



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

Case Number: 19488/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

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

(3) REVISED

DATE: 11 FEBRUARY 2021

SIGNATURE:

JUDGE MOYO

Applicant

And

THE STANDARD BANK OF SOUTH AFRICA LIMITED

First Respondent

KATSURA SOLUTIONS (PTY) LTD

Second Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG

Third Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The applicant seeks leave to appeal the judgment and order of this court handed down on 23 December 2020.

Grounds of appeal

Grounds 1, 2 and 6

- [2] The applicant submits that the court erred in having regard to the return of service of the warrant of execution dated 16 July 2015, which forms part of the paginated papers, but was not dealt with by the applicant in his founding affidavit. According to the applicant, the court should only have had regard to the allegations in the founding affidavit which were undisputed.
- [3] According to the applicant, this error placed him in the invidious position that he could not deal with the facts surrounding the return of service.
- [4] The return of service is *prima facie* proof that the warrant of execution was served on the applicant personally on 16 July 2015 and as stated *supra* was included in the paginated papers prepared by the applicant's attorney of record. In considering the application, the court must have regard to all the documents before court.
- [5] In view of the fact that the return of service formed part of the paginated documents, the applicant should have dealt with the return in his founding affidavit and his failure to do so was at his own peril.

Grounds 3, 4 and 5

- [6] It is submitted on behalf of the applicant that the court erred in finding that the applicant did not take any steps whatsoever to speedily finalise the matter and furthermore, erred in concluding that the applicant's lack of action has a bearing on his *bona fide* defence.
- [7] In this regard, the facts speak for itself. The default judgment came to the applicant's notice on 16 July 2015 and the matter only served before court in the latter part of 2020.

Ground 6

- [8] The applicant alleges that the court erred in not taking into account that the applicant's *domicilium* address, to the knowledge of the first respondent, had changed.
- [9] The applicant remains bound by the terms of the loan agreement entered into with the first respondent. In terms of the loan agreement, the *domicilium* address must be changed by notice in writing. The fact that the summons was served at the applicant's *domicilium* address explains the reason for his default and does not have a bearing on the applicant's *bona fide* defence.

Grounds 8 and 9

[10] The applicant submits that the court erred in failing to take into account that the application was brought in terms of the common law and in refusing condonation notwithstanding the *bona fide* defences raised by the applicant.

[11] Insofar as the court adjudicated the application in terms of rule 31 of the Uniform Rules of Court, the rule prescribes the procedure to be followed in an application to rescind a judgment granted by default and is clearly applicable to the relief claimed by the applicant.

[12] In respect of the *bona fide* defence disclosed by the applicant, the applicant admitted that he was in arrears at the time default judgment was granted. Save for alleging that he did not have an opportunity to avail himself of the procedures contained in section 129 of the National Credit Act, 34 of 2005, the applicant did not disclose a *bona fide* defence to the claim by the first respondent.

Conclusion

[13] Having regard to the test set out in section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013, to wit:

"17(1) Leave of appeal may only be given where the judges or judges concerned are of the opinion that –

(a)(i) the appeal would have a reasonable prospect of success; ..." (own emphasis),

I am of the view that the applicant has not met the threshold contained in the section and the application stands to be dismissed.

Costs

- [14] In terms of the loan agreement between the applicant and the first respondent, the first respondent is entitled to costs on an attorney and client scale and such order will follow.

Order

- [15] In the premises, I grant the following order:

The application is dismissed with costs on an attorney and client scale.



N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

8 February 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES:

11 February 2021

APPEARANCES

Counsel for the Applicant:

Mr Malale

(With right of appearance)

Instructed by:

Malale Nthapelang Attorneys

Counsel for the First Respondent:

Advocate J. van Heerden

Instructed by:

Hannes Gouws and Partners Incorporated