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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 19320/2022

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES

15 AUGUST 2024	
DATE	SIGNATURE

In the matter between:

MOHALE SOLOMON MASITHELA

Applicant

and

FIRSTRAND BANK LIMITED trading *inter alia* as
RMB PRIVATE BANK

Respondent

Summary: Rescission application- requirements - The Uniform Rules 31(2)(b) require a rescission application within twenty days of acquiring knowledge of a judgment. The parties entered into a "Repayment Arrangement Incorporating Consent to Disposal of Immovable Property" with an unconditional Special Power of Attorney.

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 15 August 2024.

JUDGMENT

Mudau, J:

[1] This is an application to rescind the court order granted by this Court (per Mia J) on 24 October 2022¹. In addition, the applicant ("Mr Masithela") seeks to have this court set aside the repayment arrangement concluded between the parties on or about 25 August 2021; and to interdict the sale of his property pending the finalisation of these proceedings. Mr Masithela seeks such relief on the basis, inter alia, that the repayment arrangement amounts to a reckless credit agreement in terms of the National Credit Act² ("NCA"). In addition, that he remedied his default of the underlying loan agreement in terms of section 129(3) of the NCA by the time the abovementioned court order was granted.

[2] The respondent FirstRand Bank Limited ("FirstRand") opposes this application on the grounds that, (i) no case for condonation has been made out and (ii) Mr Masithela was in wilful default when the above court order was granted. After hearing counsel (the applicant's attorneys filed a notice to withdraw on the date the matter was heard. There was no personal appearance), I made an order consistent with the draft order that counsel for the respondent had provided.

Background facts

¹ When the matter was argued on 12 August 2024, the respondent's attorneys of record had filed a notice of withdrawal the same morning. There was no appearance. Matter was recalled the following day (13 August 2024) to accommodate the respondent who was aware of the matter having been recalled, but he failed to appear. The order was reinstated.

² Act 34 of 2005.

[3] FirstRand brought an application against Mr Masithela in this Court pursuant to a Facility Agreement entered between the parties on or around 23 July 2012, in terms of which FirstRand made available a to Mr Masithela under account number 62370467469 held with FirstRand. As security for the indebtedness, FirstRand required the registration of a first covering mortgage bond in its favour over the applicant's immovable property, being ERF 1[...], M[...] Extension 106, Township Registration Division IR, province of Gauteng, measuring 2010 (Two Thousand and Ten) square meters in extent held by deed of transfer T166546/2007 ("the property").

[4] The applicant was to make monthly repayments of approximately R31 068.95, but defaulted resulting in being indebted to RMB in the sum of R4 153 066.23 ("the Indebtedness") with interest thereon at the time being 6.25% per annum, less 1.25% per annum, calculated daily and compounded monthly in arrears from 21 July 2021 to date of payment. As at the latter date the arrear portion of the indebtedness amounted to R595 484.18. Consequently, Masithela's breach of the terms of the Underlying Agreement culminated in the indebtedness in its entirety falling due for immediate payment. As at 26 April 2023, the arrears were a staggering R985 179.34 on the respondent's version.

[5] The parties later entered into what they termed "Repayment Arrangement Incorporating Consent to Disposal of Immoveable Property" on 19 August 2021. Clause 7 thereof records that: "in view of the Indebtedness having fallen due for payment to FRB" and Masithela "not being in a position to settle the indebtedness forthwith, the parties wish to deal with the repayment of the indebtedness' and the disposal of the Property on the terms set out in this agreement". The purpose of the agreement was to cater for the amicable and expeditious settlement of the Indebtedness without the need to incur the cost and delays associated with litigation (clause 8). There is provision that "to the extent that the National Credit Act 34 of 2005 ("the NCA") applies to the indebtedness or any portico thereof, Mohale records having received a letter in terms of Section 129 of the NCA in respect of the indebtedness and having understood the content thereof and being aware of the options available to him, have opted to enter into this agreement...".

[6] The agreement further recorded that Masithela “has indicated his desire to voluntarily sell the Property with a view to appropriating the proceeds of such sale in settlement or reduction, as the case may be, of the Indebtedness (“the Voluntary Alienation”). It was agreed that Masithela shall settle the indebtedness and any other monies owing to FRB in terms of the agreement by making payment on or before the last day of October 2021 (clause 15). Masithela simultaneously upon signing the agreement executed an unconditional Special Power of Attorney in favour of any manager of FRB (“the FRB representative”) authorising the FRB representative to take all steps necessary to give effect to the disposal of the property upon the breach by the applicant of any of the terms of the agreement (clause 16), which inter alia included selling the Property by way of closed auction or public auction. The agreement was, as indicated from the onset, made an order of court.

Condonation application

[7] Rule 31(2)(b) of the Uniform Rules prescribes that a rescission application must be brought within twenty days of acquiring knowledge of the relevant judgment. In a matter where a rescission application is brought outside of the relevant period, it is trite that an applicant must give a full and reasonable explanation for the delay and the explanation must cover the entire period.³ Regarding the requirement of an absence of wilful default is concerned, it is trite that the reason for default is an essential ingredient of the good cause that an applicant for rescission is required to show. Indeed, the wilful or negligent nature of the default is one of the considerations which this Court must consider in the exercise of its discretion to determine whether or not good cause is established.⁴

[8] It is common cause that on 18 July 2022, a copy of the main application was served on Mr Masithela at his chosen *domicilium citandi et executandi*. On 27 July 2022, Mr Masithela filed his notice of intention to oppose, despite delivery of such a notice, Mr Masithela did not file an answering affidavit. On 10 October 2022, a notice of set down for 24 October 2022 (being the date on which the court order was

³ See *Van Wyk v Unitas Hospital and Another* (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC)).

⁴ See *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529D-E; See also *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd* 2011 (3) SA 477 (KZP) at 485A-C).

granted) was served on Mr Masithela's erstwhile attorneys of record. Despite delivery of such a notice, Mr Masithela and/or his legal representative failed to appear in court on 24 October 2022.

[9] It is common cause that the court order was granted on 24 October 2022, the application for rescission was, however, only served on 27 January 2023, a delay of more than three months. It is common cause that on 20 November 2022, Mr Masithela sent FirstRand's attorneys an email in which he requested an update in the matter. Ms Yvonne Janse van Rensburg, a (then) candidate attorney in the employ of JMS, replied to Mr Masithela on 29 November 2022 and advised, inter alia, that the property would be sold in due course, which presupposed that the court order had already been granted.

[10] The high watermark of Mr Masithela's case on condonation in this matter is that he was suffering from ill-health when FirstRand's attorneys of record informed him of the court order. Peculiarly, he does not say when this was, which allegedly resulted in his hospitalisation. On his version, when he was discharged in December 2022. He allegedly and without more, could not raise the funds to appoint new attorneys, his explanation does not cover the entire period of the delay.

[11] As indicated from the outset, Mr Masithela contends that the repayment arrangement amounts to the granting of reckless credit and/or that he remedied his default of the underlying facility agreement in terms of section 129(3) of the NCA. This proposition is untenable. As it is apparent from that written agreement, the repayment arrangement is not a credit agreement as defined in the NCA, arrangement was merely an indulgence afforded to Mr Masithela to repay his indebtedness on better terms than would otherwise be the case.

[12] As FirstRand contends, the repayment arrangement did not, in and of itself, amount to the advancing of credit to Mr Masithela. Neither was interest (other than as provided for in the underlying loan agreement) payable on any amount due deferred. Clearly, from a proper reading and construction of their agreement the repayment arrangement was not intended to be, nor did it amount to, a novation of the underlying cause of action but to address the applicant's indebtedness and how

it can be resolved. It is a trite approach regarding the interpretation of documents, that the process of interpretation is '...a unitary exercise that requires the consideration of text, context and purpose...'

[13] In the often-quoted case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*,⁵ Wallis JA had the following to say:

“Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself ‘.

[14] Quite clearly and from a proper reading as highlighted above, the repayment agreement envisaged that the settlement of his indebtedness to FirstRand would be from the proceeds of such sale of his property on terms stipulated in their agreement regarding the repayment arrangement.

[15] It apparent from a consideration of all the facts and the applicable law that Mr Masithela has not made out a case for condonation and was in wilful default when the order was granted. No suggestion is made that the agreement was not wilfully entered or obtained fraudulently. The relief claimed to set aside their repayment agreement is without basis. Neither has he raised a bona fide defence to the bank’s claim. FirstRand sought an order that Mr Masithela's application be dismissed with costs on an attorney and client scale. First, such costs are provided for in the underlying facility agreement. Secondly, such costs are provided for in the repayment arrangement and lastly, for launching a frivolous and meritless application. I agree.

order

⁵ [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at [18].

[16] It is for the above reasons that I grant the order dismissing the application with costs on an attorney and client scale.

TP MUDAU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 12 August 2024 and 13 August 2024

Date of Judgment: 15 August 2024

APPEARANCES

Counsel for the Applicant: No appearance
Instructed by: Maja Attorneys withdrew
on 12/08/2024

Counsel Respondent: Adv. MD Oliveira
Instructed by: Jason Michael Smith Attorneys Inc.