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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2015 / 21199

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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SIGNATURE

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DATE

In the matter between:

AGENTE EZEKIEL MOTAKE

1st Applicant

LIZIWE JOYCE MOTAKE

2nd Applicant

And

NEDBANK LIMITED

Respondent

JUDGMENT

MASHILE J

[1] On 31 July 2014, this Court per Sutherland J granted a default judgment in favour of the Respondent and against the Applicants. By this application, the Applicants now seek to rescind the judgment. The rescission application seems to be premised on the provisions of Uniform Rule of Court 42(1)(a) insofar as the Applicants allege that it was erroneously sought or erroneously granted in their absence.

[2] This matter stems from the following factual background:

2.1 The Applicants and the Respondent concluded a loan agreement, which was subsequently secured by the registration of a mortgage bond over the immovable property of the Applicants on 26 January 2006;

2.2 As a result of the Applicants experiencing financial problems, in December 2010 they entered into a distressed restructure agreement (hereinafter "the agreement") with the Applicants. In terms of the Agreement, their existing indebtedness owed to the Respondent was restructured to accommodate their financial predicament in a manner that would assist them to continue to honour their commitments and perform in line with their obligations arising from the mortgage bond as read with the loan agreement;

2.3 It is significant to highlight certain clauses of the agreement for purposes of this judgment. Thus, in terms of the agreement:

2.3.1 the Applicants chose as their *domicilium citandi et executandi* 30 Ashdown Forest, Aitken Road, Eden Glen;

2.3.2 should the Applicants breach any condition contained in the agreement, or should they breach a condition of any other agreement with the Respondent, the latter would have the right, to the extent permitted by the Act, to claim repayment of the Loan or the balance thereof outstanding, which would thereupon become immediately due and payable, together with interest and all other amounts owing to or claimable by the Respondent in terms of the restructure agreement, and to have the immovable property declared specially executable;

2.3.3 all amounts owing to or claimable by the Respondent from the Applicants would, at the option of the Respondent and to the extent permitted by the Act, become immediately due and payable without notice in the event that the Applicants failed to pay on demand any sum or sums of money owing to or claimable by the Respondent in respect of any indebtedness of the applicants towards the Respondent from whatever cause arising. Any failure by the Applicants to effect payment as aforesaid would constitute a breach of the agreement;

2.3.4 the mortgage bond would secure inter alia the Applicants' indebtedness to the Respondent in terms of the agreement as well as all present and future indebtedness of the Applicants to the Respondent, from whatever other cause arising, together with interest, and would remain of full force and effect until cancelled in the deeds registry notwithstanding any fluctuation in, or temporary extinction of, the Applicants' indebtedness to the Respondent from time to time;

2.3.5 the Applicants would be responsible for all costs on the attorney and client scale

2.4 The applicants failed to observe the terms of the agreement by falling into arrears with their monthly mortgage bond instalments. Exercising its rights arising from the agreement in the event of infringement, the Respondent invoked and enforced the provisions of the agreement;

2.5 In November 2013, the Respondent embarked on the process of recovering the debt by sending notices in terms of section 129 of the National Credit Act no. 34 of 2005 ("the Act") to the Applicants. The notices were sent by registered post to the chosen *domicilium* address of the Applicants, which is also their admitted residential address. The track and trace report issued by the Eden Glen Post Office shows that on 7 November 2013 the aforesaid post office, which was responsible for handling and delivery of the notices sent out a first notification to the Applicants to collect the notices;

2.6 The Applicants did not collect the Section 129 notices at the Eden Glen post office. The Applicants failed to bring their arrears up to speed, a failure which prompted the Respondent to persist with the debt recovery process by launching motion proceedings on 13 December 2013;

2.7 On 15 January 2015, the application was personally served on the Applicants. The Notices in terms of Section 29 of the Act were also delivered as part of the application because they were annexures thereto. Even after the service of the papers, the Applicants neither opposed the application nor settle their arrears;

2.8 Seeing that the application was unopposed, the Respondent set it down for hearing and the date allocated was 29 APRIL 2014. The

returns of service, which are attached to the answering affidavit of the Respondent, serve as confirmation of service of the Notice of Setdown upon the Applicants. To stall the hearing of the application on 29 April 2014, the Applicants made part payment of their arrears on the date of hearing;

2.9 The part payment only meant that the arrears were reduced but a substantial part remained owing. The Applicants recorded the payment made by them on 29 April 2014 in writing and on 26 May 2014, the Respondent confirmed the contents of the recorded payment in a 'without prejudice letter' as follows:

"Home loan account number: [8.....]"

Total arrears: R102793.49

Monthly Instalment: R9357.43

AGREEMENT TO PAY OVERDUE ACCOUNTS

We confirm the agreement between you and the bank for payment of the arrear instalments on your home loan. Payment of overdue amounts is included in the undermentioned instalment.

Monthly arrears repayments: R102 793.49

Normal monthly payment: R9357.43

Revised arrangement amount: R10000.00

Revised amount payable monthly on: 27/05/2014

When the repayment of the arrears amount is up to date, your normal instalment will once again become

payable. Should you not adhere to this interim arrangement, we shall institute proceedings for the recovery of your indebtedness."

2.10 The letter constitutes a confirmation that notwithstanding the part payment on 29 April 2014, the Applicants were still in arrears with their mortgage bond instalments in the amount of R102 793.49 on 26 May 2014. It also advised the Applicants of the revised monthly instalments of R10 000.00 starting from 27 May 2014;

2.11 The letter also warned the Applicants of the perils of not adhering to the payment arrangement. In essence, they were admonished that the Respondent would proceed with the application to recover the debt in the case of breach. Subsequent to that arrangement, the Applicants failed to perform as envisaged in the payment arrangement of 26 May 2014 as they made no payment on 27 May and June 2014;

2.12 As a result of the breach as aforesaid, the Respondent set the application down for hearing on 31 July 2014. It is evident from the returns of service that the sheriff effected personal service of the Notices of Set Down upon the Applicants. On 31 July 2014, this Court, per Sutherland J, granted default judgment in favour of the Respondent;

2.13 Following the order of Sutherland J, the Registrar issued a writ of attachment. On 24 October 2014, the property was attached by the sheriff of Germiston North. The sheriff recorded that simultaneously with the execution of the warrant, he served copies of the warrant of execution and the writ of attachment personally upon the Second Applicant;

2.14 A sale in execution of the property was then arranged for 3

December 2014. On that day, the Respondent purchased the property. The total outstanding arrears at the time of the sale in execution was R148 000.00.

[3] From these facts, which are largely common cause and in any event, must be accepted in light of the absence of a replying affidavit, this Court must decide whether or not the Applicants have set out sufficient grounds entitling them to have the judgment of 31 July 2014 set aside.

[4] The Applicants contend, in the first place that the judgment was erroneously sought or erroneously granted by this Court, and in the absence of both the Applicants. In their endeavour to establish the above, the Applicants also argued that their failure to oppose the application does not constitute wilful default.

[5] The Applicants also asserted that by the conclusion of the payment arrangements, they settled their arrears. The conclusion of the agreement and the arrangement of 26 May 2014 prohibited the Respondent from proceeding with the application. In consequence of the settlement of the arrears in the manner described, the sale in execution is a nullity and falls to be set aside.

[6] The Respondent on the other hand has fervently asserted that the application stands to be dismissed because the Applicants were clearly in wilful default and that both the agreement and the arrangement of May 2014 were infringed by the Applicants triggering it to take appropriate legal steps to recover the debt. This being the position, the sale in

execution was valid and accordingly cannot be set aside.

[7] Rule 42(1)(a) reads:

"The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;".

[8] The question is therefore, was the judgment erroneously sought or erroneously granted in the absence of the Applicants? The Applicants vigorously protested that the Respondent utilized an incorrect address being 14 Richgrove, Van Tonder Road, Edenvale on those occasions when it meant to draw their attention to the arrear account. I guess that the argument is that had Sutherland J been aware that the address used by the Respondent was not the domicilium address, he would not have granted the judgment.

1. [9] Admittedly, it might well have been that the address was incorrect, , but what is patent is that the notices were sent to the Applicants' *domicilium* address on 4 November 2014 by registered mail. The Eden Glen post office, the post office responsible for the area of the Applicants, issued the first notice calling on the Applicants to collect the notices but they did not heed the call. Moreover, the notices were

delivered together with the motion papers when they were served on the Second Applicant on 15 January 2014. See the unreported case of this Court of *SA Taxi Development Finance v Phalafala* Case Number 1512/2013.

[10] The Applicants therefore could have known as early as the second week of November 2013 that the Respondent was intending to initiate legal proceedings for the recovery of the debt and/or declaring the property specially executable. According to **Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC)** the issuing of the notice calling upon a debtor to collect is sufficient to impute knowledge of the notice. Whether or not the affected party collects is irrelevant. In the circumstances, the Applicants knew about the notices and in any event they also came to know about it on 15 January 2014 when the papers were served.

[11] No doubt exists that the Applicants knew about the enrolment of the application on 29 April 2014 otherwise it would be enigmatic why they made payment on that day. I fully agree with the Respondent that the payment made by the Applicants on that day constitutes knowledge of the arrears. A further acknowledgment of their arrears is manifested in the arrangement that they made with the Respondent on 26 May 2014. Such arrangement would not have been necessary if they were not behind with their monthly mortgage bond instalments.

[12] There is proof that the Applicants were aware that the application was to be heard on 31 July 2014 and yet they did nothing about it. This is evident from the service of the Notice of Set Down by the sheriff on 24 June 2014 on the Second Applicant. Again, the Applicants knew that the application would be coming before this Court and deliberately elected not to attend court on 31 July 2014. Naturally, the Respondent caused the Registrar to issue a writ of attachment as per the order of Sutherland J. When the sheriff executed the writ of attachment he at once served the writ of attachment and the warrant of execution on the Second Applicant. The Applicant cannot be believed that they did not know about the sale of the property especially because they knew that it had been attached.

[13] Rule 42(1)(a) cannot avail a party who deliberately avoid to attend court so that he can later raise it when faced with a judgment against him. The error contemplated in the Rule must be such that if the presiding judge had known about it, he would not have granted an order. In this matter, it is obvious that the Applicants having been properly advised at every stage of the process, the Court was entitled to grant the judgment. The Judgment could not have been granted in error.

[14] Even if this rescission application was launched in terms of common law or Rule 31, it would still have failed as it does not satisfy the requirements envisaged at common law or under Rule 31. It is trite that an applicant in an application for rescission of judgment must show good cause in order to succeed. See **Chetty v Law Society Transvaal** 1985 (2) SA 756 (A) at 765.

[15] It is an ingredient of good cause that the element of wilfulness is absent. See **Maujean t/a Audio Video Agencies v Standard Bank of S A Ltd** 1994 (3) SA 801 C at 803 J. The requirements for an application for rescission have been stated as follows in the case of ¹ **De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd** 1994 (4) SA 705 E at 708 H to 709 D:

15.1 One must give a reasonable explanation for one's default. If it appears that one's default was wilful or that it was due to gross negligence the Court should not come to one's assistance;

15.2 One's application must be *bona fide* and not be made with the intention of merely delaying the plaintiff's claim;

15.3 One must show that one has a *bona fide* defence to the plaintiff's claim. It is sufficient if one makes out a *prima facie* defence in the sense of setting out averments which, if established at trial, would entitle one to the relief asked for. A party need not deal fully with the merits of the case and produce evidence that the probabilities are actually in that party's favour.

[16] Thus, in **Silber v Ozone Wholesalers (Pty) Ltd** 1954 (2) S345 A at 352 it was held that *good cause* includes but is not limited to the existence of a substantial defence. Where an applicant has provided a poor explanation for default, a good defence may compensate. The Court has a wide discretion in evaluating "*good cause*" in order to ensure that justice is done. The object of rescinding a judgment is "*to restore a chance to air the real dispute*."

[17] The facts demonstrate that the Applicants wilfully ignored to defend the Application. The Application was served on the Second Applicant on 15 January 2014 yet they did nothing, reacting only on the date of hearing of the 29 April 2014 when the hearing was about to proceed.

[18] If it were brought in terms of Rule 31, the 20 day period within which the Applicants should have launched the application would have found application. Needless to mention that the Applicants launched this application outside of the 20 day period.

[19] The Applicants disclose no bona fide defence in the papers. There are a whole lot of other irrelevant defences that the Applicants raised in their heads but this Court is not prepared to entertain any of them because they were not raised in their papers. One of them concerns whether or not this matter should have been brought to court by way of motion or action. Quite honestly, it is this Court's opinion that the argument of the Applicants is totally misguided insofar as they contend that these proceedings should have been by way of action.

[20] It is also significant to note that while the Applicants claim that the application is on the basis of Rule 42(1)(a), the founding affidavit does not show in what manner is it alleged that it was granted in error. The attempt to do so is only in the heads. The only other defence that they raised is that the arrangement of 26 May 2014 constitutes a settlement of their arrears.

[21] The Applicants allege that it was contemplated in that arrangement that he would commence payment at the end of September 2014. However, a perusal of the letter reveals that it was concluded on 26 May 2014 and payment of R10 000.00 was expected the following day, 27 May 2014. The Applicants failed to pay in May and June hence the placing of the matter on the roll of 31 July 2014. As a matter of fact, the Applicants concede that their arrears stood at R148 000.00 in December 2014.

[22] It is preposterous to suggest that the conclusion of the arrangement without accompanying payments being the obligations that arose as a result was sufficient to put litigation in abeyance. The understanding was that the Applicants would abide by the terms of the arrangement. their non-adherence to the arrangement caused the litigation to proceed culminating of course in the granting of the judgment.

[23] The Applicants have failed to disclose grounds that would enable them to be entitled to a rescission of this Court dated 31 July 2014. In the circumstances, the application fails and I make the following order:

1. *The application is dismissed with costs as at the scale between attorney and client.*

B A MASHILE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING: 10 May 2016

DATE OF JUDGMENT: 24 June 2016