

SOUTH AFRICA / JUDGMENT

Mahomed and Another v Absa Bank Limited and Others (3858/2007) [2017] ZAGPPHC 756 (7 November 2017) [2017] ZAGPPHC 756

COURT

North Gauteng High Court, Pretoria

BEFORE

TP Mudau

CASE / FILE NUMBER

3858/2007

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 3858/2007

DATE:

7/11/2017

Not

reportable

Not

of interest to other judges

Revised.

In

the matter between: ABDULHAMID
 EBRAHIM
 MAHOMED 1ST
 APPLICANT
 KHATIJA
 DAWOOD
 MAHOMED 2ND
 APPLICANT
 and
 ABSA
 BANK LIMITED
 1st
 RESPONDENT
 SHABIR
 EBRAHIM
 MOTI 2nd
 RESPONDENT
 THE
 SHERIFF OF THE HIGH COURT
 PRETORIA
 SOUTH
 WEST 3rd
 RESPONDENT

JUDGMENT

MUDAU, J

- [1] This is an application for rescission of the judgment granted by this Court (per Ledwaba DJP) on 13 April 2015, for the sale and execution of the property known as the Remaining Extent of Erf 1344 situated in the township of Claudius, Extension 1, Registration Division J.R., province of Gauteng, measuring 912 (nine hundred and twelve) square meters and held by Certificate of Consolidated Title Deed No. T23828/1995, better known as Nr. 282, 2nd Avenue, Laudium, Centurion, Gauteng ("the Property"). The applicable sub-rule provides that the Court has the power to reconsider a judgment upon good cause shown, granted by default, if an application is brought by a defendant, within 20 days after he or she has acquired knowledge of such judgment.
- [2] The first respondent opposes the application and filed its opposing affidavit on 25 April 2016, after which the applicants took no further steps.
- [3] The first respondent was the plaintiff in an action which it instituted against the applicants on 30 January 2007, for the payment

of arrear mortgage instalments as well as an order declaring the property specially executable based upon a loan agreement entered

into between the parties and the subsequent registration of a bond in favour of the first respondent over the property. The applicants,

represented by AW Jaffer Attorneys, filed a notice of intention to defend, where after an application for summary judgment was made; leave to defend was granted after the applicants filed their opposing affidavits.

[4] The matter was set down for trial on 8 September 2009. The applicants, despite having legal representation, failed to attend the trial on the date and default judgment was granted per Shongwe DJP.

[5] The first respondent subsequently proceeded to have its Bill of Costs in respect of the default judgment, drawn and taxed. The first respondent also endeavoured to execute the warrant in respect of the immovable property. The Sheriff was only able to serve the warrant after a period of approximately two years and issued a nulla bona return of service. An application was therefor made to obtain a date upon which the execution of the immovable property was to be

held.

[6] The applicants, acting without legal representation, applied for the rescission of the default judgment, in February 2013, which

application was granted in April 2013, on an unopposed basis. According to the first respondent for some unknown reasons, the first

respondent was unaware of the application, and for that reason never opposed the application.

[7] In December 2013, the applicants, still acting in their personal capacity, filed a plea and a counterclaim. The first respondent

requested a pre-trial meeting and the meeting were set down for 24 February 2015. The applicants did not attend the meeting and

subsequently a letter was addressed to Honourable Ledwaba DJP, requesting that a pre-trial be held in his chambers. The pre-trial

was arranged to be held on 19 March 2015. At the pre-trial the applicants were represented by Advocate Van der Merwe

during the meeting, a formal notice of a firm of attorneys, appointed as attorneys of record, was filed. The parties then exchanged various notices and the matter was finally set down for hearing on 13 April 2015.

[8] On 13 April 2015 and at the calling of the roll there was no one present for the applicants, and the Court, after hearing evidence

from the first respondent's expert, granted judgment by default. On 13 May 2015, the applicants transmitted a telefax to the first

respondent informing the first respondent of its notice of application for leave to appeal. The notice is dated 4 May 2015. The

appeal attempts were abandoned which in my view amply demonstrates that the application is not bona fide.

[9] On 5 August 2015, the applicants were served with a notice of taxation, which notice was opposed on 24 August 2015. On 15 October

2015, the first respondent's costs for the action were taxed in the amount of R135.414.35. An attempt to execute the taxed costs and a warrant of execution, failed, in that on 6 November 2015 the Sheriff issued a *nu/la bona* return. On 3 February 2016, the Applicants filed an urgent application, set down for 9 February 2016 moving, *inter alia*, for the sale of the property to be stayed. The application was dismissed with costs by Davis AJ. Subsequently, the sale in execution proceeded on 11 February 2016, on which occasion the property was sold to the second respondent. In argument before me, counsel for the applicants, Mr Snyman, placed on record that the applicants have, however, since been evicted from the property.

[10] The current application for rescission of judgment was only brought on 16 March 2016 the first respondent filed its notice of intention to oppose on 29 March 2016 and later filed its opposing affidavit on 15 April 2016. From the background history of this matter it is clear that the current rescission application was brought some 10 months after the applicants were made aware of the judgment in May 2015, when they sought to appeal. On their version however, they were served with a copy of the judgment on 5 November 2015. As the first respondent contended in argument before this Court, it would appear that this application was only launched to delay the transfer of the property to the second respondent.

[11] In practice, however, there have traditionally been requirements which an applicant is generally expected to establish to succeed in a rescission application, as intended in Rule 31 (2) (b), viz a reasonable explanation by the applicant for the default; an absence of wilfulness; a bona fide defence which has some prospects of success and that the application is bona fide and not made with the intention to delay the respondent (plaintiff)'s claim (see *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (0) at 476).

[12] When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge nor fetter, in any way, the wide discretion implied by these words (see *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352-353). It is trite, however, that the Court's discretion to grant rescission must be exercised judicially after a proper consideration of all the relevant circumstances.

[13] The applicants in this application, raises two defences. They allege firstly, that the Court was at the time of hearing of the matter, on 13 April 2015, not entitled to declare the applicants' property specially executable. This defence is quite clearly untenable and is further not supported by any case law. In terms of rule 46(1)(a)(ii) and a plethora of case law, it is trite that only a Court is competent to declare a judgment debtor's primary residence (i.e. the debtor's usual or ordinary residence) specially executable for purposes of judicial oversight, which was the case in this matter.

[14] Secondly, that the second applicant had not signed the loan agreement. In this regard the Court was referred to Annexure "AH12"

to the first respondent's affidavit. The document is the loan agreement and both the first and second applicant's signatures appear

at the end of the agreement. It is clear and it was also contended, if compared to the various affidavits filed by the applicants, that the signatures that appear on the loan agreement are those of the applicants. In any event in paragraph 8 of the founding affidavit by the first applicant which the second applicant confirmed, they are both 'joint owners of the property'. It is not in issue in this matter that the applicants in this matter fell behind with their repayments obligations to service the bond. According to the deponent to the answering affidavit by the first respondent, save for a few payments from May 2011 to May 2012, the applicants have not paid instalments towards their bond instalments for several years.

[15] The applicants' do not explain why they did not proceed to file an application for rescission of judgment, shortly after the default judgment was granted on 13 April 2015, except they stated that they consulted with their current attorneys of record in early December 2015 and only served the application on 16 of March 2016, more than four months after their first consultation with their current attorneys. The applicants also failed to make an application for condonation. By any account, the application for rescission was not brought within a reasonable time and thus fell short of the requirements in Rule 31 (2) (b). For all the reasons given above, it follows that the application in the present case must be dismissed, as it is without merit. It is an abuse of the Court processes which justifies an adverse costs award.

[16] The following order is made: the application is dismissed with costs on the scale as between attorney and client.

TP MUDAU

Judge of the High Court,

Gauteng Division,

Pretoria

Heard on:

30 October 2017

For the Applicant: Adv N Snyman

Instructed by:

Mohamed Seedat Attorneys, Pretoria

For the Respondent: Adv G T Awakoumides

Instructed by:

Snyman De Jager Inc, Pretoria

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/756.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mahomed-and-another-v-absa-unknown-topic-agpphc-2017>

Prepared on 23 October 2026 · Esheria