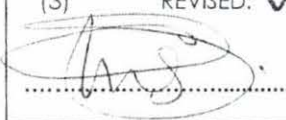


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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: ✓
	
16/02/2018	

CASE NO: 24146/2016

16/2/18

In the matter between:

**ISGAK LANSERG
AALIYAH LANSBERG**

**FIRST APPLICANT
SECOND APPLICANT**

and

**ABSA BANK LIMITED
SHERIFF WONDERBOOM**

**FIRST RESPONDENT
SECOND RESPONDENT**

JUDGMENT

THOBANE AJ,

Introduction

[1] In this application the applicant seeks to have rescinded a judgment obtained by default on 26 May 2016. The application, which is opposed, was launched against the backdrop which is set out below.

[2] The applicant initially launched an urgent application comprising two parts. The relief set out in Part A in summary form was to the effect that the respondents be interdicted from selling and/or executing immovable property as well as an order for costs. Part B comprised a relief in terms of which it was sought that default judgment be rescinded as well as an award of costs.

[3] It would seem urgency was dealt with by the parties and is therefore no longer part of this application. This application therefore is solely about rescission of the default judgment.

Background

[4] It must be mentioned from the onset that this application was set down by the first respondent. Following the arrangements made with regards to the urgent part of the application, the applicant was content to sit back and not set down the application an approach which the first respondent did not share, hence the set down.

[5] It is common cause that the applicants in July of 2006 entered concluded a mortgage bond with the first respondent. The terms of the mortgage bond are not in dispute. It is also not in dispute that the applicants fell into arrears with their monthly payments. The applicants state that the cause of their failure to keep to the terms of the credit agreement were loss of employment. I pause to state that the application by the applicants has not been elegantly put together. For example in paragraph 10 of the founding affidavit, the applicants state that the immovable property was bought in 2012. In paragraph 12 thereof it is stated that the bond was being serviced from 2006 until 2015.

[6] The failure to service the bond being common cause, the applicants state in addition, that on or about November 2015 they resorted to debt review. It is the applicants' version that they were assured by the debt counselor that everything was under control. By this I must assume is meant that the monthly deductions and payments were proceeding as arranged.

[7] In March 2016 the applicants received a section 86(10) Notice in terms of which debt review was terminated. Contact was made with the debt counselor and they were assured, once again, that the court was seized with the matter. It is not immediately clear what is meant by the statement. In addition so the applicants contend, contact was made with the bank to make payment arrangements.

[8] On 15 June 2016 the sheriff delivered a warrant of execution against property. It is after receipt of same that applicants made contact with their attorneys to enquire about the meaning of the documents received. Five days later, on 20 June 2016, applicants' attorneys set out on an investigation of the court file. It is not explained why the investigation was not launched immediately. They became aware on that date that summons had purportedly been served by way of affixing to the principal door. The applicants dispute service on the basis that the second applicant is unemployed and would have been at all times at the parties' immovable property. The applicants challenge the return of service which is to the effect that the summons were not served on either the first or the second applicant in person. The applicants state that they became aware of judgment on 15 June 2016 when the sheriff served the warrant of execution on them. The applicants emphasize that they paid the debt counselor promptly and in their view they were paying as arranged with him. The payment, on applicants' version, was done for only three months.

Issue

[9] The applicants attack the default judgment on numerous grounds;

9.1. That there was no service on them of the section 129 notice, mandatory in terms of the National Credit Act 34 of 2005, before issuing summons;

9.2. That summons were served by way of affixing to the principal door, thus service of summons is disputed;

9.3. That the order of executability of the immovable property was granted without consideration of all requisite factors including the personal circumstances of the applicants as well as case law.

Some legal principles

[10] It is trite that a default judgment may be set aside either under the provisions of the common law or Rule 42. In addition, Rule 31(2)(b) of the Uniform Rules provides a third mechanism for setting aside a judgment where it was granted by default by a court.

[11] The applicants have not in the founding affidavit set out in terms which of the three mechanisms they seek to have the default judgment rescinded. It was significant that the applicants state the approach so as to enable the court to evaluate if the requirements in each instance have been met.

[12] In brief, the requirements for bringing the application under common law are clearly set out in ***Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others 1996 (4) SA 411 (CPD)*** at page 417 where Van Reenen J states:

“In terms of common law, a court has discretion to grant rescission of judgment where sufficient or good cause has been shown. But it is clear that in principle and in the long-standing practice of our Courts, two essential elements of ‘sufficient cause’ for rescission of a judgment by default are:

10.1. that the party seeking relief must present a reasonable and acceptable explanation for his/her default,

*10.2 that on the merits such party has a bona fide defence, which prima facie, carries some prospect of success (See **Chetly v Law Society of Transvaal 1985 (2) SA 756 (A) at 765 B - C, Athmaram v Singh 1989 (3) SA 953(D) at 954 E-F).**”*

[13] Therefore a judgment obtained by default under common law can be rescinded by court if the applicant has shown, sufficient cause. Where a judgment is to be set aside on the basis of *Justus error* under common law, it was held that the discretion of the courts in setting aside a default judgment under common law extends beyond, and is not limited to, the grounds provided for in rules 31 and 42(1) of the Rules. (**De Wet v Western Bank Ltd 1979 (2) SA 1031(A).**)

[14] Rule 31 (2)(b) provides;

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

[15] Rule 42(1) (a) of the rules provides;

“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.”

[16] The applicants must show that they have a *bona fide* defence to the claim which *prima facie* carries with it some prospect of success. (See **De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 AD** at 1042 H). In **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)** Brink J at 476 - 477 stated that:

“(a) He must give a reasonable explanation of his default. It if appears that his default was wilful or that it was due to gross negligence, the Court should not come to his defence,

(b) His application must be bona fide and not made with the intention of merely delaying Plaintiff's claim.

(c) He must show that he has a bona fide defence to the Plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour"

Application of principles

[17] It must be mentioned as an observation the court makes, that the applicants have not pointed to any error in the granting of the judgment. The applicability of rule 42(1)(a) can therefore be discounted.

[18] The applicants have also made no attempt to state if the application is brought within 20 days of the knowledge of judgment as required by rule 31 (2)(b). The following timelines can be made out from the papers, the section 129 notice was dispatched on 29 February 2016 to the applicants and was collected from the post office by the second applicant on 9 March 2016. On 16 March 2016 the applicants were served with section 86(10) notice. The summons were issued on 4 April 2016 and served on 13 April 2016 by affixing to the principal door. On 14 April 2016, a day after service of the summons, the applicants in writing were *inter alia* made aware of legal action against

them. The document which the applicant signed went further to state that legal action would not be stopped and that the applicants' immovable property would be attached. Soon thereafter on 26 May 2016, in open court, default judgment was obtained. The order provided for a monetary judgment, interest, executability of the immovable property as well as authorization to issue a warrant of execution against the immovable property. On 15 June 2016 the warrant of execution was served personally on the first applicant. On 12 July 2016 the application for rescission of judgment was served on the respondent.

[19] On the aforementioned timelines, I accept that the application was launched within the requisite 20 days of knowledge of judgment, on the assumption that the applicants became aware of judgment when the warrant of execution was served on them. The applicant must show that there was no willful default. The summons were served on 13 April 2016 and on 14 April they were informed that legal action was pending and that execution would not be stopped. The applicants lack candor and are very economical with information that must assist the court in making a determination about willful default. What is clear however is that on 14 April 2016 the applicants willingly signed a document in which is spelled out that they would not be contesting pending litigation. With these facts, I am unable to find that the applicants were not in willful default. The attempt to argue that summons were not served personally on the applicants is paled by the fact that the applicants

were made aware about pending litigation and if there was a willfulness to defend the action they would obviously have done so.

[20] The applicants are required to show that there is a bona fide defence to the action and that the defence carries some prospects of success. In this regard the applicants have made no attempt whatsoever to state what their defense, if any, is. Instead they admit that they fell into arrears with their payment and that they had to resort to debt counseling. In addition they approached the first respondent and made an undertaking to pay off the arrears in monthly installments. In such circumstances it becomes relevant to ask why would the applicants seek rescission. The *bona fides* of the applicants are seriously placed in doubt.

[21] The *bona fides* are again called into question when the applicants contend that they never received the section 129 notice in circumstances where it has been shown, through the track and trace report that the section 129 letter was collected by the second applicant in person on 9 March 2016 at Pretoria North. The attempt therefore to seek to challenge the proceedings on the basis that legal action was not preceded by the section 129 notice or any other must fail. There is another reason why such an attempt must fail. It relates to the section 86 (10) notice. It was submitted on behalf of the respondents that the applicants are misplaced in contending that a section

129 letter ought to have been sent to them. Their submission, with which I agree, reflects the correct legal position.

[22] In ***Firststrand Bank Ltd t/a Honda Finance v Owens 2013 (2) SA 325 (SCA)***, the Supreme Court of Appeal had occasion to say the following;

“[10] A reading of subsections (1) of each of s 129 and s 130 shows that where it is the credit provider that wishes to enforce the debt, a notice must⁶ be given by it to the consumer in terms of s 129(1)(a). That subsection also makes it clear that the credit provider must draw to the consumer’s attention the possible methods of resolving the debt default. Section 86(10), on the other hand, assumes knowledge on the part of the consumer of these methods: it applies only where the consumer has already applied for debt review. A notice under s 129(1)(a) is thus redundant where the consumer has already taken steps to rearrange her debts. That is why s 129(1)(b)(i) states that in order to commence legal proceedings, a credit provider must give notice either under s 129(1)(a) or s 86(10). The former applies where there has been no debt review. The latter applies where there has been. The requirement of two notices to the consumer where these are meant to serve different purposes, and in different contexts, is absurd.

[11] I accordingly agree with the decision of Murphy J in **Changing Tides** that a notice in terms of s 129(1)(a) is not required where a notice under s 86(10) has been given. (My emphasis). I also agree that the reference in s 130(1)(a) to a notice under s 86(9) must be a reference to s 86(10).⁸ It is an obvious error. Section 86(9) does not deal with notices at all. And s 130(1)(a) must be read with s 129(1)(b)(i), which refers to s 86(10): they both refer to the requisite notice to be given to the consumer.”

[23] The contention therefore is not meritorious. For this additional reason also the contention that a section 129 notice ought to have been dispatched to the applicants, must fail.

[24] The applicants state that the writ of execution was obtained without judicial oversight. The applicants however do not advance any specific reason why such a contention is made. What the applicants do is to make general statements such as, “the writ interferes unjustifiably with my family and I’s existing access to adequate housing”, ‘it further violates my right to dignity and right against unlawful deprivation of property under section 25(1) of the Constitution’, and ‘the amount that is in arrears is not justifiable to execute my home and it can be paid without execution’. What is apparent

from the papers is that the application was made in open court before Bam AJ.

[25] None of the parties specifically brought it to the court's attention, however, perusal of the application placed before Bam AJ, particularly the affidavit in support of default judgment tells a story that need not be left undeconstructed. The affidavit in support of default judgment is a short one and can be reproduced herein. It states as follows;

“ 1.

1.1. I am an adult male employed by ABSA BANK LIMITED as Assistant Vice President of the Home Loan Recoveries (Secured Collections): Ground Floor, 9 Lothbury Street, Auckland, Johannesburg.

1.2. I am duly authorized to depose to this affidavit on behalf of the Plaintiff.

1.3. The content of this affidavit falls, unless the contrary is specifically stated or appears from the context, within my personal knowledge and are both true and correct.

1.4. Legal submissions contained herein are made on advice received from my legal representatives, which advice I accept.

2.

I have read the Plaintiff's summons and confirm that the contents thereof are true and correct.”

[26] It must be stated that it is permissible for the applicant in an application for default judgment to set out the factors on which reliance is placed in the particulars of claim, as appears to have been the case *in casu*. In such circumstances, the applicant must depose an affidavit confirming the contents of the summons. The other option is to set out separately in an affidavit all relevant factors relied upon. (See ***Firststrand Bank Ltd v Folscher Folscher & another and similar matters 2011 (4) SA 314 (GNP)***).

[27] Section 46 of the Uniform Rules of Court provides as follows;

“(1) (a) No writ of execution against the immovable property of any judgment debtor shall issue until -

(i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or

(ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the

an abuse. Expressed simply, the function of the court is to safeguard against abuse of the execution process. It is with the consideration of this context and purpose that a determination is made whether or not to declare a person's home executable."

[29] In light of the authorities listed above and having considered what was placed before Bam AJ, I am satisfied that judicial oversight was indeed exercised and that judgment was properly granted.

[30] I therefore make the following order;

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



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA