IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: 228/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

20 May 2022

In the matter between:

FAMANDA ERIC MANGOLELE **APPLICANT**

And

ABSA BANK LIMITED **RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 20 May 2022.

JUDGMENT

COLLIS J

INTRODUCTION

1.This is an opposed application in terms of the provisions of Rule 42(1)(a) of the Uniform Rules of Court.[1] The order which the applicant seeks to rescind was granted on 2 August 2018.

2. The matter was set down for hearing on 21 October 2021.This step was taken by the respondent after the applicant had been remiss to file his Heads of Argument and pursuant to the respondent obtaining an order in its favour to compel the applicant to file such heads.

3. The order to compel was granted against the applicant on 7 May 2021 and subsequently served on the applicant on 28th May 2021. As at date of hearing of the application, the applicant had failed to comply with the order to compel.

[1] Founding affidavit paragraph 3 paginated page 5; paragraph 8 paginated page 6

4. Upon service of the Set Down and prior to the hearing of the matter, the applicants' attorney of record requested from the respondents' attorney of record, a postponement of the application in order to file a Supplementary Replying affidavit. This request was not acceded to by the respondent.

5. On the day of the hearing, this request was once again persisted with by the applicant albeit that the request was not made through a substantive application as is the practice in this Division. The Court nevertheless in the interest of justice proceeded to hear argument and ultimately refused the application for a postponement. Consequently, the application proceeded.

BACKGROUND

6. On 2 August 2018 as mentioned, the respondent obtained summary judgement against the applicant and it is this judgment that the applicant now wishes to have rescinded.[2] It is worth mentioning that the summary judgment application was not resisted by the applicant during the previous proceedings which resulted in the judgment being obtained. On the hearing date of the summary judgment application, there was also no appearance

[2] Judgment granted by Masopa AJ on 2 August 2018 p 12.

by the applicant.

APPLICABLE LAW

7. The provisions of Rule 42(1) reads as follows:

> *"(1) 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:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
>
> *(c) an order or judgment granted as the result of a mistake common to the parties."*

8. In Kgomo v Standard Bank of South Africa 2016 (2) SA 184 (GP) Dobson J, held that the following principles govern rescission under Rule 42(1)(a):

> 8.1 the rule must be understood against its common-law background;

8.2 the basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio*, but subject to certain exceptions of which rule 42(1)(a) is one;

8.3 the rule caters for a mistake in the proceedings;

8.4 the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;

8.5 a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;

8.6 the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and

8.7 the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).

9. In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment.[3]

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[3] Nyingwa v Moolman NO 1993 (2) SA 508 (Tk) at 510D-G; Naidoo v Matlala NO 2012 (1)

THE APPLICANT'S CASE:

10. As per the founding affidavit it is the applicants' contention that the judgment was erroneously sought and granted on the basis that there were facts which existed at the time that the judgment was granted of which the Court was unaware.[4] In this regard, the applicant sets out that a fraud was committed by the respondent in the form of deliberately misrepresenting facts to the Court and not disclosing material facts to the Court at the time that the judgment was obtained.[5]

11. In support of the above contention, the applicant alleges that subsequent to concluding the underlying agreement the applicant fell into arrears with his repayments. Pursuant thereto the respondent issued summons on 5 January 2018. Upon service of the summons the applicant then delivered a notice of intention to defend on 6 February 2018.

12. On 22 February 2018 the respondent delivered an application for summary judgment. This application was initially set down for 20 April 2018.[6] Prior to the summary judgment hearing date and more specifically on 16 April 2018, the applicant proceeded to make full payment of the outstanding arrears plus payment of an additional R6 000.00 and

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SA 143 (GNP) at 153C; Rossiter v Nedbank Ltd (unreported, SCA case no 96/2014 dated 1 December 2015), paragraph [16].

4 Founding affidavit paragraph 9 p 6.

5 Founding affidavit paragraph 10 p 7.

6 Index 006-34 to 56 annexure "FA2".

proceeded to oppose the summary judgment application on this basis. In this regard annexure “FM3”[7] is proof of payment so made in the amount of R60 000.00 in respect of the arrears in the amount of R53 790.13 as at 1 December 2017.

13. However, notwithstanding the payment of the arrear amount and the payment of the additional amount (effectively placing the account of the applicant in credit and thereby eliminating both the respondent’s basis to cancel the agreement and the entire cause of action) the applicant alleges, the respondent refused to consent to a removal or a postponement of the application for summary judgment. The record of proceedings however reflect that the Court did postpone the application on 20 April 2018,[8] when it was first enrolled for hearing.

14. Subsequent thereto, the Applicant made recurring monthly payments in the amount of R20 000.00 (which was more than the instalment of R13 275.65).[9] It as such came as a complete surprise to the applicant to then later learn of the judgment being entered against his name on 9 December 2019 as he contends that his account was well beyond good standing and in credit with a substantial amount of money at the time when the summary judgment order was taken.[10]

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[7] Index 006-34.
[8] Index 006-35 annexure “FM4”.
[9] Index 006-36 to 50 annexure “FM5”.
[10] Founding affidavit Index 006-8 para 19 and 27.

15. It is on this basis that the applicant contends that had the Court been made aware of the fact that there existed no outstanding arrears in terms of the agreement, it is unlikely that the Court would have granted the order for cancellation of the agreement.

THE RESPONDENT'S CASE

16. As per the answering affidavit[11] the first point taken by the respondent was that the application to rescind the order was not taken within a reasonable time, and in addition that the application has no prayer for condonation. The applicant before Court first became aware of the judgment on 9 December 2019 when the Sheriff removed the vehicle from his possession.[12]The present application was launched by the applicant on 18 March 2020.

17. Pursuant thereto, the applicant immediately contacted his attorneys who addressed a letter to the respondent's attorney on 10 December 2019. No response to this letter was received.[13] Thereafter, numerous attempts were made to communicate with the Sheriff and the respondent's attorney but still no response was forthcoming.[14] This resulted in him ultimately consulting with his counsel during February

[11] Answering affidavit Index 011-11 to 67
[12] Founding affidavit paragraph 22 p 8.
[13] Founding affidavit paragraph 23 and 24 p 9. Also see annexure "FM6" p51 and 52.
[14] Founding affidavit paragraph 26 p 9.

2020 in order to bring a rescission application but as he contends that due to the Covid-19 lockdown, he was unable to move freely to commission the required documents and obtain the necessary bank records. It is for this reason then that he alleges that under these circumstances the application is brought within a reasonable time.[15]

18. In opposition the respondent argues that the applicant despite having had knowledge of the judgment since 9 December 2019 had waited until 18 March 2020 to launch this application.[16] In addition that the reliance placed on the lockdown as a reason for the delay is misleading as the lockdown only commenced at midnight on 25 March 2020 whereas the founding affidavit was already deposed to prior thereto on 16 March 2020 and the application subsequently issued on 18 March 2020. As such the respondent argues that the lockdown had no influence on the applicant's preparations to finalise the application.[17]

19. The present application, as mentioned, contains no prayer for condonation. Such failure in my view, is not of necessity destructive to the application more so in circumstances where the affidavit sets out an explanation for the lateness in bringing the application.

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[15] Founding affidavit paragraph 28 and 29 p 9.
[16] Answering affidavit paragraph 18 p 79
[17] Answering affidavit paragraph 23 Index 011-24.

20. A mere explanation however does not suffice. The explanation has to be a reasonable explanation as to the circumstances which brought about the delay from first gaining knowledge of the judgment, until ultimately when the application was launched. In the present instance a period of three months had lapsed until the application was ultimately launched. The explanation for the delay during this period of three months, to my mind cannot be regarded as completely satisfactory, but because the issues raised in this application is an important matter for the applicant, I deem it necessary to grant the applicant condonation and to deal with the merits of the application.

21. As to the remainder of the merits of the application, in his replying affidavit, the applicant for the first time had proffered an explanation as to his absence at the hearing when the summary judgment was entered against his name. This explanation explaining his default, is a matter which ought to have been canvassed by the applicant in his founding affidavit and not one which should for the first time be explained by him in a replying affidavit. It matters not, that this point was raised by the respondent in its answering affidavit which brought about an explanation on his part.

22. In addition, it is further settled law that in motion proceedings an applicant’s case is made out in his founding affidavit. No such explanation is contained in the founding affidavit.

23. In the absence thereof, no further consideration will be given to this point.

24. As previously mentioned, it is the applicant's case that at the time that the judgment was granted the arrears was settled and as such the respondent was not entitled to the judgment, wherein amongst other cancellation of the agreement was sought.

25. Differently put, the application is premised on the provisions of section 129(3) and (4) of the National Credit Act, Act 34 of 2005 read with the judgment of Nkata v Firstrand Bank Ltd 2016 (4) SA 257 (CC).

26. The relevant sections contained in the National Credit Act,[18] is quoted hereunder for ease of reference:

> *"(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.*

[18] National Credit Act 34 of 2005.

(4) A credit provider may not reinstate or revive a credit agreement after-

(a) the sale of any property pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123."

27. On point it is the respondent's case that the applicant's account was in arrears in the amount of R46 167.09 at the time when the summary judgment was entered and that the agreement between the parties was thereafter cancelled. Furthermore, that after the agreement was cancelled that the applicant proceeded to make further payments in settlement of the arrears and that despite the settlement of the arrears the agreement could not be reinstated as the arrears were settled subsequent to the cancellation.[19] As such the respondent contends that the applicant cannot rely on this as a defence and as a ground of rescission in terms of Rule 42 as same was not available to the applicant when the order was granted.

28. Having regard to the provisions of section 129(3) and (4) of the National Credit Act and in applying the Nkata-judgment, the applicant is

[19] Answering affidavit para 3.1.18 to 3.1.24 p 011-12 to 011-14.

not entitled to reinstatement of the cancelled agreement, more so in circumstances where the property in question on the applicant's own version has been repossessed by the respondent. On the undisputed evidence placed before this Court, it is clear that the applicant's account was in arrears at the time when the judgment was entered and that settlement of the arrears occurred after the judgment and cancellation of the agreement had taken place.

29. It is for the above reasons that I cannot but conclude that the order sought to be rescinded was not erroneously sought or granted and it is for this reason that the application cannot succeed.

ORDER

[30] In the result the following order is made:

30.1 The Applicant is granted condonation for the lateness in bringing the application;

30.2 The application is dismissed;

30.3 The Applicant is ordered to pay the costs of the application on the scale as between attorney and client.

COLLIS J

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	: Adv. M. Musetha
Attorney for the Applicant	: AM Nduna Attorneys
Counsel for the Respondent	: Adv. J. Minnaar
Attorney for the Respondent	: Hammond Pole Majola Incorporated
Date of Hearing	: 22 November 2021
Date of Judgment	: 20 May 2022

Judgment transmitted electronically