

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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| (1) | NOT REPORTABLE |
| (2) | NOT OF INTEREST TO OTHER JUDGES |

CASE NUMBER: A5040/2022

DATE: 30th January 2024

In the matter between:

NQHANASANA SIVUYILE MALEFANE

Appellant

and

NEDBANK LIMITED

Respondent

Neutral Citation: *Nqhanasana Sivuyile Malefane v Nedbank (A5040/2022) [2024]*
ZAGPJHC

Coram: Yacoob et R. Strydom et Maier-Frawley JJ

Heard: 18 October 2023

Delivered: 30 January 2024 – This judgment was handed down electronically by circulation to the respondent's representative and the Appellant in person via email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 30 January 2024 at 10h00am.

Summary:

Appeal from a single Judge in this division – whether rescission of judgment should be granted in a matter where the Registrar granted default judgment whilst he on a previous occasion referred the matter to be heard in court.

ORDER

On appeal from: The single Judge sitting in Johannesburg (Flatela AJ sitting as the Court of first instance):

- (1) The appeal of the Appellant against the order of the court dated 23 December 2021 is dismissed with costs.
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JUDGMENT

Strydom J (Yacoob and Maier-Frawley JJ concurring)

- [1] This is a Full Court appeal against the judgment of Flatela AJ (the court *a quo*) in which the court *a quo* dismissed an application for the rescission of a default judgment granted against the Appellant by the Registrar of this court.
- [2] The court *a quo* granted the Appellant leave to appeal against the judgment to the Full Court of this division.
- [3] Before us the Appellant appeared in person and the respondent (Nedbank) was represented by counsel.
- [4] The default judgment granted was a money judgment pursuant to the Appellant's breach of a loan agreement advanced to the Appellant to purchase immovable property. An order for the executability of the immovable property was not sought simultaneously with the monetary judgment. The issue whether it was competent to separately apply for a monetary judgment without simultaneously applying for the executability against immovable

property was not raised by the Appellant and was not argued before us. In the judgment of the court *a quo* in the application for leave to appeal, it was stated that the main ground of appeal against her judgment is that the court erred in not considering that the default judgment of 12 August 2020 obtained by Nedbank was erroneously granted by the Registrar. The Registrar had earlier considered the same default judgment application on 2 March 2020 and directed, in terms of rule 31(5)(b)(iv) that the matter must be referred to court for consideration. This the Appellant noted as an irregularity which violated his right to access to court.

[5] The court *a quo* found:

[6] The question that must be considered on appeal is whether the Registrar/s can reconsider an application for default judgment where there was an earlier order that was granted by the same or the other Registrar regarding the same application.”

[6] In the Appellant’s notice for leave to appeal, he merely gave notice of his intention to apply for leave to appeal. Attached to the notice for leave to appeal was an affidavit in which he stipulated his grounds of appeal. It was stated that the court *a quo* misdirected herself in finding that he failed to provide a *bona fide* defence and in her finding that the Appellant only based his defence on Nedbank’s failure to provide him with a court date. He stated that he never received the summons from Nedbank as it was served at an address Nedbank at the time knew not to be his correct address. This caused him not being able to plead to the particulars of claim. He mentioned that Nedbank obtained the default judgment in direct violation of a court order that stipulated that the matter be heard in open court. He stated that the court *a*

quo should have used its discretion to grant rescission of the judgment. He stated that the court *a quo* erred in not taking into account that his business was drastically affected by the Covid-19 pandemic. He stated that the failure to serve the summons caused him to be unaware of the court proceedings “unfolding” against him. This resulted in his property being attached and auctioned by Nedbank. He stated that what happened to him amounted to an infringement of his constitutional rights as encapsulated in section 33(1) of the Constitution which provides that “everybody has the right to administrative action that is lawful, reasonable and procedurally fair”.

- [7] Before us the crux of the argument raised by the Appellant was based on the fact that the Registrar previously referred the default judgment to open court but at a later stage, after a further application for default judgment was made, granted the judgment without further referral to court.
- [8] Before dealing with the grounds of appeal, the facts of this matter should be briefly stated. For purposes of this judgment, the facts will be best described by way of a chronology, as was done by the court *a quo*.
- [9] On 12 December 2015, the Appellant and Nedbank entered into a loan agreement in terms of which Nedbank would advance an amount of R729,000 and an additional amount of R185,000 for purposes of the Appellant obtaining immovable property situated at Douglasdale Extension 167 Township (the immovable property).

- [10] On 19 February 2016, a bond was registered in favour of Nedbank over the immovable property as security for the proper performance and repayment of the loan agreement by the Appellant.
- [11] The Appellant fell into arrears with his monthly instalments and on 24 October 2019, a letter in terms of section 129 of the National Credit Act (the NCA) was hand delivered by the attorneys of Nedbank to the Appellant's chosen domicilium address at 3 Pebbles, Montrose Street, North Riding, calling upon him to pay arrears in the amount of R55,647.71 within 10 business days.
- [12] As no response was received pursuant to the s 129 notice, Nedbank issued summons which was served on 28 November 2019 at the Appellant's domicile address for the payment of an amount of R756,725.50 plus interest.
- [13] The Appellant failed to file an intention to defend and on 27 January 2020 the respondent filed an application for default judgment with the Registrar (the first application for default judgment). The Registrar referred the application for default judgment to open court.
- [14] On 27 February 2020, the Appellant filed a notice to defend the default judgment application and on 2 March 2020 the Appellant filed an opposing affidavit resisting default judgment.
- [15] After this date there was communication between the Appellant and Nedbank. On 19 March 2020 the Appellant contacted Nedbank and enquired about his

arrears so as to formulate a repayment plan. The Appellant provided a proposal which was met with a counter proposal regarding the settlement of arrears and the payment of instalments. The Appellant then failed to respond to Nedbank's counter proposal.

[16] After the Appellant filed his notice of intention to defend he failed to file a plea. On 9 April 2020 Nedbank served the Appellant with a notice of bar but this did not prompt the Appellant to file a plea. After the period had lapsed as stipulated in the notice of bar, the Appellant was effectively barred from pleading.

[17] On 5 May 2020, Nedbank advised the Appellant that it would again apply for default judgment.

[18] On 12 June 2020, an application for default judgment was served on the Appellant. He informed Nedbank that he has a defence and will oppose the application for default judgment. He failed to file a further answering affidavit setting out his defences.

[19] On 12 August 2020, the Registrar granted default judgment on the application which was served on the Appellant on 12 June 2020.

[20] On or about 15 September 2020, a warrant of execution was issued against the movable property of the Appellant.

- [21] On 21 October 2020, the Sheriff attended at the Appellant's property with a warrant of execution.
- [22] On 30 October 2020, the Appellant brought his rescission application which was dismissed by the court *a quo* in a judgment dated 23 December 2021.
- [23] On 25 March 2022, leave to appeal was granted by the court *a quo*.
- [24] The court *a quo* in her judgment on the merits of the rescission application considered the requirements the Appellant had to meet to be granted a rescission of judgment. The court *a quo* referred to the matter of *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (OPD). In this matter at p 476, the court stated that an applicant for rescission should comply with the following requirements:
- “(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.
 - (b) His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.
 - (c) He must show that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. (*Brown v Chapman* (1938 TPD 320 at p. 325)).”
- [25] It should be noted that at this stage that the Appellant elected to apply for rescission of the default judgment instead of following the procedure provided in rule 31(5)(d) which stipulates that any party dissatisfied with the judgment granted or direction given by the Registrar may, within 20 days after such

party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.

[26] The court *a quo* considered whether the Appellant has shown a *bona fide* defence to Nedbank's claim. The defence to the claim of Nedbank raised by Appellant is that he struggled with repayments due to the financial constraints he suffered in 2019. This constraint was exacerbated by the Covid-19 pandemic and he could not keep up with his payments. He was expecting that he could come to a restructuring agreement with Nedbank to repay the debt.

[27] In my view, the court *a quo* was correct to state that the Appellant, on the merits of the matter, could not provide any *bona fide* defence. Again before this court, Appellant was asked about his *bona fide* defence but could not provide any on the merits. The mere fact that he endeavoured to obtain a repayment plan from Nedbank will not serve as a defence. It is not disputed that no such agreement to amend the original agreement was concluded between the parties.

[28] The further defence raised that he never received the summons is also without merit as the Appellant filed a notice of intention to defend, albeit, at a later stage and out of time, after the summons was served in terms of the agreement between the parties. The Appellant was placed under bar and ended up not filing a plea. There is no indication on the papers before this court that at any stage the Appellant asked for a copy of the summons to enable him to plead.

[29] All that is left for consideration is the procedural defence that the default judgment was granted by the Registrar after the Registrar previously referred the matter to open court. In terms of rule 31(5)(b) the Registrar may either grant judgment as requested or require that a matter be set down for hearing in open court. This would mean that the Registrar will exercise a discretion to make an order either way. The initial referral for hearing in open court did not create a dispute in this matter but the granting of judgment on the further application for default judgment is challenged to be irregular.

[30] Whether the Registrar may grant an order in applications covered by the NCA has been the subject of conflicting judgments in this division as well as in other divisions of the High Court. In a recent judgment dated 12 January 2024, in this division, Gilbert AJ in the matter of *Nedbank Ltd v Mashaba* Case No. 2023-034575 (*Mashaba*) this issue was comprehensively and specifically considered. The court found that the Registrar may grant default judgment in terms of rule 31(5) where the proceedings (which do not relate to immovable property), fall within the ambit of the debt enforcement procedures prescribed in s 130 of the NCA. He found that applications for default judgment were to be placed before the Registrar in terms of rule 31(5) for consideration and not enrolled for determination in open court, unless there is a good reason for the referral to court. In his judgment he referred to various conflicting judgments but followed the decisions of *Du Plessis v FirstRand Bank Ltd t/a Wesbank* [2018] ZAGPPHC 286 (2 May 2018) and *Nedbank Ltd v Mollentze* 2022 (4) SA 597 (ML).

[31] In paragraph 63 of this judgment, Gilbert AJ found as follows:

“The Registrar too must fulfil its part of the mandate. The Registrar cannot routinely, require the matter to be heard in open court simply because it is an NCA matter. Nor can it do so because it may be overburdened. The Registrar is permitted to consider NCA actions where they fall within the ambit of rule 31(5) and to perform the oversight function required by s 130 of the NCA, including to appropriately exercise the power that it has in terms of rule 31(5)(b)(i) to (iv) and it should do so. Should the Registrar require a matter to be heard in open court in terms of rule 31(5)(b)(iv), it should give sufficient reasons.”

[32] I am in agreement with the reasoning and findings in *Mashaba*. The decision in *Mashaba*, however, does not address the main concern and ground of appeal of the Appellant in this matter, being that after a default application was referred to open court the Registrar may thereafter not grant judgment himself. There may be substance in such an argument, in circumstances where a decision was made by the registrar to refer the application to open court, but thereafter, the decision is revoked and an order is granted by the Registrar. More so in a situation where the respondent in the matter was informed that the matter would be heard in open court. The matter *in casu* is, however, on a different footing. After the matter was referred by the Registrar to open court the indications were that the Appellant was going to defend the matter. The Appellant filed a notice to defend the matter on 22 February 2020 and on 2 March 2020 the Appellant filed an affidavit to resist the judgment. The matter could no longer be regarded as a default application. In this instance, however, the default judgment application was not proceeded with in open court. After this, the Appellant, if he wanted to oppose the claim, should have filed his plea as he was not yet under bar. He failed to do this. Nedbank then filed a notice of bar on 9 April 2020 but still no plea was filed by the

Appellant. The Appellant was then barred from filing a plea. After this the Appellant was yet again in default.

[33] On 20 June 2020, at a stage when the Appellant has done nothing further to resist the claim, Nedbank again applied for a default judgment. This time the Registrar granted default judgment without referral to court. The Registrar, who would have been apprised with what has transpired, considering the documents filed in the matter, was, in my view, entitled to grant the monetary judgment. This took place on 12 August 2020. In my view the Registrar did not irregularly do so as this was a further application for default judgment after the first application was referred to court but was not proceeded with. Appellant, again, was in default of he was barred from filing a plea. Executability against immovable property was not sought nor granted. This order could only be sought in open court.

[34] It should be pointed out that the further application for default judgment was served on the Appellant and he failed to oppose the application. In the second notice of application for default judgment it was specifically noted that:

“(b) The defendant failed to enter his appearance to defend on or before 12 December 2019 and the plaintiff subsequently applied for judgment against the defendant on 16 January 2020.”

[35] Clearly this was a further application for default judgment as it refers to the first judgment which was sought.

[36] This notice to apply for default judgment was sent to the Appellant under a covering email dated 12 June 2020.

[37] In this email it was stated as follows:

“We take note that you will provide us with a payment plan herein by next week.

Kindly find attached hereto for your attention and proper service the **Application for default judgment** herein.

Should we not receive your payment proposal within **5 days** hereafter we are instructed to proceed with the aforesaid application.”

[38] This email was received by the Appellant as he replied thereto by stating:

“Received & noted.”

[39] Before this on 8 April 2020, the Appellant informed the attorneys of Nedbank per email that he will accept service of all further pleadings and notices electronically.

[40] It is understandable that when the payment plan requested by the Appellant delivered nothing that Nedbank again approached the Registrar for default judgment, which was then granted on 12 August 2020, which was a month after the application was served on the Appellant.

[41] In my view, the Registrar was entitled to grant judgment by default. The Appellant could have set down the order of the Registrar for reconsideration by a court but failed to do so. Instead of a reconsideration application he brought the rescission application in which he could not establish a *bona fide* defence.

[42] The Appellant brought his application in terms of rule 31(2)(b) and not rule 42 which provides that a court may upon the application of a party rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. Even if rule 42 is considered it cannot be found that the Registrar erroneously granted the judgment. The referral to court came to naught and a further application for default judgment was made.

[43] In my view, the Appellant has failed to establish a case for rescission of the decision of the court *a quo*.

Order

(1) The appeal is dismissed with costs.

R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree,

S YACOOB
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree,

A MAIER-FRAWLEY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 18 October 2023

Delivered on: 30 January 2024

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