8/9/17

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA DIVISION,)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

8/09/2017 NKDam

DATE **SIGNATURE**

CASE NO. 3237/17

In the matter between:

DAVID NYAKAEMANG TABANE	**FIRST APPLICANT**
JEANNE BUSISIWE TABANE	**SECOND APPLICANT**
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	**FIRST RESPONDENT**
FUTURA OPTIMUM SOLUTIONS CC	**SECOND RESPONDENT**
STEPHAN DE WET	**THIRD RESPONDENT**

REASONS FOR RULING

BAM AJ

DATE OF HEARING : 28/08/2017

DATE OF RULING : 1 SEPTEMBER 2017

[1] On the 1st September 2017, I handed down the following Ruling:

1. The Application for rescission is dismissed
2. The Applicants are to pay the costs of the application on a scale as between attorney and client.

[2] I indicated to the parties that I will provide my reasons at a later stage. These follow below.

[3] The Applicants brought their application in terms of Rule 42, read with Rule 31(2)(b) of the Uniform Rules of Court. It was agreed that the Second and Third Respondents should not have been cited as they had no interest in this matter.

Rule 42 is an exception to the rule that once a court has passed a judgment, it becomes *functus officio* in respect of the matter. It allows the court to vary or rescind orders or judgments if "erroneously sought or erroneously granted in the absence of any party affected thereby", in the event of ambiguity and only to the extent of such ambiguity as well as where there was a mistake common to both parties to the action.

[4] The Applicants did not defend the respondent's claim against them, that is why default judgment was granted. It has been stated in a number of cases that a judgment to which a party is procedurally entitled to cannot be considered as having been erroneously granted by reason of facts of which the court was not aware of at the time, or in light of a defence that is disclosed subsequent to its granting.

[5] There was also no ambiguity to speak of in the judgment and certainly it wasn't granted on the basis of a common mistake. Rule 42 therefore is not applicable to this matter.

[6] Rule 31(2)(b) requires that in order to succeed in an application for rescission of judgment, an applicant needs to show good cause. This entails giving a reasonable explanation for the default; being bona fide in bringing the application and satisfying the court as to the existence of a *bona fide* defence to the erstwhile Plaintiff's claim. This application falls to be considered under the provisions of Rule 31(2)(b).

[7] The applicants received the summons on 15 June 2016. It was affixed to the door of their residence in Gauteng which they use occasionally when they are in Johannesburg for business. (*It is this same address that they gave to the respondent as their domicilium on the loan agreement between them and the respondent*). Upon receipt of the summons, they contacted their debt counsellor who asked them to forward it to him. After that they did nothing until October 2016 when they received a call from the tracing agent who had been send to repossess the vehicle that was the subject of the loan agreement. They had believed that the debt counsellor would deal with the problem as he had told them that the summons must have been issued by mistake. He never reported to them and they never followed up. The

Applicants had 20 days from the date they learned of the judgment against them, to apply to court for rescission. When they tried to contact the debt counsellor after the call from the tracing agent, he avoided taking their calls. That is when they decided to instruct an attorney who also received the same cold shoulder from the debt counsellor. When eventually the debt counsellor responded to the attorney's request for information, he emailed incorrect ~~ones~~ information without even a statement to show how the payments they made to the payment distribution agency had been disbursed.

[8] It is disturbing when one looks at the manner in which the applicants came to be under debt review. The first applicant states that he spoke to Mr De Wet (debt counsellor) over the phone and gave him information regarding their debts "orally". A few days later, De Wet told them that their application for debt review had been successful. Thereafter the First Applicant send him documents in his possession after which they sat back as they believed that they would "forthwith enjoy the protection of the National Credit Act" (paragraph 29 of the Affidavit).

[9] The First applicant states further in his affidavit that after receipt of the summons, they decided to stop paying the agreed restructure arrangement amount to the payment distribution agency – after only three months of starting with these payments.

[10] Counsel on behalf of the respondent avers that his client had received notice to the effect that the applicants had applied for debt review. When the respondent did not receive any payment, it decided to terminate the debt review in respect of the loan. It was further submitted on behalf of the Respondent that it cannot admit that there was any debt restructuring arrangement as the default continued even after receipt of the notice. In

opposing rescission, the respondent submitted that no explanation was given for the delay between October and November after the applicants became aware of the judgment through the tracing agent. It was also submitted that there is no *bona fide* defence to the respondent's claim other than the debt review process which the respondent had lawfully terminated.

[11] The Applicants have explained at length the steps they took from receipt of summons up until they instructed an attorney to assist them. They entrusted their fate to a debt counsellor who failed to account to them and they cannot to a large extent be held personally responsible for the delay.

[12] The second question is whether they have instituted this action in good faith with no intention to delay the respondent's case and thereby the relief the Respondent is entitled to.

[13] I find the applicants' attitude towards their financial woes disturbing. They were already in arrears on the payments towards the loan when they applied for debt review. The First applicant consults with the debt counsellor over the phone and later sends through the papers in his possession. When the summons arrives, he decides to stop payment and does not talk to the Respondent about how he will repay the loan going forward.

[14] It is also apparent from the documents that were placed before court that the Respondent's loan was not included in the debt restructuring arrangement because there were no payments received in the three months they made payments to the distribution agency. Secondly, the confusing responses that they received by email from the debt counsellor confirm that certain debts were attributed to wrong creditors. It appears as though De Wet did not know which of the various vehicles was the subject of the loan agreement between

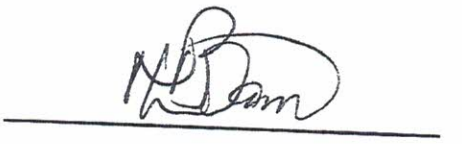
the parties. The Respondent was thus entitled to terminate the debt review in terms of Section 86(10) of the NCA.

[15] Even if the applicants were to apply for resumption of the debt review, they will not be able to reinstate the loan agreement because the respondent has already taken action as its debt was not included in the restructuring arrangements. ***In BMW Financial Services SA v Donkin 2009 (6) SA 63 (KDZ),*** it was held that the debt review process and other NCA procedures could not be used to reinstate a credit agreement which the credit provider had cancelled. This decision was confirmed in ***Stow v FirstRand Bank Ltd (2010) JOL 25921 (ECP)*** where the court said that the Section 68(11) resumption will not be available to the defendant after default judgment has been taken.

[16] The First applicant is a business man who is a director of two construction companies. As such he is expected to conduct his affairs in a more responsible manner than one would expect the proverbial lay person. His attorney should have also advised him of the causes of action and remedies available in the event of the debt counsellor failing to perform his functions properly. Had he made time to actually consult in person, he would have discovered quite early that the instructions to the debt counsellor were muddled.

[17] In the premises the applicants have failed to satisfy the two requirements of Rule 31(2)(b) relating to good cause. The respondent cannot be prejudiced further as there is a serious risk to its ability to realise its security on an item that is losing value rapidly with the passage of time. The request to stay proceedings under case number 45896/16 to allow the applicants to resume

debt review in relation to the debt owed to the respondent will of necessity fall away in light of Order 1 above.



LJN BAM

ACTING JUDGE OF THE HIGH COURT