



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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1878/2022

In the matter between:

MPHO JONATHAN MADZIBADELA Applicant

and

STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

CYMBOL CONSULTING (PTY) LTD Third Party

In re:

STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

and

MPHO JONATHAN MADZIBADELA Defendant

CYMBOL CONSULTING (PTY) LTD Third Party

Case number: 1879/2022

In the matter between:

MPHO JONATHAN MADZIBADELA First Applicant

PALESA MOSIA Second Applicant

Applicant

and

STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

CYMBOL CONSULTING (PTY) LTD

Third Party

In re:

STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff

and

MPHO JONATHAN MADZIBADELA

First Defendant

PALESA MOSIA

Second Defendant

CYMBOL CONSULTING (PTY) LTD

Third Party

HEARD ON: 17 NOVEMBER 2022

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 22 FEBRUARY 2023. The date and time for hand-down is deemed to be 22 FEBRUARY 2023 at 11:00

- [1] The two applications cited are both for the rescission of default judgements handed down by Van Zyl, J on 7 July 2022 on an unopposed basis. In case no. 1878/2022 she granted default judgement against the applicant in the amount of R10 946 735.32 plus interest in favour of the respondent. In case no. 1879/2022 she granted default judgement on the same day against the first applicant in the amount of R8 218 476.10 plus interest in favour of the respondent in respect of a certain account held at the respondent, and certain other amounts in respect of other accounts held at the respondent. The learned judge also gave default judgement against the second applicant under case no. 1879/2022 to pay, jointly and severally with the first applicant, the amount of R5 500 000.00 plus interest to the bank.
- [2] Both the applications are closely linked as far as the facts, the parties involved and the grounds for rescission are concerned. In the premises, both the applications were heard at the same time to avoid the hearing of a multiplicity of applications relating to the same subject matter in different courts.

- [3] In both the main actions from which the default judgements arose, the claims of Standard Bank were founded on a settlement agreement entered into between the bank, Cymbol Consulting and mr. Madzibadela in his personal capacity. In this settlement agreement, which was made an order of court, the debtors acknowledged to be lawfully indebted to the bank. The amounts for which default judgement was granted in both the matters against mr. Madzibadela are the amounts he failed to pay to the bank in terms of the settlement agreement. The default judgement granted against the second applicant in case no 1879/2022 was founded on a guarantee and suretyship she had signed in favour of the bank for the indebtedness of Cymbol Consulting to the bank.
- [4] According to the notice of motion in both the applications for rescission of the default judgements, the rescission is sought in terms of Rule 31(2)(b) or Rule 42 of the Uniform Rules of Court, alternatively in terms of the common law. Rule 31(2)(b) provides that the court may, upon good cause shown, set aside the default judgement on such terms as to it seems meet. In terms of Rule 42 the court may rescind an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby, an order or judgement in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission, and an order or judgement granted as the result of a mistake common to the parties.
- [5] Before I deal with the grounds advanced for a rescission in more detail, it is apposite to refer to the common cause facts behind the granting of the default judgements. Standard Bank issued summons against the applicants in both applications on 21 April 2022. Mr. Madzibadela filed notices of intention to defend on 10 May 2022, while Palesa Mosia filed such notice the following day. On 8 June 2022 a notice of bar was filed in respect of mr. Madzibadela, and on 9 June 2022 a notice of bar was filed in respect of Palesa Mosia. On 14 June 2022 the attorneys representing the applicants requested an extension of time to file a plea, which request was refused.
- [6] On 20 June 2022 the bank filed a notice in terms of Rule 31(5)(a) in both the actions pertaining to its intention to obtain default judgement. On 22 June 2022

the attorneys of the applicants served notices in terms of Rule 35(12) and (14). On 6 July the applicants filed their pleas and a third party notice by way of e-mail. On 7 July the default judgements in question were granted.

[7] The first ground advanced for a rescission is rather confusing. Mr. Madzibadela contends that both the actions were premised on the same settlement agreement. While this is true, the default judgements relate to different accounts held at the bank. The first action is still pending, and therefore the matter is *lis pendens*, it is further contended. This argument makes no sense, since there is nothing pending. Default judgement has already been granted in both the actions. Moreover, the actions were not against the same parties and the causes of actions were not the same. The applicants furthermore allege that the settlement agreement, the suretyship and the guarantee agreements referred to in the respective particulars of claim are credit agreements and that the bank has therefore failed to comply with the provisions of section 81(2) and 129 of the National Credit Act¹. The problem with this argument is of course the fact that the National Credit Act is not applicable to settlement agreements at all.² Therefore, the submission that a notice of set down for the default judgements ought to have been served on the applicants in terms of this Court's practice directions, has no merit since the relevant practice directive pertains to only default judgements based on the National Credit Act.

[8] The applicants further purport to show that they have a *bona fide* defence to the bank's claims, and they contend that, were the court a quo privy to their defences raised in their plea of 6 July 2022, the court would not have granted the default judgements. In this respect the applicants are overlooking the consequences of a notice of bar. In terms of Rule 26 a party who fails to file a plea, for instance, within the period allowed, will be *ipso facto* barred. The subsequent filing of notices in terms of Rule 35(12) and (14) to compel the delivery of documents, does not have the effect of suspending the operation of the notice of bar. If a party under bar needs more time to access documents in order to file a plea, as the applicants aver was the case here, that party may apply to court for an extension of time to compel the delivery of documents and

¹ Act 34 of 2005

² *Ratlou v MAN Financial Services SA (Pty) Ltd 2019(5) SA 117 (SCA)*

to file a plea.³ Needless to say, in this case it was not done. The applicants were therefore not entitled to serve their pleas on 6 July 2022, and it could not have any effect on the granting of the default judgements.

[9] The applicants further contend that the bank and the Third Party had concluded credit agreements in terms of which the bank extended credit facilities to the Third Party. The bank had thereafter inhibited the Third Party from carrying out its training obligations and is accordingly a joint wrongdoer in terms of section 1 of the Apportionment of Damages Act.⁴ In addition, the Third Party has indemnified the applicants against all liability, arising from the bank's claims, it is averred. However, this cannot be correct since it is trite that the Act is not applicable to contractual claims, as is the case here.

[10] The difficulty with these contentions pertaining to the Third Party is that the Third Party does not appear to be properly before the court. The Third Party is alleged to be under business rescue supervision. In such circumstances, it cannot be cited as a third party without the consent of the business rescue practitioner or the leave of the court.

[11] It is also alleged by the applicant that the third party has a counterclaim against the bank. This, however, is placed in dispute by the bank in its opposing affidavit.

[12] It follows that, upon a proper oversight of the defences raised by the applicants, there is no merit shown as far as these defences are concerned. It therefore cannot be said that the applicants have shown good cause, as required by Rule 31(2)(b). Good cause requires a reasonable explanation for the default, and a *bona fide* defence, *inter alia*.⁵ The applicants have also not shown a reasonable explanation for their default, because they could have applied for an extension of time. Sadly, the applicants also failed to show that the default judgements were erroneously sought or granted, as they were entitled to do in terms of Rule 42.

³ Potpale Investments (Pty) Ltd v Mkize 2016 (5) SA 96 (KZP)

⁴ Act 34 of 1956

⁵ Saphula v Nedcor Bank Ltd 1999(2) SA 76 (W) at 79 C-D

[13] In the premises, the following orders are made:

1. The application for rescission under case no. 1878/2022 is dismissed with costs.
2. The application for rescission under case no. 1879/2022 is dismissed with costs.

P. J. LOUBSER, J

For the applicants:

Adv. D. Mtsweni with adv. S Maelane

Instructed by:

Mabotja Attorneys, Pretoria

c/o Van Wyk & Preller Attorneys, Bloemfontein

For the respondent:

Adv. J. Els

Instructed by:

E. G. Cooper Majiedt Inc., Bloemfontein