



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE:	NO
(2)	OF INTEREST TO OTHER JUDGES:	NO
(3)	REVISED:	
Date: Signature:		<i>[Signature]</i> 13/1/2023

CASE NO: 2020/21164

In the matter between:

SIPHO PATRICK DUBE
NOMVULA DUBE

First Applicant
Second Respondent

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED
THE SHERIFF OF THE HIGH COURT GERMISTON
THE REGISTRAR OF DEEDS JOHANNESBURG
LANGLAAGTE TRUCK & CAR CC

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

Coram: Ternent AJ

Heard on: 7 November 2022

Digitally submitted by uploading on Caselines and emailing to the parties

Delivered: 13 January 2022

JUDGMENT

TERNENT, AJ:

- [1] This application came before me, on 8 November 2022, in the opposed Motion Court for hearing. The second, third and fourth respondents are not opposing the application.
- [2] At the commencement of the hearing the first respondent's counsel informed me that the Bank sought leave to file a further affidavit and required a postponement which was coupled with a tender for the wasted costs occasioned by the postponement. The submission was that having considered the supplementary heads of argument that were filed by the applicants' counsel, by consent on 31 October 2022, it became evident that the Bank needed to obtain critical documentary evidence.
- [3] The supplementary heads of argument, prepared by the applicants' counsel, pointedly raises the Bank's onus to establish their version highlighted in bold type. The heads record that ***"What was ceded however was only the first and second Mortgage bonds. The actual debt which they secured being the One Account Facility debt was not sold to Blue Granite"***. The submission made is that although judgments to be rescinded are not lightly set aside, where such judgments was induced by fraud either in the form of perjured evidence or concealed documents the judgment will be set aside. The inference then was that because the Bank had not disclosed documentary evidence, within their control and knowledge, they were concealing vital evidence.
- [4] The first respondent's counsel informed me that given the gravity of the issues in this matter alluding to the allegations of fraud made against the Bank, and the admission of the supplementary heads which resulted in a 2 November 2022 instruction to the Bank to obtain the relevant documents to establish that the actual debt which the mortgage bonds secured i.e. the One Account Facility debt was not sold to Blue Granite, the postponement was necessary. I was informed that save for one of the

documents, all the other documents had been located and that the Bank required an opportunity to disclose this evidence in a further affidavit. The documents to be disclosed were the first applicant's One Account statements. The statements would allegedly reveal that the Bank did not cede the home loan debt but instead received payment from Blue Granite in discharge of the home loan liability, which would reflect in the One Account statement. I was informed that the affidavit would be filed by the following week, Friday, 18 November 2022.

- [5] In opposition the applicants' counsel stated that the application at this late hour was vexatious and frivolous. He submitted that the conduct of the Bank in only now actioning and obtaining these documents was extraordinary and demonstrated that the request for a postponement in order to file the affidavit was late. Having noted the tender for costs, it was submitted that a more appropriate order would be a punitive costs order, should I be minded to grant the postponement, in light of this late "*volte face*". The submission was that the Bank knew of the challenge to the cession of the underlying liability which was pertinently raised in the replying/ supplementary affidavit which was commissioned on 2 March 2021 and delivered on 3 March 2022, and had left it extremely late to produce these documents.
- [6] It was further submitted that the Bank should have taken a cautious approach and have produced these documents in its answering affidavit. It's realisation of its onus and obligation to do so at this very late stage, constituted the *volte face* and this Court should express its displeasure by awarding a punitive costs order because the application would now have to be postponed once again.
- [7] It is trite, as also submitted to me, that generally only three sets of affidavits are permitted in opposed motion proceedings. As such, it was submitted, in seeking an opportunity to deliver a further affidavit the Bank was taking a second bite at the cherry.

- [8] The Bank's counsel openly conceded that the opportunity to provide this evidence, in its answering affidavit, could have been done. It was further conceded that the issue in relation to the underlying cession was raised and that the first respondent was late in raising to the challenge. Without seeking to detract from the first respondent's lateness, the first respondent's counsel submitted that the applicants themselves had already supplemented their papers twice, that there was no explanation provided as to why it was necessary for them to do so and the first supplementary affidavit had caused a postponement of the application.
- [9] Given the long history of this application - the judgment which is sought to be rescinded was granted on 11 October 2011, the gravity of the allegations that are being made against the Bank and the applicants themselves having filed two further supplementary affidavits(one of which is yet to be received into evidence), the postponement albeit late was reasonable, and in the interests of justice. It is essential that the parties place all of the relevant evidence before this Court in order that the Court can make a fair and just ruling.
- [10] In seeking the postponement, the first respondent was open and honest about the lateness of the application and its realisation that the documents in question were critical to the adjudication of the dispute. No prejudice arose to the applicants in the face of the lengthy litigation, which could not be alleviated by an award of costs which were tendered.
- [11] The Court, at most, had been inconvenienced and put to the trouble of reading the voluminous affidavits in the matter. The affidavits are voluminous because the applicants have filed a third affidavit resulting in an interlocutory application, still to be determined, simultaneously with the main application, as to whether the affidavit will be received into evidence. As such, I do not believe that the applicants can complain when the Bank seeks to file a second and crisp affidavit dealing with a highly contentious and central dispute in the application. It is for these reasons that I made

the order postponing the application.

- [12] In refusing the punitive costs sought against the Bank, I was not of the view that the conduct displayed by the Bank was vexatious or malicious. It was clear to me that on receipt of the supplementary heads of argument, also filed late but with consent, the gravity of the point and the necessity to produce the One Account to potentially dispose of the dispute became apparent to the Bank and its legal representatives. This is all part of the hurly burly of litigation. I am of the view that there was nothing opprobrious about the decision, albeit taken very late in the proceedings. As such I was not minded to make a punitive costs order.
- [13] It is in these circumstances, that I refused to do so and made an order that the wasted costs occasioned by the postponement be awarded on a party-party scale.

P V TERNENT

*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

Appearances

For The Applicants:

Instructed By:

Adv P Buirski

E-mail: pbuirski@rsabar.com

Mr K M Mmuoe

K M Mmuoe Attorneys

E-mail: mmuoe-attorneys@exclusivemail.co.za

For First Respondent:

Adv K D Iles

E-mail: kiles@counsel.co.za

Instructed By:

Van Hulsteyns Attorneys

E-mail: daniel@vhlaw.co.za