IN THE CONSTITUTIONAL COURT

(REPUBLIC OF SOUTH AFRICA)

CASE NO: CCT52/13

In the matter between:

DESTRI JOSEPH MALCOLM FERRIS	First Applicant
SORAYA LACHPORIA FERRIS	Second Applicant
and	
FIRSTRAND BANK LIMITED	First Respondent
D LEE	Second Respondent

FIRST RESPONDENT'S WRITTEN ARGUMENT

INTRODUCTION

1. This is an opposed application for leave to appeal the judgment and order handed down on 5 October 2012 by the Honourable Mr Justice Kgomo in case number 22156/2010 in the South Gauteng High Court, in which the first and second applicants' ("the

applicants") application for rescission of a judgment granted against them on 9 November 2011 was dismissed.

2. Leave to appeal has been refused by both the court of first instance and the Supreme Court of Appeal.

3. The right of this Court to decide this matter is not challenged.

4. The applicants' application for condonation is not opposed.

BACKGROUND

5. The applicants and the first respondent are respectively the mortgagor and the mortgagee in respect of a mortgage bond registered over the applicants' immovable property pursuant to a Transaction and Facility Agreement ("the loan agreement") entered into between them. The loan agreement is subject to the provisions of the National Credit Act 34 of 2005("the NCA").[1]

6. The history of the proceedings is set out in the chronology annexed hereto marked "A". For ease of reference attention is drawn to the

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1 Bundle "D", FA, para 10, p. 6; AA, para 12, p. 37

following salient events and dates :

6.1 The applicants fell in arrears with their monthly payments in terms of the loan agreement. They applied for debt review on or about 24 February 2009 and subsequently applied to be declared over indebted out of the Randburg Magistrate's Court on 22 September 2009.[2]

6.2 The first respondent sought to terminate the debt review on or about 20 April 2010, acting in terms of section 86(10) of the NCA.[3]

6.3 An order was granted by the Randburg Magistrates' Court on 30 April 2010, which order incorporated the first respondent's debt ("the debt review order")[4].

6.4 The first respondent issued summons against the applicants on or about 14 June 2010. The action was defended by the applicants. Pursuant to pleadings being closed, the first

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2 Bundle "D", FA, para's 11 & 12, p. 7; AA, para 13, p. 38

3 Bundle "D", AA, para 14.2, p. 38 and Annexure "FA3", p. 24; Bundle "A", Annexure "D" to summons, p. 42 – 45

4 Bundle "D", FA, para 12, p.7; Annexure "FA1", p. 19 – 20; AA, para 14.1, p. 38

respondent served rule 35 (discovery) notices which the applicants did not respond to. An order was obtained compelling the applicants to file a discovery affidavit, which order was not obeyed. An order was subsequently granted striking the applicants' defence and granting default judgment ("the default judgment")[5], and a writ of execution was issued.

6.5 The applicants launched an application for rescission of the default judgment ("the rescission application").

7. The rescission application was heard on 25 July 2012. The applicants argued only one issue, namely whether the debt review order was an effective suspension of the matter as against the applicants and precluded the respondent from issuing summons against the applicants whilst it was in place.

8. The rescission application was dismissed on 5 October 2012.[6]

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5 Bundle "D", Annexure "FA4", p.25

6 Bundle "D", AA, para 23.1, p.44; Annexure "AA6", p. 68 - 75

9. The applicants subsequently:

9.1 delivered an application for leave to appeal the order dismissing the rescission application, which application was refused by the court of first instance;

9.2 delivered an application for leave to appeal to the Supreme Court of Appeal, which was dismissed on 22 February 2013.

THE LEGAL PRINCIPLES INVOLVED IN RESCISSION APPLICATIONS

10. The applicants raise various grounds on which they allege the rescission ought to have been granted. These issues are dealt with hereunder.

11. However, prior to dealing with those issues, it is emphasised that this application is to be adjudged in the context of a rescission of a default judgment.

12. The test for a rescission under the common law is trite, namely that good cause must be shown, i.e. that there is a reasonable explanation for the default, that the application is made *bona fide*,

and that there is a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success[7].

13. The issue whether the judgment was granted lawfully, due to the termination of the debt review not being effective, does not in itself entitle the applicants to a rescission of the judgment. The applicants still have to show good cause to entitle them to a rescission.[8]

14. The defences raised must not only be decided against the backdrop of the full context of the case, but must also be *bona fide* and the nature and grounds of the defence and the material facts relied upon therefor must be disclosed fully.[9]

15. The principles applicable to rescission applications in terms of rule 31(2)(b) are also applicable to rescission applications brought in terms of the common law.[10]

16. It is further submitted that a rescission of judgment would not be

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7 Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9C – F, para [11]

8 Gundwana v Steko Development and Others 2011 (3) SA 608 (CC) at para [58]

9 Standard Bank of SA Ltd v El-Naddaf 1999 (4) SA 779 (W) at 784D - F

10 Terrace Auto Service Centre (Pty) Ltd and Another v First National Bank of South Africa Ltd 1996 (3) SA 209 (W) at 210I – J and 212E - F

granted if the outcome of the trial were in any event a foregone conclusion; the existence of a *bona fide* defence presupposes that a triable issue exists worthy of consideration at the trial.

17. Although it has been held that a judgment erroneously granted as envisaged in rule 42(1)(a) may be rescinded without the need to disclose a defence[11], it is submitted that such a rescission would also not be granted if the outcome of the trial were a foregone conclusion.

EXPLANATION OF DEFAULT

Negligence of the attorney

18. The applicants' explanation of their default is exculpatory, and places all the blame on their erstwhile attorney.[12]

19. The attorney's alleged remissness was not limited to a single occurrence. The default judgment had followed on various preceding notices, events and orders in respect of discovery, more

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11 Tshabalala and Another v Peer 1979 (4) SA 27 (T)

12 Bundle "D", FA, para 17, p. 8; Bundle "A", FA, para's 4.2 – 4.7. pp. 9 - 12

specifically notices in terms of rule 35, an application to compel discovery, an order compelling discovery, service of the order compelling discovery, and service of the application to strike out and for default judgment. According to the applicants, their attorney did not inform them of any of these events, which amounts to gross negligence on the part of the attorney.

20. There is a degree of negligence by an attorney beyond which a litigant cannot be excused. This was put as follows by Steyn CJ in Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 141C – E:

> "I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of the failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a

relationship, no matter what the circumstances of the failure are."

21. The present is such a case, where the attorney's alleged negligence is such that the applicants should not be entitled to hide behind it.

Delay in seeking rescission

22. The applicants allege that they first became aware of the default judgment during April 2012[13].

23. This is incorrect. The second applicant was informed of the default judgment on 29 November 2011. This appears from a chain of emails dated 29 and 30 November 2011[14]. The gist of the e-mails is as follows:

23.1 The first respondent's attorney confirmed a telephone conversation with the second applicant on 29 November 2011 in which he had informed her of the order. A copy of the order was also annexed to the e-mail.

23.2 The second applicant responded on the next day to the effect

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13 Bundle "D", FA, para 18, p. 8

14 Bundle "D", AA para 20, p.41 – 43; Annexures "AA3", p.64 & "AA4", p.65

that:

23.2.1 they (the applicants) did not want to lose the house;

23.2.2 a new proposal was submitted that entailed payment of not only the full bond instalment but also an additional amount towards the arrears.

(Significantly no mention was made of either the debt review or the debt review order at the time.)

24. The applicants accordingly became aware of the default judgment some five months prior to the date alleged in this application, and therefore delayed for almost six months before launching the application for rescission.

25. The first respondent submits that such delay is inexcusable, and should not be countenanced.

NO TRIABLE ISSUE

26. The applicants contend that there was no compliance with the provisions of section 86(10) of the NCA, and that the existence of

the debt review order is an insuperable obstacle for the first respondent.

27. The first respondent does not persist in alleging that there had been proper delivery of the section 86(10) notice, but submits that this aspect does not provide the applicants with any *bona fide* defence or triable issue, for the reasons set out hereunder.

28. Section 88(3) of the NCA provides *inter alia* that a credit provider who receives notice in terms of section 86(4)(b)(i) may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until the consumer is in default under the credit agreement (which is admitted by the applicants[15]) and the consumer defaults on any obligation in terms of a rearrangement ordered by a court.

29. The provisions of section 88(3) are mirrored in the debt review order, which stipulated that the rights and obligations as amended by the re-arrangement order would be revived and be fully

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15 Bundle “B”, FA, para 17, p.16

enforceable should the applicants default in terms of the order[16].

30. Subsequent to the debt review order, the applicants defaulted in complying therewith from the outset. By the time the summons was issued on 14 June 2010 they were in arrears with their payments in terms thereof in the sum of R7 934.00[17].

31. Accordingly, the first respondent was entitled to proceed to enforce its claim against the applicants by the issue of summons, and the debt review order placed no hindrance in its way.

32. The first respondent's right to rely on the wording of the debt review order and section 88(3) was pleaded in its replication[18].

33. It is submitted that once a credit provider may again exercise or enforce its rights under a credit agreement by litigation, by reason of either section 88(3) or the wording of the debt review order, the NCA does not require any further preceding notice to be given to the consumer, in terms of either section 129(1)(a) or section 86(10),

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16 Bundle “D”, AA, para 24.4, p. 45; Annexure “FA1”, p. 19/20, para 4

17 Bundle “D”, AA, para's 24.5 and 24.6, p. 45; Annexure “AA7”, p. 76; Bundle "B", AA, para 30, p. 60; Annexure "AA7", p. 76; RA, para 30, pp. 95/6

18 Bundle "A", replication, para 1.2, pp. 54 - 55

for the following reasons :

33.1 Section 129(1)(a) requires the credit provider, in the notice, to propose *inter alia* that the consumer refer the credit agreement to a debt counsellor. That is clearly inappropriate, since the consumer had already referred the credit agreement to a debt counsellor, and had indeed proceeded to the point where a debt review order had been made. In addition, having elected the process of debt review, the consumer in any event made known their choice of the available options referred to in section 129(1)(a), and need not be given those options again. It could therefore not be required that a section 129(1)(a) notice should be given to the consumer in those circumstances.

33.2 It is equally, if not more so, inappropriate that a section 86(10) notice should be given, since such a notice may only be given after the consumer had applied for debt review but before the debt review order is made[19]. Since the debt review order would already have been made, a notice in

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[19] Collett v FirstRand Bank Ltd 2011 (4) SA 508 (A) at para [11]

terms of section 86(10) at that stage would be inappropriate.

33.3 Where a consumer has referred the credit agreement to a debt counselor, made application for debt review, obtained a debt review order but then defaulted thereunder, there is no policy consideration that requires any further notice to be given to the consumer before litigation commences.

33.4 In the circumstances of the present case, there is no dispute concerning the loan agreement, the fact that the applicants defaulted thereunder, and that the applicants are unable to pay the outstanding balance or even the full monthly instalments. This is apparent from the fact that application was made for debt review, the contents of the debt review order, as well as the facts set out in paragraph 23.2 above and the common cause facts. Accordingly, there is no imperative that requires any further notice to be given in this case.

34. Should it be found that a notice in terms of section 129(1)(a) should nevertheless have been given prior to the commencement of litigation, the following submissions are made:

34.1 Non-compliance with the provisions of section 129(1)(a) is not a defence *per se* in summary judgment applications[20] or rescission applications[21];

34.2 The reason for this is that in terms of section 130(4)(b), such non-compliance may be cured by the court adjourning the matter before it and making an appropriate order setting out the steps the credit provider must complete before the matter may be resumed[22]. Accordingly, the defence of non-compliance is merely dilatory, and no triable issue will exist at the trial;

34.3 In addition, should a court hypothetically at the trial order the first respondent to give notice to the applicants in terms of section 129(1)(a), the applicants have already indicated their choice of the available options, namely to refer the matter to a debt counsellor and proceed with an application for debt review. There is no point in affording the applicants a further

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20 Standard Bank of South Africa Ltd v Rockhill and Another 2010 (5) SA 252 (GSJ) at para's 16 - 19

21 ABSA Bank Ltd v Petersen 2013 (1) SA 481 (WCC) para's [25] and [31]

22 Rockhill matter *supra*; Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases 2011 (6) SA 111 (WCC) at para's 35 – 36

choice in the matter, and for that reason too there would be no triable issue at the trial.

35. Should a notice in terms of section 86(10) be required to be given prior to commencement of litigation, then such a notice has in the meantime been received by the applicants, and a further adjournment in terms of section 130(4)(b) at the trial would be unnecessary[23]. Such non-compliance is also not *per se* a defence[24]. In this regard there is also no triable issue left for the trial.

36. Accordingly, neither the non-compliance with section 86(10) nor the existence of the debt review order affords the applicants any ground for the rescission of the default judgment, since such a rescission would be fruitless and lead to a trial in which no triable issues would be involved.

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[23] SA Taxi Development Finance (Pty) Ltd v Phalafala (unreported, case number 1512/2013, GSJ)

[24] The Standard Bank of South Africa v Wessels (unreported, case number 64923/2011, GNP) at para 34

RESCISSION IN TERMS OF RULE 42

37. The applicants contend that the default judgment was granted erroneously as envisaged by rule 42.

38. For the reasons stated above, more particularly that the existence of the debt review order did not prevent the institution of action and that no further notice to the applicants was required, the default judgment was not erroneously granted, since there was no fact of which the Judge was unaware which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment[25].

39. Even if the judgment was erroneously granted, it is submitted that rescission would not necessarily follow since, for reasons stated above, the outcome of the trial would be a foregone conclusion and the granting of rescission would be pointless.

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[25] Erasmus : Superior Court Practice by Farlam and Others at B1-308A

FURTHER MATTERS

Refusal of offer valid

40. The applicants allege that they made an offer to the first respondent on 13 March 2009, which offer was ignored by the first respondent.[26]

41. The first respondent submits that the offer was on the face of it incorrect and in contravention of the provisions of the NCA as it *inter alia* contained a provision that the interest rate be fixed at 14%. This is not competent as the interest rate in terms of the loan agreement was a variable interest rate.[27]

42. In addition the offer was unacceptable as the proposed instalment was approximately 25% of the monthly instalment.[28]

43. Nothing however turns on this aspect in the present matter.

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26 Bundle "D", FA, para 11, p.7

27 Bundle "D", AA, para 13.2, p. 38; Firstrand Bank Ltd v Adams and Another 2012 (4) SA 14 (WCC); Section 87(1)(b)(ii) read with Section 86(7)(c)(ii) of the NCA

28 Bundle "D", AA, para 13.2, p. 38; Wessels case *supra* at para's 35 - 42

Executability of property

44. The applicants allege that they reside on the property with their minor grandchildren.[29]

45. This allegation has consistently been denied by the first respondent. The applicants initially alleged that their minor children resided at the property with them[30]. It is still unclear which grandchildren reside with the applicants.[31] Their allegations in this regard are needlessly vague.

46. It is submitted that this part of the order was correctly granted, and it is in any event not attacked independently of the default judgment.

CONCLUSION

47. Regard being had to the above, it is submitted that the applicants have not shown good cause for a rescission of the default judgment.

48. The granting of rescission involves the exercise of a discretion.

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29 Bundle “D”, FA, para 39, p.13

30 Bundle "B", FA, para 19, p. 17

31 Bundle “D”, AA, para 27.3, pp. 47/8

Accordingly, leave to appeal can only be granted if the court of first instance exercised its discretion capriciously or upon a wrong principle, did not bring its unbiased judgment to bear on the question or did not act for substantial reasons.[32] The first respondent denies that the court of first instance acted as aforesaid and submits that the rescission was correctly dismissed.

49. It is not in the interests of justice that leave to appeal be granted or that the appeal succeeds.

50. The application should accordingly be dismissed with costs.

ANDRÉ GAUTSCHI SC

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Sandton
26 September 2013

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32 Ex parte Neethling 1951 (4) SA 331 (A) at 335E