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

Case Numbers: 1999/3354

(1)	REPORTABLE: YES / NO		
(2)	OF INTEREST TO OTHER JUDGES: YES / NO		
(3)	REVISED: YES / NO		
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In the matter between:

NEDBANK LTD

Applicant

and

MAMOKELE MARIA MOISI N.O.

First Respondent

FINAL HOUSING SOLUTION PTY LTD

Second Respondent

THE REGISTRAR OF DEEDS: JOHANNESBURG

Third Respondent

JUDGMENT

Introduction

[1] This is an application for the rescission of a default judgment granted on 5 March 1999. The application is instituted in terms of rule 42(1) of the Uniform Rules of Court. The second respondent opposes this application on various grounds. In addition the second respondent raises the following points in *limine*— (a) that there was foreseeable dispute of fact; (b) the non-joinder of necessary parties; and (c) the lack of *locus standi*.

Background facts

[2] The applicant is Nedbank Ltd, previously known as Nedcor Bank Limited until May 2005, a general commercial bank registered and duly incorporated in accordance with the company and banking laws of the Republic of South Africa, with its principal place of business at 135 Rivonia Road, Sandton, Gauteng. The applicant was previously known as Nedcor Bank Limited and was later renamed the Nedbank Group on May 2005

[3] The first respondent is Mamokele Maria Nkosi Moisi, an adult female of full legal capacity, currently residing at Erf 1623 Vosloorus Extension 2, Gauteng. She is the only heir as well as the executrix of the estate of the late Lefu Stephen Moisi (the deceased).

[4] The second respondent is Final Housing Solution Pty Ltd, a company with limited liability duly registered and duly incorporated as such in terms of the company laws of the Republic of South Africa. Its principal place of business situated at Constance Place, Koedoe P91 Street, Birchleigh, Kempton Park. Its registered address is 54 Gousblom Street, Northmead Extension 4, Benoni.

[5] The third respondent is the Registrar of Deeds, Johannesburg, a department established by the Minister of Land Affairs, in accordance with the Deeds Registries Act 47 of 1937. Its offices are situated at C[...] V[...] W[...] and J[...] Streets, Johannesburg.

[6] On or about 10 July 1989, the applicant and the deceased entered into a loan agreement in terms of which the applicant advanced R 37 196.00 to the deceased, secured by a mortgage bond registered over the property in the applicant's favour.

[7] Due to the deceased's breach of the loan agreement, an action was instituted against him. In or during 1999, the applicant obtained judgment for payment of the full outstanding balance, together with an order declaring the property specially executable in respect of the amount owing to the applicant (the foreclosure proceedings).

[8] The applicant acquiesces that the summons in the foreclosure proceedings could not have been served upon the deceased personally, as is reflected in the return of service. This is because the deceased had passed away approximately two years prior to the summons purportedly being served upon him personally.

[9] The return of service in the foreclosure proceedings records that the summons was served on the deceased personally, on 16 February 1999. However, from the death certificate, it is apparent that the deceased passed away on the 16 December 1997. Obviously, personal service on him was impossible and could not have been effected as reflected in the return of service.

[10] The first respondent was appointed as the executrix of the deceased estate on or about 10 March 1998, which predated the service of the summons by approximately one year, as appears from her certificate of appointment.

[11] There was no proper service upon the first respondent in her capacity as executrix of the deceased's estate and judgment was thus granted in her absence. The judgment was void *ab initio*.

Applicant's case in summary

[12] The second respondent does not, in the main, deny that the judgment was erroneously obtained. However, it alleges that it is entitled to compensation for the property pursuant to the granting of a rescission of the judgment and an order that the property be transferred to the first respondent.

[13] The applicant submits that this application for rescission is not the appropriate proceeding in which the second respondent should seek compensation. Should the applicant and the second respondent not be able to resolve the issue of compensation, the second respondent must institute action for the recovery of whatever amount it considered to be due to it. If appropriate these proceedings will be defended by the applicant.

[14] The applicant reiterates its latest proposal (made in June 2023) to resolve this matter is reasonable insofar as the applicant proposes to repay the purchase price paid by the second respondent for the property in an amount of R10 430.00, plus interest. This is an amount inclusive of all transfer costs and rates and taxes in order to effect transfer of the property into the name of the first respondent. The second respondent, however, wishes to make a substantial profit and requested payment in the sum of R 500 000.00.

[15] Efforts were made to settle the matter between the applicant and the first and second respondents. These efforts were, however, unsuccessful.

[16] In the circumstances, the judgment was erroneously sought and stands to be set aside because there was no proper service upon the first respondent in her capacity as the executrix of the deceased's estate, and judgment was thus granted in her absence. The judgement was void *ab initio*.

[17] The judgment stands to be set aside on this basis alone, even if it is correct in all other respects.

Respondent's case in summary

[18] The second respondent submits that the application is vexatious, frivolous, unreasonable and constitutes an abuse of process. Its basis for this is that the parties have engaged at length regarding the compensation for the property. Yet the applicant proceeded with this application despite being aware of the unsuitability and that its liability would be raised, and that litigation would be in abeyance pending resolution of the current dispute before this court.

[19] The second respondent further submits that the founding affidavit is riddled with inaccuracies and incomplete information, and as such, does not make out a case for the relief claimed.

[19] The second respondent opposes the granting of the order on the merits and relies on the following:

- a) The applicant has failed to satisfy the court that the applicant was in fact the owner of the property.
- b) Consequently, the applicant lacks the *locus standi* to bring this application and to claim the relief sought in the notice of motion.

[20] The second respondent submits that the first respondent's claim may very well have become prescribed, as the transfer of property constitutes a debt and as such is liable to prescription, the running of which commenced as early as 1999. Admittedly, there are various questions surrounding this, including the period in early 2004 when, according to the second respondent, engagement with the first respondent started. These remain unchallenged and as such, the claim to transfer may have prescribed.

Points in limine

Dispute of fact

[21] The second respondent submits that there is a clear dispute of fact that was foreseeable and/or foreseen.

[22] The applicant has been fully aware that the second respondent would, in principle, be willing to relinquish the property (which is what is in fact sought by this application). The circumstances and various unresolved questions regarding the allegedly erroneous judgment arose from the applicant's negligence. Various unsuccessful attempts were made to address this issue with the applicant.

[23] The second respondent submits that the relief claimed by the applicant is final in nature and that it is trite that a litigant who elects to proceed on notice of motion must be aware where a material dispute of fact is foreseeable or where such litigant should have realised that such a dispute would arise.

[24] The second respondent submits that the applicant was aware of the deceased passing, or at the very least ought to have been aware thereof from the facts of the matter. The applicant was responsible for the administration of the insurance policy which would have settled the mortgage held by it over the property, which was paid (effectively to itself) in 1999. The applicant sold the property to Pyraned Ltd, which in turn sold it to the second respondent, with the full knowledge of the status of the property.

[25] The second respondent submits that the applicant failed or refused to immediately repurchase the property from the second respondent at market value to remedy the situation. The second respondent further stands to lose the full market value of the property if the order to rescind the court order is granted with no order as to damages.

[26] The second respondent submits that it has a claim for occupational rent which it would have earned had it taken possession of the property in 2005, which then constitutes a loss of income. All of this was predicated by the applicant's negligence, which is also at the heart of the dispute. The second respondent is further indebted to the Ekurhuleni Metropolitan Municipality in the amount of R 70 155.00, as evidenced by annexure FA6 attached to the applicant's founding affidavit.

[27] The second respondent submits that it would be inequitable and unfair under the circumstances to direct the Registrar of Deeds to simply register the property in the first respondent's name without compensating the second respondent, even if an order is granted rescinding the judgment and declaring the sale in execution null and void together with all subsequent sales of the property. The second respondent contends that such relief was improperly sought without addressing the second respondent's rights as an innocent purchaser, as questions regarding equitable compensation and fairness remain in dispute.

Non-joinder

[28] The second respondent submits that the Sheriff has not been joined in these proceedings, while it is alleged, by implication at least, that the Sheriff is the cause of the applicant's misfortune, in that the sheriff's office was and is solely responsible for the irregular service which led to the judgment, as well as the subsequent sale in execution.

Lack of locus standi

[29] The second respondent submits that the applicant is a legal entity and as such only an authorised representative of the applicant can depose to the founding affidavit and bring the current application. The deponent bases her authority on the fact that it is in the employ of the applicant's attorneys. The attorneys are not in the employ of the applicant and would not have knowledge of the proceedings preceding this application. No resolution was passed authorising the deponent (attorney) to depose to the affidavit.

[30] The second respondent submits that it is disingenuous at best to vaguely assert that it recently came to the applicant's attention that the summons in the foreclosure proceedings could not have been served upon the deceased, especially as the insurance policy that purportedly covered the mortgage bond in the event of death was surrendered and paid in favour of the applicant during 1999. Despite having full knowledge of the surrender and payment to the mortgage account, the applicant caused the property to be sold in execution.

[31] The second respondent submits that the applicant was well aware of the passing of the deceased and proceeded to sell the property in execution after the death of the deceased back in 2004.

[32] The second respondent submits that the applicant was advised by the first respondent of the deceased's passing even before the foreclosure proceedings commenced, back in 1997. In that respect, the second respondent attaches a copy of the first respondent's opposing affidavit in the pending eviction application in the Magistrate's Court, Boksburg, marked as annexure 5J57.

[33] The second respondent further submits that it requested the applicant's attorney of record to comply with the provisions of rule 7. From the belated reply dated 20 July 2023, it is clear that the current application is not authorised, nor was it retrospectively authorised. The power of attorney only authorised the collection of monies owing, and not any other matter and/or action.

[34] The second respondent submits that this application for rescission, as well as the relief which is in essence vindicatory on behalf of the first respondent, is not authorised.

Condonation for the late filing of the replying affidavit

[35] On or about 24 March 2023 and 12 April 2023 respectively, the applicant served an application for rescission of judgment on the respondents.

[36] The second respondent served its notice of intention to oppose on 28 March 2023. The second respondent delivered an answering affidavit on 22 April 2023.

[37] The applicant had 10 days from 22 April 2023 to deliver its replying affidavit. The applicant failed to deliver the affidavit, allegedly due to attempts to settle the matter with the second respondent from during or about February 2021 to June 2023. The applicant did not wish to incur further legal costs by the

preparation and delivering of the replying affidavit. However, faced with the reality that the second respondent is not willing to settle the matter, the applicant now seeks condonation for the late filing.

[38] With regard to any prejudice that might be caused to the second respondent, should the lateness of this replying affidavit be condoned, it is the applicant's case that there can be no such prejudice as the second respondent is not in occupation of the property and has not done anything for 19 years to obtain possession of the subject property.

[39] The first respondent and applicant would, however, suffer prejudice if this Court elects not to condone the late delivery of this replying affidavit, as the applicant is trying to resolve a wrong which followed from the judgment having been erroneously sought and erroneously granted. If condonation is not granted, the second respondent's version as contained in the answering affidavit would stand to be accepted as uncontested by this court.

[40] The applicant requests condonation for the late delivery of the replying affidavit.

[41] The applicant admits that the failure to file in time may be condoned on good cause shown. The applicant's submission is that the reason for the late filing was that it was negotiating a settlement with the second respondent, albeit in vain, and wished to avoid incurring legal costs.

[42] I am satisfied that good cause has been shown for the late filing of the affidavit and that the second respondent will suffer no prejudice if condonation is granted.

Legal Framework and Analysis

[43] Rule 42(1) provides that 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 an

order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[44] It is important to reflect briefly on the principles entailed in a rescission application. In terms of rule 42(1)(a), a rescission will be granted where the order or judgment was erroneously sought or granted in the absence of a party affected thereby. The judgment would be erroneously granted if there were facts which existed which the court was unaware of and which would have induced the court not to grant the order or judgment. The applicant in this instance is not required to show good cause.

[45] In *Kgomo v Standard Bank of South Africa*,¹ Dodson J, at para 11, relied on the judgments of *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* and *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* said that the following principles govern rescission under rule 42(1)(a) -

- (a) The rule must be understood against its common law background;
- (b) The basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio*, but subject to certain exceptions, of which rule 42(1)(a) is one;
- (c) The rule caters for a mistake in the proceedings;
- (d) The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from information made available in an application for rescission of judgment;
- (e) A judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of the default judgment;
- (f) The error may arise either in the process of seeking the judgment on the part of the applicant for default judgment, or in the process of granting default judgment on the part of the court; and
- (g) The applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).

¹ 2016 (2) 184 GP.

[46] The court has a discretion to grant rescission. As aforesaid, the application for rescission of judgment in this matter is pursued under rule 42(1)(a).

[47] I now turn to consider whether the grounds proffered by the applicant in justification of the rescission of the default judgment have merit.

[48] It is common cause that default judgment was granted in favour of the applicant against Lefu Stephen Moisi, the deceased, on 5 March 1999.

[49] The judgment was granted because there was Sheriff's return of service that indicated that there was personal service on the deceased, whilst the deceased at the time of the default judgment, had already passed away. The Sheriff's return of service thus contradicts the fact that the deceased had passed away long before the default judgment was granted.

[50] I believe that had the judge been aware that the deceased had already passed away, the default judgment would not have been granted.

[51] The facts before this Court warrant that the judgment be rescinded.

[52] The deceased received no notice of the foreclosure proceedings, despite such notice being required. Therefore, the judgment was, without more, erroneously sought and must be set aside, as it was both erroneously sought and granted.

[53] The second respondent opposes the application on the basis that the applicant failed to agree on a compensation amount that would be payable to it pursuant to the transfer of the property to the first respondent (executrix).

[54] The second respondent opposes the application on the basis that the applicant was aware of the judgment that was erroneously granted but proceeded to sell the property to it.

[55] The first respondent was not aware of the judgment taken against the deceased.

[56] In principle, the second respondent does not deny that the judgment was erroneously granted.

[57] The concerns that the second respondent has raised, whether genuine or not, are not relevant to the application for rescission.

[58] The main issue is that a default judgment was granted against someone who had passed away long before the judgment was granted, because of the wrong information that was contained in the proceedings (the return of service that spoke of personal service).

[59] For this reason, the application for rescission must succeed.

The second respondent's points in limine

Dispute of Fact

[60] I have reviewed the second respondent's answering affidavit and the second respondent's heads of argument, as well as the submissions made on the date of the hearing of this application regarding the dispute of fact. There is no case made for this point *in limine*, and as a result I will not make any determination on it. There is no genuine dispute, factual or otherwise, in respect of the ground for the rescission.

Non-joinder

[61] The sheriff has not been joined in the proceedings of this application for rescission.

[62] The sheriff has no material and substantial interest in the outcome of the proceedings. The sheriff is not an affected party. I do not see how he would assist in the application for rescission of a default judgment. This application is not calling for

a party to account for their actions but is the application for rescission of a judgment that was erroneously obtained.

[63] The Supreme Court of Appeal in *Absa Bank Ltd v Naude N.O.*² held the following view:

“the test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined and some other authorities.”³

[64] The applicant submitted in the answering affidavit that the Sheriff in this rescission application has no material and substantial interest in the outcome of the proceedings. However, the sheriff may be an interested party in action proceedings which may be instituted by the second respondent, in terms of which it seeks compensation in respect of its purchase of the property.

[65] I therefore agree with the applicant’s submission. The Sheriff is not necessary to be joined in the proceedings.

Lack of Locus Standi

[66] The second respondent submitted that Jocolene Angelina Louwrens van Vuuren (the deponent) who deposed to the founding affidavit is neither in the employ of the applicant or authorised to bring such an application on behalf of the applicant.

[67] There is a confirmation affidavit deposed to by a manager in the applicant employ, marked RA1, as well as a copy of the applicant’s power of attorney, marked RA2, which empowered the deponent to institute these proceedings and to prosecute them to finality.

[68] In *Ganes and Another v Telkom Namibia Ltd*,⁴ the court held that the deponent of an affidavit need not to be authorised, and the legal proceedings are

² [2015] ZASCA 97; 2016 (6) SA 540 (SCA).

³ *Id* at para 10.

instituted or defended by an attorney. Rule 7 set out the procedure to challenge lack of authority.

[69] In the judgment the court, at para 19, held:

“[t]here is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent, Hankie said that he was duly authorised to depose to the affidavit. In his answering affidavit, the first appellant stated that he had no knowledge as whether Hankie was authorised to depose to the founding affidavit on behalf of the respondent that he did admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit.”

[70] The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceeding and the prosecution thereof which must be authorised. In the present case, the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion, a Mr Kurtz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the applicant; it must therefore be accepted that the instruction of the proceedings was duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant.

[71] It is then my view that this point *in limine* does not stand.

Order

[72] In the result the following order is made:

⁴ 2004 (3) SA 615 (SCA); 2004 25 ILJ 995 (SCA).

1. Condonation for the late filing of the applicant's replying affidavit is granted.
2. The points *in limine* are all dismissed.
3. The judgment granted on 5 March 1999 against Lefu Stephen Moisi is rescinded and set aside.
4. The following transfers are declared to be invalid, unlawful and of no force or effect, and are set aside.
 - a) The transfer from the first respondent to the applicant (Deed of Transfer T[...])
 - b) The transfer from the applicant to Pyraned Ltd (Deed of Transfer T[...])
 - c) The transfer from Pyraned Ltd to CC Trade 57 CC (Deed of transfer T[...]; and
 - d) The transfer from CC Trade 57 CC to the second respondent in or around 2004 (Deed of Transfer T[...])
5. The third respondent is directed to cancel the title deed in respect of the property which was issued in favour of the second respondent.
6. The third respondent is directed to take the necessary steps forthwith to cancel the registration of the immovable property currently registered in the name of the second respondent and to register it in the name of the first respondent.
7. The applicant is directed to pay all the transfer costs associated with the property being registered in the first respondent's name.
8. Each party to pay its own costs

N MZUZU

Acting Judge of the High Court,
Johannesburg

Appearances

For the Applicant: D Van Niekerk

2nd Respondent: Adv CJ Marneweck

Date of Hearing:

Date of Judgment: