

2/6/2010

IN THE HIGH COURT OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE

(NORTH GAUTENG HIGH COURT, PRETORIA)

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

NOT REPORTABLE

DATE

2/6/10

SIGNATURE

CASE No. 33047/2008

In the matter between:-

SYDNEY MUDLAZAKHE DHLAMINI

Applicant

and

NEDBANK LIMITED

First Respondent

LOUIS MALAPO

Second Respondent

HARVEY NORTJE

Third Respondent

SHERIFF OF THE HIGH COURT, WITBANK

Fourth Respondent

REGISTRAR OF DEEDS

Fifth Respondent

JUDGMENT

Van der Byl, AJ:-

[1] In this matter the Applicant in effect seeks, in addition of the ordinary order of costs against the First Respondent, Nedbank Limited, an order -

- (a) rescinding and setting aside of the judgment granted by default by the Registrar under Case No. 23047/08 on 21 September 2007 (default judgment was actually

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granted on 19 September 2008) ;

- (b) setting aside the sale in execution of the immovable property described as Erf 1342, Phola, held under title deed TL34887/1991.

(I will for the sake of convenience refer to the parties as they were cited in the action at the time when default judgment was granted, ie. to the Applicant as the Defendant and to the First Respondent as the Plaintiff)

[2] It is common cause that, as is apparent from the summons issued by the Plaintiff against the Defendant on 9 July 2008, a mortgage bond was registered over the property known as Erf 1342, Phola Township, Mpumalanga, being the chosen *domicilium citandi et executandi*, of which the Defendant was the registered owner, as security for the Defendant's indebtedness to the Plaintiff in respect of an amount of R47 873, together with costs of R4 787,30 and interest, lent and advanced to the Defendant by the Plaintiff.

[3] It is likewise common cause that in terms of the mortgage bond the capital sum and all other moneys which may be claimable under the mortgage bond would immediately become due and payable in the event of the failure by the Defendant to make payments in terms of the mortgage bond and entitling the Plaintiff to take such steps as may be necessary to have the property declared specially executable.

[4] It is also not disputed that the Defendant breached his obligations under the

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agreement in that he failed to make payments in accordance with the mortgage bond and that he was in arrears with payments in the sum of R1 872,06 as at 1 July 2008. The amount outstanding in terms of the bond at that time amounted to R29 396,60, together with interest.

[5] It is, furthermore, averred in the summons that a letter was forwarded by way of ordinary mail in terms of section 129, read with section 130, of the National Credit Act, 2005, to the Defendant on 3 June 2008 and that no reply was received from the Defendant after the lapse of 10 days since delivery of the letter.

[6] A simple summons issued on 11 July 2008 was served by the Sheriff upon the Defendant by, according to the return of service, affixing it to the principal door at his chosen *domicilium citandi et executandi* address.

[7] The Defendant failed to enter an appearance and default judgment was granted against the Defendant by the Registrar on 19 September 2008 for -

- (a) payment of the sum of R29 396,60;
- (b) interest thereon at a rate of 15,50 per cent per annum from 2 July 2008 to date of payment;
- (c) costs in an amount of R200 plus the Sheriff's fees.

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In addition the mortgaged property was declared specially executable.

[8] A notice of attachment and a warrant of execution was forwarded by prepaid registered post to the Defendant at his chosen *domicilium citandi et executandi* address on 26 January 2009 and a notice of sale of the property was, apart from being affixed to the notice board at the magistrate's court Wilbank and being advertised in the Government Gazette and Beeld newspaper on 6 March 2009, delivered by the Sheriff at the *domicilium citandi et executandi* address .

[9] On 18 March 2009 at a sale in execution the property was sold by the Sheriff to a certain Mr. Louis Malapo for an amount of R100 000.

[9] It is, as is apparent from the Applicant's founding and replying affidavits, his case -

- (a) that he for the first time became aware of the fact that judgment had been granted against him and that his house had been sold in execution after Mr. Louis Malapo approached him on 20 April 2009 and informed him that he had bought his house;
- (b) that the summons commencing action was never served on him and must have gone astray as the gate to which it was affixed opens out onto the street;
- (c) that he has paid his entire indebtedness to the Plaintiff in that he during 2005

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arranged that monies due to him by the Mineworkers Provident Fund be used to pay off the bond;

- (d) that he was later informed by the Mineworkers Provident Fund that the outstanding amount had indeed been paid by it to the Plaintiff;
- (e) that he received no letter from the Plaintiff indicating that his account was in arrears or any notice in terms of the National Credit Act, 2005, since Erf 1342, Phola Township, Witbank, is not a street address;
- (f) that he approached the Plaintiff on 23 April 2009 where he was informed that his account was indeed in arrears in an amount in excess of R20 000
- (g) that he then approached the Mineworkers Provident Fund, but was at the time at his disposal unable to establish what happened to his money;
- (h) that Matla Coal Limited by whom he is employed stood surety for his indebtedness and that the Plaintiff, instead of calling upon the surety, has chosen to sell his house.

[10] In its opposing affidavit the Plaintiff confirms that the Defendant's account is in arrears in the amount specified in the summons and that it took all steps required to enforce the terms of the mortgage bond.

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[11] In terms of a long standing practice followed in our courts a party seeking rescission of a judgment or order obtained on default of appearance in terms of either Rule 31(2)(b) or the common law is required to establish on a balance of probabilities two essential elements, namely -

- (a) a reasonable and acceptable explanation for his or her default of appearance;
and
- (b) a *bona fide* defence on the merits which carries some prospect of success.

(See: ***Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, fifth edition, Volume 1, p. 938***)

[12] In an application for rescission in terms of Rule 42(1)(a) based on an allegation that a judgment or order had been erroneously granted against a party affected thereby good cause by way of these two essential elements need not to be shown (***Topol v LS Group Management Services (Pty) Ltd 1988 (1) SA 639 (W) at 650D-J***).

[13] Mr. Omar who appeared on behalf of the Defendant argued, in an attempt to bring the application under Rule 42(1)(a), that the Registrar was not authorized or empowered to grant an order in terms of which the Defendant's property is declared specially executable.

In terms of Rule 31(5) the Registrar is empowered to grant default judgment where a claim is for a "*debt or liquidated demand*". A claim for a declaration that hypothecated

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immovable property be declared executable is "is simply a request for a direction with regard to the execution of a judgment sounding in money and is ancillary to the claim for such judgment" (*Entabeni Hospital Ltd v Van der Linde; FNB of SA Ltd v Puckriah* 1994 (2) SA 422 (N) at 424G; *Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK* 1995 (3) SA 659 (T) at 661H) and is in any event a claim for a liquidated demand (*Clayton v Pullen* 3 EDC 231; *Van der Hoven v Potgieter* 1928 TPD 724; *Fred and Another v Keelan* 1951 SR 7; *Morris v Stern* 1970 (1) SA 246 (R) at 247).

The submission made in this regard on behalf of the Defendant is accordingly devoid of any substance.

[14] The question to be pronounced upon in this matter is accordingly whether the Defendant has shown "good cause" or "sufficient cause" for rescission of the default judgment obtained on his default of appearance.

[15] In this regard Mr. Omar argued -

- (a) that, having regard to the fact that, as explained by the Defendant, the summons was served by affixing it to the outer gate of the premises, it is most likely that it did not come to the attention of the Defendant; and
- (b) that, relying on the decision in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), the property was sold when a minuscule amount of approximately R3 000 was in arrears without taking into consideration the

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Defendant's personal circumstances and also that the Plaintiff sold the property instead of acting against Matla Coal Ltd which stood surety for Defendant's indebtedness.

[16] Although it may be true that the summons did not come to the Defendant's attention, the manner of service was effected as provided in Rule 4(1)(iv) and it cannot be said that the summons was not served as was held in *Fraind v Nothmann 1991 (3) SA 837 (W)* on which Mr. Omar relied in support of his submissions.

[17] In the *Jaftha case, supra*, the Constitutional Court was dealing with the constitutionality of the provisions of section 66(1)(a) of the Magistrate's Court Act, 1944, which provided that a judgment for the payment of money is enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, then against the immovable property of the party against whom such judgment has been given.

It was in this context that the Constitutional Court held at **158C-D** that "*(i)t is difficult to see how the collection of trifling debts can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated, possibly permanently, especially where other methods exist to enable recovery of the debt*", being a passage on which Mr. Omar relied in his submission that the property was sold when a minuscule amount of approximately R3 000 was in arrears and that the Plaintiff could have acted against the surety for Defendant's indebtedness.

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[18] As is apparent from the facts of this matter the facts are distinguishable in many respects from the situation with which the Constitutional Court was faced.

As a matter of fact the Constitutional Court held at **162E, para [58]** as follows:

"Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge."

[19] In this matter we are indeed concerned with a situation which was described in **Standard Bank of SA Ltd v Sanderson 2006 (2) SA 264 (SCA) at 269B** as follows:

"[1] The mortgage bond is an indispensable tool for spreading home ownership. Few people can buy a home immediately: by providing security for a loan, the mortgage bond enables them to do so. There can hardly be a private residence in this country that has not at one time or another been mortgaged, nor a homeowner who has not at some time been a mortgagor. We were told by the appellant bank that in August 2005 loans secured by mortgage bonds on residential property in this country amounted to almost R500 billion.

[2] A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later, when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.

[3] The value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms. That confidence has been shaken by a recent decision of the Cape High Court that is the

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subject of this appeal. The decision must be seen against the background of the ordinary legal process for recovering debts. When judgment is given against a debtor and the debtor fails to satisfy the judgment debt the process for recovery of the judgment debt is by execution against the judgment debtor's belongings. It is a long-standing practice of our courts that execution must be directed first against the debtor's movable property and only thereafter, if the movables are insufficient, against immovable property, but a Court may alter that sequence. This occurs when the debt is secured by a mortgage bond for the secured creditor will then ordinarily ask the Court in advance

'to dispense with the circumlocution of having to take execution against the movable property first and only on that property failing to realise the money sum, then to have recourse against the immovable property. When an order is granted declaring executable the property specially hypothecated that order permits the grantee, the creditor, to take his execution straightaway against the immovable property.'

[20] In **Nedbank Ltd v Mortinson 2005 (6) SA 462 (W)** the Court specifically considered the question whether the **Jaftha case** is applicable to applications for default judgments in terms of Rule 31(5)(a) in circumstances where the defendant has specially hypothecated immovable property as security for the debt and the plaintiff seeks default judgment against the defendant, as well as an order to have the immovable property declared executable and held at 470C that the **Jaftha case** was distinguishable from the circumstances pertaining to the application of Rule 31(5).

[21] Apart from these considerations, I am satisfied that the Defendant failed to have made out a "prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for" (**Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-7**).

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For these reasons the Applicant's application is dismissed with costs.


P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

MR Z OMAR
ZEHIR OMAR ATTORNEYS
c/o Friedland Hart Attorneys
Momentum Office Park
79 Steenbok Avenue
Monument Park
PRETORIA
Ref: Mr Z Omar
Tel: (011) 815 1720

ON BEHALF OF THE FIRST RESPONDENT

ADV S VAN ASWEGEN

On the instructions of

BEZUIDENHOUT VAN ZYL & ASSOCIATES INC
c/o HENDRIETTE MULLER ATTORNEYS
110B 1st Floor, Infotech Building
1090 Arcadia Street
Hatfield
PRETORIA
Ref : Mr G van der Merwe/MAT27083
(011) 789 3050

DATE OF HEARING

³¹
~~27~~ May 2010

JUDGMENT DELIVERED ON

2 June 2010