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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

DATE

SIGNATURE

**Case No: 69492/2017
20/6/2019**

In the matter between:

**SIKANDER MAHOMED
(Id. No.: [....])**

APPLICANT

and

**THE STANDARD BANK OF SOUTH AFRICA LTD
(Reg. No.: 1962/000738/06)**

1ST RESPONDENT

SHERIFF PRETORIA SOUTH AFRICA

2ND RESPONDENT

JUDGMENT

G JACOBS (AJ)

- [1] Applicant, seeks in its Notice of Motion, a rescission of Judgment granted against him in case number 69492/2017, in this Honourable Court on 14 March 2018.
- [2] The Applicant further seeks condonation for the late filing of the Application for Rescission and further seeks that the Warrant of Execution and the Notice of Attachment, issued pursuant to the Judgment be set aside.
- [3] The Applicant did not file Heads of Argument, in terms of the Practice Directive and also did not pursue the Application after it became opposed by the First Respondent (hereafter “Standard Bank”).
- [4] Standard Bank set the matter down on the opposed roll and the matter was allocated for argument.
- [5] On the date that the matter was set down, the legal representative on behalf of the Applicant approached the Court with a Condonation Application explaining the failure to file Heads of Argument and requested the Court to accept the Heads of Argument, at that stage.
- [6] The late Heads were canvassed with the representative on behalf of Standard Bank and as no objection was raised. The Applicant further tendered the wasted

costs for 3 June 2019 and the matter stood down to 4 June 2019 for argument and in order to give me the opportunity to consider the arguments set out in the Heads.

[7] At that stage, I indicated that the scale of costs should be reserved and shall be dealt with at the argument stage.

[8] It is not clear, in terms of the Notice of Motion, read with the Founding Affidavit, whether the Application is brought in terms of Rule 31(2)(b), or the common law. However, in the Heads of Argument, the Applicant insisted that the Application was brought in terms of Rule 31(2)(b), the common law, as well as Rule 42(1)(a).

[9] On the papers, I am of the view that Rule 42(1)(a) does not apply and will consider the rescission on the basis of Rule 31(2)(b) and the common law.

[10] In terms of Rule 31(2)(b):

“A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside the judgment and the court may, upon good cause shown, set aside the default judgment, on such terms as it seems meet.”

[11] In terms of the common law, as set out in **Promedia Drukkers en Uitgewers (Edms) Bpk) v Kaimowitz and Others 1996 (4) SA 411 (CPD) at 417**, the Court

has a discretion to grant a rescission of judgment where sufficient or good cause has been shown.

- [12] The two essential elements of sufficient cause for rescission of judgment is set out in ***Chetty v Law Society of Transvaal 1985 (2) SA 756 (A) at 765 B – C*** and are the following:

12.1 The party seeking relief must present a reasonable and acceptable explanation for his or her default.

12.2 On the merits, such party shall disclose a bona fide defence, which *prima facie* carry some prospects of success.

- [13] This is also echoed in ***Herbstein and Van Winsen – The Civil Practice of the High Courts of South Africa, Fifth Edition at 938 to 939***. The learned authors, *inter alia* relying on ***Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A)***, state that the phrases “good cause” and “sufficient cause” are synonymous and interchangeable. The learned authors further state that the Court, when asked to grant an order for rescission, under Rule 31(2)(b) exercise a discretion in doing so and that, that discretion shall be exercised judicially. See the authorities quoted in footnotes 173 and 174 therein.

- [14] The bank opposed the Application on both the elements (the explanation for the default as well as whether the Applicant disclosed a *bona fide* defence) in a

comprehensive Opposing Affidavit, the relevant portions thereof will be dealt with *infra*.

[15] As to whether the Applicant was in default and wilful default, I have considered all the allegations made by the Applicant, together with the referral to correspondence and telephonic discussions that took place between Standard Bank and the Applicant, prior to Summons being issued. I cannot find, on the papers, that the Applicant was in wilful default and the enquiry in this case will then proceed to whether the Applicant disclosed a *bona fide* defence, which *prima facie*, carry some prospects of success.

[16] Similarly, if the Application is considered in terms of Rule 31(2)(b), the Application was brought outside of the twenty days provided for in the Rule. Again, the explanation for the delay since the Applicant became aware of the Judgment and the issue of the Application is in my view adequately explained and the Court condones the late bringing of the Application in terms of the Rule.

[17] If the Application is brought in terms of the common law then the Application, in my view, was brought within a reasonable time.

[18] **THE APPLICANT'S DEFENCE:**

18.1 The Applicant states in his Founding Affidavit that when he applied for the loan in 2008, he was 62 years old, employed by Micom and was due to retire at the age of 65. He further states that at the time, he did not

contribute to any formal pension fund and his primary source of income was derived from his employment (Micom), described above.

- 18.2 He further stated that his primary asset was the immovable property (Erf 319 Laudium, Pretoria). I pause here to mention that the Respondent showed that this is the same property for which the loan was granted and in essence, the Applicant bought the property from this close corporation, of which he was the only member and he held 100% members interest.
- 18.3 The Applicant alleges that to the best of his knowledge and recollection, the loan was granted without a credible affordability test being conducted. He further states that Standard Bank failed to take into account that his income was not reliable, consistent and sustainable, taking into account that he was only three years away from retirement and he had no sizable pension pay-out to speak of.
- 18.4 Applicant further alleges that Standard Bank failed to take into account his age and the fact that he would be 82 years of age when the last payments that were due, in terms of the loan, had to be paid.
- 18.5 He further alleges that Standard Bank failed to take into account his past credit history and exposure to credit.

- 18.6 As to the allegation that no credible affordability test has been conducted, it is important to note that the Affordability Assessment Regulations published in Government Gazette No.: 38557 on 13 March 2015, was not yet published and is not be applicable to this case.
- 18.7 The Respondent, in the Opposing Affidavit, fully sets out the measures it took and the factors it considered, more specifically with regards to the affordability of the loan and I am satisfied that Standard Bank, at the time that the loan was granted (2008), properly considered the question whether the Applicant could afford to repay the loan.
- 18.8 This is confirmed by the facts of this matter that, on the undisputed version of the Applicant, he was able to service the loan and make repayments up to approximately 2016 (ie. 8 years after the loan was granted).
- 18.9 As to the allegation by the Applicant that Standard Bank failed to take into account his past credit history, Standard Bank, in its opposing papers, annexed the necessary credit bureau history that were done in 2008, when the loan was applied for. Again, this allegation by the Applicant is not sustainable and does not, in my view, amount to a bona fide defence.
- 18.10 The aspect that remained and which was extensively argued by both parties, was the age of the Applicant, at the time when he applied for the loan (62 years of age). Further, directly relevant to this, was the source of

income of the Applicant at that stage and the allegation that he had no sizable pension of any nature.

18.11 In this regard, Standard Bank drew my attention to Section 61 of the National Credit Act (Act 34 of 2005) (hereafter “the Credit Act”) which specifically protects a consumer or prospective consumer against discrimination, as set out in Section 9(3) of the 1996 Constitution. Relevant for purposes of this Application, Standard Bank should not discriminate against a consumer or prospective consumer on the basis of age.

18.12 In the National Credit Act (Sections 80 and 81), the legislator deals with reckless credit and prevention of reckless credit, the relevant sections will not be quoted *verbatim* herein.

18.13 On the papers, and in argument, it was never contended that the Applicant could not afford to repay the loan, at the stage when the credit was granted. The long term sustainability and affordability, due to his age was the contentious issue before this Court.

18.14 Standard Bank also, in its papers, Heads of Argument and argument before this Court, alluded me to Section 81(4), which reads as follows:

“For all purposes of this Act, it is a complete defence to an allegation that a credit agreement is reckless if –

(a) the credit provider establishes that the consumer failed to fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section...”

18.15 In this regard, my attention was drawn to the two application forms which formed part of the credit application that were completed and signed by the Applicant when he applied for the loan. Standard Bank argued that the Applicant did not truthfully disclose his occupation in that the averment in his Founding Affidavit is contradicted by the credit applications, the latter stating that he was self-employed as a sole proprietor.

18.16 The Applicant attempted to rectify this in his Replying Affidavit but merely added to the confusion. In his Replying Affidavit, he stated that he was not only self-employed but he was also employed as alleged in his Founding Affidavit. Nowhere in the application for credit and the information supplied by the Applicant, did he disclose to Standard Bank that he was indeed due to retire (as he alleges now in his papers), at the alleged age of 65. In my view, this non-disclosure, does have a material effect on the long term sustainability of the Applicant’s ability to repay the loan. To the contrary, the Applicant states in his credit application that he is self-employed, the

reasonable inference therefrom is that he is a businessman and that there is no formal retirement age.

18.17 Another factor that the Court has to take into account, when exercising is discretion whether to grant a rescission or not is the fact that the Applicant, in essence, by purchasing the property from the close corporation, of which he was the sole member, at that stage raised capital of 1.5 Million Rand, on a property which he already owned through the close corporation and occupied, as set out in his Founding Affidavit. Nowhere is it explained what happened to the proceeds received by the close corporation, of which he as the sole member.

18.18 In the circumstances, I find that on the Applicant's papers in this Application, read with his application for credit in 2008 there was a material non-disclosure of fact, facts that in all probability would have influenced Standard Bank's decision to grant the loan or not.

[19] In the premises, and in terms of Section 81(4)(a), Standard Bank has a complete defence, against the allegation of reckless credit.

[20] Even if I am wrong in the aforesaid conclusion, on a proper conspectus of the information provided by Standard Bank in its Opposing Affidavit, the original credit application and ancillary documents, even if the Applicant was 62 years old, the conduct of Standard Bank cannot be construed as reckless.

- [21] In my view, a proper consideration of all the facts, including the fact that he was a sole proprietor, had business interests and a significant disposable income, at that stage, was taken into account when the loan was granted. If these facts are to be compared, it is in stark contrast with the matter of ***Absa Bank Ltd v De Beer and 2 Others 2016 (3) SA 432 GP***, where money was lent and advanced to pensioners and as the Court therein found, was actually money thrown into a bottomless pit.
- [22] In the premises, I am of the view that the Applicant, in this Application, failed to establish that he has a bona fide defence, more specifically a defence that Standard Bank granted the credit recklessly and therefore, the Application for rescission, in my view, should not succeed.
- [23] In making this finding, I have duly considered all the authorities referred to in the Applicant's list of authorities that were included in the Heads of Argument.
- [24] This brings me to the counter Application by Standard Bank. In this counter Application, Standard Bank seeks that the property described as Erf 319 Laudium Township, held by Deed of Transfer No.: T120724/20078 (hereafter "the property") to be declared specifically executable.
- [25] The Applicant answers to this Application in paragraphs 133 and further of its Replying Affidavit. The first point he raises is a point *in limine* and the allegation

that the Applicants cannot proceed with the relief as a result of the Judge President's Practice Directive 2 of 2018, where all foreclosure matters were postponed *sine die*, pending a decision of the Full Bench.

[26] This point has become moot when the Full Bench considered the approach in foreclosure matters, in ***Absa Bank Ltd v Mokebe and related cases 2018 (6) SA 492 (GJ)***. Therefore, the point *in limine* cannot be upheld.

[27] In considering Standard Bank's request that the property be declared specifically executable, this Court has to consider the approach set out in ***Firststrand Bank Ltd v Folscher and Another, and similar matters 2011 (4) SA 314 (GNP)*** where the Full Bench of this Division set out the principles that should be applied in cases like these and further weighing the interests of the debtor against the interests of the bank.

[28] In the present case, the Applicant has a duty to fully disclose, and is in the best position to fully inform the Court of any aspect that should be taken into account. See: paragraph 42 of the Folscher Judgment at page 333.

[29] The Applicant merely states:

"In lieu of the fact that there is no real proceeds to be realised from the sale, it will mean that we cannot buy another home."

He further states:

"I also do not have financial means to pay rentals."

He further states:

"As a result, we will have no residence and proper housing."

- [30] With the aforesaid in mind, he lists in paragraph 139, a number of persons (family) who resides in the property but does not explain how, in light of his financial position, he is able to provide for them or that he indeed does provide for them. The list of persons also does not include any explanation as to their rights to reside on the property and stay in his home. The mere fact that a person or persons reside in the home of another does not necessarily give them a right in law to remain there.
- [31] The fundamental right to housing and its limitations is fully set out in the Folscher Judgment at paragraph 11 to 17 and has to be considered by this Court. The Applicant, unfortunately, does not set out any grounds or sufficient information on which the Court can find that there is any alternative to declaring the property executable.
- [32] Standard Bank, on the other side, provided a loan to the Applicant, in essence raising further finance on a property which he already occupied (albeit through a

close corporation) and as security for that loan, caused a bond to be registered over the said property. If the said bond was not provided, the loan would not have been granted to the Applicant.

[33] The Applicant had the benefit of the loan since 2008, fell in arrears, and on his own version cannot enter into any alternative arrangement with the bank to prevent the property from being declared executable. The Applicant further does not propose any alternative, save to state that he cannot afford to obtain alternative housing, without taking the Court into his confidence and supplying any details.

[34] In the present case, I deem it necessary to hold the Applicant to the original terms of the loan agreement, more specifically that he furnish as security for the said loan, the property which he now occupies.

[35] In the premises, the Court is satisfied that the property should be declared executable.

[36] In terms of the Absa Bank v Mokebe matter *supra*, the Court has a discretion to determine a reserve price. See: paragraph 51 of that Judgment at page 515 and further. The determination of a reserve price is to be considered on the merits of each case and I canvassed this aspect with both parties in argument.

- [37] Standard Bank, in its opposing papers, annexed a valuation determining a market value of between 1.7 Million Rand and 1.95 Million Rand, with a forced sale value of R1.4 Million Rand. The municipal value of the property, is allegedly R870 000.00.
- [38] In the present case, considering all the facts, I am of the view that to set the reserve price at 1.4 Million Rand (being the forced sale value as determined by Standard Bank, which is not disputed by the Applicant), would protect the interests of all the parties.
- [39] If the reserve price is too high, then Standard Bank might have difficulty to dispose of the property and will have to approach the Court at a later stage, to reduce the reserve price, only incurring further costs. A forced sale value is, almost without exception, used in this Court in sequestration proceedings and in voluntary surrender of estates and I see no reason why that same principle should not be applied when a reserve price, in matters like these, have to be set.
- [40] Unfortunately, as the enforcement of a reserve price is a relatively new development in our Courts, there is very little direction, if any, in the case law as to the approach that should be adopted.
- [41] This brings me to the question of costs. The loan agreement between the Applicant and Standard Bank provides for attorney and client costs and I see no reason why, if Standard Bank is successful in its opposition of Applicant's

Application, and if Standard Bank is successful in its counter Application, why I should deviate from that. I only have to include that the costs of 3 June 2019 that was occasioned by the late filing of Heads of Argument, on behalf of the Applicant, should also be on an attorney and client scale.

[42] In the premises, I make the following order:

42.1 The Applicant's claim is dismissed.

42.2 The Applicant is to pay the costs of the Application, including the wasted costs of 3 June 2019, on a scale as between attorney and client.

42.3 The property known as Erf 319 Laudium Township, Registration Division JR, Province of Gauteng, ("the property") held by Deed of Transfer No.: T120724/2008, is declared specifically executable.

42.4 The Registrar of the above Honourable Court is authorised to issue a Writ of Execution in respect of the property.

42.5 The property is to be sold in execution, subject to a reserve price of 1.4 Million Rand.

42.6 The Applicant is to pay the costs of Respondent's counter Application, on a scale as between attorney and client.

G JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the applicant: Mr Pillay
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For the respondent: Adv Reyneke M
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