs.

[59] The costs of 15 March 2012, when the matter was postponed by agreement, were reserved to be determined by the court hearing the matter.

[60] The applicants contend that the first respondent should have notified them in terms of Uniform rule 6(5)(d)(iii) that it would take a legal point regarding the form of notice of motion that the applicants had used, instead of disclosing this for the first time in its heads of argument. The applicants thus contend that the first respondent is substantially to blame for the postponement and should pay the wasted costs.

[61] This was however not the reason why the applicants could not proceed with the application on the day that they had enrolled it for hearing. To this end, the first respondent gave proper notice of its intention to oppose the application and the matter was enrolled in the opposed motion court. The applicants then failed to comply with the rule 13.3 of the Rules regulating the conduct of the proceedings of the Orange Free State Provincial Division of the

High Court of South Africa (now the Free High Court, Bloemfontein) [published in GN 820 of 7 September 2007]. In terms of the said rule parties must file heads of argument in opposed motions with the court registrar no later than 15h00 on the Tuesday immediately preceding the motion day, or, if such Tuesday is a public holiday, on such court day preceding such holiday. The applicants filed no heads of argument. The applicants proceeded at their peril by electing not to file heads of argument in the circumstances. The consequence of their failure was inevitably that the application could not proceed on that day.

[61] In **Gelb v Hawkins** 1960 (3) SA 687 (AA), Holmes AJA at 694A said:

‘In seeking a basic principle to apply, I do not think it is necessary or desirable to say more than that the Court has a discretion, to be exercised judicially upon a consideration of the facts in each case, and that in essence it is a matter of fairness to both sides. The various decisions in the reports in regard to costs seem to me to be illustrations of this basic principle.’

[62] I have already found that the application was not bona fide and

had no prospect of success.

[63] Justice will be best served if the reserved costs follow the result.

[64] In the result, the application is dismissed with costs.

N. SNELLENBURG, AJ

First and Second Applicant: Adv. N D Khokho

Instructed by:

Ponoane Attorneys,

Bloemfontein

First Respondent:

Adv. M C Louw

Instructed by:

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