2/12/2010

/LVS

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

DATE 1/12/10 SIGNATURE

DATE: 1 December 2010
CASE NO: 7408/09

NOT REPORTABLE

In the matter between:

FIRST RAND BANK LIMITED	**PLAINTIFF / RESPONDENT**
VS	
PIENAAR, W	**FIRST DEFENDANT / APPLICANT**
PIENAAR, A	**SECOND DEFENDANT / APPLICANT**

JUDGMENT

BOTHA J:

This is an application by the two applicants, Mr and Mrs Pienaar, for the rescission of a default judgment granted against them on 5 October 2009.

The respondent, and plaintiff in the main proceedings, is Standard Bank of South Africa Ltd.

In the main proceedings the respondent sued the applicants for payment of the balance of a home loan secured by a first mortgage.

The applicants are married out of community of property.

The following sequence of events is relevant:

On 27 January 2009 the first applicant, Mr Pienaar, applied for debt review in terms of section 86(2) of the National Credit Act, 2005 (Act 34 of 2005).

On 3 July 2009 the respondent sent a notice to the applicants in terms of Rule 129(1) of Act 34 of 2005.

On 17 August 2009 the respondent issued summons against the two applicants.

On 24 August 2009 the summons was served on the applicants at their *domicilium citandi et executandi*.

On 5 October 2009 the respondent obtained default judgment against the applicants.

On 13 October 2009 the sheriff executed a writ of attachment pursuant to the default judgment.

On 10 March 2010 the first applicant's application for debt review was on the roll in the Magistrate's Court. On that day the application was withdrawn.

On 31 May 2009 the first applicant re-applied for debt review. He did not give notice to the respondent and did not include it as a creditor.

On 12 August 2010 the respondent terminated the first applicant's debt review in terms of section 86(10) of Act 34 of 2005.

In the first answering affidavit the respondent conceded that on the face of it the judgment against the first applicant was premature. After it investigated the matter it lodged a supplementary affidavit in which it explained what happened on 10 March 2010, namely that the first applicant withdrew his application for debt review. It therefore adopted the attitude that there was no bar to the enforcement of its claim against the first applicant.

Mr Botha, who appeared for the applicants, could present no valid argument in support of the second applicant's application for rescission. There was proper service on her and she did not apply for debt review. She has no other defence.

In respect of the first applicant, he argued that the default judgment could not have been granted in view of his prior application for debt review.

Mr van Den Heever, who appeared for the respondent, argued that the reliance on the debt review was a dilatory defence that fell away when the application for debt review was withdrawn on 10 March 2010.

In my view one has to look at the situation as it was when summons was issued and when the judgment was obtained. If there was a bar then to the enforcement of the respondent's claim against the first applicant, the judgment should be set aside.

The respondent's own attitude to the effect of the withdrawal of the application for debt review was ambivalent. If it thought that the debt review had come to an end on 10 March 2010 it is not clear why it found it necessary to terminate it in terms of section 86(10) on 12 August 2010. It must be remembered that it had no knowledge of the application launched on 31 May 2010. Therefore it could only have purported to terminate the debt review initiated by means of the application launched on 26 January 2009. The point is that if the debt review had to be terminated on 12 August 2010, it was still alive when the steps were taken to enforce the claim. If it was still alive on 12 August 2010 it cannot be said that it was retrospectively extinguished on 10 March 2010.

For all these reasons I am of the view that the application of the first applicant for the rescission of the judgment must succeed.

The parties were in agreement that in that event I should order costs to be costs in the cause. It is not necessary to make a distinction between the applicants as far as costs are concerned.

The parties were also in agreement that if the judgment against the first applicant is rescinded the court should give directions in terms of section 134 of Act 34 of 2005 with regard to possible steps in terms of sections 86(10) and 86 (11).

In the result the following order is made:

1. **The application of the second applicant is dismissed.**
2. **The application of the first applicant succeeds. The default judgment granted against him on 5 October 2009 is rescinded.**
3. **The respondent may on or before 17 December 2010 give a notice in terms of section 86(10) of Act 34 of 2005, if so advised.**
4. **The first applicant may within 15 days of receipt of a notice given in terms of paragraph 3 above, apply in terms of section 86(11) of Act 31 of 2005, that the debt review resume.**
5. **The action against the first applicant is postponed sine die.**
6. **The costs of this application shall be costs in the action against the first applicant.**

C. BOTHA
JUDGE OF THE HIGH COURT