

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 27863/14

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

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DATE

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SIGNATURE

In the matter between:

ZANAZO, ESTHER NOMHLE

Applicant

and

**FIRSTRAND BANK LIMITED
t/a FIRST NATIONAL BANK**

First Respondent

MMAMANE DANIEL RAMMAWI

Second Respondent

REGISTRAR OF DEEDS

Third Respondent

J U D G M E N T

SUMMARY

Urgent application to interdict transfer of immovable property pending rescission application.

- Arrears at April 2014 amounting to R14 018,69.
- Applicant sought to cancel agreement and claim full amount.
- Agreement to settle arrears breached by applicant.
- Matter set down again in 2016.
- Applicant alleging R14 018,69 arrears had been paid off and therefore Respondent was obliged to issue a new section 129 notice and not obtain default judgment.
- Further arrears incurred since R14 018,69 arrears paid.
- Respondent entitled to proceed for judgment.
- Agreement only re-instated in terms of *Nkatha v FirstRand Bank limited 2016 (4) SA 257 (CC)*, if full arrears paid.
- *Res judicata* – previous application for interdict of sale in execution which application was dismissed on same grounds.
- Application dismissed with costs.

WEINER, J:

[1] The applicant seeks to interdict the transfer of an immovable property situate at Erf [...] South Kensington Township, Gauteng (the property) pending her application for rescission of the judgment granted against her in December 2015 (the judgment).

[2] The applicant alleges that the matter is urgent as the property has now been sold and transfer can take place at any time.

BACKGROUND

[3] The first respondent issued a notice in terms of section 129 of the National Credit Act (NCA) on 11th April 2014 in respect of arrears owing by the applicant in the sum of R14 018,69. In July 2014 the first respondent sought to cancel the agreement and claimed the accelerated amount.

[4] The applicant made certain arrangements to pay the amount and the application for default judgment was not proceeded with.

[5] The first respondent alleges that the applicant failed to settle the arrears in terms of the agreement and the application for default judgment was set down again.

[6] The respondents' contention is that by the time the matter was set down again she had paid the ±R14 000,00 arrears which was owing as at April 2014 and therefore the applicant was not entitled to proceed in an application based on that section 129 notice.

[7] Applicant's contention is that the first respondent was obliged to issue a fresh section 129 notice in respect of what she refers to as "new arrears".

[8] The first respondent contends that the applicant admits that the account has been in a constant state of arrears since August 2013. It contends that when the applicant alleges that she paid up the arrears of ±R14

000,00 she does not set out that payments were made erratically and towards the balance owing whilst the account remained in arrears as payments fell due. The ±R14 000 was not paid in one amount to settle the arrears. It was paid over a period of time, whilst mortgage bond payments fell due for payment in respect of months after April 2014. The applicant's account accordingly at all times remained in arrears.

[9] The first respondent disputes the urgency of the matter. It submits that the applicant has been aware of the judgment against her since service of the warrant of attachment on the 26th February 2016 and only applied for rescission six months later. The first respondent also submits that the relief being sought is *res judicata*. The reason for this is that the applicant launched an earlier urgent application seeking the same relief but pending the sale in execution. That application was heard by Matojane J on the 6 September 2016 and was dismissed with costs.

[10] The first respondent sets out that this case falls precisely within the prerequisites for reliance upon the *res judicata* principle. See *National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited*¹. The phrase “the same grounds” has been expressed to mean “the same issue should have been adjudicated upon”. See *Horowitz v Brock*². The applicant states that plea of *res judicata* is not applicable as there is no final order. However, the applicant has applied for

¹ (72/99) [2000] ZASCA 70; 2001 (2) SA 232 (SCA); [2001] 1 All SA 417 (A) (28 November 2000) at 239F

² (168/85) [1987] ZASCA 126; [1988] 2 All SA 15 (A) (5 November 1987) 1988 (2) SA 160 at 179G

leave to appeal against the judgment of Matojane J which it did on the 7th September 2016. This she could not have done unless the judgment was final.

[11] The first respondent contends that the applicant's allegation that she has a *prima facie* right of ownership of the property was the same subject of the urgent application that came before Matojane J on the 6th September 2016. The defence which the applicant seeks to rely on is that the credit agreement was reinstated after the arrears of ±R14 000, 00 were paid. Matojane J held that this cause of action was ill-founded and accordingly he dismissed her application.

[12] The applicant argued that as the relief sought is different, that is interdicting the transfer of the property pending finalisation of the application of rescission, that the matter is not *res judicata*. This she state is because Matojane J had to decide whether or not to stay the sale in execution.

[13] However, what the applicant's argument fails to take into account is that it is not the relief which renders the matter *res judicata* but the basis for the relief sought. This cause of action was considered by Matojane J and dismissed.

[14] Secondly, the applicant cannot dispute that the account has been in a constant state of arrears since August 2013. The applicant cannot argue that because an amount of ± R14 000,00 was paid into the account, that this

amount settled the arrears and that new arrears have been established, which require the first respondent to commence with a new Section 129 Notice and application. The applicant's contention, making payment in an amount equal to an arrear amount some months later and in erratic and unequal payments, which payments may at some point equal the arrears of ± R14 000,00, does not take into account the fact that the arrears escalate on a monthly basis, as the amounts falling due are not paid. The credit agreement was therefore not reinstated. It can only be reinstated if payment of the full arrears is made. See *Nkatha v Firstrand Bank Limited*³.

[15] Although the judgment of Matojane J is not yet available, it is referred to in correspondence between the parties. According to such correspondence the learned judge found:

- 15.1 that the applicant's defence raised in the urgent application heard on the 6th September was not sustainable;
- 15.2 the rescission of judgment application was not brought in good faith; and
- 15.3 the rescission of judgment application was nothing more than an attempt to have the sale in execution postponed again.

³ 2016 (4) SA 257 (CC) at 263C-D, 278E and 284G-H

[16] The first respondent accordingly contends that the court has already made a finding on the *prima facie* right upon which the applicant relies for interdictory relief.

[17] even if the matter was not *res judicata*, the defence raised is unsustainable for the reasons set out above. The application of the applicant accordingly must fail. The first respondent seeks costs on a punitive scale *de bonis propriis* against the applicant's attorney on the basis that they were informed that the issue was *res judicata* in correspondence and that the allegations placed in the affidavit are factually incorrect to the knowledge of the applicant and her attorney.

[18] The applicant attempts to explain such factual inaccuracies by stating that her legal team did not understand the figures reflected on the bank statements. However, the first respondent contends that the detailed information and calculations were set out in the answering affidavit filed in the applicant's first application but despite same she repeated them in the present application.

[19] However, this Court is unable to find that the applicant herself is not the author of her own misfortune and that her attorney is simply following her instructions.

[20] There was also an order that costs be reserved in respect of the application launched on the 5th October 2016 which was postponed for the applicant to join the Registrar of Deeds.

Accordingly, the following order is made:

The application is dismissed with costs including the costs reserved on the 5th October 2016.

**S WEINER
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

Appearances

For the Plaintiff: Advocate Z Feni

Instructed by: Faku Attorneys

For the First Respondent: Mr C Cilliers

Instructed by: Charl Cilliers

Date of hearing: 26 October 2016

Date of Judgment: 02 November 2016