IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NUMBER: 434/2015

15/12/2017

In the matter between:

THABO XOLANI NKHATHI	First Applicant
REFILOE KHOALI	Second Applicant
and	
ABSA BANK LIMITED	First Respondent
SHERIFF OF THE COURT (ROODEPOORT NORTH)	Second Respondent

JUDGMENT

MOKOENAAJ,

INTRODUCTION

[1] The applicants are approaching this court with a rescission application.

The applicants' application is brought in terms of Rule 42(1) and the common law.[1]

[2] This matter is not without its own unique history:

[3] On 7 December 2012, the applicants purchased a house at [….] province of Gauteng.

[4] As a form of security for the loan amount advanced pursuant to the written mortgage loan agreement concluded between the parties, a mortgage bond in the sum of R688 000.00 was registered against the aforesaid property, in favour of the first respondent..

[5] During November 2014, the applicants fell in arrears with the bond and the first respondent initiated action proceedings against the applicants in order to recover the full amount owing and the arrears which at the time were R51 663.93.

THE DEFAULT JUDGMENT

[6] The first respondent contends that it has effected service of the combined summons on the applicants by affixing the summons at the applicants' chosen *domicilium citandi et executandi* at [….] Extension 30. as corroborated by the Sheriffs return of service.[2]

[7] In essence, the first respondent contends that the service was effected by means of the court rules and at the chosen *domicilium.*

[8] The first respondent submits that the applicants' failure to attend the action proceedings was wilful.

[9] On the other hand, the applicants contend that they did not defend the actions against them as a result of having not received the summons and being unaware of the proceedings instituted against them by the first respondent.

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[1] Applicants' rescissionapplication, p. 56, paras 1 - 6; **NB! see para 3 of the notice of motion to the rescission application.**

[2] Bundle to the main action, p. 1 - p. 2.

[10] The applicants further submit that judgment obtained by the first respondent on 5 March 2015 was by default as they were not aware of the set down and of the proceedings initiated by the first respondent against them.

THE RESCISSION APPLICATION

[11] This matter comes before me against the background as alluded to, above. In their rescission application, the applicants makes the following submissions:-

"7. *First Applicant was not served with summons but summons was affixed at Applicant's place of residence. First Respondent proceeded with application for default judgment, which application was granted in first Applicant's absence.*

8. First Respondent has *failed to* serve *summons in terms of what is regarded as good and proper service, as summons* was *not served personal on 1st applicant.*

9. First Applicant became aware of the judgment when people came to his house for viewing the house and when he was *informed that his house was sold on auction.*

10. Default Judgment was *obtained against Applicant without Applicant's knowledge. The order to have the property declared especially executable* was *never served on the Applicant* as *required when execution* is *sought against* a *person's primary residence.*

11. Not only did s1t Respondent fail to warn Applicant of the failure to defend the action against him, especially when it sought to obtain an order to declare the property specially executable, 1st Respondent failed to inform First Applicant of the date upon which such application to declare the property specially executable would be heard.

12. Applicant was *not aware until in July 2016, that 1st Respondent had*

obtained default judgement against him and his property would be sold and or has *been sold.*

13. Applicant sought legal assistance from a *paralegal legal and or property agents to* assist *him with further settlement negotiations with 1st Respondent concerning his arrears and the capital amount on the bond account.*

14. The negotiations between Applicant and 1st Respondent proved to be unsuccessful as *1st Respondent insisted selling the property despite the offer to settle the judgment debt*."[3]

[12] On the other hand, in opposing the applicants' rescission application, the first respondent advances the following argument:-

"5.*1 In amplification to the above it is the First Responden1ts case that:*

5.1.1 The First Respondent concluded a *written mortgage load agreement with the Applicants in 2012.* As *security for the loan amount advanced to the Applicants a written mortgage bond* was *registered over the subject properly. The Applicants fell in arrears and the First Respondent instituted legal proceedings against the Applicants;*

5.1.2 The summons was served by affixing at the chosen domicilium and this address is *still the Applicants place of residence; and*

5.1.3 On 5 March 2015 default judgment was *granted by the Honourable Judge Matojane against the Applicants;*

5.2 It is *the* first *Respondent's submission that no single shred of evidence* is *supplied by the Applicants as regard to:*

5.2.1 Any attack on the validity of the returns of service;

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[3] Applicants' heads of argument. p. 4, para 7 - p. 5, para 14; **see also** p. 5, para 15 - p. 6, para 19.

5.2.2 Any possible explanation as *to why the summons never came to his attention;*

5.2.3 Any defence as *to the merits of the First Respondent's claim;*

5.2.3 Any a/legation as to why the judgment might have been erroneously sought and/or granted; and

5.2.4 Any indication as *to when exactly the judgment apparently came to his knowledge and what steps he took after having received such knowledge.*

5.3 *It is further the First Respondent's submission that the Applicants have failed to make out* a case *setting aside the warrant of attachment or to pend the sale in execution* as *prayed for.*"[4]

APPLICABLE LEGAL PRINCIPLES

[13] For reasons which will become more apparent, below, I am not persuaded that this rescission application ought to be initiated in terms of Rule 42(1) of the uniform rules of court and/or to be premised on the common law. In my view, this is a rescission application which ought to be determined in terms of Rule 31(2)(b).

[14] Rule 31(2)(b) of the uniform rules of court, provides that:-

"A defendant may within twenty days after he or she has 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 to it seems *meet.* "

[15] The applicants in their notice of motion also seek condonation for their failure to initiate their application as envisaged in Rule 31(2)(b) within the prescribed time periods.

[16] The court has a wide discretion in evaluating *' good cause'* in order to

[4] First respondent's heads of argument, p. 6, para 5.1 - p. 7, para 5.3; **see also** p. 7, para 7.1 - p. 11, para 9.2.

ensure that justice is done.[5]

[17] For this reason, the courts have refrained from attempting to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of an indulgence, for any attempt to do so would hamper the exercise of the discretion.[6]

[18] The requirements for an application for rescission under this subrule have been stated to be as follows:[7]

> *"(a) He (ie the applicant) 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 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 the 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."*

[19] When considering what constitutes willful default, this subrule does not require that the conduct of the applicant for rescission of a default judgment be not wilful, but it has been held that it is clearly an ingredient of the good cause to be shown that the element of wilfulness is absent.[8]

[20] While wilful default on the part of the applicant is not a substantive or compulsory ground for refusal of an application for rescission, the reasons for the applicant's default remain an essential ingredient of the good cause

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[5] *Wahl v Prinswil Beleggings(Edms) Bpk* 1984 (1) SA 457 (T).
[6] *Cairns' Executors v Gaam* 1912 AD 181 at 186; *Abraham v City of Cape Town* 1995 (2) SA 319 (C) at 3211- J .
[7] *Colyn v Tiger Food Industries Ltd tla Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9F.
[8] *Maujean t/a Audio Video Agencies v Standard Bank of* SA *Ltd* 1994 (3) SA 801 (C) at 803J.

to be shown.[9]

[21] The wilful or negligent nature of the defendant's default is one of the considerations which the court takes into account in the exercise of its discretion to determine whether or not good cause is shown.[10]

[22] While the court may well decline to grant relief where the default has been wilful or due to gross negligence, the absence of gross negligence is not an absolute criterion, nor an absolute prerequisite, for the granting of relief, it is but a factor to be considered in the overall determination of whether or not good cause has been shown.[11]

[23] The reasons for the applicant's absence or default must, therefore, be set out because it is relevant to the question whether or not his default was wilful.[12]

[24] In **Silber v Ozen Wholesalers (Pty)** Ltd[13], it has been held that the explanation for the default must be sufficiently full to enable the court to understand how it really came about, and to assess the applicant's conduct and motives. An application which fails to set out these reasons is not proper,[14] but where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle the applicant to the relief sought.[15]

[25] Before a person can be said to be in wilful default, the following elements must be shown:

25.1 knowledge that the action is being brought against him;

25.2 a deliberate refraining from entering appearance, though free to do so; and

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[9] *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529E-F.
[10] *Scholtz v Merryweather* 2014 (6) SA 90 (WCC) at 94F- 96C.
[11] *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance* Co *Ltd* 1994 (4) SA 705 (E) at 709A-E.
[12] *Brown v Chapman* 1928 TPD 320 at 328.
[13] 13 1954 (2) SA 345 (A) at 353A.
[14] *Marais v Mdowen* 1919 OPD 34.
[15] Cf *Behncke v Winter* 1925 SWA 59.

25.3 a certain mental attitude towards the consequences of the default.

[26] The courts have had some difficulty in defining the third requirement. At one stage, it was held to be a *willingness that Judgment should go against him, because of a knowledge or belief that he* has *no defence.*[16]

[27] In **Hainard v Estate Dewes**[17] the test of willingness was retained (although the court expressed the opinion[18] that *unconcern* or *insouciance* would be more appropriate terms), but without the qualification that the willingness must be because of a knowledge or belief that there was no defence.

[28] In **Checkburn v Barkett**[19], the court followed this suggestion, and the test adopted was whether the person alleged to be in wilful default, *'knows what he is doing, intends what he is doing, and is* a *free agent, and is indifferent as to what the consequences of his default may be'.*[20]

[29] This latter test has been followed in a number of later cases[21] but it has been suggested that this test, too, is not conclusive and that the true test is whether the default is a deliberate one, ie when a defendant with full knowledge of the circumstances and of the risks attendant on his default freely takes a decision to refrain from taking action.[22]

[30] All three elements must be established before the party can be said to have been in wilful default. The onus of proof rests ultimately on the respondent.

APPLYING THE LEGAL PRINCIPLES TO THE FACTS

[31] This rescission application can be disposed of on the following common cause and/or uncontested facts:-

31.1 the applicants as a matter of fact were in arrears and unable to

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[16] *Hitchcock v Raaff* 1920 TPD 366.
[17] 1930 OPD 119.
[18] At 124.
[19] 1931 CPD **423.**
[20] At 423 (emphasis added).
[21] *Mangalelwe v Van Niekerk* 1941 EDL 229.

honour their obligations in terms of the loan agreement concluded between the parties;

31.2 the first respondent was, in law, entitled to initiate the action proceedings against the applicants, as it did;

31.3 it is not disputed (and this was confirmed by counsel for the applicants,) that summons was indeed served as indicated in the return of service;

31.4 the applicants do not dispute that the service was effected as contended for by the first respondent but they merely state that they did not receive a summons without providing facts or assisting the court with the averments upon which it could be inferred, in their favour, that service was not effected as alleged and/or that summons did not come to their attention;

31.5 the default judgment was obtained on 5 March 2015. The rescission application was only initiated in July 2016. The applicants allege that they only became aware of the proceedings initiated by the first respondent only in July 2016;

31.6 fundamentally, the applicants in their founding affidavit in support of the rescission application, they do not provide any reasonable and/or valid defence against the first respondent's claim.

[32] Having considered the papers filed by the parties in these proceedings, the heads of argument submitted on behalf of the parties and the applicable legal principles, I am not persuaded that the applicants have satisfied the requirements of a rescission application and accordingly the rescission application must fail.

INTEREST OF JUSTICE

[33] During argument advanced on behalf of the parties, before me, both counsel informed the court that their clients were required and invited to

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[22] *Markel v Absa Bank Bpk* 1996 (1) SA 899 (C) at 905C-D

file supplementary affidavits as per the directions of Molopa-Sethosa J. The parties duly complied with the aforesaid directions and I also had to consider the averments contained in the parties' supplementary affidavits.

[34] Crucially, the first respondent was required to explain as to why it proceeded with the sale in execution while there was a pending rescission application. In its supplementary affidavit, the first respondent alleges that subsequent to the sale in execution, the transfer of property was placed on hold as agreed to by the Sheriff, the purchaser and the first respondent to ensure that the rescission application is disposed of prior to registering the transfer. I find this to be a reasonable explanation and a reasonable approach adopted by the first respondent.

[35] On the other hand, the applicants in their supplementary affidavit discloses facts which were not before Molopa-Sethosa *J* pertaining to the status of the immovable property, in question.

[36] Fundamentally, in paragraphs 31 to 36 of their supplementary affidavit, the applicants disclose the following facts which are supported by correspondence attached to their supplementary affidavit:-

> *"31. Sometimes in March 2017 before this application was heard in May 2017, my attorney informed Hammond Pole that Michel's offer was still standing and that Michel's bond attorneys were still awaiting acceptance by ABSA of Michel's offer. I attach hereto marked annexure "D 1 - D 5" copies of email communication between Hammond Pole and our attorneys of record.*
>
> *32. We have displayed to ABSA that Michel* was *still interested in purchasing our property as per initial offer, however* ABSA *have been persistent with their refusal to accept the offer by Michel.*
>
> *33. In fact ABSA has argued that they are unable to accept our offer* as *the sale agreement between them and a certain Mr. Warren Hayes who had purchased the property from the auction for the* sum *of R750,000 was still enforceable.*
>
> *34. However my attorney has since learnt that Mr. Warren Hayes had long cancelled the sale between himself and ABSA as far back as*

July 2016. I attach hereto marked annexure "E1 - E6" copies of email communication between ABSA *and Mr. Hayes.*

35. *The honourable court would appreciate that Mr. Hayes cancelled the sale* as *far back* as *July 2016, however* ABSA *has decided to mislead the honourable Judge Molopa - Sethosa during the hearing of the matter in May 2017, by stating that the sale* was *still enforceable against Mr. Hayes.*

36. *I submit that Absa has no interest in* us *settling our debt, rather than dragging this matter longer that it has been running. Furthermore* Absa *has caused* us *much financial discomfort in that we are now faced with bills for legal fees when this matter could have been settled long ago."*[23]

[37] Surely the purpose of the first respondent in initiating the proceedings against the applicants was to protect its interest and to ensure that any liability arising from the aforesaid property is extinguished.

[38] Accepting the explanation of the first respondent when addressing the concerns raised by Molopa-Sethosa J and having regard to the averments made in the applicants' supplementary affidavit (wherein the applicants appears to be making a plea and seeking to ensure that the property is not disposed of below the market value, to the detriment of the applicants).

[39] I see no harm in the first respondent, in the interest of justice, engaging with the applicants and entertaining the offer to purchase alluded to by the applicants in their supplementary affidavit.

[40] In the event that the first respondent decides to dispose of the property and in the event that the first respondent engages with the applicants and still reject their offer, the applicants are ordered by this court, in the interest of justice, not to sell the property less than an amount of R1 000 000.00 which the applicants would have received as per the offer alluded to from Michell Morris.

ORDER

[41] In the circumstances, we make the following order:

41.1 the rescission application is dismissed with costs;

41.2 the first respondent is ordered to engage with the applicants in relation to the offer to purchase the property in question received by the applicants from Michell Morris. in an amount of R1 000 000.00;

41.3 in the event that the first respondent decides to dispose of the property and in the event that the first respondent engages with the applicants and still reject their offer, the applicants are ordered by this court not to sell the property less than an amount of R1 000 000.00.

MOKOENA AJ

ACTING JUDGE OF THE HIGH COURT

[23] Applicants' supplementary affidavit, p. 6, para 31 - p.7, para 36.