

SOUTH AFRICA / JUDGMENT

Ratshitanga v Firststrand Bank Limited (23989/2013) [2021] ZAGPPHC 496 (10 August 2021) [2021] ZAGPPHC 496

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

23989/2013

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date:

10 August 2021
E van der Schyff
CASE NO: 23989/2013
In

the matter between:

RAVHALUSANI
RATSHITANGA
APPLICANT
and
FIRSTRAND
BANK
LIMITED
RESPONDENT

JUDGMENT

Van der Schyff J

- [1] The applicant instituted an application for rescission of a default judgment granted on 7 October 2013. The application was heard by Makhubele J, and judgment was reserved on 27 July 2020. Makhubele J became unavailable to finalise the matter. The Judge President was requested to allocate the application to another judge. It is indicated in a widely shared note published on CaseLines that the parties agreed that the matter could be decided on paper only. The matter was allocated to me on 6 August 2021 and I am to adjudicate the application based on the documents filed before the Court at the time the matter was brought before Makhubele J.
- [2] The applicant, who acts in person, seeks the rescission of a default judgment in terms of Rule 42 (1)(a) of the Uniform Rules of Court. The application was issued on 26 September 2019. The applicant places the following facts before the court:
- i. The order was granted in his absence;
 - ii. After receiving a s 129 notice in terms of the National Credit Act, 34 of 2005 ('s 129 notice') in 2012, the applicant made an arrangement with the bank regarding the arrears;
 - iii. The applicant was not given any notice before the default judgment was granted in circumstances where he failed to deliver a plea;
 - iv. The applicant only became aware of the fact that default judgment was granted against him during 2016 when his application for debt review was refused because of the existence of the default judgment;
 - v. If the property is sold in execution, the applicant and his three children will be rendered homeless;
- [3] The applicant states that he has a bona fide defence without providing any details regarding the defence. He relies on the decision of the Constitutional Court in *Gundwana v Steko Development CC and Others*.^[1]
- [4] The respondent opposes the application. The respondent avers that the applicant is only delaying the execution of the judgment, failed to show that the judgment was erroneously granted, failed to set out any ground which existed at the time the judgment was granted upon which rescission can be granted, failed to show that a bona fide defence which prima facie has some prospect of success exists, and failed to provide a reasonable explanation for the delay in lieu of the fact that he avers that he became aware of the judgment during 2016 but only instituted the rescission application in 2019.

[5] The respondents explain that the parties concluded a mortgage loan during August 2011. The applicant failed to comply with his obligations in terms of the loan agreement and fell into arrears with the repayment of monthly instalments. A s 129 notice was duly sent to him. Summons was issued on 23 April 2013 and served at the applicant's chosen domicilium citandi et executandi by affixing a copy to the main door. No appearance to defend was entered, and default judgment was granted by Tolmay J on 7 October

2013. Judgment was only granted for the monetary amount, and the prayers regarding the executability of the property were postponed

sine die. On 14 July 2015, the Sheriff attempted to execute against the applicant's movable assets but failed to establish whether the applicant owned any movables on the property. Subsequently, no movable assets were attached. After default judgment was granted, the Rule 46(1) application was enrolled several times, and each time the applicant entered into a new payment arrangement with the applicant.[2] None of these payment arrangements were honoured. The applicant filed several opposing affidavits during the period 2016 to 2018.

[6] The following emerges from the respective opposing affidavits filed by the applicant in the Rule 46(1) application:

i. In the affidavit dated 7 March 2016, the applicant acknowledges his liability towards the respondent. He also acknowledges that he could not honour the payment arrangement because his employment contract expired. He stated that he did not respond to the summons or filed a notice indicating his intention to defend because he made a payment arrangement with the applicant.

ii. In an affidavit dated 20 July 2017, the applicant stated that his liability towards the respondent would be repaid in a reasonable period. He stated that he obtained employment and received payment in terms of a claim against the Road Accident Fund. He was also waiting for his late father's estate to be distributed and expected his cousin to assist him with payments.

iii. In the affidavit dated 6 February 2018, the applicant explained the financial difficulties experienced by him since 2014. He explained that since default judgment was granted in 2013, he made payments in the amount of R140 000.00. He reiterated that the summons was served at his residence during his absence. He could not respond to either the summons or the s 129 notice but made arrangements to pay.

[7] After the respondent's heads of argument were filed, the applicant filed two documents purporting to be replying affidavits. The first is an affidavit wherein the applicant indicates whether he agrees or disagrees with the content of certain paragraphs. The second is an application for condonation for the late filing of the rescission application. In both these affidavits, the applicant states that the period to defend the action has already lapsed once he received the summons. Since he made arrangements to pay, he did not consider it necessary to defend the action. He states what he considers to be his bona fide defence in the second affidavit. He avers that:

- i. The summons was not served on him personally and reached his residence when he was away for a prolonged period;
- ii. He was not notified of the existence of the default judgment, and his right to debt review was violated because of the existence of the judgment;
- iii. The judgment is based on a reckless lending contract since he was on a 3-year contract employment when he was granted a 20-year mortgage. In addition, he did not receive a basic salary when the mortgage was approved, and he became over-indebted. No credit assessment was done before the loan was granted.

[8] When parties appear in person, courts generally lean backward to ensure that they are afforded sufficient opportunity to be heard. However, an applicant cannot be accommodated to the extent that an injustice is done to the respondent. It is trite that an applicant must make out its case in the founding affidavit.[3] The applicant must make out a prima facie case. This process allows the respondent to answer the case. Therefore, an applicant can only answer in a replying affidavit to

new matters introduced by a respondent in the answering affidavit. An applicant cannot make out its case in the replying affidavit as the respondent would not have the opportunity to address the court regarding the new matters so introduced. For this reason, the submission that the applicant became over-indebted because the respondent failed to conduct a credit assessment will be disregarded.

Having said this, it must be pointed out the first affidavit filed in opposition to the respondent's Rule 46 application flies in the face of this submission. In this affidavit, the applicant states that 'I lost my job from the film and publication Board as my contract expired after 10 years of my service/second term (proof attached), and the other reason being I was not receiving my expected payment during my service.' He then continues to explain at length why he would be in the position to honour the loan agreement.

[9] The applicant was clear that the application for rescission is brought in terms of Rule 42 of the Uniform Rules of Court. Rule 42(1) provides that:

'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 omission;
- (c) An order or judgment granted as the result of a mistake common to the parties.'

- [10] The purpose of Rule 42 is ‘to correct expeditiously an obviously wrong judgment or order.’[4] Dodson J held in *Kgomo v Standard Bank of South Africa*[5] that Rule 42 caters for a mistake in the proceedings. The judgment cannot be said to have been erroneously granted in the light of a subsequently disposed defence that was not known or raised at the time of default judgment. The question is thus whether, at the time the order was granted, a fact existed 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. Where an application is brought ex parte without notice to a party who has a direct and substantial interest therein, where the summons was not served, where there was an irregularity in the proceedings, or where it was not legally competent for the court to have made the order it granted, Rule 42 applies. A judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously within the meaning of Rule 42(1) by reason of facts of which the court was unaware at the time of granting the judgment.[6]
- [11] It is common cause that the applicant received a s 129 notice before the summons was issued. The summons was served at the applicant’s chosen domicilium citandi et executandi. The service of the summons accorded with Rule 4(1)(iv) of the Uniform Rules of Court. Default judgment was obtained after no appearance to defend was entered. The respondent was not required to serve a notice of set down when it approached the court for the granting of default judgment due to the fact that no appearance to defend was entered. The default judgment was granted within four months of the summons being issued, hence neither the service nor the summons was stale. In these circumstances, it cannot be said that the order granted by Tolmay J on 7 October 2013 was erroneously granted. The respondent was procedurally entitled to the order granted. The applicant’s reliance on Rule 42 is thus misplaced.
- [12] The applicant emphasised the fact that the judgment was granted by default in his absence. A judgment can be set aside at common law, amongst others, where the judgment had been granted by default.[7] However, to succeed, an applicant must show good or sufficient cause for the default judgment to be rescinded.[8] A court must exercise its discretion after properly considering all the relevant circumstances when it determines whether good cause exists for rescinding the judgment. In exercising its discretion, the court will consider the following:
- i. Does the applicant provide a reasonable and acceptable explanation for his default?
 - ii. Does the applicant show that the application is made bona fide?
 - iii. Does the applicant show on the merits that he has a bona fide defence which prima facie carries some prospect of success?
- [13] The applicant fails to provide an acceptable explanation of his default. He states that he was not home when the summons was served. However, he does not relate how and when it came to his attention that a summons was served, or when he returned from his prolonged visit to Venda. The refrain throughout all the affidavits filed by the applicant is that he did

not defend the action because he made payment arrangements with the respondent. However, proof that the arrangements were honoured is not provided. In addition, an applicant who approaches the court to rescind a default judgment in terms of the common law, must seek relief within a reasonable period of time.[9] The Constitutional court held in *Van Wyk v Unitas Hospital*[10] that an applicant for condonation must fully explain the delay. This explanation must cover the entire period of the delay. In casu, the rescission application was issued almost six years after the default judgment was granted and three years since the applicant

became aware of the existence of the judgment. No explanation is provided for the applicant's delay in instituting rescission

proceedings when he, on his version, became aware that default judgment was granted against him in 2016.

[14] The applicant fails to make out a case that he is bona fide. Counsel for the respondent draws attention to the fact that the applicant failed to enroll the application. The respondent took it upon itself to index, paginate and enrol the application. The applicant likewise failed to show on the merits that he has a bona fide defence which prima facie carries some prospect of success. The applicant acknowledges the debt and that he fell in arrears with his payment obligations. He does not make out a case that he met the alternative payment arrangements.

[15] The applicant's reliance on *Gundwana* is misplaced. Not only was the order he seeks to rescind granted by a Judge of the High Court, as opposed to a Registrar, but the immovable property was not declared executable. Tolmay J only granted the monetary judgment. All the prayers relating to the exclusion of the immovable property were postponed sine die.

[16] There is no reason to deviate from the principle that costs are generally awarded to the successful party.

ORDER

In the result, the following order is made:

1. The application for the rescission of the order granted by Tolmay J on 7 October 2013 is dismissed.
2. The applicant is to pay the costs of the application.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 10 August 2021.

Counsel for the applicant:

Adv. L Badenhorst

Instructed by:

Coetzer and Partners

The respondent:

In person

Date application allocated:

6 August 2021

Date of judgment:

10 August 2021

[1] 2011

(3) SA 608 (CC).

[2] The Rule 46(1) application was enrolled for 14 March 2016, 28 September 2016, 27 July 2017, and 19 February 2018.

[3] Bowman N.O. v De Sousa Roldao 1988

(4) SA 326 T at 327

[4] Bakoven Ltd v G J Howes (Pty) Ltd 1992

(2) SA 466 € at 471E-F.

[5] 2016

(2) SA 184 (GP) at 187F-188C.

[6] Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007

(6) SA 87 95D-E.

[7] De Wet v Western Bank Ltd 1979

(2) 1031 (A).

[8] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003

(6) SA 1 (SCA) at 9C.

[9] Firestone South Africa (Pty) Ltd v Genicuro AG 1977

(4) SA 298 (A) at 306H.

[10]

[2007] ZACC 24; 2008

(2) SA 472 (CC) at para [22].

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