THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 96/2014

In the matter between:

TERENCE JOHN ROSSITTER	**FIRST APPELLANT**
TERENCE JOHN ROSSITTER NO	**SECOND APPELLANT**
GAIL WINGROVE ROSSITER NO	**THIRD APPELLANT**

and

NEDBANK LTD	**RESPONDENT**

Neutral citation: *Rossitter & others v Nedbank Ltd* (96/2014) ZASCA 196 (1 December 2015)

Coram: Navsa, Shongwe, Mbha and Mathopo JJA and Baartman AJA

Heard: **17 November 2015**

Delivered: **1 December 2015**

Summary: Civil Procedure – application of Uniform rule 42(1)*(a)* in terms of which a court is empowered to set aside a default judgment erroneously sought and granted in the absence of a party affected thereby.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (D Pillay J, sitting as court of first instance):

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and is substituted with the following order:

'(a) The application for the rescission of the default judgment granted by the Registrar of the High Court on 30 May 2014 is granted and the default judgment is set aside.

(b) The respondent is ordered to pay the costs of the application.'

JUDGMENT

Mbha JA (Navsa, Shongwe and Mathopo JJA and Baartman AJA concurring):

[1] The issue for determination in this appeal is whether the KwaZulu-Natal Division of the High Court, Pietermaritzburg (D Pillay J), was correct in refusing an application for the rescission of a default judgment that was granted by the registrar of that court on 30 May 2012. It is common cause that the application was brought under Uniform rule 42(1)*(a),* on the basis that the default judgment had erroneously been sought and granted in the absence of the appellants. The appeal is with the leave of the court a quo.

[2] The background is as follows. On 31 March 2008 the Rossitter Family Trust (the trust) represented by the first appellant in his capacity as a trustee, and BOE Private Bank, the respondent's predecessor in title, concluded a written loan agreement (the first loan agreement), in terms of which the respondent advanced to the trust, the amounts of R13.5 million and R9.77 million, repayable with interest in instalments over a period of 240 months. Subsequently, the parties, on various occasions, made written variations to the terms of the first loan agreement, more particularly concerning the trust's repayment obligations – timeframes were changed. In the last such variation in respect of the loan agreement of R 13.5 million concluded on 15 March 2010, the parties agreed that the capitalised loan amount payable by the trust was R14.65 million which together with additional amounts (not capitalised) would amount to R15 233 273.79 being repayable, plus interest at a rate equal to respondent's prime rate plus 1 per cent.

[3] Importantly, the varied agreement provided that the full outstanding amount would be payable in one single 'bullet repayment' which meant that the entire principal loan and interest was due at the end of the loan term which fell due on 1 June 2010. In respect of the loan of R9.77 million loan, the last written amended agreement was concluded on 10 March 2010, in terms of which the parties agreed that the capitalised loan amount payable by the trust was R10.6 million and that, together with additional amounts (not capitalised), the amount that would be payable was R11 012 885.76 plus interest. This amount and the amount at the end of the preceding paragraph was also

payable in one single bullet repayment on or before the final repayment date, namely 1 June 2010. The amounts due were secured by mortgage bonds registered in favour of the respondent over various immovable properties registered in title to the trust namely Erf 30 Winston Park, Erf 1692 Umhlanga Rocks and Erf 210 Port Zimbali. In addition, the first appellant signed two suretyships in favour of the respondent.

[4] It is common cause that the trust defaulted in its repayment obligations. As a result, on 14 October 2010 the respondent issued summons against all the appellants for payment of the amounts of R13 975 793.17 and R10 686 943.68, being outstanding balances due after payment of certain instalments, plus interest on the two loans. A notice of intention to defend the matter was served on 5 November 2010. On the same day the parties concluded yet a further agreement varying the payment terms of the loans. This variation agreement incorporated a confession of claim valid for 12 months in terms of which the appellants confessed to the amounts owed to the respondent, less any payments that had been made. Accordingly, the appellants did not dispute their liability for the principal debts.

[5] Initially the appellants made payments in terms of the variation agreements but defaulted soon thereafter. A letter of demand, enclosing a notice of breach dated 8 March 2008, calling upon the appellants to bring the arrears on the respective amounts up to date on or before 15 March 2012, failing which further legal action would be pursued, did not yield any results. As a consequence, a notice of bar was served upon the appellants' attorney on the 29 March 2012, some 16 months after the notice of

intention to defend had been served. The notice of bar required the appellants to file their plea within five days after its delivery.

[6] It is common cause that no plea was delivered within the five days as requested. Instead, on 13 April 2012, the appellants' attorney telephoned the respondent's attorneys requesting an indulgence for the late filing of the plea. The respondent's attorneys refused to accede to the request and advised that they were proceeding to apply for default judgment.

[7] The application for default judgment was lodged with the registrar, purportedly in terms of Uniform rule 31(5)*(a)* and served on the appellants' attorney on 17 May 2012. Default judgment was granted on 30 May 2012, in terms of which the appellants were held to be indebted jointly and severally, to the respondent in the sums of R11 313 793.17 and R9 309 656.59, respectively. In addition, the trust's immovable property was declared immediately executable.

[8] It is not disputed that the first appellant became aware of the judgment on 9 July 2012, whereupon he instructed his attorney to make application for the rescission thereof. Such application was ultimately brought on 14 August 2012. In his affidavit supporting the application, the applicant's attorney confirmed having received the notice of bar. His reason for not timeously delivering a plea was that he had been too busy with other matters and that at some point he was indisposed. He also placed the blame on his support staff for not timeously attending to the appellants' matter. This explanation is

far from satisfactory. It is however, not an issue on which this appeal turns. The court below ignored the procedural shortcomings, which I will deal with in due course and went on to consider and reject the substantive defences raised by the appellants. Pillay J consequently refused the application for rescission of judgment brought in terms of rule 42(1)*(a)*. It is against that conclusion that the present appeal is directed.

[9] The appellants contended that the default judgment had been erroneously sought and granted because of non-compliance by the respondent with Uniform rule 31(5)*(a)* read with para 2.3 of the Practice Manual of the KZN Division of the High Court GN 535, *GG* 26180, 2 April 2004 (practice manual). The issue that must be determined and which is dispositive is whether the default judgment had been erroneously sought and granted within the prescripts of rule 42(1)*(a).*

[10] However, before considering this aspect, I deem it necessary to deal briefly with two other issues. First, the appellants sought condonation for the late delivery of the appeal record, and the respondent similarly sought condonation for the late delivery of its heads of argument and a supplementary volume of the record. By agreement between the parties, condonation was granted to each as requested, with each party having to bear its own costs. Second, in support of the contention that the appellants' appeal has become perempted, the respondent averred that the appellants had conducted themselves in a manner inconsistent with an intention to pursue the appeal and from which the only conclusion that can be drawn is that they acquiesced in the

default judgment that had been granted against them.[1] The respondent submitted that after the court had dismissed the application for rescission on 27 February 2013 and after leave to appeal to this court was granted on 24 May 2013, the appellants did not resist the respondent's applications to execute the judgment against the appellants' movable and immovable properties and the subsequent transfer of the various immovable properties to the respondent. Examples provided were that the appellants did not resist the transfer on 19 February 2014 of the Winston Park property mortgaged in favour of the respondent and did not oppose the application brought by the respondent on 13 August 2014 to have the Umhlanga property declared specially executable. Thus the argument was that by their conduct, the appellants clearly and unconditionally decided to abide by the default judgment and that they are now precluded from continuing with the appeal.

[11] This latter argument cannot succeed. I have considered the history of this matter and in particular the relevant correspondence exchanged between the parties, and that which emanated from the office of the registrar of this court in relation to the prosecution of the appeal. Importantly, the appellants lodged the appeal record, albeit incomplete, with the registrar of this court on 17 December 2013, coupled with an application for the condonation for the late delivery thereof. It accordingly cannot justifiably be contended that the appellants had conducted themselves in a manner inconsistent with an intention to prosecute and finalise the appeal. On the contrary, the appellants had lodged the appeal record in December 2013 signifying a clear intention to proceed with the appeal.

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[1] *Qoboshiane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* 2013 (3) SA 315 (SCA) para 3.

I find it disturbing that the respondent still saw fit to thereafter proceed to transfer in execution of judgment the Winston Park property on 19 February 2014 and to have the Umhlanga property declared specially executable on 13 August 2014. To add insult to injury, the respondent contended that since the properties that served as security for the loans had already been transferred, that rendered the appeal moot. This submission for obvious reasons is unsustainable. In any event the properties were transferred in the face of a pending appeal and the respondent transferred them into its name. That process can be easily undone.

[12] I now return to consider Uniform rule 42(1)*(a)*, which provides:

'The court may, in addition to any 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'.

[13] Uniform rule 31(5)*(a)* provides:

'Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wished to obtain judgment by default shall . . . file with the registrar a written application for judgment against such defendant. Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than five days' notice of his or her intention to apply for default judgment'.

[14] Paragraph 2.3 of the relevant practice manual provides as follows:

'Where an application for default judgment is made six months after the date of service of the summons it is both the practice of the registrar's office and the Court to require that a notice of set down be served on the defendant informing him/her that such default judgment will be sought on a given date and time. Such date and time being not less than five dates from the Notice'.

[15] It is common cause that the notice of intention to apply for default judgment does not comply with the prescripts of rule 31(5)*(a)* read in conjunction with para 2.3 of the practice manual. The notice did not provide a time and date on which default judgment would be sought – the summons had been served more than six months before the application for default judgment was made thus the requirements of para 2.3 *had* to be complied with. The respondent's notice was therefore lacking. Simply put, it was procedurally defective. I pause to mention that a practice manual or directive duly promulgated by the Judge President of a division of the High Court, has the same force and effect as the Uniform rules.[2]

[16] The law governing an application for rescission under Uniform rule 42(1)*(a)* is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission.[3] It is not necessary for a party to show good cause under the subrule.[4] Generally a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of,

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[2]*National Pride Trading 452 v Media 24 Ltd* 2010 (6) SA 587 (ECP) para 31.
[3] *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471G.
[4] *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA (ECP) at 597I-598B.

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.[5] There can be no doubt that if the registrar had been made aware of the procedural defect in the rule 31(5)(a) notice, default judgment would not have been granted. In *Lodhi 2 Properties Investments CC v Bondev Development (Pty) Ltd* 2007 (6) SA 87 (SCA), Streicher JA held that if notice of proceedings to a party was required but was lacking and judgment was given against that party such judgment would have been erroneously granted. The following appears in para 24:

'Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. . . .'

It follows that the default judgment in the present case had been erroneously granted and that the appellants were entitled to have it rescinded. The court below accordingly erred in dismissing the application for rescission of judgment.

[17] In view of what is set out above it is not necessary to consider the various defences raised on the merits by the appellants, for example that the summons was defective because the third trustee namely, Patrick Claude Rivalland was neither cited nor served with the summons. The appellants had also denied that the trust had entered into valid loan agreements with the respondent and that the mortgage bonds were valid. These defences do not fall for consideration in this court.

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[5] *Erasmus: Superior Court Practice* 2 ed (Revision Service 1, 2015) Vol 2 at D1-567. See also *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 153C.

[18] I make the following order:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and is substituted with the following order:

‘(a) The application for the rescission of the default judgment granted by the Registrar of the High Court on 30 May 2014 is granted and the default judgment is set aside.

(b) The respondent is ordered to pay the costs of the application.’

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B H Mbha

Judge of Appeal

APPEARANCES:

For Appellant:	T N Aboobaker SC
Instructed by:	Theyagaraj Chetty Attorneys, Durban
	Honey Attorneys, Bloemfontein
For Respondents:	P J Combrinck
Instructed by:	Lynn & Main Attorneys, Pietermaritzburg
	Rosendorff Reitz Barry, Bloemfontein