IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 487/2011

In the matter between:

COLLIN SOOBRAMANY	1st Applicant
VIJAYLUXMI SOOBRAMANY	2nd Applicant
and	
CHANGING TIDES 17 (PTY) LTD **(Registration No.: 2001/009766/07)**	1st Respondent
SHERIFF OF THE HIGH COURT, CHATSWORTH	2nd Respondent

ORDER

After hearing counsel and considering the matter, I make the following order:

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

JUDGMENT

Date Delivered: 28 May 2019

Masipa J

Background

[1] This matter has a long history having initially been heard on 31 March 2011, and thereafter on approximately 17 sittings over a period of eight years. It emanates from an application by the first respondent to have an immovable property declared specially executable.

[2] The current application is brought by the applicants as an application to stay the sale in execution set for 28 May 2019. It is the third such application with the two earlier applications having been dismissed with costs. Despite these dismissals, the first respondent did not proceed with the sale pursuant to undertakings to pay by the applicants, alternatively the filing of an application for leave to appeal.

[3] It is necessary to set out the full relief sought by the applicants in this matter which is the following:

'1. A rule nisi do hereby issue calling upon all interested parties, if any, to show cause before the above Honourable Court, on the 11th day of June 2019 at 09h30 or so soon thereafter as the matter may be heard, why an Order should not be granted in the following terms that:

a. Non-compliance with the uniform rules be condoned in terms of Uniform Rule 6(12) (a).
b. The sale in execution set down for the 28 May 2019, of Portion 5782 of 5762 of Erf 107 Chatsworth situate at 75 Progress Avenue, Moorton, Chatsworth is stayed.
c. The Judgement of this honourable court, under case number 487/2011 dated 20 March 2017 is rescinded and set aside.
d. The settlement agreement dated 14 June 2011 between the applicants and the first respondent is set aside.

e. The second applicant is compliant with the debt restructuring order 25 July 2008, under case number 22340/2008 of the Durban Magistrate Court.

f. Costs of application.

2. Prayer (b) to act as an interim interdict until the rule nisi is either confirmed or discharged.

3. Alternatively, a reserve price for the sale in execution is set at R 600 000-00 of Portion 5782 (of 5762) of Erf 107 Chatsworth situate at 75 Progress Avenue, Moorton, Chatsworth.'

The Facts

[4] On 12 December 2006, the applicants concluded a mortgage loan agreement, secured by a bond registered in favour of South African Home Loans Guarantee Trust, over the property described as Portion 5782 (of 5762) of Erf 107 Chatsworth in extent 243 square metres. The first respondent is a trustee of this trust. During 25 July 2005, the first applicant experienced financial difficulties and applied for debt restructuring. It is important to mention at this stage that the applicants are married in community of property. It is not disputed that the applicants failed to comply with the terms of the debt restructuring order. The first respondent issued summons against the applicants which led to the parties concluding a settlement agreement on 14 July 2014. In terms of that agreement, the applicants acknowledged their indebtedness to the first respondent and undertook to make monthly payments of R2 854 for six months, and thereafter R3 752.82 until the loan was settled in full. It was also agreed that the applicants would sign a consent to judgment. However, only the second applicant signed it.

[5] On 23 July 2014, pursuant to the applicants' breach of the settlement agreement, the first applicant, relying on the strength of the consent to judgment, sought and obtained judgment in the amount of R383 549.22 plus interest and an order declaring the immovable property executable. Following this, the applicants filed an application for rescission of judgment on 21 March 2015 on the basis that the debt review order had not been terminated, that the settlement agreement and confession to judgment were not countersigned by the first applicant and lastly, that the first applicant had several

medical conditions. The judgment was rescinded by Jappie JP after hearing argument on the opposed roll.

[6] Subsequent to the rescission of the judgment, no further steps were taken by the applicants, which resulted in the first respondent applying for judgment based on the settlement agreement. The applicants opposed the application on the basis that the debt review order had not been terminated, that the settlement agreement and the confession to judgment were not countersigned by the first applicant, that legal fees have been debited to the account, and lastly denied the arrears. The matter was heard as an opposed application before Jappie JP on 20 March 2017.

[7] The court in that instance, following an application for adjournment, raised concerns that the matter was long outstanding and confirmed with the first applicant that monies were owed to the first respondent. The court indicated that the matter had nothing to do with the debt review but related to a settlement agreement. The court indicated that it was apparent from the papers that the debt review had been cancelled. The first applicant indicated that they could not afford to pay the instalments in terms of a settlement agreement and had not made any payment towards the loan over a period of 62 months. The first applicant made a tender to pay upon receipt of a payment from his pension fund. As correctly stated by the first respondent, this tender was made on numerous previous occasions but was never effected.

[8] The order was granted in favour of the first respondent in the amount of R434 080.96 as appeared on the certificate of balance. Interest was granted at the rate of 10.1 per cent which the court found was in accordance with the settlement agreement. This was on the basis that the applicants were in breach of the settlement agreement, and that the first applicant had admitted to the indebtedness and raised no defence to this. Pursuant to the judgment, the first respondent applied for a second sale in execution. Approximately four months later, the applicants applied for leave to appeal the judgment of 20 March 2017. On 19 July 2017, that application was dismissed with costs on attorney client scale.

[9] The first respondent proceeded to obtain a date, the third one, for a sale in execution, and approximately three months later, the applicants petitioned the Supreme Court of Appeal, which petition was refused with costs. The first respondent applied for a fourth sale in execution and obtained a date for 30 October 2018. The applicants launched an urgent application to stay the sale on the following grounds:

1. that legal costs were debited to the account;
2. the prejudice to be suffered by the applicants should the sale proceed;
3. the first applicant’s medical condition;
4. concerns about the debt review;
5. that their son would assist with the bond payment;
6. that the disability grant/pension they had been awaiting for in the amount of R147 000 would be received during the first week of December; and
7. complaints about the conditions of sale.

[10] At the hearing of that application before Madondo DJP on 29 October 2018, the applicants made a tender of R100 000, and further monthly payments of R4 000. After hearing the application, it was dismissed with costs. The applicants then approached the first respondent with a tender of R50 000, and pleaded for the sale not to proceed. The first respondent agreed to this. Not surprisingly, the applicants again did not keep to the promised tender and made no payments. The first respondent applied for a fifth sale in execution which was set for 26 February 2019.

[11] On 22 February 2019, the applicants launched another urgent application to stay the sale pending a rescission application. This matter was argued before me. The issues raised by the applicants in this instance were the following:

1. the applicants sought the introduction of a reserve price;
2. raised the issue of legal costs;
3. raised the issue of the property to be sold being their primary residence;
4. raised the issue of debt review; and
5. stated that the notice of sale did not properly describe the property.

[12] Having raised the settlement agreement and the confession to judgment, the applicants' counsel conceded that these issues had been raised before and considered. The applicants' counsel also conceded that the applicants had not paid the loan, and attributed this to their medical condition. He further conceded that the applicants previously made a tender to pay the monies owed.

[13] This application for 22 February 2019 was also dismissed with costs. Thereafter, the applicants applied for leave to appeal. A request for reasons for the order was made and the reasons were provided on 20 March 2019. In these reasons, it was noted that the judgment which the applicants sought to rescind was the judgment of 15 September 2015 relating to the confession to judgment, which judgment was rescinded by Jappie JP. Further, that the introduction of a sale price related to rule 46A which came into effect on 22 December 2017, which was after the judgment and the declaration of executability of the applicant's property, and that the provisions of this rule did not apply retrospectively. I noted that the tender for payment based on a payment from the pension fund was made on numerous occasions, and that the applicants owned another immovable property with the result that they would not be prejudiced to be without a home as envisaged by s21 of The Constitution of the Republic of South Africa, 1996.

[14] It was further noted that the applicants had done all they could to frustrate the first respondent's endeavours to obtain judgment, and to secure payment for the loan by continuously raising issues already determined by the court. Numerous attempts were made to set the application for leave to appeal down at the convenience of the applicants' legal representatives. The application was ultimately set down on 13 May 2019, one of the dates provided by them. Despite providing the date, the applicants' representatives again sought a change of the date and when this was declined, withdrew as attorneys of record. The first applicant appeared in person and sough an adjournment of the application.

[15] The first applicant appeared in person at the application for leave to appeal, and after a failed application for adjournment and an attempt to raise new issues, the

application for adjournment and the leave to appeal were dismissed with costs. The first respondent obtained a sixth sale date. The rescission application was set down for 10 June 2019. In view of the sale date, the applicant launched the third application to stay the execution pending the current application. The application is premised on the following issues:

1. a complaint about legal fees which were charged when they were not due;
2. interest allowed by Jappie JP at the rate of 10 per cent when the settlement agreement provided for 7.70 per cent;
3. that the settlement agreement was not signed by the first respondent;
4. failure by the first respondent to serve the requisite notice in terms of s129 of the National Credit Act 34 of 2005 ('the NCA') on the applicants;
5. that they were not in arrears when judgment was taken against them;
6. that the settlement agreement was not in compliance with the Uniform Rules of Court when judgment was granted;
7. the rescission of the judgment on the grounds set out above.

Submissions by counsel and analysis

[16] Mr Nicholson, for the applicants, argued that since the rescission application was set down for 10 June 2019, it was therefore pending. It was not competent for this court to determine the matter and that it was appropriate that the sale in execution be stayed pending the rescission application. This argument could however not be sustained in light of the relief sought by the applicants in the current application. In fact, as was submitted by Mr Aldworth, for the first respondent, the applicants suggested in their founding affidavit for the current application, that they may have been given incorrect legal advice since the rescission application seeks to challenge a judgment based on the confession to judgment, and not upon the settlement agreement. This concession by the applicants was as a result of the reasons for the judgment dated 20 March 2019. This acceptance can be accepted as an admission that there are no prospects of success in the rescission application set down for 10 June 2019.

[17] Mr Aldworth submitted that the applicants' rescission application was based on the provisions of rule 42(1), and that is does not satisfy the requirements of this rule since the relevant rule provides as follows:

'The court may, in addition to any other powers it may have *mero motu* or upon the application of any party affected, rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) An order or judgment granted as the result of a mistake common to the parties.'

[18] Mr Aldworth submitted that the applicants' rescission application fell short of meeting the requirements of rule 42, since the applicants were legally represented or in appearance at all times when the matter was in court when judgment was granted. Mr Nicholson submitted that the issue of non-compliance with rule 42 was an issue to be determined by the court hearing the rescission application. In terms of the relief sought by the applicants, this court is appropriate to determine the issue as rescission was one of the issues raised.

[19] He submitted that in order to succeed with obtaining the interim order, the applicants must demonstrate prospects of success with the rescission application. This would have been so if the applicants did not seek rescission in the current application. In any event, the applicants conceded that they had no prospects of success with the rescission application set down for 10 June 2019.

[20] Relying on *Nkata v Firstrand Bank Ltd* 2016 (4) SA 257 (CC), Mr Nicholson argued that rescission could be applied for once the arrears have been paid, since the agreement between the parties would be reinstated. In this regard, he submitted that the first respondent erroneously debited an amount of R66 000 as legal fees and once this was credited, it amounted to payment which must be taken into account when considering payment in terms of the settlement agreement. Once this is done, it would be apparent

that the settlement agreement has been complied with. This is of course disputed by Mr Aldworth who argued that the legal costs were erroneously debited and then credited, and that this could not be construed as payment in terms of a settlement agreement. I agree with this argument, and am of the view that there was no payment in terms of the settlement agreement. This means that the re-instatement of the agreement was not competent.

[21] The applicants conceded on several occasions that they owed monies to the first respondent, despite raising a bare denial as a defence. It therefore cannot be accepted that there are no monies owing in the form of arrears. The loan agreement can therefore not be reinstated.

[22] The second point which was raised related to the interest which was awarded by the court. Mr Nicholson argued that percentage agreed to in the settlement agreement was 7.70 per cent, while to court awarded 10.1 per cent. He argued that this was a mistake falling within the application of rule 42(1)(c). Mr Aldworth argued that this submission was flawed since the parties to the matter were the Applicants and the first respondent and the purported mistake would have been made by the court. He submitted that if the applicants were right, which was disputed, then the appropriate cause would have been to appeal the judgment. In view of the two interest rates contained in the settlement agreement and the absence of clarification thereof before Jappie JP, it cannot be said that there is a patent error as provided for in rule 42(1)(b). Consequently, I agree with the argument by Mr Aldworth.

[23] The third point raised by the applicants is the purported failure by the first respondent to issue a section 129 notice letter in terms of the NCA. Mr Nicholson argued that since the second applicant was not under debt review, this issue should have been raised as a defence prior to judgment in the matter. Since it was not, it does not and cannot fall within the operation of rule 42. In *Ferris & another v Firstrand Bank Ltd & another* 2014 (3) BCLR 321 (CC), the court at 327 held that section 129(2) of the NCA

expressly stipulated that the requirement to send a notice under section 129(1) of the NCA was not applicable to debts subject to debt-restructuring orders.

[24] Mr Aldworth argued that even if the issue was to be considered, the s129 notice was not applicable in view of the debt review. He submitted that since the applicants are married in community of property, debt review applied to the entire estate. In regard to this, Mr Nicholson argued that since the joint estate was affected by the debt review, notice of cancellation of the debt review in terms of s 86(10) of the NCA had to be sent to both spouses. He relied on *Subramanian v Standard Bank Limited* 2012 JDR 0381 (KZP). The court in that matter found that it was in the interest of justice for the notice of cancellation of a debt review affecting community of property not only to be served on one of the spouses. Notably though, that case is distinguishable to the current once since in that case, both spouses applied for debt review. Further, the applicants own case is that the first applicant was not placed under debt review.

[25] In *Ferris*, the court held that defective delivery of the s 86(10) notice did not preclude the enforcement of the loan by the bank. Section 86(10) permits a credit provider to terminate a debt review by giving notice at least 60 business days after the debtor applied for debt review. While the bank was not entitled to rely on this section for the enforcement of the loan because notice was not properly given, it was independently entitled to enforce the loan on the basis of the breach of the debt-restructuring order. In any event, this issue does not fall within the application of rule 42.

[26] With regard to the issue of primary residence, Mr Aldworth submitted that this issue was determined by Madondo DJP who found that the applicants had seemingly concluded a fraudulent transaction to make it appear as though their son had purchased their second property. He found that the applicants failed to show that the property sought to be sold was their primary residence. This decision was never appealed against, and stands, hence the issue was not raised again when the matter came before me for the first time on 22 March 2019.

[27] Mr Aldworth argued that there must be finality of matters once judgment is granted. It was therefore not competent for the applicants to keep coming to court even after approximately four years to raise new issues. He submitted that in any event, the issues which are raised by the applicants have all been dealt with and determined. The applicants ought to have brought their review application within a reasonable period and in order to succeed, show that judgment was based on a mistake common to both parties. The applicants' application did not meet these requirements. There was therefore no basis for interim relief.

[28] In order to comply with the requirements for an interim relief, the applicants have to show a *prima facie* right, reasonable apprehension of irreparable harm, balance of convenience and the absence of any satisfactory remedy. On the facts of this case, the applicants have failed to make out a case for the interim relief sought. It cannot be said that they have shown any right to be protected, since the issue regarding their right to housing has been dealt with by this court on countless occasions. While the applicants may have an apprehension of irreparable harm, this is not reasonably held since they have alternative housing as was found by Madondo DJP. The balance of convenience favours the first respondent who has bent backward to accommodate the applicants by not persisting with at least three sale dates. Justice and fairness required that this matter be brought to finality. The delay caused by the applicants of more than eight years is unreasonable. Of course if the applicants wished to appeal the judgment of 20 March 2017, they have had more than sufficient time to do so since they have been legally represented at all material times relevant thereto. The applicants have exhausted numerous legal remedies in this matter. Their conduct of bringing continuous rescission applications, and applications to stay sales in executions, borders close to an abuse of the court process.

[29] On the evidence before the court and upon hearing counsel, I find that the applicants have failed to make out a case for the relief sought, and that the application falls to be dismissed. Mr Aldworth submitted that such costs be as against attorney and client. In view of the applicants' conduct since 2017, I am of the view that a punitive costs

order is necessary. The applicants have continuously abused the court process by raising the same issues on numerous occasions with the aim of preventing the sale in execution. They continue to do so despite several cost orders being made against them. It is hoped that the current cost order will serve as a deterrent to them, and to bring an end this frivolous behaviour by the applicants.

[30] The following order is made:

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

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Masipa J

DETAILS OF THE HEARING

Matter heard on: 23 May 2019

Judgment delivered on: 28 May 2019

Appearance Details

For the Applicant: Mr WAJ Nicholson

Instructed by: Mervin Dorasamy Inc

For the Respondent: Mr DWD Aldwoth

Instructed by: Shepstone & Wylie