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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: **61088/2020**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

DATE: 28 AUGUST 2024

SIGNATURE

In the matter between:

AVHURENGWI ENOS RAMATLAPA

First Applicant

KARABO MORARE

Second Applicant

and

SB GUARANTEE COMPANY (RF) (PTY) LTD

Respondent

(Registration No.2006/021576/07)

In re:

SB GUARANTEE COMPANY (RF) (PTY) LTD

Plaintiff

(Registration No.2006/021576/07)

and

AVHURENGWI ENOS RAMATLAPA

First Defendant

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 28 August 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] To entertain the application for leave to appeal brought before this Court is to ponder on what the Constitutional Court [CC] re-iterated is the functions of a Court. This is particularly apt in that the first and second applicants [applicants], who are admittedly indebted to the respondents, have delayed the administration of Justice by their actions, and in so doing, deemed it appropriate to allege that this Court was “*bias*” in the exercise of its core function.

[2] The CC highlighted in the matter of Eke v Parsons,¹ that:

“[39] ... Without doubt, rules governing the court process cannot be disregarded. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts

¹ 2016 (3) SA 37 (CC).

have often said '[i]t is trite that the rules exist for the courts, and not the courts for the rules'.

*[40] Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to 'secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice'. I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules, and generally ensuring the efficient administration of the courts' judicial functions."*²

[3] Against this backdrop, the applicants, the defendants in the main action apply for leave to appeal to the Full Court of this Division, against the *ex tempore* judgment and order granted in favour of the respondent on 17 April 2024 in which the applicants' rescission application was dismissed with costs. The judgment which stood to be rescinded was an unopposed summary judgment granted on the 7 March 2022 by Phooko AJ.

[4] To unpack the unsatisfactory turn of events is to deal with the chronology, the procedural elections and events and to carefully consider the part played by the legal practitioners, purported or otherwise and a messenger of this Division.

DISREGARD OF THE COURT'S FUNCTION AND DELAY OF THE ADMINISTRATION OF JUSTICE

² **Hood v Hood, De Aubrey v De Aubrey** 1942 NDP 198 (HODD), reference to **Kgobane and Another v Minister of Justice and Another** 1969 (3) SA 365 (A), which dealt with this concept in the context of the number of condonation applications that were being received by the Appellate Division at the time, which Rumpf JA described at 396H as "*tendency [which] must be reduced in order to ensure that the administration of justice is maintained on a proper level*". See generally Taitz, *The Inherent Jurisdiction of the Supreme Court* (Juta & Co Ltd, Cape Town 1985) at 148, **De Wet and Others v Western Bank Limited** 1977 (2) SA 103 (W), which identified the ability of courts in the then Natal Province to order rescission of judgments even though no relevant rule aligned for such an order existed at the time.

[5] The applicants admit their indebtedness in favour of the respondent. Such indebtedness arises from a home loan agreement concluded between themselves and Standard Bank Limited in June 2016. The registration of first covering continuing mortgage bond over their immovable property in favour of the respondent is admitted. It is common cause that the applicants received the loan amount of approximately R1 800 000.00 and failed to repay the loan amount as agreed upon. The first applicant admits being unemployed in 2020 and unable to pay the indebtedness. The reasons for the second applicant's failure to pay the debt is unclear as she proffers no version. Notwithstanding, the applicants to date, have not demonstrated a willingness to pay their indebtedness since the inception of the legal proceedings in 2020.

[6] The respondent instituted action by way of summons in November 2020. The certificate of balance, as at the material time, indicated a *prima facie* indebtedness. The claim for repayment was met with opposition through, the applicants' attorney of record, Messieurs MJ Mashao Attorneys [Mashao]. The notice to defend was dated the 3 February 2021. From this date, a delay stratagem becomes apparent on the procedural facts. Such stratagem included the use of attorneys and their practices which, to date, do not appear on the Legal Practice Council's [LPC] website as duly admitted legal practitioners nor practising under such name and style.

[7] The stratagem commenced with the applicants' dilatory inaction to serve their plea. Such inaction was met with a notice of bar, some 9 (nine) months after the notice to defend was received. Eventually, on the 6 December 2021, Mashao filed the applicants' plea. The plea in terms of uniform rule 32 was met with an application for summary judgment. The application was set down on the unopposed roll on 7 March 2022. Mashao received service of the application and the final notice of set down was served on his offices on the 17 February 2022.

[8] The applicants did not react to the summary judgment application. No opposition was filed, no opposing papers were filed from which a clearer picture of the triable defences raised in the plea could be gauged, the applicants nor their attorney, Mashao, attend Court on the 7 March 2022. Mashao who, according to

the first applicant, was instructed to deal with the applicants' defence and who had received due notice elected not to appear on his clients' behalf. Such default wilful.

[9] The summary judgment before Phooko AJ, was dealt with on an unopposed basis, and the Court was able to deal with the matter having regard to the pleadings filed as well as the respondent's detailed affidavit filed in support thereof. The respondent in detail dealt with each and every defence raised by the applicants in their plea. The judgment was not erroneously sought nor granted on the unopposed papers and not, in the absence of Mashao who, was on record and received notice.

[10] Summary judgment was granted in favour of the respondent in the amount of R 2 537 687.61 together with interest, against the applicants who were then jointly and severally liable for the repayment thereof and their immovable property was declared executable. A writ of execution was duly authorised.

[11] 3 (three) months thereafter and after the warrant of execution was served, the applicants on 15 June 2022, launched a rescission application to rescind the judgment granted of the 7 March 2022 and to set aside the warrant of execution against the immovable property. The rescission application was signed by the first applicant personally. Mashao, however on the papers, had still not withdrawn as the applicants' attorney of record.

[12] The papers which were filed by the applicants in support of the rescission application consisted of a founding 'affidavit' and confirmatory 'affidavit'. Both 'affidavits' purportedly commissioned by one Robert Charles Maasdorp [Maasdorp]. Maasdorp, at the time was a Court messenger and did not hold office nor was he authorised to administer the oath and commission any document as envisaged in terms of the Justice of the Peace and Commissioners of Oaths Act 16 of 1963 [Oaths Act]. This fact was verified with the office of the Deputy Chief Registrar of this Division. This would explain why Maasdorp did not clearly set out his designation nor his *ex officio* as statutorily prescribed by the Oaths Act and the regulations thereto. Maasdorp rather and disingenuously so, merely inscribed "*The High Court*" as his designation and *ex officio*. Maasdorp then proceeded to detail

the physical address of this Division as the address from whence he held and exercised such 'office' and from where he administered the prescribed oath and affixed his signature. The weight of the applicants' evidence in support of the rescission application clearly disturbed and Maasdorp perpetrating a possible fraud.

[13] The content of the filed papers, in so far as Mashao is concerned, is noteworthy in that the first applicant confirms that he instructed Mashao Attorneys *"to handle the summons on his behalf and entrusted them with the prosecution of his defence"*. No mention of Mashao's mandate ever being terminated was dealt with nor confirmed.

[14] The applicants did not deal with the triable defences raised in their plea in the filed papers, they instead attempted to raise a new defence which had not served before Phooko AJ for consideration.³ The new defence was the allegation of a credit life policy which would cover the debt in circumstances when the applicants could not pay. Reference to the document was made are allegedly attached as annexure "AER2". No such annexure was attached nor did the applicants ever rectify the position notwithstanding invitations to do so. The existence and terms of "AER2" unknown.

[15] Other than filing uncommissioned papers, the applicants took no further steps in the prosecution of their own rescission application nor did they file a replying affidavit. That applicants in fact, left all the remaining procedural steps to the respondent who did so at their own costs in an attempt to obtain finality of the matter. The applicants remained in possession of the property without making any further payments towards the outstanding debt.

[16] On the 29 June 2022 the first applicant and not Mashao, addressed an email to the respondent's attorney in which he merely granted them permission to file further documents by email. The first applicant provided the email address which appeared to be his personal email address, although this is not confirmed. The email communication did not inform the respondents that Mashao had

³ ABSA Bank SA Ltd V Meiring (WCC) at para, 14, Thysseen v Cape Francis Township (Pty) Ltd 1966 (2) SA 115 (E) at 116.

withdrawn as the attorney, the content merely confirmed that documents could be received via email with the use of the given address. In other words the mode of service.

[17] The respondent filed their opposing papers on 22 July 2022 to which the applicants, to date have not replied to. The respondent had to obtain an order to compel the applicants to file heads of argument in their own rescission application to secure as set down of the matter. On the 5 July 2023, more than a year after the initiation of the rescission application, the respondent's secured an order in which prayer 2 stated the following:

“2. *In event that the respondents (the applicants-own emphasis) fail to file their heads of argument in accordance with paragraph 1 above, the applicants (the respondents-own emphasis) may forthwith set the rescission application down on the opposed roll.*”

[18] The applicants simply ignored the Court order too, and failed to file heads of argument to assist this Court. In fact, the applicants remained in contempt of that order on the day the rescission application was heard. This was done without apology.

[19] The applicants actions up and until this point clearly demonstrated a disregard for the Court process, procedure and its orders. In the meantime, the respondent secured a date for hearing and set the matter down, attending too, to the notice of set down.

[20] On the 17 April 2024, when the matter was before this Court, the applicants again wished to delay the hearing of their own application. This was done by allowing an advocate, Advocate Molia to appear on their behalf. Advocate Molia correctly and eloquently at the beginning of the matter excused himself from the proceedings, conveying to the Court that he had not been formally nor properly briefed by the attorney of record and that he was waiting for proper instructions. Such was not forthcoming. Adv Molia's submission appeared to imply that there was an attorney of record who had asked him to appear on behalf of the

applicants but that he had not received formal instructions nor a formal brief. The Court excused Adv Molia on that basis.

[21] The Court, at this stage, was acutely aware of the status of the applicants' evidence and that they had not filed a reply, thus not disturbing the respondent's allegations in its answering affidavit. To assist the applicants this Court enquired whether they wished to address the Court in person. The first applicant did and in argument, sought a postponement. The main thrust was that he, yet again, could obtain legal representation. Having heard submission from the respondent's Counsel and the first applicant in person, the Court was not inclined to delay the matter any further. To assist the first applicant, who confirmed on the record that he had drafted the papers himself, the Court afforded him the opportunity to read the content of his uncommissioned version into the record and to confirm whether he still agreed with the content and if not, in what respect and why. In this way the Court could try and understand the reasons he brought the rescission without simply dismissing for want of evidence in support of the rescission relief. The first applicant stated his case in his own words with the guidance of the papers he drafted. He was heard and made his submissions. However he too, after being asked, could not produce the annexure "AER2".

[22] The basis upon which the applicants relied to rescind the summary judgment was unclear, no evidence was before Court in support thereof, no explanation for his failure to oppose the summary judgment nor why he did not appear himself before Phooke AJ was stated nor explained. He failed to deal with any of his defences raised in his plea as a triable defences which served before Phooke AJ. These defences disregarded. He only referred to annexure "AER2" but conceded no copy was before Court. Nor did he explain why he failed to rely to the respondent's filed answer in the rescission application, the allegation therefore not disturbed. In consequence, the inevitable followed, Phooke AJ had correctly entertained and granted the order on the facts before him. In consequence, the rescission application was dismissed. There was no reason to reserve the judgment and delay the matter any further and reasons were given *ex tempore*.

[23] However, on 22 April 2024, the applicants served their application for leave to appeal to the Full Court of this Division. On 26 June 2024, the parties were informed that this Court would hear the application during its recess either on the 9th or the 11 July 2024. This was to accommodate the parties to bring the matter to finality. The matter was finally set down on the 11 July 2024.

[24] On 8 July 2024, and without Mashao ever formally withdrawing, Malatji Attorneys [Malatji] came on record by notice. Malatji in the notice was cited as the attorney of record in care of Samalenga attorneys. This created the impression that Samalenga was Malatji's correspondent. However, both Samalenga attorneys and Malatji practice in Pretoria and from the same address, situated at the Centenary Boulevard, at 2[...] B[...] Lane, Church Square Pretoria. The reason for the use of the acronym 'c/o' in the notice is unknown, it is confusing and certainly under the circumstances raises suspicion. Furthermore, Malatji's letterhead fails to identify any of its partners nor style under which the practice is registered. Whether practising in a partnership, own account or otherwise. This omission by Malatji is in contravention of provision 15 of the South African Legal Practice Council Codes of Conduct promulgated in terms of section 36(1) of the Legal Practice Act 28 of 2014 [LPC Act].

[25] Notwithstanding, on the 10 July 2024, the day before the hearing of the application for leave to appeal Malatji Attorneys addressed a letter to the respondent's attorney informing them that they only received instructions from the applicants on Monday the 8 July 2024 and that they were not informed by the applicants of the date of set down for the hearing. As they intended to and required to brief counsel to prepare for argument they indicate they could not proceed. Again, the applicants did not appear to want to prosecute their own application for leave to appeal and the unanswered question again is raised, what had become of Mashoa who still remained on record the papers?

[26] On 10 July 2024, the respondent's attorneys responded to Malatji, stating the following:

“Unfortunately we hold instructions not to entertain your request to obtain a new date for the application of leave to appeal and, should you wish to request a postponement of the hearing of the application for leave to appeal, we suggest that either representative of your offices with a right of appearance at the High Court of South Africa, alternatively appointed Counsel attend Court on behalf of your client on the 11th of July 2024, and at the scheduled time for such a request.”

[27] Notwithstanding being told what to do, Malatji did not prepare an application for postponement, did not brief Counsel to prepare nor to appear on behalf of the applicants nor was a practice note filed to explain to the Court what had transpired. The applicants and their legal team simply did not bother to appear on the 11 July 2024 either. Their non-appearance was by election and in consequence wilful.

[28] This Court, notwithstanding their blatant wilful default, to once again assist the applicants, postponed the matter to the 25 July 2024 however with costs and ordered the respondent to serve a notice of set down on Malatji. This was to ensure that on the 25 July 2024 there could be no confusion or misunderstandings of what had transpired in their absence.

[29] Again, on the 25 July 2024, the applicants failed to upload heads of argument, no practice note as per the directive which was uploaded. This inaction, notwithstanding in the time afforded Malatji and the applicants from the 8 July 2024 to the 25 July 2024. In fact, Counsel for the applicants, now an Adv TC Molopyane, during the hearing confirming in the record that he held instructions from Malatji and that ambit thereof was simply to request a postponement. This he did from the bar, without a substantive application for postponement being filed. No reasons under oath were filed and as such no basis before Court nor facts upon which the respondent could reply nor from which this Court could exercise its discretion. What was clear was that Adv TC Molopyane was not informed that the application for leave to appeal had previously been postponed on the 11 July 2024 to assist the applicants to prepare for their own application. The thrust of the submissions made for such postponement was that it was filed without obtaining

the record. A fact this Court was aware of as the applicants had stated as much in their application for leave to appeal yet, despite that proceed to file their application. No explanation of the attempts they had made to obtain a copy of the record was provided. No intimation of a proposed amendment to their application was suggested nor sought. This again a delay stratagem.

[30] The postponement was not granted and this Court provided its full reasons in the record. Adv TC Molopyane stated that he could not take the matter any further and sat down. Deference was given to his instructing attorney who sat, fully robbed behind him. Being robed, suggested an anticipation of the Court's ruling without a substantive application for postponement. The attorney, ostensibly a Mr Moses Mosiko boldly stated his name into the record and confirmed, when prompted, that he was in possession of a section 25 certificate authorising him to appear⁴ in the High Court.

[31] To test the weight of the submission this Court requested Malatji after the hearing to provide proof of Mr Moses Mosiko's section 25 certificate confirming his authority of right of appearance and that he indeed was an admitted attorney in their employ. No response was forthcoming from Malatji. Several attempts were made. In fact, Mr Moses Mosiko's name nor a firm practising as Malatji attorneys at the given address on their letterhead, appears on the LPC's website. Confirmation of Mr Mosiko's admission, his right to appear in the High Court and the proper registration of Malatji with the LPC remains unconfirmed. The necessary authorities will be requested to attend to the further enquiry and consequences thereof.

[32] Notwithstanding, the delay stratagem was confirmed by Mr Mosiko himself in his address when, going to the merits, , *inter alia*, with ease and confirmed that the thrust of the application for appeal lay in this Court's failure in affording the applicants a postponement on the 17 April 2024 and its failure to consider and accept the unsubstantiated allegation of a credit life insurance policy raised by the first applicant. No mention was made of why Phooko AJ on the papers could not

⁴ Section 25(3)(a) of the Legal Practice Act 28 of 2014.

have considered and granted the unopposed summary judgment nor what of the second applicant's defence.

[33] Conversely the respondent's Counsel had prepared concise and helpful heads of argument to assist this Court. This Court has considered the matter and was not persuaded that the applicants have met the threshold of section 17 of the Superior Courts Act 10 of 2013. In fact, this Court is rather inclined to demonstrate its displeasure with the manner in which the applicants and their legal team have conducted themselves and the possible misrepresentations perpetrated and allow the appropriate authorities to conduct their investigations.

[34] There is no reason why the costs should not follow the result. However, the respondents have indicated such to be cold comfort as the recovery as against the applicants has thus far proved futile.

[35] The following order:

1. Application for Leave to appeal is dismissed.
2. This judgment and order is to be brought to the notice of the Legal Practice Council for further investigation and appropriate action.
3. This judgment and order is to be brought to the attention of the office of the Chief or Deputy Chief Registrar of this Division for investigation and appropriate action.
4. The first and second applicants are ordered to pay the costs, taxed on scale B.

L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Date of hearing: 25 July 2024
Date of judgment: 28 August 2024