

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 20119/2019

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 23 FEBRUARY 2024

SIGNATURE

In the matter between:

KGABO MARIA MAHLABA N.O

Applicant

and

PEOPLE'S BANK LIMITED

Respondent

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] An application for rescission of a default judgment granted on 28 May 2009 came before this court yesterday. The application has been launched on 12 March 2019, that is almost five years ago and almost 10 years after the default judgment had been granted. I shall deal with the aspect of delay hereunder while referring to

the parties as in the main action. Their identities and that of other role-players will appear from the chronology of the matter.

Chronology

[2] In 1999 the late Marakiwa Cedrick Mashabela bought a property situated at Erf 1[...], P[...] C[...], Soweto (the property). The purchase price was funded by a loan from (then) FBC Fidelity Bank Ltd and secured by a bond over the property on 15 October 1999.

[3] FBC fidelity Bank Ltd with registration number 94/000929/06 later became known as People's Bank Ltd and later as the People's Mortgage Ltd (with the same registration number) and is administered by Nedbank Ltd (Nedbank). It was at all relevant times a registered bank and credit provider in terms of the applicable legislation. It later became the plaintiff in this matter.

[4] On 11 December 2004 the late Mr Mashabela passed away and on 22 July 2005 Ms Kgabo Maria Mahlaba was appointed as the executrix in the deceased estate. She, in that capacity, eventually became the defendant in this matter.

[5] At the time of the passing of Mr Mashabela, the defendant believed that the outstanding amount due on the bond would be covered by the proceeds of a life policy held by BOE Life Insurance. For this purpose she had reported the passing to Nedbank and had completed the necessary claim documentation.

[6] On 2 November 2005 however, BOE Life Insurance advised the defendant as follows: *"We refer to your submission of a death claim that was received by this office on 4 September 2005 ... we have repudiated the claim on the above policy as the event that caused the late MC Mashabela's death is excluded in terms of the policy. Should you require further medical information in this regard, please request that the late MC Mashabela's medical practitioner write to our company medical officer at the address below, who will supply the deceased's medical practitioner with full reasons for the repudiation ..."*. The claim and its repudiation were not further pursued.

[7] On 15 November 2005 the defendant received a letter from Nedbank reflecting the outstanding amount on the bond to be R93 804, 22 with an arrears amount of R19 895.84. The defendant's affidavit deposed to in support of the rescission application is silent as to what her reaction was to this letter save to indicate that she had not received correspondence from the plaintiff directly, but always via Nedbank.

[8] It appears however that the bond payments remained unpaid and in arrears and some three years later on 13 October 2008 Nedbank's attorneys sent the defendant a letter of demand which she concedes having received. The relevant portions of the letter read as follows: *"We act on behalf of Nedbank Ltd. Please convey our condolences to the family of the deceased. The balance outstanding on the abovementioned bond account is in the sum of R103 894, 76 at the rate of 16.25% per annum calculated from 20 March 2008. Please note that the following guidelines can be followed to finalise the estate: (a) enter into a six months payment plan to settle the outstanding balance, (b) apply for a section 45 or section 57 endorsement, (c) settle the outstanding balance in full or (d) proof must be submitted, should the beneficiaries be pensioners, minor children or medically boarded or disabled"*.

[9] None of the above options were exercised by the defendant. Instead, she approached Nedbank on 4 November 2008, after having been advised to do so by the attorneys who had sent the letter of demand. The defendant states that she had agreed with Nedbank that she would pay R2000,00 per month into the attorneys' account. She furnished no particulars of the remainder of the terms or conditions of this agreement.

[10] The defendant furnished proof of four such payments and a fifth one, after allegedly having been telephoned by the attorneys, on 30 April 2009. She alleges that she had paid R23 000,00 in total.

[11] In the meantime summons had been issued on 12 April 2009. Pursuant to a failure to deliver a notice of intention to defend, default judgment had been granted

against the defendant in her capacity as the executrix of the deceased estate on 28 May 2009.

[12] There is no further proof of payment but the defendant alleges that about the time that default judgment had been granted, the attorneys had sent a valuator to value the property.

[13] After a writ of attachment had been issued (the papers are silent as to when it was executed) a sale in execution took place on 22 October 2009. The defendant alleged that she only received the notice of that sale on 30 October 2009. She further alleged that *“this was for the first time to know there was a case against me ... I then stopped paying the agreed amount because I was confused about the sale of the house while I was busy making payments as per our agreement”*.

[14] It appears that Udumo Trading 77 (Pty) Ltd had purchased the property at the sale in execution. It had on-sold the property on 31 March 2010 to a Mr and Mrs Nkgaba who initiated eviction proceedings in the Johannesburg Division of this court under case no 31385/2010. The notice of motion was served on the defendant on 20 August 2010. Pursuant thereto and apparent appearance by or on behalf of the defendant, the eviction matter was postponed on 6 October 2011 and the defendant was ordered, both in her personal and representative capacity, to institute an application for rescission within 30 days.

[15] Four days after the postponement, the defendant went to the registrar of this court, searching for the court file. She was assisted by three named officials who could not locate the court file. She had also resorted to Nedbank's attorneys who had by then returned their file to Nedbank but who made enquiries at the bank on her behalf, also to no avail. The attorneys later obtained returns of service from the sheriff and confirmed that the default judgment had properly been obtained.

[16] On 11 November 2011 the defendant instructed Kabu Phetedi Attorneys who also made enquiries at Nedbank's attorneys who on 21 February 2012 advised them of the return of the file.

[17] The details of further searches and/or legal steps taken by the defendant remain unclear. In the portion of her affidavit dealing with condonation, she says the following on this aspect: “[I] stopped searching for the file after being advised by advocate Kabu Phetedi that they will take care of the matter ... the applicant [the defendant] had not approached one attorney for advice on this matter, but four (4) attorneys who failed her. The first one was Attorney Mophosho, the second one was Advocate Ngwangele; Advocate Steven Khoza who was immediately arrested for not being a qualified advocate; Thomas Benjamin Percy Parker, from unnamed attorneys, who briefed Advocate Kabu”. I interject the chronology to point out that the defendant was during the present matter represented by Baloyi Ntsako Attorneys who had briefed Adv Ntsimane to argue the matter.

[18] The papers are silent as to when and from where the annexures that featured in the present application had been obtained. There are also no particulars furnished in respect of a court order granted on 15 August 2012 in Case No 31385/2010 in the Johannesburg Division whereby that application was postponed *sine die*. Without explanation, the heading of that order indicated the defendant (and no longer Mr and Mrs Nkgaba) as the applicant and Nedbank, the Sheriff, the Registrar of Deeds and Mr and Mrs Ngaba as the respondents. This might or might not have been the rescission application contemplated in the order of that Division granted on 6 October 2011.

[19] A next inexplicable item in the chronological train which I have pieced together from the parties’ various statements, is the following statement made by the defendant in her founding affidavit: “On the 19th of September 2018 a notice of motion was filed which combined Part A and Part B (rescission of judgment and lack of jurisdiction of the respondent), but none of the respondents filed intention to defend hence this application only respondent. Therefore, this matter is only part A of that application”.

[20] Whatever “that application” may have been a reference to, the current application was launched on 23 March 2019 and the only relief claimed apart from punitive costs was: “That the default judgment of the 28th day of May 2009 ordering

payment of R103 894,00 and declaring property known as Erf 1[...] P[...] C[...], held under deed of Transfer T[...] specially executable, be rescinded”.

Evaluation

[21] The defendant principally relied on the provisions of Rule 31 for purposes of her application (references were made in heads of argument filed on her behalf to Rule 42 and the common law but reliance thereon was not pursued, in my view correctly so as no case in that regard had been made out in the papers). Counsel for the defendant had, in my view again correctly so, summarized in her heads of argument the questions to be answered as follows: “7.1 *whether the applicant [the defendant] has shown good cause for non-compliance with the rules on late filing of her application for rescission; 7.2 whether the applicant was in willful default and 7.3 whether she has a bona fide defence*”.

[22] On the most beneficial version of events, the defendant knew on date of the sale in execution (or at the latest on 30 October 2009) that judgment had been granted and that executability had been ordered. Had she at that time taken the steps required by a defendant seeking to rescind a judgment, the problems which later manifested regarding loss of files or documents would have been prevented.

[23] Even though the defendant stated that she had taken the notice of the sale in execution to her erstwhile attorneys, her affidavit is silent as to what steps she took to ensure that her attorneys were executing their mandate. She made no enquiries, telephone calls or any attempt at ascertaining the position for almost a year until she was served with eviction papers¹.

[24] Upon being served with the eviction papers, she did nothing until she obtained a postponement thereof on 6 October 2011.

[25] Despite the obstacles in thereafter obtaining copies of documents up to February 2012, her silence and inactivity for a further 6 years until either 2018 (having regard to the possibility of an application in the Johannesburg Division) or for

¹ See also the duties of such a litigant as referred to in *Saloojee & Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141.

a further year until the launch of the present application, is grossly unreasonable and constitute an inexcusable delay without any cogent explanation. For purposes of obtaining condonation under Rule 27(3), which is the Rule upon which the defendant relied, a full and reasonable explanation, covering the whole period of delay should have been furnished². This was not done.

[26] The first of the questions posed in paragraph [21] above should then be answered in the negative and the defendant should not be entitled to condonation. This I find, would be the position irrespective of whether the application had been brought under Rule 31(5), 31(2)(b) or in terms of the common law, which also requires a full explanation for a delay of this nature to have been furnished.

[27] A further consequence of the long delay is that other innocent third parties have been drawn into the chain of events, namely subsequent purchasers of the property. Although counsel for the defendant had from the bar tendered the evidence that the defendant has since, in response to the eviction application/s, vacated the property (which removed some of the prejudice of the third parties) the same counsel conceded readily that those parties had a direct and substantial interest in the matter as it may affect their title to the property. The fact that these parties have not been cited and given notice of these proceedings amount to a fatal non-joinder.

[28] As to the issue of willful default in failing to initially defend the action, but for a denial, the defendant offered no evidence in this regard. Even if the totality of her evidence of the *pactum de non petendo* by way of monthly payments of R2000,00 per month is accepted and if all the vagueness surrounding that agreement is ignored, there is no evidence as to why the action was not defended and why this point had not been raised then (or even pursued after the sale of the property).

[29] As to the merits, the position is simply this: the defendant had hoped or believed that the life cover of the late Mr Mashabela would extinguish the bond debt but once this had not taken place, no other defence to the plaintiff's claim remained.

² Erasmus – *Superior Court Practice*, 2nd Edition, volume 2 at D1-323

[30] There were two further peripheral issues raised. The first related to the plaintiff's *locus standi* and much was made of the defendant's interaction with Nedbank (only) and the different names of the plaintiff. Having regard to the evidence tendered by the plaintiff and as referred to in paragraph [3] above, nothing turns on this. The plaintiff had clearly all along been the same juristic entity, despite name changes from time to time. The second point related to judicial oversight over executability of primary residences. The order was granted before the promulgation of Rule 46A in 2017 and even before the proviso to Rule 31(5)(b) with effect from 16 August 2013 having been introduced, requiring such oversight. This court has found, however that these provisions do not operate retrospectively³. Additionally no facts have been asserted which could notionally even have invoked the exercise of a court's discretion in favour of the defendant⁴.

[31] Despite valiant efforts having been expended by counsel on her behalf, particularly in written heads of argument, the defendant has failed to present sufficient evidence to this court to satisfy the requirements for a rescission of judgment.

Costs

[32] Ordinarily costs should follow the event. In this case however, somewhat of the delay which ultimately initiated the defendant's difficulties once she embarked upon a course of action to have the judgment rescinded, was caused by the plaintiff itself. How can it be that a bank cannot produce copies of the documents on which it had obtained judgment? The fact that these documents eventually became annexures in this matter is proof that the documents had not been destroyed but was merely imprecisely stored. Having regard to this fact and the respective positions of the parties and the deceased estate and in the exercise of the court's decision, I propose to make no order as to costs, resulting therein that each party would pay its own costs.

³ *Williams v Standard Bank of SA Ltd* [2019] ZAGPPHC 364 (3 May 2019) and *Classic Crown Property v Standard Bank of SA Ltd* [2023] ZAGPPHC 1137 (5 October 2023) (a full Court Decision).

⁴ See: *NGPS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA).

Order

[33] The following order is made:

The application is dismissed without an order for costs.

N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 22 February 2024

Judgment delivered: 23 February 2024

APPEARANCES:

For the Applicant:

Adv B B Ntsimane

Attorney for the Applicant:

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For the Respondent:

Adv C. G. V. O Stevenster

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