

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE HIGH COURT, PORT ELIZABETH**

CASE NO: 2000/2007

In the matter between:

XXXXX

FIRST APPLICANT

XXXXX

SECOND APPLICANT

and

XXXX

RESPONDENT

FOUNDING AFFIDAVIT

I, the undersigned

XXXXX

do hereby make oath and state:

1. I am the First Applicant in this application for rescission of default judgment. The facts set out herein are, unless otherwise indicated, within my personal knowledge. I reside at xxxx, xxxx, Port Elizabeth and am unemployed.
2. I am married in community of property to Second Applicant, **XXXXXXXX** who resides at the same address. The Second Applicant supports the bringing of this application. I attach her confirmatory affidavit hereto as **ANNEXURE MJ 1.**

3. The Respondent is **XXXXXX**, a company with limited liability duly incorporated within the Statutes of the Republic of South Africa with branch offices at **xxxx**, Braamfontein, that alleges in paragraph 1 of its Particulars of Claim that it acquired certain of the assets and liabilities of African Bank Limited in terms of Section 54(1) of the Banks Act (Act 94 of 1990), as amended.
4. This Honourable Court has jurisdiction to hear the matter as the property, referred to hereinunder, situate within the jurisdiction of the Court and the Registrar of this Honourable Court made a default order as set out hereinunder.
5. During 1994 I bought the property presently occupied by Second Applicant and myself and which was declared executable by the Registrar of this Honourable court under the above case number. I will hereinafter refer to this property as “the property.”
6. On 11 April 1994 a mortgage bond was registered over the property in favour of African Bank Limited for the sum of R60 000 plus an additional sum of R12 000 together with interest thereon. This bond document is already attached to the Particulars of Claim of the Respondent in the main action between the parties. In terms of the mortgage bond the amount had to be repaid in 120 consecutive monthly payments of R1 008.06.

These monthly repayments were adjusted when there were changes in the interest rate.

7. I made regular monthly payments to Respondent by way of a stop order against my monthly salary, until the total amount of the bond was fully paid. According to the payslips and bank statements which is currently in my possession and it was calculated that I had paid a total amount of R148 050.68 to Respondent from September 1994 to July 2005.
8. On 11 September 2007, more than two years after I had paid the bond in full, Respondent issued a summons out of this Honourable Court against Second Applicant and I in which it claimed, *inter alia*, an amount of R63,012,30 being an amount allegedly owed by us on the mortgage bond registered on 14 April 1994.
9. Due to the fact that I disputed that we owed this amount or any other amount to Respondent I immediately went to see the Respondent's local attorney Mr XXXXX of the attorney's firm XXXXX Incorporated. I handed to him my payslips from 1994 to July 2005 as proof of the fact that I have paid the amount owing under the mortgage bond in full.
10. I did not enter an appearance to defend as I was brought under the impression that Mr XXXX would investigate the matter and come back to me. Mr XXXX specifically told me that no one will sell my house if I paid the amount in full.

11. During about August 2009, I received a letter from Respondent informing me that the property will be sold in execution. I immediately went to Mr XXXX to find out what is going on. Mr XXXX informed me that he is no longer dealing with the matter and that the matter is now being dealt with by Respondent's attorneys in Johannesburg.
12. I then approached XXXXX for assistance in this matter, who indicated that I must return as soon as a summons is delivered. They explained that a house will not be sold, unless there is a court order and I was under the impression that there was no court order against me.
13. On 3 September 2009 I received a notice by registered mail in which I was informed that my property will be sold in execution on 4 September 2009 at 15:00. As XXXX only take in walk-in clients in the morning, I was unable to see a lawyer on 3 September. I returned to their offices the following day, 4 September 2009.
14. It was only when I received the registered notice of the sale in execution that I realised that Respondent applied for and was granted default judgement in this matter. Only after looking at the court file did my attorney ascertain that this default judgement was given by the Registrar of this Honourable court on 5 November 2007.
15. On 4 September 2009 this Honourable Court, on an urgent basis, granted an order whereby the sale in execution that was due to take place that

afternoon was stayed pending an application for rescission of the default judgement against Second Applicant and myself. This order included a rule nisi that was extended from time to time by agreement between all parties. The next date for hearing of the rule in the urgent application is 18 May 2010.

16. Since 4 September 2009 my attorney of record endeavoured to obtain the payslips handed to Mr XXXX from Respondent's attorneys. He also tried to obtain a schedule of payments received by Respondent from me and the fluctuations in interest rate applicable to the said mortgage bond. To date Respondent's attorney in Johannesburg has supplied my attorney of record with the originals of the payslips that were handed to Mr XXXX. However, the schedule of payments received and fluctuations in interest rate applicable to the mortgage bond that was supplied to my attorney of record is for the most part illegible and of no use.
17. In the circumstances it has been decided to proceed with an application for rescission of the judgement without such schedule. In this regard I attach a letter by the Respondent's Johannesburg attorney, wherein he states that they agree that the rule be discharged and that the costs reserved and that a substantive application for rescission of judgement be served on their Port Elizabeth correspondents, XXXX. I attach this letter hereto as **ANNEXURE MJ2**.

18. I therefore pray that this Honourable Court will condone the delay in bringing this application. On the next day after the day that I became aware of the default judgement and obtained a rule nisi against the Respondent. By agreement now this rule will be discharged and cost reserved.

19. I deny that the amount claimed in the summons or any other amount is due to Respondent, and as set out above I aver that the mortgage bond has been paid in full. I respectfully submit that I have a *bona fide* defence to Respondent's claim.

20. I also deny that the Registrar had the power to declare the property executable.

21. In the circumstances I respectfully request this Honourable Court to condone the fact that this application was not brought within the time prescribed in the rules of this Honourable Court, to rescind the judgement granted on 5 November 2007 and to grant me leave to defend this action.

XXXXX

Done and signed before me at Port Elizabeth on this the day of 2010. The deponent acknowledged that he knows and understands the contents of this affidavit, that he confirms the contents thereof, that he has no objection to taking the prescribed oath and that he regards the prescribed oath as binding on his conscience.

COMMISSIONER OF OATHS

**FULL NAMES
CAPACITY
AREA
ADDRESS**