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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Date: 22 October 2024

Signature: _____

CASE NO: 2022/21790

DATE: 22 October 2024

In the matter between:

FIRSTRAND BANK LIMITED trading *inter alia* as Applicant
FIRST NATIONAL BANK and as FNB

And

FELICO GENERAL MERCHANDISE CC
(Registration No. 2005/097976/23)

First Respondent

UMUNNAKWE, EMEKA
(Identity No. 6[...])

Second Respondent

Coram: M Van Nieuwenhuizen, AJ

Heard on: 14 October 2024

Delivered: 22 October 2024

JUDGMENT

M VAN NIEUWENHUIZEN, AJ:

[1] On the 17th of January 2023 a monetary judgment (*“the Judgment”*) was granted by default against the first and second respondents (*“the respondents”*) on the basis that the respondents had failed to file an answering affidavit in that application (*“the main application”*).

[2] On 5 May 2023 the respondents served a notice of set down and an application for rescission of the Judgment (*“the rescission application”*). The Notice of Motion in the rescission application states that it is supported by an affidavit of the *“applicant”* (sic) and it is dated 20 February 2023. However, the founding affidavit in support of the rescission application was in fact deposed to by Odirachukwu Stephen Mwim, the respondents’ attorney of record in the rescission application. The second respondent did not file a confirmatory affidavit personally or in his capacity as a member of the first respondent together with the founding affidavit.

[3] The applicant (*“FRB”*) opposed the rescission application on 12 May 2023 and on the 2nd of June 2023 delivered a notice in terms of Rule 6(5)(d)(iii), giving notice of its intention to raise a point of law in that the application is based on inadmissible hearsay evidence and ought to be dismissed. FRB alleged that the entire affidavit deposed to by Mr Mwim in support of the rescission application was based on inadmissible hearsay evidence.

[4] On the 15th of October 2023, and in response to FRB’s attorney of record’s two previous e-mails, the respondents’ attorney (Mr Mwim) responded by e-mail and enclosed a confirmatory affidavit by the second respondent dated 9 June 2023.

[5] This is an application to set aside this confirmatory affidavit as an irregular step or proceedings in terms of Uniform Rule 30(2)(c).

[6] On the 27th of October 2023 the applicant delivered a notice in terms of Rule 30(2)(b), which complaint the respondents have failed to remove resulting in the current application.

BASIS FOR THE RULE 30(2) APPLICATION

[7] The cover e-mail of 15 October 2023 (Annexure “NR6”) from Mr Mwim alleges that the second respondent deposed to and signed the confirmatory affidavit when he was on a trip out of the country and that he was not in the country at the time of filing and that Mr Mwim only received the original document when the first respondent (sic) arrived in South Africa. He allegedly arrived back in South Africa on 20 April 2023.

[8] The confirmatory affidavit was, however, only signed on 9 June 2023 and in Pretoria and shortly after the second respondent had received the Rule 6(5)(b)(iii) notice. The confirmatory affidavit fails to contain any explanation as to why it is filed more than seven months after the founding affidavit had been delivered and there is no application made in support of the filing of a further affidavit.

[9] There is furthermore no explanation why there is no mention of a confirmatory affidavit in the founding affidavit in the rescission application or the reasons why a confirmatory affidavit was not attached to the papers.

[10] FRB argues that a proper response to this application or the notice preceding the application would have been an application requesting the Court to condone the late filing of the confirmatory affidavit setting out proper reasons for the delay and alleging that the respondents have good prospects of success in the rescission application. The applicant argued that the respondents have failed to do. Instead, they have embarked on a futile application in compelling the applicant to file an opposing affidavit.

[11] The respondents have further failed to take the Court into their confidence

and explain the nature of the emergency travel that was allegedly required as well as the delay between the time that the second respondent returned to South Africa on the 20th of April 2023 and 9 June 2023 when he finally signed the confirmatory affidavit.

PREJUDICE

[12] In argument it appears that the respondents have conceded that the confirmatory affidavit had been delivered irregularly. The respondents however argued that there is no prejudice suffered by the applicant and that the applicant “*must merely deliver its answering affidavit*” in the rescission application. The respondents allege that in fact the applicant is causing a delay in not filing its answering affidavit.

[13] The applicant alleges that it is prejudiced by the random filing of the confirmatory affidavit without it being set aside as an irregular step in that should the Court admit it “*then FRB will have to decide if it wishes to persist with the Rule 6(5)(d)(iii) notice*”. The applicant alleges that the failure of the respondents to seek leave to admit the affidavit, alternatively apply for condonation for the late filing of the confirmatory affidavit has the effect of disrupting and delaying the finalisation of the matter.

[14] Under normal circumstances, if the founding affidavit in support of the rescission application consisted of admissible allegations the applicant would have been required to file an answering affidavit to the founding affidavit. As the founding affidavit, however consisted entirely of inadmissible hearsay evidence, and no admissible evidence at all, FRB was not required to respond thereto and instead delivered a notice in terms of Rule 6(5)(d)(iii) on the 2nd of June 2023, as it was entitled to do. The applicant argued that it did not “*fail or refuse*” to file an answering affidavit as alleged by the respondents.

[15] It is evident that the founding affidavit in support of rescission consists entirely of hearsay evidence.

[16] The applicant argued that the respondents ought to have prepared heads of argument, a practice note and a chronology in preparation for setting the rescission application down only in terms of a point of law. Instead the respondents e-mailed FRB's attorney of record attaching a document titled "*confirmatory affidavit*" dated 9 June 2023.

[17] Should this Court dismiss the application and the confirmatory affidavit is accepted into evidence, the applicant is not entitled to merely deliver an answering affidavit as suggested by the respondents. The applicant will have to satisfy the Court that it was not acting *mala fide*, that an adequate explanation for the failure to file an affidavit on the merits is given and where justice demands that the applicant should have further time for the purpose of presenting its case.¹

COSTS

[18] The late filing of the confirmatory affidavit seven months after delivery of the application for rescission constitutes an abuse of process.

[19] The respondents' attorney was advised by FRB's attorney of record on 21 August 2023 and again on 3 October 2023 that the next step after filing the Rule 6(5)(d)(iii) notice was to attend to setting the matter down for hearing. Instead on 15 October 2023 Mr Mwim sent an e-mail attaching the confirmatory affidavit and placing FRB under timelines within which to file an answering affidavit when FRB was not required to do so under the circumstances.

[20] The respondents failed to bring a condonation application for the late delivery of the confirmatory affidavit or an application for leave to file a confirmatory affidavit.

¹ De Villiers J in his descending judgment in ***Standard Bank of South Africa Ltd v RTS Techniques and Planning (Pty) Ltd*** 1992 (1) SA 432 (T), which is reported *sub-nomine* in ***Standard Bank of South Africa Ltd v RTS techniques and Planning (Pty) Ltd*** 1992 (2) SA 532 (T)

ORDER

[21] The filing of the confirmatory affidavit dated 9 June 2023 in the rescission application is set aside as an irregular step or proceeding.

[22] The respondents are entitled to file an application for leave to admit the confirmatory affidavit dated 9 June 2023 into evidence, should they so wish.

[23] The respondents are to pay the costs of the application on the scale as between attorney and client.

Delivered: This judgment was prepared and authored by the Judges whose names are reflected 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 hand-down is deemed to be on 22 October 2024.

HEARD ON:	14 October 2024
DATE OF JUDGMENT:	22 October 2024
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