IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

REPORTABLE

CASE NO. 9817/2008

In the matter between:

CAREL HENDRIK VENTER	**APPLICANT**
And	
ABSA BANK LIMITED	**FIRST RESPONDENT**
BERTIE ENGEL	**SECOND RESPONDENT**
IAN CRAFFORD	**THIRD RESPONDENT**
THE SHERIFF OF THE HIGH COURT	**FOURTH RESPONDENT**
THE REGISTRAR OF DEEDS (CAPE TOWN)	**FIFTH RESPONDENT**

Coram	:	DLODLO, J
Judgment by	:	DLODLO, J
For the Applicant	:	**ADV. C. MAREE**
Instructed by	:	Smith Kruger Attorneys 32 Wellingotn Road DURBANVILLE DOCEX 6 DURBANVILLE (REF. JP VAN NIEKERK) TEL. NO. (021) 976 1304
For the Respondents	:	**ADV. P de B VIVIER**
Instructed	:	Sandenberg Nel & Haggard Golden Isle 281 Durban Road BELLVILLE (REF. L Sandenberg) TEL. NO. (021) 919 9570
Date(s) of Hearing	:	9 SEPTEMBER 2011
Judgment delivered on	:	15 SEPTEMBER 2011

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JUDGMENT DELIVERED ON THURSDAY, 15 SEPTEMBER 2011

DLODLO, J

[1] This is an application wherein the Applicant seeks to have the warrant of execution stayed. The relief sought in paragraph 2 of the Notice of Motion (that the warrant of execution, and "all steps pursuant thereto", be stayed *pendente lite*) is premised on the Applicant's contention that he is entitled to an order that the default judgment which was granted against him on 1August 2008 ("the default judgment"), be rescinded in terms of either Rule 42 (1), Rule 31 (2) (b) or the common law. It is therefore of

cardinal importance to consider the contentions on which the default judgment is premised. These contentions are that; (a) the First Respondent ("Absa") has abandoned the proceedings (under case number 9817/2008) pursuant to which Absa had obtained the default judgment; (b) Absa has over-charged interest in respect of the Applicant's "home loan account" in an amount of sixty three thousand seven hundred and thirty three rand and forty eight cents (R63 733.48); (c) Absa has applied for and obtained the default judgment notwithstanding certain payment arrangements that the applicant had agreed to with Absa in respect of the amount which was in arrears on the mortgage loan, and that pending such payments, Absa would not proceed with further steps against the Applicant.

[2] It was submitted by Mr Vivier on behalf of Absa that the Applicant's further contentions with regard to the unconstitutionality of the Registrar's order in terms of which his property had been declared executable, and that the attachment and sale thereof in execution constituted an "overkill" (in view thereof that he was only in arrears in an amount of eighty five thousand rand (R85 000.00), are only relevant to the alleged unconstitutionality of the aforesaid order and, therefore, the invalidity of the subsequent attachment and sale in execution of his property. The Applicant's contentions in this regard (according to Mr Vivier) do not constitute grounds for the rescission of the default judgment. I cannot falter this submission. This, however, will become clearer as I proceed with this judgment *infra*.

[3] Before considering the Applicant's defences, as one must in a matter of this nature, it is of some importance to briefly set out the history of this matter *infra*. The summons was served on the Applicant personally on 1

July 2008 as appears on the record page 97. The Applicant failed to give notice of his intention to defend the action (evidently because he had no defence to the claim and did not intend to defend the action) and the default judgment was granted on 1 August 2008, after the expiry of the *dies induciae*. It would thus appear that Absa was therefore procedurally entitled to apply for default judgment, and it cannot be said to have been granted erroneously (as envisaged in Rule 42 (1) (a), in the light of a subsequent disclosed defence. See ***Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*** 2003 (6) SA 1 (SCA) at para 5-10***; Lodhi 2 Properties Investments CC v Bondev Developments*** 2007 (6) SA 87 (SCA) at para 17 and 27. It is perhaps appropriate to quote the relevant passages of the ***Lodhi 2 Properties Investments CC*** judgment *supra*:

"[17] In any event, a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the Judge who granted the judgment. In support of their contention to the contrary the applicants relied on authorities such as Nyingwa v Moolman NO 1993 (2) SA 508 (Tk) and Stander and Another v Absa Bank 1997 (4) SA 873 (E) to the effect that in an application for rescission of a default judgment in terms of Rule 42 (1) (a) a Court may in certain circumstances have regard to facts of which the Judge who granted the judgment was unaware in order to determine whether the judgment had been granted erroneously.

[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment

by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."

In Mr Vivier's submission rule 42 (1) has no application in the instant matter. I fully agree. The default judgment can only be rescinded in terms of Rule 31 (2) (b) of the Uniform rules of Court, or under the common law. I proceed to briefly consider the defences advanced on behalf of the Applicant.

ABANDONED PROCEEDINGS AND OVER CHARGING OF INTEREST

[4] It does not appear that the above defences can avail the Applicant in the instant matter. It is trite law that any cause of action which is being relied upon as a ground for setting aside the final judgment, must have existed at the date of the judgment. Differently put, there must be some causal connection between the circumstances which give rise to the claim for the rescission, and the judgment. See ***Lazarus v Nedcor Bank*** Ltd; ***Lazarus v Absa Bank Ltd*** 1999 (2) SA 782 (WLD); ***Swart v Absa Bank*** 2009 (5) SA 219 (CPD); ***Vilvanathan v Louw*** 2010 (5) SA 17 (WCC).

PAYMENT ARRANGEMENTS

[5] As regards rescission of judgment based on the arrangement to make payments, the reading of the papers reveals that at least since 25 September 2008, the Applicant acquiesced in the judgment and took no steps up until the present proceedings were launched to have the judgment rescinded. Papers show abundantly that during this period, the Applicant clearly understood or must be taken to have understood and appreciated (without objection) that Absa would proceed and attach his property, in the event of him being in default in terms of the alleged payment arrangement. He defaulted even on the so called payment arrangements.

[6] The following scenario represents what one can describe as pertinent and undisputed background fact in this regard:

On 11 July 2008, the Applicant addressed an e-mail to Absa, in which e-mail he admitted that the mortgage bond was in arrears in an amount of one hundred thousand rand (R100 000.00) and he stated that his expected income from certain transactions would allow him *"...om 'n minimum R40 000.00 per maand teen die verbandrekening in te betaal"*.

On 29 July 2008, Absa responded and informed the Applicant that they would be prepared to accept the offer. However, the Applicant should urgently notify them *"...wanneer u eerste paaiement betaal sal word"*. The Applicant responded that he had already paid an amount of twenty five thousand rand (R25 000.00) (on 28 July 2008), and that he would make further payments of forty thousand rand (R40 000.00) per month, from the end of August 2008. The Applicant did not comply with this undertaking. He did not make any payment during August 2008. In the meantime, on 1 August 2008, the default judgment was granted. On 25

September 2008, the Sheriff served the warrant of execution on the Applicant personally.

[7] In response to the Applicant's enquiry as to why the warrant had been served notwithstanding further payments (of R25 000.00) on 28 July 2008 and R40 000.00 on 9 September 2008), Absa explained that when the Applicant's first payment of R40 000.00 had not been received by 3 September 2008, they had given instruction to their attorneys to proceed with the sale in execution. It is common cause that on 25 September 2008, the Applicant knew that his property had been attached and that the sale in execution thereof would proceed. The Applicant did not raise any objections against Absa's conduct or intentions in this regard. On the contrary, the Applicant requested that Absa should grant him a reasonable opportunity to comply with his obligations to bring the arrear instalments up to date. On 3 November 2008, the Applicant notified Absa that he had not yet paid the arrear instalment, which he then promised to do as soon as certain payments that he was expecting from his own debtors had been received. On 24 February 2009, the Applicant informed Absa that he had suffered a serious eye infection as a consequence of which he had been unable to earn an income. The Applicant confirmed that he was committed to Absa *"...om alle verpligtinge na te kom"*. Except for a payment of R13 500.00 on 30 January 2009, the Applicant made no further payments. The next payment of R10 000.00 was made on 3 July 2009.

[8] Accordingly, on 14 August 2009 Absa's attorneys informed the Applicant that they had received instructions to proceed with the sale in execution. The sale in execution of the Applicant's property was scheduled to take place on 1 April 2011. However, this sale was cancelled when Appolis

Attorneys (who then represented the Applicant) informed Absa that they had been instructed by the Applicant to bring an application for the surrender of his estate. (They did not attack the validity of the default judgment). The Applicant did not proceed with this application. Consequently, the sale in execution was re-scheduled for 27 July 2011. The notice of sale in execution, which contained all the relevant information with regard to the sale in execution, was served upon the Applicant personally during the last week of June 2011. The above factual matrix makes it absolutely clear that the Applicant had full knowledge of the fact that his property would be sold in execution in the event of the Applicant not complying with the arrangements he had made with Absa in regard to the payment of the arrear amount on his mortgage loan. He clearly had resigned himself to this inevitable consequence of his failure to pay the arrears. There is clear merit in the submission made on behalf of Absa namely that the Applicant had clearly acquiesced in the judgment and the execution thereof in the event of the arrear amount in respect of his mortgage debt not being paid timeously.

[9] The Applicant alleges in his Replying Affidavit that although, by 25 September 2008, he had full knowledge of the fact that the default judgment had been granted, there was no reason at that stage to have it rescinded in view thereof that his payments during the period of July to November 2008, had extinguished the arrear amount. In Mr Vivier's submission this is an incorrect and disingenuous statement made by the Applicant. Maybe one must recap in order that the fallacy in this allegation is properly put to rest. At that particular stage, the monthly instalments amounted to R13 281.00. On the Applicant's own version that he was in arrears with an amount of only R85 000.00, and taking into account the monthly instalment of R13 281.00, the Applicant had to pay

an amount of at least R151 405.00 in order to have extinguished the amount of the arrear payments. However, during this period the Applicant only paid an amount of R138 000.00 (this is evident from Annexure "CV8"). Importantly, it is further apparent from the Applicant's own correspondence dated 3 November 2008 (Annexure "MH3") and 24 February 2009 (Annexure "MH4") respectively that, at that stage, the Applicant knew full well that the mortgage bond account was still in arrears. Interestingly on 3 November 2008 the Applicant was informed by Absa as follows:

"...Die agterstallige bedrag betaalbaar is R75 620.74, met die paaiement van 1/8/08 ingesluit". (See Annexure "CV7"). It is once more abundantly clear on the Applicant's own version, he only disputed the validity of the default judgment for the first time, during June 2011 when he had been advised by "CONSUMER VERIFICATION SERVICES" that interest had allegedly been overcharged in respect of the mortgage bond account. (See Annexure "CV11"). Mr Vivier submitted in this regard that it is trite law that acquiescence in the execution of a judgment would bar an application to rescind a judgment. I was referred in this regard to the following authorities:

Mvaami (PVT) Ltd v Standard Finance Ltd 1977 (1) SA 861 (R) at 862F; **Schmidlin v Multisaam (Pty) Ltd** 1991 (2) SA 151 (C) at 15B; ***Manjean t/a Audi Video Agencies v Standard Bank of SA Ltd*** 1994 (3) SA 801 (CPD) at 805 A-F. Perhaps it may help to elucidate this aspect. In ***Mvaami (PVT) Ltd v Standard Finance Ltd*** *supra* at 862 F Davies J made the following observation of importance:

"Wilful default amounting to acquiescence would, however, normally bar success, and in this connection it is to be noted that "wilful" merely means "deliberate". See Neuman (PVT) Ltd v Marks, 1960 (2) SA 170 (S.R.) at p. 173."

[10] The Applicant placed heavy reliance on ***Gundwana v Steko Development*** 2011 (3) SA 608 (CC) in its intended application to rescind default judgment granted in the instant matter. In my view, the Applicant's attack on the constitutional invalidity of the Registrar's order to declare his property executable, also cannot avail the Applicant. In ***Gundwana v Steko Development*** *supra*, the constitutional Court concluded that mere constitutional invalidity of the Rule under which the property had been declared executable, is not sufficient *"to undo everything that followed"*. In order to achieve this result, *"debtors will have to explain the reason for not bringing a rescission application earlier, and they will have to set out a defence to the claim for judgment against them"*.

The apparent flaw in the Applicant's case is that he lost sight of the object of rescission of a default judgment which is *"to restore a chance to air a real dispute"*. See Erasmus, **Superior Court Practice** at page 1-204A. Regardless of the irregularity (perceived or otherwise) of Absa's conduct to execute on the default judgment (notwithstanding the ***Gundwana Constitutional Court*** judgment relied on by the Applicant) the Applicant still has to show, in addition to the normal requirements for rescission, that a Court, with full knowledge of all the relevant facts existing at the time of granting the judgment, would nevertheless have refused leave to execute. See Erasmus, **Superior Court Practice** at page 1-204A.

[11] I would unreservedly agree with Mr Vivier that except for the fact that the Applicant's property did not fetch a price which is comparable to its alleged market value, and that he was in arrears with an amount of only R85 000.00 (shown to be incorrect), the Applicant failed to set out any facts to indicate that a Court would have refused leave to execute. Essentially, the Applicant has not discharged the onus of proving the

essential requirements for the rescission of the default judgment whether in terms of Rule 31 (2) of the Uniform Rules of Court or in terms of the common law. Thring J of this division faced with an application for rescission of judgment in ***Vilvanathan v Louw*** *supra* considered the term 'sufficient cause' or 'good cause' (synonymous) and he stated that these terms have been considered by the Appellate Division in ***Chetty v Law Society, Transvaal*** 1985 (2) SA 756 (A) where Miller JA said at 764 I – 765 E:

'The appellant's claim for rescission of the judgment confirming the rule nisi cannot be brought under Rule 31 (2) (b) or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. (See De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) at 1042 and Childerly Estate Stores v Standard Bank of SA Ltd OPD 163). The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See Cairn's Executors v Gaarn 1912 AD 181 at 186 per Innes JA). But it is clear that in principle and in long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. (De Wet's case supra at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer NO and Another, Smith NO v Brummer 1954 (3) SA 352 (O) at 357-8).

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.' In Thring J's views in ***Vilvanathan v Louw*** case *supra* I subscribe to the two essential elements of 'sufficient cause' or 'good cause' required for the rescission of a final judgment, both of which must be present, are set out with abundant clarity in the above quoted passage. Importantly, the Applicant must show that on the merits of the case he has a *bona fide* defence which *prima facie* carries some prospect of success. Under common law the most recent judgment is that of ***Colyn v Tiger Food industries Ltd t/a Meadow Feed Mills (Cape)*** 2003 (6) SA 1 (SCA) ([2003] 2 ALL SA 113). In the latter judgment the Court's common-law powers were again considered and commented upon by the Supreme Court of Appeal at 5I- 6B as follows:

'As I shall try to explain in due course, the common law before the introduction of Rules to regulate the practice of Superior Courts in South Africa is the proper context for the interpretation of the Rule. The guiding principle of the common-law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes functus officio and may not ordinarily vary or rescind his own judgment (Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 306F-G). That is the function of a Court of appeal. There are exceptions. After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the

limited case of a judgment obtained by fraud or, exceptionally, Justus error. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause.'

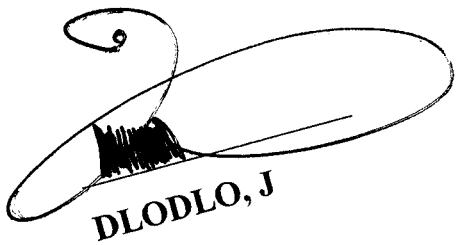
[12] In ***Swadif (Pty) Ltd v Dyke NO*** 1978 (1) SA 928 (A) at 939 E the following authoritative formulation appears and is of cardinal importance:

'It is abundantly clear that at common law any cause of action, which is relied on as a ground for setting aside a final judgment, must have existed at the date of the final judgment. There must be some causal connection between the circumstances which give rise to the claim for rescission and the judgment...' Regard being had to the aforegoing, this application is clearly doomed to failure.

ORDER

In the circumstances I make the following order:

(a) The application is hereby dismissed with costs.



DLODLO, J