



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN DIVISION, GQEBERHA)**

CASE NO: 834/2020

In the matter between:-

SAMUEL STEPHEN LOTTERING

First applicant

DELENE ELANA LOTTERING

Second applicant

and

ABSA BANK LIMITED

Respondent

JUDGMENT

MATEBESE AJ

[1] In this matter the applicants approach the court seeking an order in the following terms:

"1. Granting of condonation for the non-compliance with the time frames stipulated in the High Court Rules;

2. *Rescission of the monetary judgement granted by the Registrar of this Honourable Court on 30 June 2020 in whole, namely:*
 - 2.1 *Payment in the sum of R1382 113.56;*
 - 2.2 *Payment of interest on the amount of R138211.56 at the rate of 9.75 % per annum as from the 24 January 2020 to date of final payment, such interest to be capitalized monthly in arrears.*
 - 2.3 *Costs of suit (to be taxed) on an attorney and client scale.*
3. *Rescission of the warrant of execution granted by the Registrar of this Honourable Court on 14 July 2020.*
4. *Postponement of any legal action against the Applicants for the payment of any money dues under Home Loan Account Number 806167088 pending the provision of the original credit agreement or a copy of the original thereof to the satisfaction of the Honourable Court upon which the Respondent's claim is based in respect of the Home Loan Account.*
5. *Costs of this application against any opposing Respondent."*

[2] The application is opposed by Absa Bank Limited, the respondent herein. I deal with the basis of the application and the merits or lack thereof later in this judgement. First, I deal with the factual background which I consider relevant to this application. I must mention that the material facts are common cause between the parties.

Factual background:

- [3] On 23 March 2020¹ applicants were served with summons in which the respondent claimed, as against the applicants, payment of the sum of R1 382 113.56 together with interest on the said amount at the rate of 9.75% per annum, costs and other consequent orders.
- [4] The applicants failed to file a notice to defend the matter. As a result, on 30 June 2020 the respondent sought and obtained default judgement against the applicants for the payment of the amount referred to above, interest and costs. It is this judgement that is sought to be rescinded in these proceedings.
- [5] On 14 July 2020 a Warrant of Execution against the movable property of the applicants was issued by the Registrar. A return of service from the Sheriff reflects that the Warrant was executed on 30 July 2020 and the Sheriff was informed by the first applicant that the applicants have no movable assets to satisfy the debt.
- [6] On 16 October 2020 the respondent instituted proceedings in terms of rule 46A seeking an order declaring the applicants' property executable. The

¹ In the Founding affidavit, para.18, the applicants state that they were served on 18 March 2020. The return of service from the Sherriff reflects that service was effected personally upon the first applicant on 23 March 2020.

- application was set down for 17 November 2020. On 17 November 2020 the first applicant appeared in person and the matter was postponed to 24 November 2020 and he was ordered to pay the costs occasioned by the postponement.
- [7] On 24 November 2020 the matter was again postponed to 8 December 2020. At the hearing the applicants were represented by counsel. On 8 December 2020 the applicants, represented by counsel, sought a postponement of the matter. The postponement was granted to 19 January 2021 and they were ordered to pay costs of the postponement.
- [8] On 19 January 2021 the application was once again postponed, at the instance of the applicants, to 21 January 2021 and the applicants were directed to file their opposing papers by noon on 20 January 2021 and their Heads of Argument by end of business on 20 January 2021. In all these appearances the applicants were represented by counsel.
- [9] On 21 January 2021 the application was postponed *sine die* with costs reserved. The matter was again before court on 23 February 2021 where it was again postponed *sine die* with costs reserved.
- [10] This review application was only launched on 21 January 2021.

[11] In the founding affidavit there is no explanation for the delay in the launching of this application. Accordingly there is no basis for one to grant the relief sought in prayer 1 of the Notice of Motion.

[12] It is trite that an applicant seeking condonation must furnish an explanation that accounts for the full period of the delay and, above all the explanation given must be reasonable.² The exercise of a discretion to grant condonation is one that must be done judiciously and in the interests of justice. It must be informed by facts. Absent facts, it is arbitrary.

[13] Accordingly, I am unable to grant the condonation sought by the applicants. The application falls to be dismissed with costs on this basis alone.

[14] However, even if I may be wrong in this finding, the application is simply without merit and falls to be dismissed. I say this for the reasons that follow hereunder.

[15] First, both under rule 31(2)(b) and the common law an applicant for rescission must establish good cause . Good cause includes a full and frank explanation for the delinquent party's default. It also requires the court to consider the delinquent party's prospects of success, usually

² Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others 2016 (6) SA 181 (SCA) para. 26.

expressed as a requirement that he has a bona fide defence. The delinquent party must also show that the rescission application is brought bona fide and not for the purpose of delay.³

[16] Second, the common law rescission remedy is a discretionary remedy. The remedy may be refused and the applicant may be non-suited if he or she unreasonably delays in claiming the remedy.⁴

[17] It is clear from what I have stated herein before that the applicants have delayed in claiming their remedy under the common law. The judgement was granted in June 2020 and they were aware of same from July 2020. They only instituted the rescission application on 21 January 2021. No explanation is furnished for the delay. Their attempt at explaining the delay in instituting the rescission by saying they had no financial means to instruct an attorney is not convincing and cannot avail them, especially regard being had to the fact that they have not stated anywhere what attempts they made to seek assistance in this regard. They have also failed to explain why they did not institute the proceedings from 24 November 2020, when they had the assistance of attorneys and counsel.

[18] In the circumstances, the delay is unreasonable and it, on its own, non-suits the applicants in their pursuit of the common law rescission.

³ Ellis v Eden 2023 (1) SA 544 para.31 and 55

⁴ Ellis, supra para.55 and the authority referred to therein.

- [19] Furthermore, the applicants have failed to show that they have a bona fide defence and that the rescission application is brought bona fide. The applicant's counsel argued that the respondent overcharged the applicants for interest and as a result the amount claimed and arrears claimed by the respondent do not reflect the amount due to the respondent. She argued that the respondent failed to charge interest as per the debt review order, when same was still in place.
- [20] There is no merit to this argument. From the applicant's papers it is clear that from 08 March 2010, when the applicants were placed under debt review, they were charged interest at the rate of 5%. This continued until 23 July 2019 when the debt review order was rescinded.⁵
- [21] The applicants further sought to argue that the institution of the proceedings by the respondent was an effort to undermine the debt review process. There is also no merit to this argument. By the time the proceedings were instituted the applicants were no longer under debt review, same having been brought to an end by the rescission order granted on 23 July 2019. On their own version, the applicants became aware of the rescission order on 4 November 2019⁶, about four months before the summons were issued and served upon the applicants.

⁵ Annexure "SDL3" to the applicant's Founding Affidavit

⁶ Paragraph 15 of the Founding Affidavit.

[22] The applicants do not state in their papers what their defence is to the claim for monetary order by the respondent. They have therefore failed to establish that they have a bona fide defence to the respondent's claim.

[23] Furthermore, regard being had to what I have stated herein before, a conclusion is inescapable that the applicants are not bona fide in bringing this application. They only seek to delay the respondent's pursuit of its remedy under the loan agreement.

[24] Accordingly, the applicants have failed to make out a case for the relief sought in the Notice of Motion. It follows therefore that the application for rescission also stands to fail on its merits.

Costs

[25] The general principle on costs is that costs follow the result. The respondent has succeeded in the application. There is no reason to depart from the general rule. The only issue is the scale of such costs.

[26] The respondent sought costs on a punitive scale. In my view the respondent is only entitled to party and party costs in this application. I see no reason to award costs on a punitive scale.

[27] In the result the following order is made.

1. The applicants' application for condonation is dismissed.
2. The rescission application is also dismissed.
3. The applicants shall pay the costs of the application on a party and party scale.

Z.Z. Matebese

Acting Judge of the High Court

Appearances:

For the applicant: Adv Masiza

Instructed by: Brendan Weldrick Attorneys

For the respondents: Adv Ellis

Instructed by: Velile Tinto & Associates

C/O Jacques du Preez Attorneys

Date Heard: 24 August 2023

Date delivered: 29 August 2023