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

Case Number: 2020/31972

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
_____ DATE	_____ SIGNATURE

In the matter between:

FAZLIN FASSER (née SASMAN)

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Respondent

JUDGMENT

DT v R Du Plessis, AJ

- [1] The applicant applies for the rescission of a summary judgment that was granted on 15 June 2022 by this court against her and in favour of the respondent for the payment of R1 436 719.30 together with interest and costs. The judgment also contained an order that her immovable property situated at Erf 2[...] S[...] Township, be declared specially executable. The issuing of a writ was suspended for six months.

- [2] The application for rescission was launched on 17 February 2023, which was after the expiry of the six-month period provided for in the summary judgment.
- [3] The whole basis of the application is that the immovable property is the primary residence of the applicant, who lives there together with some family members, and that this fact was never communicated to the court that granted the summary judgment. This, so the argument goes, led to the court not having all the relevant information at its disposal at the time which further resulted in it not having considered all relevant factors as determined by Rule 46A(2)(b) of the Uniform Rules of Court.
- [4] The summary judgment was granted in the following circumstances:
- 4.1. A default notice in terms of section 129(1) (as read with section 130) of the National Credit Act 34 of 2005, was forwarded to the applicant in July and August 2020, i.e. before summons was issued;
 - 4.2. The applicant failed to respond to the default notice;
 - 4.3. The summons expressly drew the applicant's attention to section 26(1) of the Constitution of the Republic of South Africa which affords everyone the right to have access to adequate housing;
 - 4.4. The particulars of claim alleged that the property was the primary residence of the applicant and set out all the factors that a court should consider before an order for execution should be authorised;
 - 4.5. The applicant filed a plea to the respondent's particulars of claim which was in essence a bare denial but in which the factors and allegations relating to the property were noted;
 - 4.6. The application for summary judgment was accompanied with an affidavit pursuant to chapter 10.17 of the practice manual that governs proceedings in this court. In this affidavit, which complied with all the requirements of the practice manual and Rule 46A, an allegation was made that the property was the primary residence of the applicant;
 - 4.7. The applicant was informed that if she objected to the property being declared executable, she had to place facts and submissions before the court in order for those to be considered in terms of Rule

46(1)(a)(ii) of the Rules and that a failure to do so may result in an order declaring her home specially executable;

- 4.8. On 14 June 2022, i.e. a day before summary judgment was granted, the respondent's attorneys of record received an email from Marjorie Bingham, an attorney who practised in Cape Town under her own name. This email referred to discussions that were held the previous week and requested a postponement of the summary judgment application on behalf of the applicant;
- 4.9. The respondent's attorneys responded to the effect that they would take instructions from the respondent and revert;
- 4.10. On the same day, Ms Bingham forwarded another email, confirming that the summary judgment could proceed the next day but requesting that the judgment be 'pending' for six months so that the parties could discuss a payment plan;
- 4.11. On 15 June 2022, the applicant appeared personally in court and agreed to the summary judgment on condition that the writ be suspended for six months.

[5] From these facts it is clear that the court granting the judgment was perfectly aware of all the relevant factors and took them all into account before granting the order. The court was specifically aware of the fact that the property was the applicant's primary residence.

[6] In her application for rescission, the applicant alleges that Ms Bingham did not hold a mandate to represent her. She attached a letter from Ms Bingham to the effect that she was merely doing the applicant a favour and providing her with advice.

[7] In my view, this does not assist the applicant. There is no affidavit by Ms Bingham, which is peculiar. Secondly, the applicant had the benefit of legal advice at the time, whether that advice was by an attorney who had a mandate or not. It also seems as if the applicant's attorneys who were formally on record and who caused the plea to be filed on her behalf, had formed the view that the summary judgment could not be defended. This

must have been the reason that the applicant sought advice and assistance elsewhere.

[8] Be that as it may, the whole basis of the application for rescission is factually wrong as the court that granted the summary judgment was perfectly aware of the fact that the property was the applicant's primary residence. The applicant was also aware of all her constitutional rights as she was informed thereof in various documents served on her. She elected not to place any facts before the court to be considered when granting an order to declare the property specially executable.

[9] The application cannot be in terms of Rule 42 as it was not erroneously sought or granted in the absence of the applicant. It can only be in terms of the common law, which requires that proper grounds should be set out for a rescission. The application fails to allege a *bona fide* defence, or in fact any defence, to the respondent's claim. Adv Mokhethi, who appeared for the applicant, could also not provide me with any defence when asked to do so.

[10] In her replying affidavit under the heading "Bona fide defence", the applicant merely states that she would have defended the matter on the basis that the property is her primary residence. As already stated, that fact was already before the court that granted the summary judgment and cannot assist the applicant in this application.

[11] For these reasons the application should fail.

[12] I therefore make the following order:

"The application for rescission of the summary judgment granted on 15 June 2022 is dismissed with costs."

Acting Judge of The High Court
Johannesburg

Date of Hearing: 30 January 2024

Date of Judgment: 2 February 2024

Counsel for Applicant: Adv T Mokhehi

Instructed By: Saleem Ebrahim Attorneys

Counsel for Respondents: Adv A Saldulker

Instructed By: Van Hulsteyns Attorneys