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

Case Number: 2023-050021

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

In the matter between:

NKULULEKO MANQELE

FIRST APPLICANT

(Identity number: 8[...])

PALESA VALENTINE MAGAKOA

SECOND APPLICANT

(Identity number: 9[...])

And

SB GUARANTEE COMPANY (RF) (PTY) LTD

FIRST RESPONDENT

(Registration Number: 2006/021576/07)

**THE SHERIFF OF THE HIGH COURT, SANDTON
NORTH**

SECOND RESPONDENT

in re

SB GUARANTEE COMPANY (RF) (PTY) LTD

APPLICANT

(Registration Number: 2006/021576/07)

And

NKULULEKO MANQELE

FIRST RESPONDENT

(Identity number: 8[...])

PALESA VALENTINE MAGAKOA

SECOND RESPONDENT

(Identity number: 9[...])

JUDGMENT

Introduction

[1] This is an application for rescission of a court order granted on 11 September 2023 against the first and second applicants, allegedly in their absence (the “court order”). In this judgment I will refer to -

- a. the application which resulted in the court order being granted as the “main application”;
- b. the first applicant in these rescission proceedings as Mr Manqele and the second applicant as Ms Magakoa; and
- c. the first respondent in these rescission proceedings as SB Guarantee Company.

[2] SB Guarantee Company was the applicant in the main proceedings and Mr Manqele and Ms Magakoa were first and second respondents respectively in the main proceedings.

[3] In terms of the court order, Mr Manqele, and Ms Magakoa were ordered to pay SB Guarantee Company an amount of R8 294 955.00 plus interest and costs and

certain residential immovable property at 1[...] D[...] Ave, B[...] (the “property”), was declared specially executable.

[4] It is common cause that the property is the primary residence of Mr Manqele but is not the primary residence of Ms Magakoa. Mr Manqele and Ms Magakoa are estranged.

[5] Mr Manqele and Ms Magakoa state that neither the main application nor the court order came to their notice until 26 January 2024.

[6] Mr Manqele and Ms Magakoa apply for rescission on two bases. The first is on the basis that the court order was erroneously sought and erroneously granted in their absence. The second is on the basis of the common law, for which they must show sufficient cause for the rescission including a reasonable explanation for the default and a bona fide defence.

The sheriff's return of service

[7] in terms of Rule 46A(3)(d) –

“every notice of application to declare residential immovable property executable shall be served by the sheriff on the judgement debtor personally...”

[8] A copy of the sheriff's return of service upon which SB Guarantee Company relies to show personal service of the main application on Mr Manqele is attached as annexure “M4” to Mr Manqele's founding affidavit in these proceedings. The return was dated 14 August 2023 and in it the sheriff stated –

IT IS HEREBY CERTIFIED:

That on 14 August 2023 at 10h35 at UNIT 1[...], 1[...] D[...] A[...], B[...] being the 1st Defendant's chosen domicilium citandi et executandi a copy of the NOTICE OF APPLICATION TO DECLARE IMMOVABLE PROPERTY EXECUTABLE was served to, NKULULEKO MANQELE personally after the original document was displayed and the nature and contents thereof explained to him. Rule 4(1)(a)(i).

[9] The Superior Courts Act¹ provides-

"the return of service of a deputy sheriff of what has been done upon any process of a court, shall be prima facie the evidence of the matter therein stated"

Mr Manqele

[10] Mr Manqele, in his founding affidavit, denies that there was any personal service of the main application upon him –

- a. On 14 August 2023, Mr Manqele was in Albert Falls, KwaZulu-Natal, filming season 2 of the television series "Ingono Yomsamo." The call sheet (which he attaches), shows the crew departed for Albert Falls at 06:00 on 14 August 2023 and returned on 18 August 2023. Mr Manqele says he arrived at Albert Falls before 14 August 2023, because he travels ahead of the crew;
- b. WhatsApp messages between 12 August 2023 and 17 August 2023 indicate communications between Mr Manqele with a colleague, a Mr. Mkhize, based in KwaZulu-Natal. One message on 14 August 2023 states "Guys have arrived," to which Mr Manqele responded "I'm outside too" at 14:37. This, he says, refers to being at Albert Falls outside Mr. Mkhize's house.
- c. It would have been impossible to meet with the sheriff at 10:35 AM in Bryanston and be at Albert Falls at 14:37.

[11] The sheriff deposed to an affidavit setting out what he says happened on 14 August 2023. The sheriff stated –

I confirm that service was completed on the 1st Respondent personally, as he confirmed to me that he is indeed the 1st Respondent. It was served in the court yard garden to the left of the house. I (sic) copy of my Google Maps extract is attached hereto marked annexure "RG2". Furthermore, about thirty minutes following service I was contacted by a person who alleged that he was the 1st Respondent's attorney informing me that they intend on resolving the matter. Shortly after, the 1st Respondent phoned me personally to enquire

¹ 10 of 2013

whether his attorney had called me, and again confirmed that the matter was being resolved.

[12] Mr Manqele in reply states –

... it is clear that the said sheriff failed to confirm the identity of the person he allegedly spoke to (assuming this to be true, which is not conceded).

Insofar as the alleged Google Maps summary relied upon by the said sheriff is concerned, it is not within my knowledge whether or not the sheriff attended in the area of my property that day, but I specifically deny that the sheriff served any documentation on me personally as I was not at the property on 14th of August 2023 as stated in my founding affidavit.

Insofar as the said sheriff alleges that an undisclosed person, alleging to be my attorney phoned him, apparently intendant (sic) "on resolving the matter", this is specifically denied . I did not instruct any attorney at all in August 2023 and my current attorney of record was instructed for the first time in February 2024 after I received the notice of sale. I sought legal assistance for the first time in February 2024.

Insofar as the said sheriff alleges that I called the sheriff to enquire whether my attorney had called him and "confirmed that the matter was being resolved", this is specifically denied.

I do not understand what the sheriff means "in the court yard garden to the left of the house". The house itself, is on the left and there is no courtyard garden. There are three other houses at the street address , linked by a driveway.

[13] Neither version concerning the service of the main application is particularly satisfactory. For example Mr Manqele could easily have filed an affidavit from Mr Mkhize confirming that Mr Manqele was with him in KwaZulu-Natal on 14 August 2023. Similarly the sheriff could have done more to confirm that the person upon whom he was serving the main application, was Mr Manqele.

[14] Given that the sheriff did serve the main application on a person, the question remains - was that person Mr Manqele? The only evidence supporting this is the sheriff's statement that the person he served it on, confirmed that he is the first

respondent (in the main application). The evidence of Mr Manqele himself contradicts this.

[15] The sheriff's statement that he was later contacted by a person who alleged that he was the first respondent's attorney is not helpful. Mr Manqele denies that he was represented by an attorney at the time and it is doubtful that Mr Manqele was in fact legally represented at the time. As appears from the founding affidavit, during 2023 Mr Manqele conducted his dealings with the Standard Bank himself and was not legally represented.

[16] The sheriff goes on to say Mr Manqele telephoned him personally to enquire whether his attorney had called the sheriff, and confirmed that the matter was being resolved. This is again denied by Mr Manqele.

[17] The sheriff makes mention of Google Maps. That evidence goes no further than showing that the sheriff went to the property at that specified time and date.

[18] This is not to say that the sheriff was being untruthful in his affidavit. He made it clear in his affidavit that he relied on or was repeating what other people had told him.

[19] SB Guarantee Company submits, correctly, that the onus rests on Mr Manqele if he wishes to impeach the facts as set out in the return of service. The sheriff's return setting out personal service stands as prima facie evidence that such personal service was effected.

[20] Relying on *Sussman and Company (Pty) Limited v Schwarzer*² SB Guarantee Company submits that the Mr Manqele must show by clear evidence that what is set out in the return of service is not correct. The *Sussman* case and the cases that followed it, were dealing with a sheriff's *nulla bona* return under section 8(b) of the Insolvency Act³.

² 1960 (3) SA 94 (O)

³ No. 24 of 1936

[21] In my view this matter is distinguishable from the Sussman decision. Here we are dealing with proceedings under Rule 46A. In Absa Bank Ltd v Njolomba and Another, and Other Cases⁴, after quoting from Nkata v FirstRand Bank Ltd and Others⁵ Fisher J held –

There have, of late, been salutary moves in the statutes, case law, rules, and practice directives to introduce a measure of flexibility into the execution process where it is sought to execute against the home of a debtor. These laws and rules emanate from an accepted need to promote the objects of our Bill of Rights and especially the requirement that all relevant circumstances be considered before depriving a person of his or her home. They include the requirement that immovable property not be executed against without judicial oversight being brought to bear thereon and the recent introduction of rule 46A into the Uniform Rules, which requires that the court consider alternative means of satisfying the judgment debt, other than execution against the judgment debtor's primary residence. The cases have required stringent adherence to notices and service requirement and the furnishing of details in relation to the steps taken to manage the indebtedness of the debtor. Recent amendments to Rule 46 of the Uniform Rules require the consideration by the court of alternative means of satisfying the judgment debt. These changes impose an even more rigorous investigative function on a court faced with an application for a declaration of executability and require still more information to be forthcoming in relation to the debtor's circumstances and the value of the property. This assists in setting appropriate reserve prices and other sale conditions in the event of execution against the property becoming necessary. However, the process has, as its main endeavour, to maintain the mortgage loan and to rehabilitate the debtor if at all possible.

[22] Given the court's oversight obligations and requirement to consider alternative means of satisfying the judgment debt which, in turn, require information to be forthcoming in relation to the debtor's circumstances and the value of the property, it

⁴ 2018 (5) SA 548 (GJ)

⁵ 2016 (4) SA 257 (CC)

is important to ensure that the debtor is given the opportunity to place facts before a court to allow a proper exercise of the court's functions under the Constitution and Rule 46A.

[23] This means that a court should be satisfied that the debtor has been given the information that he or she requires to place facts before the court to enable the court to fulfil its functions.

[24] The starting point is for the court to be satisfied that the debtor has been served with the creditor's application. In this regard the sheriff's return of service is prima facie evidence of what has been done. If the respondent denies personal service the onus rests on him or her if he or she wishes to impeach the facts set out in the return of service.

[25] In my view and in the context of proceedings under Rule 46A, this onus is discharged on an ordinary balance of probabilities and not by "*the clearest and most satisfactory evidence*" referred to in Sussman's case.

[26] Returning to the matter under consideration, Mr Manqele says he was not at 1[...] D[...] Avenue, B[...] when the application was served. He says he was in Kwa-Zulu-Natal and provides some corroborative evidence to this effect. The sheriff, in his affidavit states that the person upon whom he served the application confirmed that he was the first respondent (in the main application). There is no evidence available to decide whether this person understood the question being asked or whether he was being truthful in his answer or not.

[27] Taking all the facts into account, in my opinion Mr Manqele has discharged the onus to prove, on a balance of probabilities, that the main application was not served on him personally. I therefore find that the court order against Mr Manqele has been granted erroneously and falls to be rescinded⁶.

⁶ Fraind v Nothmann 1991 (3) SA 837 (W)

Ms Magakoa

[28] In terms of the court order, both Mr Mangele and Ms Magakoa were ordered to pay SB Guarantee Company an amount of R8 294 955.00 plus interest and costs and the property was declared specially executable.

[29] In Absa Bank Ltd v Mokebe and Related Cases⁷ it was held –

...

1. In all matters where execution was sought against a debtor's primary residence, the entire claim, including the money judgment, had to be adjudicated at the same time. The money judgment in personam was the basis of, and a necessary averment in, the claim in rem for execution. ... Since the two claims were inextricably interlinked, they had to be brought at the same time in one proceeding. If the matter required postponement, it had to be postponed in its entirety.

...

[14] In our view the money judgment is an intrinsic part of the cause of action and inextricably linked to the in rem claim for an order for execution, the latter which is non-existent without the money judgment. The default of the debtor and the money judgment are a precondition for the entitlement of the mortgagee to foreclose.

[15] It is also intrinsically linked because the claim for execution is accessory in nature and is dependent for its existence on the obligation which it secures.

...

[18] We ... regard this ... as support for the view that personal action for a money judgment goes hand in hand with the claim in rem based on the bond judgment, must be adjudicated at the same time.

...

[29] There is, therefore, a duty on banks to bring their entire case, including the money judgment, based on a mortgage bond, in one proceeding simultaneously. Should the matter require postponement for whatever reason,

⁷ 2018 (6) SA 492 (GJ)

the entire matter falls to be postponed and piecemeal adjudication is not competent.

[30] In the main application both Mr Manqele and Ms Magakoa were ordered to pay SB Guarantee Company an amount of R8 294 955.00 plus interest and costs and the property was declared specially executable.

[31] I have decided that the court order against Mr Manqele has been granted erroneously and falls to be rescinded. This results in the order declaring the property specially executable being rescinded.

[32] The personal action for the money judgment against Mr Manqele and Ms Magakoa is inextricably linked with the claim *in rem* based on the bond judgment. With the bond judgment being rescinded, this means that the money judgment in the court order against Ms Magakoa must be rescinded as well.

Costs

[33] With the judgment being rescinded because of non-service and with no consideration of the merits, another court will determine whether SB Guarantee Company is in fact entitled to an order on the same or similar terms to the court order now rescinded.

[34] That court will be in a better position to decide who should bear the costs of this application. In my opinion therefore, costs should be reserved.

Order

It is ordered –

A. the default judgment granted against Nkululeko Manqele (Identity number: 890512 5073 082) and Palesa Valentine Magakoa (Identity number: 900306 0048 084) on 11 September 2023 under case number 2023-050021 is rescinded;

B. any writ of execution issued by SB Guarantee Company (RF) (Pty) Ltd (Registration Number: 2006/021576/07) pursuant to the court order dated 11 September 2023 under case number 2023-050021 is set aside;

C. costs are reserved.

A MITCHELL

Acting Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 24 March 2025.

HEARD ON: 17 February 2025

DECIDED ON: 24 March 2025

For Applicants: Matthew Kerr-Phillips
Attorney with right of appearance
011 467 4562
matthew@mkplaw.co.za

For First Respondent: Adv AJ Venter
ajventer@law.co.za
082 551 4108
Attorneys
Alexandra Pesci
Martins Weir-Smith Inc
Tel: 011 450 3054
Email: alexb@mwlaw.co.za

For Second Respondent: No appearance