IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No: 3372/2018

In the matter between:

SELEBOGO WILLIAM MOKOA 1st Applicant

MOTSOAHOLE ALICE MOKOA 2nd Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

IN RE:

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Applicant

And

SELEBOGO WILLIAM MOKOA 1st Respondent

MOTSOAHOLE ALICE MOKOA 2nd Respondent

HEARD ON: 15 June 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 14 September 2023

---

[1] On 07 October 2021, summary judgment was granted against the applicants for the payment of R 234 093.01 together with interest and costs on an attorney-client scale.

[2] On 17 October 2022, the applicants filed this application seeking the following relief:

"a) Granting condonation for the late bringing of this application;

b) Setting aside the default judgment granted on 7 October 2021 in lieu of the plaintiff's application for summary judgment;

c) Stay or suspension of any and all warrants of execution granted against the applicant properties; and

d) Costs of the suit if opposed."

[3] The application is opposed on the grounds that:

3.1 Rescission of judgment in terms of Rule 31(2)(b) of the Uniform Rules of Court is not competent in the circumstances[1];

3.2 The applicants failed to make out a case in the founding affidavit for the relief in terms of the common law;

[4] The application served before me on 15 June 2023. The applicants were unrepresented and, after the parties had presented their oral submissions to the court, the applicants undertook to furnish the court, within a week from that date, with proof from their bank that the capital amount claimed in the summons was never paid into their bank account in 2007 or at any other stage. Judgment was then reserved. The applicants have to date failed to furnish such proof.

[5] On 3 February 2022, and pursuant to the summary judgment granted, the respondent instituted an application in terms of Rule 46A of the Uniform Rules of Court to declare the applicant's immovable property specially executable. The application was served personally on the applicants and enrolled for hearing on 24 March 2022. The applicants opposed the application on 22 March 2022 but failed to file the necessary papers despite the matter having

[1] Paragraph 36 of the Answering Affidavit.

been enrolled on several occasions. On 6 October 2022, the applicants once again appeared in person and were granted the opportunity to file their rescission application on/or before 17 October 2022.

[6] In the application for condonation, the applicants stated in the founding affidavit[2] that they became aware of the judgment on 7 October 2021, the date on which they were present in court, but their attorneys, SST Attorneys, were not. The first applicant then sent an email to the court clerk, Mrs Ntwasa, and R Naude, requesting them to have the case reviewed as it was finalised in the Judge's Chambers. The applicants were not aware of this development as they were at the court, waiting for it to start. After the default judgment was granted against them, the applicants unsuccessfully approached the Human Rights Commission and Legal Aid South Africa for assistance.

[7] The Legal Aid of South Africa referred them to the Legal Practice Council ("the LPC"), that appointed Messrs De Beer and Claassen and Mlozana Attorneys to assist them with the matter on 4 September 2022. The delay in bringing the application for rescission was not intentional as the first applicant attempted to resolve the matter and obtain legal assistance.[3]

[8] In their plea, the applicants specifically denied that they concluded the loan agreement with the plaintiffs as claimed in the Particulars of Claim nor signed the loan agreement as alleged. Consequently, they denied having received any money from the plaintiff nor applied for any loan at any of the plaintiff's branches. The first applicant submitted in court on 15 June 2023 that he should be given about a week to produce proof that the respondent never advanced to the applicants the amount claimed in the summons.

[9] The respondents stated in their answering affidavit that it was factually incorrect that SST attorneys represented the applicants at the time the summary judgment was granted. These attorneys had withdrawn as the applicant's attorneys on 14 June 2021. At the time summary judgment was instituted, the applicants were represented by Legal Aid which also withdrew on 20 September 2021. The applicants' explanation for the delay in the period

[2] Deposed to on 17 October 2022.
[3] Para 39 of the FA.

spanning between 7 October 2021, when judgment was granted, to 4 September 2022, when the LPC appointed legal representatives for the applicants, was scant and unsatisfactory.

[10] The respondent contended further that the applicants also failed to proffer an explanation why their attorneys of record, including Legal Aid and the LPC-appointed attorneys, have all withdrawn. It was submitted that the reason therefor was that the applicants did not have a bona fide defence.[4] On 12 January 2007, the applicants, according to the respondent, accepted the respondent's offer of the loan of R106 026.00 and signed a debit order instruction, authorizing the respondent to debit their Nedbank account for the monthly repayment of the home loan. The loan amount was duly paid by the transferring attorneys to the applicants' Nedbank account whereafter a mortgage bond was registered over the applicants' property on 20 February 2007 in favour of the respondent. The debit orders were deducted from the Nedbank account but were only cancelled after nine years without explanation.[5] The last payment was made in February 2016.[6]

[11] The applicants' application for the rescission of judgment is predicated on Rule 31(2)(b) of the Uniform Rules of Court. Rule 31(2) provides that:

"**Judgment on confession and by default and rescission of judgments**

(1) (a) …

(b) …

(c)…

(2) (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.

---

[4] Para 42 of the AA.
[5] Para 52 of the AA.
[6] Para 58 of the AA.

(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."

[12] It is evident that this application falls outside the ambit of this particular rule. I agree with the respondent that, contrary to the rule, the claim against the applicants is for a debt or a liquidated amount, and the applicants have already filed their notice of intention to defend and a plea. The application for rescission of judgment in terms of Rule 31(2)(b) is not competent in the circumstances.

[13] Apart from Rule 31(2)(b), a default judgment may be set aside in terms of Uniform Rule 42 or the common law.[7] Rule 42(1)(a) 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. In *FREEDOM STATIONERY (PTY) LTD AND OTHERS v HASSAM AND OTHERS,* [8] it was stated that the phrase, *'erroneously granted',* relates to the procedure followed to obtain the judgment in the absence of another party, and not the existence of a defence to the claim. Thus, a judgment to which a party was procedurally entitled, cannot be said to have been erroneously granted in the absence of another party. The applicants could, therefore, not have employed the provisions of this rule.

[14] The common law empowers the court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown.[9] Sufficient cause, for the rescission of a judgment by default, consists of two elements which are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.[10]

---

[7] Erasmus: RS 18, 2022, D1-562A.
[8] 2019 (4) SA 459 (SCA) para 18.
[9] De Wet and Others v Western Bank Ltd 1979 (2) SA p1031at 1042.
[10] De Wet, supra, Chetty v Law Society, Transvaal 1985 (2) SA 756 (A).

[15] I agree with the respondent's counsel that the applicants have not fully explained why it took five months after the summary judgment was granted, for the first applicant to explain on 22 March 2022 why he was not indebted to the respondent.[11] In annexure "A1" to the founding affidavit, the applicants stated that:

"*5. This matter was finalised in the Judge Office (sic) while sitting in Court E. The complaint was sent to Honorable Mrs Ntwasa and Mr/Mrs R Naude both never reply. How was this judgment granted with this false information?*

6. Our rights were violated during that day. See attached code. The case did not take place in court as the matter was finalized in the Judge's office. We fought with the Judge secretary to give us the outcome of the meeting of which she sent as SMS to the Typist to inform us but never sent the outcome of the case from 9:00 am until 12:30 pm while sitting and waiting for the court but never appeared on that day.

7. The manner in which the outcome was delivered to us was unprofessional and unacceptable."

[16] Before 22 March 2022, the delay is explained in broad terms that the applicants made unsuccessful attempts for legal assistance to three institutions before the LPC appointed attorneys to assist them. The respondent's counsel correctly pointed out that the applicants' explanation for the delay in filing their application was somewhat glib and lacked particularity. The explanation was not reasonable and did not cover the entire period of the delay. It is in the public interest that there be finality in litigation.[12]

[17] Having considered the long litigation between the parties and the hesitant manner in which the applicants have approached this case, I am not persuaded that the applicants have a bona fide defence to the respondent's claim. It is therefore my considered view that this application must fail.

[18] It is trite that the successful party is entitled to the costs.

[19] I, therefore, make the following order:

[11] Para 15 of the FA.
[12] Absa Bank v Petersen 2013 (1) SA 481 (WCC).

Order:

The application is dismissed with costs.

____

MHLAMBI, J

On behalf of the Applicant: In Person

On behalf of the respondent: Adv. PR Long

Instructed by: Strauss Daly INC
104 Kellner Street
Westdene
BLOEMFONTEIN