

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

Case Number: 2012/40121

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

23 October 2025

In the matter between:

**MOSES LEMOGO MODISANE
(IDENTITY NO: 6[...])**

First Applicant

**MIRRIAM KEITHENG MODISANE
(IDENTITY NO: 6[...])**

Second Applicant

and

ABSA BANK LIMITED

First Respondent

THE SHERIFF OF THE COURT

Second Respondent

Date of Hearing: 23 October 2025

Date of Judgment: 23 October 2025

JUDGMENT

ESTERHUIZEN, AJ

NATURE OF APPLICATION

- [1] This is an application in which the first and second applicants (“applicants”) seek to set aside an order dated 20 November 2023, fixing a reserve price in terms of Rule 46A(9)(a) & (b) for the sale of portion 1 of erf 6[...] Brixton Township (‘the property’).

BACKGROUND

- [2] During 2007 the first respondent and the applicants entered into a Mortgage Loan Agreement (“the agreement”). The agreement was subject to the registration of a mortgage bond by the applicants in favour of the first respondent as security for the loan granted. All conditions were met, the home loan fully implemented, paid out to the applicants and the bond subsequently registered.
- [3] Following the applicants’ default on their payments the first respondent issued summons against the applicants. On 4 June 2013 a default judgment was granted in favour of the first respondent against the applicants jointly and severally, the one paying the other to be absolved (“the default judgment order”).
- [4] On 30 September 2013 judgment was granted in which the property was declared specially executable in accordance with the provisions of Rule 46(1)(a)(ii) of the Uniform Rules of Court (“the executability order”).

[5] During October 2013 a writ of execution ("the writ") was issued and the property was subsequently judicially attached.

[6] On 28 January 2016 the Property was sold at a sale in execution. Due to the fact that the purchaser failed to carry out all of his obligations under the conditions of sale, an application in terms of Rule 46(11) of the Uniform Rules of Court was launched and on 28 May 2018 an order cancelling the sale was granted.

[7] On 16 October 2023 the first respondent launched an application for the fixing of a reserve price in terms of Rule 46A(9)(a) & (b) ("the rule 46A order") and on 20 November 2023 the court granted an order that:

"2. A reserve price for the first sale in execution of the immovable property is set at R660 000.00.

3. In the event that the reserve price, as referred to in prayer 2 above, is not achieved at the first sale in execution, the immovable property may be sold at a second sale in execution, on a date different to that of the first sale in execution, and the reserve price for the second sale in execution is set at R530 000.00;"

[8] The first respondent scheduled a sale in execution for the property to be held on 14 March 2024. On the same day that the sale in execution was scheduled the applicants launched an urgent application, to be heard on 19 March 2024, in which the applicants sought an order that the sale in execution of the property on the 14th of March 2024 be suspended pending the rescission application by the applicants.

[9] Notwithstanding the above, on 14 March 2024 the sale in execution was declared a “no-bid-no-sale”, and the applicants’ urgent application was subsequently removed from the roll.

[10] On 13 March 2024 the applicants launched the present application to rescind and/or set aside the Rule 46A Order.

DISCUSSION

[11] The applicants have never attempted to rescind or set aside the default judgment order or the executability order, and they are not seeking to set these orders aside in the present application. These orders accordingly stand. Even if the applicants made out a case for the rescission of the Rule 46A Order, which for the reasons set out below they have not, it will have very little practical effect as the first respondent would simply proceed with the sale without a reserve price.

[12] What the applicants’ application does not disclose is the legal basis on which the rescission is being sought. The applicants failed to file any heads of argument, nor did they provide any input into the joint practice note to shed any light on the nature of their application. This left both the court and the applicants in the dark as to the basis of the application. This notwithstanding considering all the known rescission options the applicants application falls hopefully short of making out a case to support a rescission and or setting aside of the Rule 46A order. This is evident from the following:

Rule 31(2)

[13] Rule 31(2)(b) of the Uniform Rules of Court provides as follows:

“(b) A defendant may within 20 days after acquiring 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 it deems fit.”

[14] Rule 31(2)(b) makes provision for the setting aside of a default judgment which in this instance was already granted on 4 June 2013. Not only will the applicants' application be dismally late but, as stated, their application is not to set aside the default judgment granted in 2013.

[15] The Applicants do not make any allegations in their papers that could remotely support an application in terms of Rule 31(2)(b). They do not show an absence of wilfulness¹, they do not provide any, let alone a reasonable

¹ In *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 804 C-E the court made the following pronouncement:

*“It is clear on authority that a defendant who knows that default judgment is to be taken against him and does not demur but allows the plaintiff to take his course, is presumed to be in wilful default and is not entitled to rescission of the judgment. In this Division there are the decisions of *Hendricks v Allen* 1928 CPD 519 (Gardiner JP and Watermeyer J); *Chedburn v Barkett* 1931 CPD 421 (Gardiner JP and Sutton J) and *Newman v Ayten* 1931 CPD 454 (Gardiner JP and Sutton J) to the effect that, in the words of Gardiner JP in *Hendricks v Allen* at 521:*

‘If he knows that a case is coming on, and whatever his motive, deliberately refrains from entering appearance, then it seems to me there is wilful default: His reason need not be, to my mind, that he knows he has no defence; he may have some other motive, but, knowing that he is summoned to appear, if he deliberately fails to enter an appearance, from whatever motive, it seems to me there is wilful default.’”

explanation, for their default and set out no defence to the first respondent's claim, in fact the applicants acknowledge that they are in arrears.

[16] Therefore, had it been the applicants' intention to base their application on rule 31(2) they have failed to do so.

Rule 42(1)

[17] In their founding affidavit the applicants make a bold allegation, without any evidence to support it, that:

"I will ask this Court to rescind such an order as it was granted by means of misleading information as I was not even represented by a legal representative at the time that this order was obtained by the first Respondent."

[18] To the extent that the Applicants seek to rely on Rule 42(1) they need to comply with its requirements. Rule 42(1) provides:

"42 Variation and Rescission of Orders

- (1) *The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
 - (a) *An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
 - (b) *an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission".*
 - (c) *an order or judgment granted as the result of a mistake common to the parties."*

[19] An order is “*erroneously sought or erroneously granted*” if it was legally incompetent for the court to have made the order, or the order was without legal foundation.² In *Marais v Standard Credit Corporation* the court said, with reference to rule 42(1)(a):³

“In my view the word ‘erroneously’ covers a matter such as the present one, where the allegation is that for want of an averment there is no cause of action, ie nothing to sustain a judgment, and that the order was without legal foundation and as such was erroneously granted for the purposes of rule 42(1)(a).”

[20] The applicants need to make out a case that the Rule 46A Order was erroneously sought or erroneously granted which they have failed to do. There is nothing to support a finding that the court was not legally competent to have granted the Rule 46A Order. I agree with counsel for the first respondent that a judgment to which a party is procedurally entitled cannot be said to be erroneously granted by reason of facts of which the judge who granted the judgment was unaware. Similarly, a judgment to which the first respondent (plaintiff in the action) was procedurally entitled in the absence of the applicants (defendants in the action), cannot be said to have been granted erroneously, in light of a subsequently disclosed defence, which the applicants in any event did not raise.

[21] The applicants further fail to allege any ambiguity, patent error or omission in the Rule 46A Order. There is no argument made to suggest that the Rule 46A

² *Athmaram v Singh* 1989 (3) SA (D) at 956D-957A.

³ *Marais v Standard Credit Corporation* 2002 (4) SA 892 (W), at 897A-B.

Order was granted as the result of a mistake common to the applicants and the first respondent.⁴

[22] Therefore, had it been the applicants' intention to base their application on rule 42(1) they have failed to do so.

Common law rescission

[23] In order to show good cause for a rescission at common law an applicant should comply with the following requirements:

[23.1] It must give a reasonable explanation of the default.

[23.2] The applicants must show that they have a *bona fide* defence to the first respondent's (plaintiff in the action) claim.⁵

[24] It is not sufficient if only one of these two requirements have been met.⁶ In this instance neither have been met. The applicants in fact admit that i) they

⁴ The "mistake" referred to in rule 42(1)(c) must relate to and be based on something relevant to the question to be decided by the court at the time. In *Thivase Royal Council v Thivase* 1992 (4) SA 852 (A) at 863 the court held:

"The principle is that you cannot subsequently create a retrospective mistake by means of fresh evidence which was not relevant to any issue which had to be determined when the original order was made. The reason is obvious: the Court would at that time have had before it no evidence and thus no wrong evidence on the point; hence there would have been no mistake."

See also Harms, Civil Procedure in the Superior Courts, paragraph B42.5

⁵ *De Witt Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (E) at 708 H – 709 D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), paragraph [11]

are in arrears with their payments; ii) they admit that they were provided with an opportunity to mediate the dispute, but they could not reach a settlement and iii) they admit having been served with papers that the property would be sold. Therefore, if anything, on the applicants own admissions, they are indebted to the first respondent.

[25] Affordability of making payment in terms of an agreement is not a defence to the applicants' claim for payment of the outstanding debt which has increased substantially since the institution of the claim by the applicants. As the applicants raise no defence, let alone any prospects of success on the merits, their application must fail.

[26] Therefore, had it been the applicants' intention to base their application on the common law they have also failed to do so.

[27] In the circumstances the Applicants application cannot succeed and stands to be dismissed.

COSTS

⁶ See e.g. *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 418B ("It is not sufficient if only one of these elements [for 'sufficient cause'] is established."); *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765C-E "It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

[28] The first respondent prays for an order that the applicants be held liable to pay the costs of this application on punitive scale due to the frivolous nature of their application. I agree that this case calls for a punitive cost order when regard is had to the manner in which the applicants approached it. The applicants failed to comply with the Uniform Rules of Court by not filing Heads of Argument and did not provide any response on the Joint Practice note. The applicants had not even attempted to bring the application within the realm of any of the known rescission remedies but instead elected to simply use the exact same affidavit it used in its urgent application in support of this application in which completely different relief is being sought. The approach by the applicants in this instance was no more than a delaying tactic and thus justifies a punitive cost order.

Therefore, I make the following order:

ORDER

1. The Applicants application is dismissed.
2. The Applicants to pay the costs of this application on an attorney and client scale.

**ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

Applicants: In Person

Attorneys for first respondent Tim du Toit & Co Inc

Counsel for first respondent A J Reyneke