IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case Number: 47699/2017

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|---|---|
| (1) | REPORTABLE: **NO** |
| (2) | OF INTEREST TO OTHER JUDGES: **NO** |
| (3) | REVISED. **NO** |

25/3/2026 [redacted]

DATE SIGNATURE

PASEKA FRANS MOTSOENENG APPLICANT/DEFENDANT

AND

KHULU PHILEMON RADEBE RESPONDENT/ PLAINTIFF

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**JUDGMENT**

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***MAKUME, J:***

## *INTRODUCTION*

1. In this matter the applicant seeks an order rescinding a money judgment obtained against him by the respondent in this court on 14 March 2018.
2. According to the respondent he loaned an advanced to the applicant, an amount of R600 000 during the year 2012, he attaches a copy of his bank statements that shows an amount of R600 000 being paid out of his account.
3. The loan agreement was verbal in terms of which the applicant firstly undertook to repay same by way of monthly instalments of R100 000. It was when the applicant failed in his undertaking that an agreement was reached that he repays the loan at a rate of R10 000 per month. The applicant commenced repayment at the rate of R10 000 per month from August 2015 and suddenly stopped in the year 2016.
4. A letter of demand was sent to him in June 2017 which he ignored, as a result summons for payment of R470 000 was issued on 4 December 2017 and served on his son on 19 February 2018 at his residence. No appearance to defend was entered, as a result default judgment was granted against the applicant on 14 March 2018.
5. On 25 June 2020 a Section 65 notice was served on him by the sheriff of the court. It was only on 9 February 2021 when the applicant deposed to his affidavit in support of his application for rescission of judgment, this is a period of seven months from

the time that he came to know about the judgment.

6. It is trite law and common cause that for an application for rescission of a judgment to succeed the applicant must satisfy both the requirements of a reasonable explanation for default and a *bona fide* defence with prospects of success.

7. In this matter the applicant relies on the provisions of Rule 42(1)(a) of the Uniform Rules of Court which provides as follows:

> "The court may in addition to any other powers it may have *mera motu* or upon application of any party affected, rescind or vary:

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

*BACKGROUND FACTS*

9. It is common cause that applicant is a pastor of a church known as The Incredible Happenings Ministry, he describes it as 'my church', the respondent and his wife were members of that church until a certain period which will be dealt with later in this judgment.

10. In paragraph 37 of his answering affidavit the respondent says that on 1 June 2012 he concluded a verbal agreement with the applicant in terms of which he advanced and amount of R600 000 to the applicant which amount the applicant undertook to repay at the rate of R100 000 per month with effect 1 July

2012.

11. The respondent then says that the applicant failed to make any payment, as a result when he confronted him about the non-payment, they both agreed to amend the agreement that he repays the amount at the rate of R10 000 per month with effect, 4 August 2015. It is not apparent as to when exactly this new agreement was concluded, safe to say that it was during 2015.

12. The applicant indeed commenced payments at the rate of R10 000 from 4 August 2015 and stopped paying on 6 August 2016 having paid in total an amount of R130 000 leaving a balance of R470 000.

13. In paragraph 45 of his answering affidavit the respondent says that at the end of January 2017 he sent a letter of demand to the applicant demanding that the applicant make payment of the balance of R470 000 within 14 days, it is common cause that no payment was ever received thereafter.

14. Summons was issued in December 2017 and served on the applicant's son, the applicant did not enter appearance to defend which then led to an application for default judgment which this court granted on 14 March 2018 in the absence of the applicant for payment of an amount of R470 000 plus interest and costs.

15. During the year 2020 the respondent's attorneys, Ms CF Van Coller issued a Section 65(a)(1) notice on the applicant which was served on him on 25 June 2020. On receipt of that note,

the applicant instructed attorneys Sibanda Nkosi to act for him and they addressed a letter on 31 August 2020 to CF Van Coller and requested the latter to furnish them with copies of all pleadings in the matter which matter carried case number 6749/2019 (magistrate's court case).

16. It is not apparent from the papers before me as to when the attorney received the requested documents, it was only on 9 February 2021 when the applicant served and filed his application to rescind the default judgment dated 14 March 2018.

17. On receipt of the applicant the respondent's attorneys requested indulgence which was granted by the applicant's attorneys to file the answering affidavit outside the stipulated period.

18. The respondent's answering affidavit was filed and served on them during March 2021. The applicant did not file any reply thereto, the things were quiet since then and there was no exchange of any pleadings.

19. During November 2024 the respondent's filed a supplementary answering affidavit in which he raised the defence of superannuation as a point *in limine* and applied that the applicant's application be dismissed in that it has taken the applicant three years since he filed his application and that he folded his arms and did nothing to prosecute the matter.

20. The applicant quickly filed an opposing affidavit opposing the supplementary answering affidavit and raised a procedural

issue that there was no proper Notice of Motion seeking leave to file a further affidavit. I do not deem it necessary to deal with the dispute in respect of this fourth affidavit and I agree with the applicant that it is procedurally non-suited and is struck off from the record. The issue about superannuation is not dispositive of the dispute in this application and was accordingly unnecessary.

*THE APPLICANT'S CASE*

21. The applicant's case is made out in paragraphs 21 to 29 in which he denies ever entering into an oral agreement of loan with the respondent, he made the point that respondent's wife was the treasurer in his church and that she and the respondent were responsible for his as well as the church's financial affairs.

22. He says that the church was doing well financially and could never have borrowed money from an individual. The relationship between him and the respondent and his wife ended in the year 2016 when he noticed mismanagement of the church's finances by the respondent and his wife.

    a. He concludes at paragraph 36 by saying the following:
    "I maintain that I have never entered into any oral agreement with the respondent nor has the respondent loaned me money. Instead it is the respondent and his spouse that owes my church

all the monies that they have appropriated from my church."

23. The applicant does not say how much money was misappropriated by the respondent from his church and what steps has he taken to recover same.

*RESPONDENT'S CASE*

24. In his answering affidavit, specifically in response to allegations by the applicant denying the loan, the respondent sets out in his paragraphs 37 to 49 the terms of the agreement, he attaches a copy of his bank statement showing an amount of R600 000 debited against his account on 1 June 2012.He further details that due to the applicant's failure to make payment as agreed they amended the agreement to read that the applicant should repay the loan at the rate of R10 000 per month, with effect 4 August 2015.

25. At paragraphs 42 and 43 the respondent attaches a copy of his bank statement showing that the applicant commenced repayment at R10 000 per month from 4 August 2015 up until 6 October 2016. The bank statement clearly indicates that the payments were received from Incredible Happenings.

26. The applicant did not file any replying affidavit, save for the answering affidavit to the respondent's defective supplementary affidavit, he said nothing to refute what the respondent said in his answering affidavit.

a. Rule 6(5)(e) of the Uniform Rules read as follows: "Within 10 days of the service upon him of the affidavit and documents referred to in subparagraphs 1 of paragraph b of sub rule 5 the applicant may deliver a replying affidavit."

27. It is trite law that the primary purpose of the replying affidavit is to put up evidence which serves to refute the case made out by the respondent in the answering affidavit (see *Standard Bank of South Africa Limited v Sewpersadh* 2005 (4) SA 148 (C) at page 159).

28. The applicant by failing to file a reply to the respondent's case is fatal and leaves only the version of the respondent to be considered. His is a bare denial which is not sufficient to refute the evidence set out by the respondent.

## *EVALUATION OF THE APPLICANT'S CASE*

29. The applicant seeks to rely on the provisions of Rule 42(1)(a) of the Rules of Court for the rescission which took place in his absence and for that he needs to prove that the judgment was erroneously sought and granted in his absence.

30. I accept that the applicant may not have received the summons that was served on his son and therefore the judgment was granted in his absence, however he must place facts to prove the erroneous error in the granting of the judgment, this he has

failed to do.

31. The question as to what constitutes an error for purposes of Rule 42 has been the subject of a number of decided cases. The rationale seems to be that a judgment has been erroneously granted if there existed at the time of its issue, the fact of which the Judge was unaware which would have precluded the granting of the judgment and which would have induced a Judge, if aware of it, not to grant the judgment (see in this regard *Nyingwa v Moolman N.O.* 1993 (2) SA 508 (TKGD) at page 510).

32. The summons was served on the applicant's son which service was in accordance with the rules. It would have been prudent in this matter, in this application for the applicants to tell the court if indeed he has a son who lived with him at his house and if so, what is his name and to further attach an affidavit from him saying what he did with the summons. I can find no error having been committed by the Registrar who granted judgment in terms of rule 31(5).

33. The next issue is whether the applicant has set out a *bona fide* or a triable issue, in this instance the applicant firstly denies that he loaned any amount of money from the respondent, secondly he denies ever making the payments of R130 000 to the respondent and lastly he says that if it is found that he indeed borrowed money, the R600 000 from the respondent, then such claim has prescribed because the claim prescribed in June 2015 and yet the respondent issued summons in the year

2018, a period of 6 years later.

34. In argument the applicant abandoned the defence based on the National Credit Act and based his whole defence on the concept of prescription, I now turn to deal with that defence.

35. The applicant argues that if the court finds that there was indeed the loan agreement concluded between the parties in June 2012, then such debt prescribed in June 2015 and that when the applicant commenced making payment at the rate of R10 000 on 4 August 2015, it was not an acknowledgement of that claim that had prescribed as according to the applicant, a prescribed debt cannot be revived by an acknowledgement of liability.

36. It is trite law that a debt is extinguished after the lapse of the prescribed period applicable to that debt and that such a debt cannot be revived by an acknowledgement of liability.

37. In this matter the respondent at paragraph 7 of the Particulars of Claim says that the defendant failed to make payment of the monthly instalments of R100 000, he continues to say that on 4 August 2015 he and the applicant agreed that the defendant would make payment of monthly instalments at the rate of R10 000 with effect to 4 August 2015.

38. In my view the applicant and the respondent entered into a new contract. In the matter if *Lipschitz v Dischamps Textiles, Gambit & Another* 1978 (4) SA 427 (CPD) at page 430 F, Van Heerden J concluded as follows:

> "To my mind the said anomaly does not detract

from the clearly expressed wording of section 10(1) that once the period provided for has lapsed, barring any delays or interruption, the debt is extinguished. When this has occurred any subsidiary debt that which arose from such debt is also extinguished and it would appear that once extinguished, the debt can no longer by acknowledgement revive such debt <u>unless of course it is in the form of an undertaking amounting to a new contract</u>."

39. The applicant and respondent concluded a new contract on 4 August 2015 and when the respondent issued summons on 6 December 2017 that in itself interrupted prescription, that commenced running only after payment of that last instalment of R10 000 in October 2016.

40. The applicant breached the agreement that was concluded in August 2015, not the 2012 agreement. When the applicant commenced payment of R10 000 in August 2015, it was in satisfaction of a new agreement and was never meant to revive the 2012 agreement.

41. What is also obvious and proves a new agreement, there is sufficient proof that the applicant utilising his own church's funds, made payments totally R130 000 to the respondent, he does not deny having made these payments.

42. An application for rescission of judgment must demonstrate a

*bona fide* defence or a triable issue, the applicant has failed to do so and relies on a technical defence of prescription, he had no *bona fide* defence and must accordingly fail.

43. In the result I make the following order.

*ORDER*

1. The application for rescission of judgment is dismissed;
2. The applicant is ordered to pay the respondent taxed party and party costs on scale B.

[redacted]

**MAKUME J**

**JUDGE OF THE HIGH COURT**

**JOHANNESBURG**

**Appearance**

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| For the Applicant: | Adv T Mathopo |
| Instructed by : | Gogome Attorneys |
| For Respondent : | Adv L Liebisch |
| Instructed by: | Diemieniet Attorneys |