



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 08 January 2024

Signature: \_\_\_\_\_

**CASE NO.**

**66600/2016**

In the matter between:

**MPAI MMATLALA MOTLOUNG**

Applicant

And

**FIRSTRAND BANK LTD**

Respondent

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## JUDGMENT

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**NYATHI J**

### **A. INTRODUCTION**

[1] This is an application for the rescission and setting aside of judgments which were granted by the above this honourable Court on 19 October 2016 and 07 August 2017 respectively, a monetary judgment as well as judgment whereby the property in question was declared specially executable.

[2] The rescission application is brought in terms of both Uniform Rule 31 (2) (b) and Uniform Rule 42 (1) (a).

[3] The property in question is not the applicant's primary residence but is used for investment purposes.

[4] The application is opposed by the respondent.

### **B. BACKGROUND**

[5] The parties entered into two written home loan agreements.

- [6] The applicant failed to honor its commitments in terms of the agreements and on 26 May 2016 a notice in terms of section 129 of the NCA was sent to the applicants chosen domicile address via registered post.
- [7] The first notification was sent on 2 June 2016.
- [8] On 2 September 2016 an application was launched for monetary relief and to declare the property spatially executable. It was served at the hypothecated address by means of affixing to the principal door.
- [9] Absent the filing of a notice of intention to oppose, the respondent proceeded with the application on a default judgment basis. Judgment was granted on 19 October 2016 in the amount of R 550 372.52 with interest and costs. The relief in relation to having the property declared specially executable was postponed *sine die*.
- [10] On 03 November 2016 a warrant of execution was issued against the applicant's movable property.
- [11] The warrant of execution was served upon the applicant's spouse by sheriff on 06 February 2017. The applicant's spouse declared to the sheriff an inability to pay the judgment debt and costs in full or in part and pointed out movable goods which were judicially attached.

[12] In light of the applicant's inability to satisfy the judgment, the respondent proceeded with an application in terms of Rule 46 (1) for an order declaring the applicant's immovable property specially executable.

[13] At the time the affidavit was deposed to in support of the application in terms of Uniform Rule 46 (1) the applicant was 6.54 months in arrears and accordingly owed an amount of R 43 414.89 as at March 2017.

[14] The Uniform Rule 46 (1) application was personally served on the applicant at her residential address on 10 May 2017.

[15] Once again, absent the filing of a notice of intention to oppose, the respondent on a default basis was granted an order 17 August 2017 which declared the applicant's property specially executable.

[16] Thereafter a warrant of attachment was issued by the sheriff on 11 September 2017.

[17] This application for rescission was served on 25 June 2019.

[18] As of 14 August 2019, the applicant was 43.49 months in arrears and the amount owed had escalated to R 221 822.82, the last payment made on the account was on 04 November 2017 in the amount of R 9 288.91.

### **C. COMMON CAUSE FACTS**

[19] The property in question is not a primary residence, the applicant derives an income from the property from various tenants.<sup>1</sup>

[20] The applicant admits that she defaulted on her contractual obligations towards the respondent and therefore breached the terms of the agreement.<sup>2</sup>

[21] The applicant further admits that the application to declare the property specially executable was served on her personally on 10 May 2017.<sup>3</sup>

### **D. THE APPLICATION FOR RESCISSION**

[22] This rescission application is brought in terms of both Uniform Rule 31 (2) (b) and Uniform Rule 42 (1) (a).

[23] For a successful rescission application in terms of Rule 31 (2) (b), the applicant must establish the following:

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<sup>1</sup> Applicant's founding affidavit para 11 and 33.

<sup>2</sup> Founding affidavit para 15.

<sup>3</sup> Founding affidavit para 10.

- 23.1 the judgment was granted by default before a Court or the Registrar;
- 23.2 it must have been due to the failure to enter an appearance to defend or a plea;
- 23.3 the application must be made within 20 days after the defendant had obtained knowledge of the judgment (it is generally accepted that the application must be issued, served and filed within the stated period);
- 23.4 an absence of wilfulness must be shown;
- 23.5 a reasonable explanation for the default;
- 23.6 the application is bona fide and not made with the intention to delay; and
- 23.7 that the applicant has a bona fide defence.

[24] There is no dispute that the applicant was in default when the judgment was granted and failed to appear and oppose the application for default judgment. Furthermore, the applicant failed to apply for rescission within 20 days of obtaining knowledge of the judgment.

[25] It is probable that the applicant was notified of the existence of the judgment against her when the sheriff came to attach certain movable assets in February

2017. This approximates 2 years and 4 months before this rescission application was launched and served on the respondent.

[26] If we accept for a moment, the applicant's allegation that she only became aware of the judgment against her when personal service was effected upon her in May 2017, then the period of delay is close to 2 years and 1 month before she launched and served this application.

[27] The explanation furnished by the applicant in her founding papers is wholly insufficient for purposes of extending or abridging the 20-day time period prescribed by the Uniform Rule.

[28] The applicant at paragraph 15 of her founding affidavit admits having received the documents in relation to the Rule 46 application and pursuant thereto purports to have entered into an agreement with the respondent which made provision for the applicant to bring the arrear bond repayments up to date within a given time.

[29] There however, are no details furnished regarding the date, place, identity of the signatories and whether the agreement was verbal or written and what the material terms thereof were.

[30] The respondent's contention is that it never concluded such an agreement. At any rate, should it be the applicant's version that the agreement was verbal,

that is denied because the respondent is statutorily forbidden from concluding such agreements by virtue of section 93 of the National Credit Act 34 of 2005.

[31] In any event, on the applicant's own version, the agreement was to bring her arrear bond payments up-to-date, which obligation was clearly not adhered to.

[32] Counsel for the respondent submitted that the applicant lay supine for months on end before launching this application and has failed to take the court into her confidence. The reasons furnished are vague and lacking in detail and substance. No accountability is taken by the applicant herself and therefore such gross tardiness ought not be condoned by this court.

[33] The Applicant has failed to establish the absence of wilfulness. The applicant is an educated professional with access to legal representation. Despite the papers being served on her personally, the applicant did not make any efforts to oppose the matter or even present herself at Court in person. The Applicant was clearly wilful and fails to overcome this hurdle as well.

[34] That the applicant was in wilful default can hardly be gainsaid. She had knowledge of the action being taken against her, refrained from taking any steps to appear and carried on with no care. This is symptomatic of a debtor who was in breach and had no defence.



[35] The applicant's explanation is poor. Therefore, the strength of the applicant's defence on the merits become crucial as it may compensate for a poor explanation in certain circumstances.

[36] The applicant ventures a defence in paragraph 30 of her founding affidavit by alleging that the amount that was in arrears which was referred to in the section 129 letter had been paid in full.

[37] **UNIFORM RULE 42 (1) (a)**

37.1 The applicant has also invoked Uniform Rule 42 (1) (a) in her quest for rescission.

37.2 This Rule provides for variation of a Court order in the following instances:

37.2.1 where an order or judgment was erroneously sort of erroneously granted in the absence of any party affected thereby;

37.2.2 an order or judgment in which there is ambiguity, or a patent error or omission in the order or judgment, but only to the extent of such ambiguity, error or omission; and

37.2.3 an order or judgment granted as the result of a mistake common to the parties.

[38] It follows that an applicant who lay supine for months on end without dealing with his or her predicament cannot be heard favourably when they complain after the lapse of time. What is a reasonable time depends upon the facts of each case.

[39] In *Ethekwini Municipality v Ingonyama Trust*<sup>4</sup> the Constitutional Court held that where the delay was lengthy, the explanation given must not only be satisfactory, but must also cover the entire period of the delay. The court further emphasized the necessity that an application for condonation must provide a full explanation for the delay, which explanation must be reasonable.

[40] The court has a discretion whether to grant or refuse a rescission under this rule. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*<sup>5</sup> the court stated that:

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<sup>4</sup> *Ethekwini Municipality v Ingonyama Trust*, 2014 (3) SA 240 (CC).

<sup>5</sup> *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113(SCA) (31 March 2003).

*“Recession or variation does not follow automatically upon proof of a mistake. The rule gives the courts a discretion to order it, which must be exercised judicially.”*

[41] A judgment to which a Plaintiff is procedurally entitled in the absence of the defendant cannot be said to have been granted erroneously as contemplated in Rule 41 (2) (a). The applicant’s defence is the following:

41.1 It is the applicant's contention that the judgment was granted in error in that at the time the application for default judgment was launched, on 25 August 2016, the amount which was recorded in the letter of demand issued under section 129 of the NCA had been settled in full and that the respondent relied on a certificate of balance dated 27 June 2016 and never published an updated certificate of balance. The applicant made two separate payments which she contends satisfied the amount demanded, on 13 July 2016 and 16 August 2016 respectively.

41.2 Secondly, it is contended that the respondent was mistaken in treating the property in question as the applicant's *domicilium* address at which legal proceedings could be served in terms of Uniform Rule 4 as well as for purposes of section 129 of the NCA. Therefore, the honourable Court committed an error in accepting that the provisions of section 129 of the NCA had been duly complied with.

[42] In response, the respondent submits that the two payments on 13 July and 15 August 2016 respectively were made after the 10 business day period afforded in the section 129 demand. The 10-day period has been calculated from 02 June 2016, being the date on which the first notification was sent, to 17 June 2016. The applicant only settled the full amount in terms of the section 129

demand on 15 August 2016 (just shy of 1.5 months of the first notification) and certainly over the 10-day period. Despite the two payments the applicant's account remained in arrears throughout as she failed to make her payments for the respective months of July 2016 and August 2016.

[43] The respondent further submits that the property in question (the hypothecated address) was correctly regarded as the applicant's chosen *domicilium* address in that the applicant had nominated in both the first agreement ( sub clause 5.31.2.2)and in the second agreement (sub clause 4.30.1) the physical address on the first page of the agreements as the physical address for the service of all forms, notices and documents in respect of any legal proceedings. In the event that the applicant failed to nominate an address, then the address of the property shall be deemed to be the applicant's nominated physical address. The applicant failed to provide the conveyancer with a physical address and thus she elected the physical address of the hypothecated property as the chosen *domicilium* address. Had the applicant wished her residential address to become the chosen *domicilium* then she could have accordingly indicated that.

[44] Thus, the applicant failed to settle the outstanding amount in the requisite period, and when she did, she was in arrears for the months of July and August

2016. The applicant had always been in arrears from the date on which the section 129 demand was sent and was so when the application was issued.

## **E. CONCLUSION**

[45] The application by the applicant thus falls short of the requirements of both Uniform Rules 31 (2) (b) and 42 (1) (a) as articulated above.

[46] The application was brought way outside the 20-day period or within a reasonable period, and the applicant's explanation is inadequate.

[47] The applicant was confronted with legal documents which were served on her personally, but she wilfully disregarded them notwithstanding the fact that she is a professional person, not an indigent one, and could at the very least have attended court, even unrepresented, or contacted the respondent to enquire as to the current status of the matter.

[48] Setting aside the respective judgments would at any rate not serve any purpose because the applicant would revert to a situation where she is in arrears of at least 49 months with no defence. Subsequent judgment against the applicant would be inevitable.

[49] The applicant has taken technical points as an afterthought and has no bona fide defence.

[50] A final matter to be considered is that of costs. It is trite that costs follow the event. The respondent is seeking a punitive cost order on an attorney and client scale. There is no substantiation made for such an order. I could also not glean any specific provisions for such in the mortgage agreement. I will accordingly award costs on a party and party scale.

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

The application for rescission is dismissed with costs.

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J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 07 February 2023

Date of Judgment: 08 January 2024

On behalf of the Applicant: Mr. Sekhasimbe

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**Delivery:** This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 08 January 2024.