IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

Date: Signature: _____

CASE NO: **99/754**

In the matter between:

MOLEFE, MAURICE SETLHARE	Applicant/First Defendant
and	
NEDCOR BANK LIMITED	First Respondent/Plaintiff
MASEKWAMENG, JOSEPH	Second Respondent
THE REGISTRAR OF DEEDS JOHANNESBURG	Third Respondent

Coram: Ternent AJ

Heard on: 7 November 2022

Digitally submitted by uploading on Caselines and emailing to the parties

Delivered: 12 January 2023

JUDGMENT

TERNENT, AJ:

[1] This is an application for the rescission of a default judgment which was granted by this Court, as it was previously known, the Witwatersrand Local Division, on 5 February 1999. It is immediately apparent from the case number and judgment, that this application is brought some twenty-two years after the default judgment was granted in favour of Nedcor bank, the first respondent. As a consequence, the applicant seeks condonation for the late bringing of the application in addition to the rescission of the default judgment.

[2] He furthermore seeks an order that:

"1. The writ of execution which resulted in the immovable property ("the property"), Erf 18002 Vosloorus Extension 25, Ekurhuleni, being purchased by Nedcor Bank, who was the bondholder, and plaintiff in the application for default judgment be set aside;

2. That the sale in execution to Joseph Masekwameng (Masekwameng), the second respondent, be declared invalid and set aside. (In this regard there is a reference to a sale in execution but as Nedcor bank purchased the property at the sale in execution this relief seems to require relief against Nedcor bank rather than Masekwameng);

3. That the bond which was granted to the applicant for the purchase of the property be reinstated; and

4. costs of suit, if the matter is opposed.

[3] In addition, and in the alternative to the relief set out above, the applicant persists with declaratory relief that the property was sold by Nedcor bank to the applicant as set out in paragraph 6.1 of the Notice of Motion. The applicant's counsel informed me that the applicant was not pursuing the relief set out in paragraphs 6.2, 6.3 and 7 of the notice of motion and abandoned the relief because the applicant had not provided sufficient *"documentary evidence"* to this Court in order to substantiate the relief.

[4] The only party to oppose the application was Masekwameng. There was no opposition from Nedcor Bank or the Registrar of Deeds, the third respondent.

[5] In bringing the application, it is clear from the affidavit filed by the applicant that he seeks relief under Rule 32(1)(b) and/or Rule 42(1)(a) of the High Court Rules and/or the common law.

[6] In seeking to comply with Rule 31(2)(b), in the face of the default judgment, it is trite that the applicant must bring his application for rescission of the judgment within twenty days *"after he or she has knowledge of such judgment* [and] *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 to it seems meet"*.

[7] It is trite that condonation is not for the asking.

[8] Rule 27 of the High Court Rules makes provision for the Court to condone any non-compliance with the Rulesalbeit that the Court also has an inherent power to regulate its own process which has been enshrined in the Constitution. It is correct that in considering the application for condonation and whether good cause has been shown a Court must consider :

8.1 whether or not a reasonable explanation has been given for the delay;

8.2 whether the application is *bona fide* and not made simply to delay the opposing party's claim;

8.3 whether there has not been a reckless or intentional disregard of the Rules of Court;

8.4 whether the applicant's application is not ill-founded; and

8.5 whether any prejudice to the opposite party can be compensated by an appropriate order as to costs.[1]

[9] Furthermore, however, in the constitutional democracy, in the matter of ***Ferris v Firstrand Bank Ltd***[2] the Constitutional Court has found that in determining an application for condonation it may be granted where it is in the interests of justice for the application to be granted. Needless to say in exercising its discretion, a Court must still consider the factors of *bona fide* defence and the other factors as mentioned above.

[10] The applicant must give a reasonable explanation of his default for the entire period of the delay to enable the court to understand how the delay was occasioned and to assess the applicant's conduct and reasons - if it is wilful or due to gross negligence, the Court should not come to his assistance. The applicant must show that he has a *bona fide* defence to the plaintiff's claim. A *prima facie* defence will suffice in the sense that if the averments made, if established at trial, would entitle him to the relief asked for. He is not required to show that the probabilities are in his favour nor does he need to deal fully with the merits of the case and produce evidence. That said he must in establishing good

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1 ***Smith v Brummer*** 1954 (3) SA 3520 at 358 (A)

2 2014 (3) SA 39 (CC) at 43G-44A

cause, demonstrate a substantial defence.[3]

[11] It is common cause that the applicant and his estranged wife, they are currently in divorce proceedings, purchased the property during June 1990. Furthermore, the applicant avers that an instalment sale home loan agreement was concluded and a bond was registered in favour of Nedcor Bank, then Nedperm Bank Limited, under Bond BL28229/1990. The bond agreement was provided to the Court. Notably the bond agreement provides that should any proceedings be instituted against the applicant his chosen *domicilium* would be at the mortgaged property.

[12] In essence, the applicant in providing an explanation for his default commences to do so from April 2021. He says that on receipt of a proposed divorce settlement agreement, sent to him by his wife's attorney on 19 April 2021, he discovered that neither he nor his wife owned the property. On appointing his current attorney of record, he was informed that the property had been sold to Masekwameng, his brother-in-law. In a Deeds Office printout, Masekwameng became the owner of the property on 16 January 2006 when transfer of ownership to him was registered in the Deeds Office, his having purchased it on 7 January 2005 for R70 000,00.

[13] On 14 May 2021, he says that the Deeds Office was approached and this case number under which the execution order was granted was obtained. On the same day, the attorney ascertained that the case file was now stored in national archives. On 22 June 2021, the attorney tested positive for Covid-19 and went into isolation for two weeks. Eventually, on 8 July 2021, an e-mail was sent by the attorney to the High Court seeking progress on the location of the file from the national archives. On 19 July 2021, a response was apparently received that the file would take a month to retrieve. Thereafter a further e-mail, dated 13 August 2021, was sent by the attorney calling for an update as to the

[3] **Silber v Ozen Wholesalers (Pty) Ltd** 1954(2) Sa 414(O)

whereabouts of the file. The file was then retrieved during the week of 20 August 2021.

[14] The affidavit was signed on 17 September 2021 by the applicant and the notice of motion was signed by his attorney on 16 September 2021. However, it appears that the application was only uploaded to CaseLines on 15 November 2021, having been served on Masekwameng on 3 November 2021. From the returns of service uploaded to CaseLines the application was served on Nedcor Bank on 22 September 2021 and on the Registrar of Deeds on 23 September 2021. It is self-evident that there is no explanation as to why there was a further delay in serving the application on Masekwameng and the launching of this application. This is particularly so because the applicant saw fit to file a supplementary affidavit dealing with the failure to cite Masekwameng and the Registrar of Deeds, which is dated 14 October 2022, and was uploaded to CaseLines on 15 November 2021. No opportunity was taken to explain this additional delay.

[15] Although the delay may be attributed to the attorney, this lackadaisical approach given the express provisions of the Rule, the patent non-compliance therewith and the positive affirmation by the applicant that he has *"sufficiently explained the reasons for the delay in launching this application"* does not sit well with the Court. That being said, I may have excused the applicant, but as appears below, I am not of the view that the applicant has sufficiently explained his wilful default let alone demonstrated that he has a *bona fide* defence, as required.

[16] The central issue is the applicant's failure to explain fully and plausibly why he harboured under the mistaken belief for some twenty-two years that he owned the property. In one breath he avers that he diligently paid the bond instalments to Nedcor Bank. He then says that, on 21 May 1996, he and his wife purchased another property at 16 Rooibok Street, Dawn Park, Boksburg. Having done so, his wife's sister, Paulina

Masekwameng (Paulina) moved into the property on 22 May 1996 and according to the applicant rented the property from him. He avers, no documentary proof being furnished, that she would pay the instalments on the property directly to Nedcor Bank. This she was to do he says until the bond was paid up and cancelled whereupon he was going to discuss with her how the property would be dealt with. He avers that she then ceased to pay the instalments. He provides no reasonable explanation why he failed to monitor the bond, having already said that he was so diligent in paying the bond instalments to ensure that his obligations were complied with. Yet, he delegated his contractual obligations to Nedcor Bank to Paulina over the period from 22 May 1996 until June 1999. The submission that Paulina was family and he trusted her to pay the bond instalments does not pass muster. It is common cause that the applicant was in default.

[17] As a consequence, the applicant can take no issue with Nedcor Bank taking steps to issue summons as it was entitled to do. The applicant defaulted on the bond payments due to it. Nedcor Bank validly effected service of the summons on the applicant by affixing it to the door of the property, being his chosen *domicilium*.

[18] He avers that Paulina, now deceased, never informed him that she had received the summons, on 18 January 1999, when the sheriff had affixed it to the principal door of the property. He says that it was only during June 1999 that Paulina informed him that she had not paid the loan agreement and was in default. Paulina, of course is not able to confirm this version, as she passed away on 28 August 2013. It was then that he approached Nedcor Bank and was informed that the bond which had been registered had been cancelled. He avers that a new instalment sale agreement was concluded on 18 June 1999 with Nedcor Bank. It was signed by Nedcor Bank's representative, Moses Tsele Sejake, and signed by the applicant and his wife who appended their names thereon. In this agreement he misrepresented to the bank that he was in

occupation of the property. This was false as he and his wife lived in the Boksburg property. The agreement provides that the instalments of R 1233,00 and interest must be paid over 20 years. It also provides that if the monthly instalments are paid promptly for 12 months, after the date of signature, the buyer (the applicant), is entitled to transfer of ownership to the property to him subject to his paying the transfer costs and a bond being registered against the property. The applicant avers that this agreement was not explained to him and he was unaware that he was re-purchasing the property.

[19] At this point, the applicant had already purchased the second property in Boksburg in 1996, whereafter he seems to have washed his hands of the property in question and his obligations to Nedcor Bank. He was not an inexperienced purchaser, had financed the purchase of the property and may have also financed his purchase of the Boksburg property. Having attached the instalment sale agreement, concluded in 1999, he wants the Court to simply disregard its content despite its clear and express terms to the contrary. His alleged failure to understand the transaction is baldly averred. How he could possibly have held this belief is belied by the two letters of acceptance which he proffered to the Court from Nedcor Bank dated 6 July 1999 and 4 August 1999. In the first letter, which is short and to the point, the Bank expressly records *"We are pleased to advise that your application to purchase the abovementioned property has been approved. A copy of the contract is enclosed."* The letter expressly refers to the purchase price of R75 000,00 and the date of the first instalment being 1 August 1999. Furthermore, the letter records that should he fail to understand any of the matters contained in the letter or experience any difficulties he should not hesitate to contact Nedcor Bank. He simply fails to take the Court into his confidence as to why he did not do so if he did not understand the transaction which he had concluded. This I find implausible.

[20] In so doing, he seeks to persuade the Court that he was, as a result completely unaware of the sale of the property to Masekwameng or that Nedcor Bank acted to foreclose on the property by the institution of legal proceedings in this Court because the bond repayments were in arrears. The applicant's wife, rejects this and in a confirmatory affidavit, on behalf of Masekwameng, avers positively that the applicant and her were aware that the bond was in arrears and that Masekwameng had taken ownership of the property. Masekwameng affirms that he never lived in the property and did not take occupation in 2003, as alleged by the applicant. The applicant, in reply, says that his wife is biased against him because of the pending divorce and that her evidence is unreliable and in passing says that his in-laws conspired against him. There is no factual basis for these allegations and they were not pursued in argument.

[21] He avers, as proof of his ignorance, that he continued to pay the bond instalments to Nedcor Bank subsequent June 1999. He attaches personal bank statements which he says reflects these continued debit orders against his account. The first statement is dated 4 July 2007. This reflects a debit order of R725,27 on 30 June 2007 next to the reference *"Bond Repayment 9482 Nedcor Home Loan"*. The second statement is dated 21 November 2007 reflecting a debit order for R725,27 on 31 October 2007 with the same reference. A third and final statement is proffered dated 1 December 2007, most of which is illegible, reflecting 3 further debit orders, only one of which the Court can discern on 30 November 2007. Other than these five debit orders in 2007 the applicant provides no further proof that beyond this period he continued to service the bond. He says that he was unable to retrieve earlier statements from Nedcor Bank as the records have been destroyed and/or deleted. Again this is a fleeting and unhelpful statement particularly because one would have anticipated that he would have kept proper records. He was now aware of the prior default and the cancellation of the earlier bond and yet again adopted a

lackadaisical approach to his contractual obligations.

[22] Furthermore, whatever his version is in relation to the 1999 instalment sale agreement, it is evident therefrom that the bond instalments would be paid over a period of twenty years. This means the agreement would have terminated during 2019. There is no explanation from the applicant as to why he has not furnished his more recent bank statements in support of his allegations that he was honouring his obligations and paying the bond. These statements surely do exist and have not been deleted. He belatedly avers, in reply, that he was afforded a housing subsidy for the first seven years which reduced the bond liability to R725,27 monthly, being 50 % of the bond instalment, and that he believed the bond would have been liquidated in half the time because Masekwaneng was also paying the bond for Paulina, and so was he. Yet there is no substantiation for these statements. Masekwaneng denies this. He says he paid the bond instalments and acquired ownership of the property.

[23] The lack of documentary evidence in the face of the clear wording of the 1999 instalment sale agreement suggests that the applicant lacks *bona fides* and does not have a defence let alone a *prima facie* defence. Rather the ineluctable inference is that he was again in default of his obligations. The bank, as a result, terminated the agreement and the property was sold to Masekwameng in 2006.

[24] Masekwameng annexes a one-page handwritten document, dated 13 July 2003, to his answering affidavit. This document is purported to have been written by the applicant. At the foot thereof are two names, seemingly signatures of the applicant, M Molefe, and Paulina, P Masekwameng, which provides as follows:

> *"I Maurice Molefe gave Paulina Masekwameng a bond house number: 18002 Ext 25 to stay in it and pay the bond herself. It*

wa (sic) *the year 1996.*

In 1999 the house had a problem an (sic) *it was sold for the second time. I Maurice Molefe signed the papers at the bank again as the owner of the house. But I am not paying the bond (house 18002). Paulina Masekwameng is the one who is paying the bond and stays in the house. If anything happens to me → (Maurice) Paulina Masekwameng should be the owner of th* (sic) *house number 18002 Extension 25.*

M. Molefe 13 July 2003

Witness:

P Masekwameng 13 July 2003"

[25] Masekwameng proffers this document to show that the applicant, knew that the property had been sold in execution. Furthermore, that he bought it again in 1999 but never intended to remain the owner of the property and was not paying the bond. Rather, Paulina would again pay the bond, in his stead, and would become the owner of the property, should something happen to him.

[26] In reply, the applicant rallies against the document and says that the signature reflected thereon is not his. He says no more. He does not dispute the content of the document or that he was the author thereof. Instead, he baldly denies any knowledge of the document and then says that the document in fact affirms his position that he was unaware that the house had been sold a second time. This of course is incorrect.

[27] The document reflects that in 1999 there was a problem and that the house was sold for a second time. The only problem in 1999 was that a default judgment had been taken against him and his wife. It was in

1999 that the property was sold to him for a second time, despite his protestations to the contrary. That is what the instalment sale agreement makes provision for. The document accurately records, as set out in his affidavit, that he signed the papers at the bank again. It again records that he is not paying the instalments, and is permitting Paulina to do so. More importantly he is not residing in the property because he resides in the Boksburg property.

[28] The accuracy of events recorded in this document mitigates against any co-incidence that the applicant did not know in 1999 about the default judgment. I cannot accept that he did not sign the document or author its contents. It mirrors the agreement between him and Paulina in 1996 and the events of 1999 when the bank foreclosed onthe property. Furthermore, if one considers the writing on the document and the applicant's signature, it appears to me *prima facie* that it is his.

[29] The applicant's affidavit glosses over the second sale and the instalment agreement, and the 13 July 2003 agreement with Paulina. He does so because he was aware of his default in 1999, when he became aware of the judgment. As such he has known about it for 22 years. This materially disposes of his applications for rescission and condonation. I find that he wilfully failed to rescind the judgment and cannot do so now,

[30] Insofar as the alternative defence under Rule 42(1)(a), the Court may rescind or vary *"(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby"*.

[31] In order for a rescission under this rule the applicant must show that there was an irregularity in the proceedings or it was not legally competent for the court to have made such an order.[4]

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[4] Athmaram v Singh 1989 (3) SA 953 (D)

[32] It is apparent from the aforesaid, that it is not disputed that the applicant and/or Paulina had failed to pay the bond instalments and that the bond was in arrears. As such, Nedcor Bank was strictly within its rights to apply for default judgment in circumstances where the bond was not being serviced. The summons was properly served in terms of Rule 4(1)(a)(iv), at the applicant's chosen *domicilium*. No issue was taken with service, correctly so because even if the applicant was not living there, there was good service at his chosen domicilium[5].

[33] Respondent's counsel referred me to ***Lohdi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd***[6]:

> *"[25] However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the judge who granted the judgment, as he was entitled to do, was unaware …"*

i.e. the applicant did not obtain notice of the summons because it had been served on Paulina. This does not entitle the applicant to relief under this Rule. Nedcor Bank served the summons in accordance with the *domicilium* clause, the applicant was in default and, accordingly, it was entitled to its judgment. There was no irregularity in the default judgment proceedings.

[22] Finally although there was the reference to relief under the common law, there were no submissions made to the court. In any event it is clear that the common law does not assist the applicant for the reasons already set out in the judgment.

[23] To the extent that it is necessary, the respondents' counsel informed the Court that although the applicant's wife to whom he is married in

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5 United Building Society v Steinbach 1942 WLD 3

6 2007 (6) SA 87 (SCA) at paragraph 25

community of property was not joined to these proceedings, a patent non-joinder, and a point which was raised in the answering affidavit, he was not pursuing this point, more particularly because the wife asserted that the judgment was properly granted.

[24] The applicant's counsel referred me to the decision of ***Agnes and Another v Tobeka and Others*** (42040/2018) [2022] ZAGPJHC 814 (19 October 2022) as authority for the proposition that judgments can be rescinded after thirty years. In this case declaratory relief was sought declaring that a sale and later registration be declared illegal, invalid and of no legal effect *ab initio inter alia*. I agree with the respondents' counsel submission that this judgment is distinguishable on the facts. The financial institution had taken steps to foreclose and proceed to a sale in execution in circumstances where the transaction was tainted with illegality. This was because the financial institution had not followed due process and had acted extra judiciously. In this matter, Nedcor Bank obtained a court order in 1999 and, armed with that order, which allowed it to execute against the property, purchased the property at an auction, as it was entitled to do.

[25] The applicant's wilful conduct cannot be condoned and he has failed to establish a *bona fide* defence, and good cause for the rescission of the judgment. As a result, all of the remaining relief sought must fall away predicated as it is on the setting aside of the default judgment. It is also clear that the applicant is not the owner of the property and the declaratory relief must be refused.

[26] I see no reason why the costs should not follow the result.

In the circumstances, I make the following order:

ORDER

33.1 The application is dismissed.

33.2 The applicant is to pay the costs of the application to the second respondent on the party party scale.

P V TERNENT
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Appearances :

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