8/9/17

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2016/42519

Before Her Ladyship Ms Acting Justice Grenfell

Heard on Monday 4 September 2017

Judgment delivered: 8 September 2017

In the matter between:

WYCLIFFE EARNEST THIPE MOTHULOE Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED Respondent

JUDGMENT

GRENFELL, AJ:

[1] **INTRODUCTION**

1.1. The applicant launches, by way of notice of motion, an application for the rescission of the judgment granted against him by default on 12 August 2016 by Jansen J, which ordered payment of the amount of R6 267 044.80, together with interest as set out in prayer 2 thereof. In addition, the default judgment declared certain immovable properties in Houghton Estate executable in the terms set out in paragraph 3 of the default judgment order, and contained an order that the registrar was authorised to issue writs of execution in respect of the said properties and payment of monthly insurance premiums due in the terms defined therein, together with payment of costs on an attorney and client scale.

1.2. The respondent was the plaintiff in the main action and for convenience will be referred to hereinafter as "the Standard Bank".

1.3. The applicant delivered a voluminous founding affidavit, to which an answering affidavit was delivered by the Standard Bank and the applicant then delivered a replying affidavit.

1.4. The matter was set down for hearing on the opposed roll by notice delivered on 28 April 2017 and duly served on such date on the applicant's attorneys of record.

1.5. On 10 March 2017, the Standard Bank caused to be delivered its practice note, chronology, an index, heads of argument and a list of authorities in respect of the opposed rescission application.

1.6. Notwithstanding the fact that he is the applicant, the applicant caused his heads of argument and practise note to be delivered two months out of time.

1.7. The Standard Bank's attorneys have attended to index and paginate the court file.

[2] **REQUIREMENTS FOR RESCISSION**

The requirements for rescission of default judgment are well known and can be summarised as follows:

2.1. The applicant must give a reasonable explanation of his default.[1]

2.2. The applicant must show that he has a *bona fide* defence to the plaintiff's claim.

2.3. The application itself must be brought *bona fide* and not with the intention of delaying the plaintiff's claim or another ulterior purpose.

[3] **CONDONATION**

3.1. Both the application to rescind and answering affidavit from the Standard Bank were filed outside of the time periods provided for in the rules of court.

3.2. In light of the view that I take of the matter, in order to avoid a piecemeal adjudication, I grant condonation to both parties, and the matter will be decided on its merits.

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1 Grant v Plumbers (Pty) Ltd 1949(2) SA 470 (O) at 476 to 477
Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003(6) SA 1 (SCA) at 9F

[4] **WILFUL DEFAULT**

4.1. The applicant is an attorney, duly admitted to practise since 1996, and carrying on practise for his own account from premises situate at 20A St John's Road, Houghton.

4.2. The applicant's conduct in dealing with the summons in the main action falls to be considered in light of the applicant's professional choosing and qualifications.

4.3. The applicant's version is that he only became aware of the default judgment and therefore the main action during the period 25 August 2016 to 6 September 2016.

4.4. The applicant in his affidavit indicates that the default judgment was brought to his attention by virtue of an innocuous letter, that was written to him by an entity styled "Smart Debt Advisors", dated 18 August 2016 pursuant to which he was inaccurately advised that judgment was granted against him for arrear payments in respect of his bond payments.

4.5. Notwithstanding the inaccuracy of the letter, the applicant contends that this was the first time at which the possibility of a judgment was brought to his attention.

4.6. Notwithstanding the incorrect spelling of the plaintiff in the letter of Smart Debt Advisors as "Standerd Bank", this letter contained a case number and the court in which the judgment was granted, being the North Gauteng High Court.

4.7. The applicant then contends that he required time to investigate and that he erroneously caused a search to be conducted in the South Gauteng High Court. The applicant fails to deal with the fact that he must have known that he was in default in repayment of the loans.

4.8. The nub of the applicant's complaint is that the summons and particulars of claim were served on a domicilium address, which the Standard Bank knew was situate at premises where the applicant no longer resided.

4.9. The applicant also contends in correspondence and in his affidavits that the Standard Bank was forum shopping and that he should have been sued out of the South Gauteng High Court, comprising the local division closest in geographical proximity to his residence and place of practise.

4.10. The Standard Bank's attorneys contend that efforts began as early as 22 April 2016 to notify the applicant, as an attorney and colleague, that the Standard Bank was issuing summons against him.

4.11. It was contended by Mr Amm, who appeared for the Standard Bank, that the founding affidavit is silent in respect of why the applicant failed to respond to messages left for him or why he did not act when a copy of the summons was delivered by a candidate attorney by hand at the premises from which he operates and conducts his attorney's practice in Houghton, Johannesburg.

4.12. These factors and opposing contentions by the parties lead me to conclude:

4.12.1.The applicant as an attorney was not entitled to rely on the vague assertion that in moving to new residential premises in Northcliff that the domicilium address should have been unilaterally altered by the Standard Bank to reflect his home address.

4.12.2.The applicant's explanation as to why he did not respond to messages left for him is simply unacceptable, as is the uncontested evidence that his staff refused to give out his cell phone details to the attorney for the Standard Bank.

4.12.3.I am of the view that the applicant's conduct comprises wilful at worst or grossly negligent at best conduct, in a concerted and conscious effort by the applicant not to engage with the attorney for the Standard Bank and to frustrate service of the summons on him.

4.12.4.At best for the applicant, the degree of negligence demonstrated comprises wilful default and I am unsatisfied that the applicant has met the first requirement for rescission of judgment.

4.13. In the event that I am incorrect in the above conclusion, I propose to deal with the second leg of the test for rescission of judgment.

[5] ***BONA FIDE* DEFENCE**

5.1. The cause of action comprises four loan agreements and the registration of mortgage bonds over immovable property owned by the applicant to secure such debt.

5.2. Of significance, regard being had to the voluminous complaints contained in the founding affidavit in respect of the National Credit Act 34 of 2005, is the fact that the first three loan agreements were concluded prior to the effective date of the National Credit Act and that the fourth loan agreement does not form part of the over-indebted complaints.

5.3. Nowhere in either of his affidavits, does the applicant contend that he does not owe the money claimed in terms of the loan agreements to the Standard Bank, but rather seeks to rely on other defences set out below. The applicant had contended that the South Gauteng High Court is the court with jurisdiction and that the Standard Bank was forum shopping in proceedings out of the Pretoria High Court.

5.4. In correspondence even prior to launching the rescission application, the applicant contended that a decision of His Lordship Mr Justice Legodi J, as cited in correspondence, was apposite and applicable to his situation and that his constitutional rights regarding access to court in terms of section 32 of the Bill of Rights had been violated.

5.5. Standard Bank contends that it is entitled to proceed against the applicant in the Pretoria High Court as it is the provincial division, which would have had concurrent jurisdiction with the South Gauteng High Court.

5.6. Mr Jacobs, who appeared for the applicant, wisely did not pursue the jurisdiction point which I would have decided against him, as the decision of Legodi J is distinguishable by virtue of the fact that he was dealing with two

circuit courts, and the situation here is that the Pretoria High Court is the provincial division and the Johannesburg High Court is the local division.

5.7. I am fortified in this view by the fact that the judge hearing the default judgment was satisfied that he had jurisdiction to determine same.

5.8. Questions of convenience do not come into it, as whilst a discretion based on convenience is vested in the court in terms of section 27 of the Superior Courts Act to remove a matter from one division to another based upon convenience, this is hardly a matter that can be raised at the stage at which jurisdiction to determine a cause of action is determined.

5.9. I conclude that the jurisdiction point has no merit and the point was not argued at the hearing.

5.10. In respect of the reckless credit defence, the affidavits of the applicant are littered with a plethora of irrelevant attacks relating to various commercial transactions concluded with the Standard Bank which are said to be illegal by virtue of non-compliance with the National Credit Act in that the applicant was harassed into concluding credit agreements which he was unable to honour by virtue of being over-indebted.

5.11. In essence, two points were raised on the applicant's behalf by Mr Jacobs in argument, being that the conclusion of three motor vehicle finance agreements were an inducement to contract on behalf of the Standard Bank.

5.12. In this regard it was emphasised that Innocentia Mogale, acting on behalf of the Standard Bank, did cause three credit agreements in respect of the purchase of a Range Rover, BMW and Landcruiser motor vehicles to be spread over a four-month period.

5.13. The inducement contended for is belied by the fact that as indicated by the Standard Bank in its answering affidavit, the final decision to grant credit was not that of the private banker dealing with the applicant, but rather that processes entailed that commercial decisions were made within risk parameters set by the Standard Bank.

5.14. It was further submitted by Mr Amm, on behalf of Standard Bank, that the rationale behind the purchase of the three motor vehicles aforesaid was that the applicant in his founding affidavit stated that he feared for his life, and that the purchase of the vehicles was in keeping with security advice that he had received to secure his safety from threats on his life.

5.15. For both the above reasons I find that there was no inducement on the part of Standard Bank to compel the applicant to conclude credit agreements in respect of the three motor vehicles with it.

5.16. The reckless credit defence, as alluded to hereinbefore, is predicated upon the provisions of the National Credit Act, *inter alia* section 79, 80 and 81 thereof.

5.17. The applicant and Standard Bank appeared to be in agreement that the time at which over-indebtedness needs be considered is as at the date that the application for credit is made.

5.18. In this regard the applicant does not seek to create any challenge of over-indebtedness for the four loan agreements which form the subject matter of the Standard Bank's cause of action.

5.19. The reason for that is self-evident in respect of three of such loan agreements in that they were concluded prior to the commencement of the National Credit Act, and there is no challenge in respect of the fourth agreement.

5.20. Mr Jacobs argued that it was a grey area and undecided by courts, as to whether the over-indebtedness need be determined as at the date of considering the financial circumstances for subsequent credit agreements, i.e. retrospectively.

5.21. I admit to having substantial difficulty with the submission as a matter of logic, as the question of over-indebtedness can only be determined at the time that the application is made.

5.22. In light, for example, of the asset value given by the applicant to the Standard Bank being in excess of R20 million, it appears that the position as at the motor vehicle financing dates, may have been within the parameters of the Act. I do not need to decide this as the motor vehicle finance agreements are not relevant to the defence that has to be made out.

5.23. As a final submission, Mr Amm submitted that the applicant had his remedies in respect of the three credit agreements in respect of the purchase of the motor vehicles concerned, but that same did not comprise a triable issue for purposes of this rescission.

5.24. The threshold is a modest one. All that the applicant needs to establish is facts, which if established at trial, would entitle him or her to the relief requested. I am of the view that even this modest threshold has not been met and that no bona fide defence is set out.

5.25. It would be an exercise in futility to refer the question of over-indebtedness in respect of the credit agreements on the three motor vehicles to trial, as same are irrelevant to the issues to be determined in the main action out of which this rescission application arises.

5.26. Accordingly I am quite satisfied that neither the inducement defence nor reckless credit defence comprise triable issues that would warrant the matter being sent to trial.

[6] **_BONA FIDE_ APPLICATION**

6.1. The third requirement for a rescission in terms of the rules of court comprise that the application must be brought *bona fide*.

6.2. Much is said of *male fides* in respect of both parties, but what is objectively apparent is that the applicant was not anxious to have the matter

resolved and that the Standard Bank's attorney had to take steps in order to have the matter enrolled for hearing.

6.3. It is unnecessary for me to find that the application is not brought *bona fide* in light of the view that I have taken on the other two requirements that are lacking to entitle the applicant to relief.

[7] **COSTS**

7.1. Mr Jacobs conceded that the applicant, in seeking rescission, was in terms of trite principle liable to pay the costs regardless as to the outcome of the application, but submitted that no punitive costs were warranted in the circumstances.

7.2. Mr Amm submitted that whether the application is granted or refused, the Standard Bank would seek punitive costs from the applicant.

7.3. I was entreated not to penalise the applicant for the manner in which the application was run, in that it was human to get subjectively involved in one's own matter. I do not agree.

7.4. The rescission application is fraught with scandalous, unsubstantiated allegations against the Standard Bank, in circumstances where the applicant even seeks to set out the cellular telephone numbers of witnesses that he has contacted in what appears to be some misguided intimidation tactic.

7.5. Independently of the fact that the agreements upon which the default judgment was granted, provide for attorney and client scale costs, by virtue of the applicant's conduct in this litigation, and the allegations that are made of and concerning the conduct of the Standard Bank, I have no hesitation in exercising my discretion to award attorney and client costs against the applicant herein.

7.6. In this regard I have taken into account allegations of the applicant that include:

7.6.1. That the bank creamed off a profit out of turpitude, that the applicant is choking in the enshacklement of over-indebtedness which Standard Bank created and placed him under with its reckless credit, yet the applicant has nothing to show for it because in its cut-throat and commercial might and power, Standard Bank repossessed and sold his vehicles and now seeks to do the same thing with his properties.

7.6.2. A statement, under oath, that the conduct of the bank is irreconcilable with a just and open democratic society where fairness, equity and ethical business practises should be the norm and order, the applicant goes on to state that to allow the bank to benefit from this cancerous turpitude is to negate both the Act and mainly the Constitution.

7.6.3. That the applicant contends, humbly, to open the unsuspecting South African citizens to commercial vultures by allowing the bank's unrestrained exploitation and even abuse of its citizens.

7.7. The above attack on the Standard Bank is emotional, unwarranted, unsubstantiated and ill-befitting an attorney of the above Honourable Court.

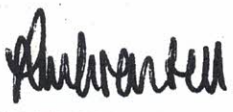
7.8. The situation is exacerbated by the fact that the applicant does not contest that he owes the money in question, but seeks to rely on technical defences in order to avoid making payment therefor.

[8] **ORDER**

I make the following order:

8.1. The application for rescission of judgment is dismissed.

8.2. The applicant is ordered to pay the respondent's costs on an attorney and client scale.



LM GRENFELL

ACTING JUDGE OF THE HIGH COURT

Date of hearing:	4 September 2017
Judgment delivered:	8 September 2017
Appearing for applicant:	Adv G Jacobs
Counsel for Respondent:	Adv G Amm