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REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

CASE NO: 67181/2011

DATE: 4/3/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

CECELIA MOSIAMANG MASILO

Applicant

and

ABSA BANK LIMITED

First Respondent

THE SHERIFF OF THE HIGH COURT,

TSHWANE SOUTH EAST

Second Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Third Respondent

RAJENDRA SOMAN DASS

Fourth Respondent

JUDGMENT

JW LOUW, J

[1] The applicant applies for an order:

- granting the applicant condonation for the late filing of the present application for the rescission of a default judgment granted pursuant to a confession to judgment signed by the applicant on the same date;
- rescinding the said judgment;
- granting the applicant condonation for the late filing of the present application for the rescission of the order granted in terms of Rule 46(1)(a) on 21 May 2013 declaring Erf [..... W. R], Pretoria, also known as [..... J. R. S.], [W. R], Pretoria ("the property") specially executable and authorizing the registrar to issue a warrant of attachment;
- rescinding the said order;
- setting aside the warrant of attachment issued pursuant to the order;
- setting aside the attachment of the property made in terms of the warrant.

The applicant also applied for an order that the endorsement of the attachment of the property which is registered in the Deeds Office against the property be removed; that the sale in execution of the property held on 15 April 2014 be set aside; that a declaratory order be issued that the sale in execution was a nullity; and that the fourth respondent, who purchased the property at the sale in execution, be interdicted from selling the property to any third party. All of this relief was abandoned during argument by Mr. du Preez who appeared on behalf of the applicant.

[2] The application was issued during June 2015. The first and fourth respondents filed answering affidavits in which they each counter claim an order that no legal proceedings may be instituted by the applicant against any person in any Provincial or Local Division of the High Court or any inferior court without the leave of that court or any judge of the High

Court, alternatively that no legal proceedings may be instituted by the applicant against either the first or the fourth respondent in any Provincial or Local Division of the High Court or any inferior court without the leave of that court or any judge of the High Court.

[3] The applicant did not file an affidavit opposing the counter applications and also took no steps to enrol the matter. The matter was enrolled by the fourth respondent's attorneys during October 2015, who also attended to the indexing and pagination of the papers. The first and fourth respondents filed their heads of argument during October 2015. The applicant failed to file heads of argument within the time stipulated in the practice manual of this Division. Mr. du Preez handed up heads of argument with the leave of the court when the matter was called.

[4] It is necessary to set out the chronology of events which preceded the launch of the present application:

- Summons was issued by the first respondent against the applicant on 21 November 2011. The first respondent's claim was for payment of the full outstanding amount owing by the applicant to the first respondent in terms of a loan agreement which was secured by a mortgage bond registered over the property. The applicant entered an appearance to defend the action and the first respondent thereafter applied for summary judgment.
- The application for summary judgment was set down for hearing on 24 July 2012. The applicant opposed the application but did not file an opposing affidavit. The applicant was legally represented and the parties reached a settlement in terms whereof it was agreed that the applicant would pay the arrears in installments and sign a confession to judgment in the event of the applicant failing to comply with the payment arrangement. The confession to judgment signed by the

applicant records the payment arrangement and then proceeds as follows:

"AND WHEREAS I AGREE to the signing of a Confession to Judgment in terms of the aforementioned Rule, [1] details of which appear below, and agree that the PLAINTIFFS' attorney may apply for Judgment against me without further notice in the event

- of me failing to comply with the repayment arrangement concluded with the Plaintiff.*

AND WHEREAS I furthermore agree that the filing of an affidavit by the Attorney of record of the PLAINTIFF reflecting my failure to comply with the repayment arrangement shall be sufficient proof for the Registrar of the above Honourable court for the granting of judgment in terms of this confession. I hereby agree that this confession can be made an Order of Court.

NOW THEREFORE I the undersigned,

CECILA MOSIAMIE MANG MASILO

HEREBY confess in whole to the PLAINTIFFS' claim contained in the Summons namely:

The relief claimed in the summons is then set out, including the claim for an order declaring the property executable and directing the registrar to issue a warrant of execution against the property.

- On 24 July 2012, the parties also agreed to a draft order which was made an order of court. In terms of the order, the total outstanding capital amount owing to the first respondent shall immediately become due and payable in the event of the applicant failing to effect timeous payment of the amounts due in terms of the

payment arrangement (which is recorded in the order) and the applicant consents that judgment may be entered against her for any such amount as may be due at such point in time, without further notice. It was further ordered that the applicant agrees that the filing of an affidavit by the first respondent's attorney of record reflecting the applicant's failure to comply with the payment arrangement shall be sufficient proof for the registrar to grant judgment in terms of the confession signed by the applicant on the same day.

- The applicant made some payments pursuant to the payment arrangement, but thereafter defaulted. On 21 May 2013, the first respondent applied to court for and obtained judgment in terms of the confession to judgment, including an order declaring the property specially executable and authorizing the registrar to issue a warrant of execution against the property .
- The applicant states that some people from Cape Town called her during 2013 and informed her that they had seen that her house was on auction. They offered to help her for a fee, indicating that they would advertise that she was "*going insolvent*" which would stop the auction. She agreed, to "*save our house*". It appears, therefore, that the applicant was prepared to take part in a dishonest scheme to frustrate the sale of the house. Sometime thereafter she was informed by someone, she can't recall who, that the house was advertised for auction again. She consulted an attorney who advised her that the sale had not been properly advertised. The first respondent's attorneys were informed of the defective advertisement and the sale was as a result cancelled. She negotiated with the first respondent and offered to cede a claim which she had against the Rustenburg municipality for some project. The first respondent declined the offer

and indicated that it would only be prepared to stop the sale in execution if the applicant immediately paid an amount of R100 000.00. The applicant did not have the money. The arrears at that stage exceeded R700 000.00.

- On 11 April 2014, a few days before the sale, the applicant's new firm of attorneys filed a notice of application for leave to appeal against that part of the order granted in terms of the confession to judgment declaring the property executable. The grounds of appeal stated in the notice of appeal were that the court erred in making such order without taking into consideration the amendment of Rule 46 of the High Court Rules and without compliance with the provisions set out in s 131 read with ss 127 and 128 of the National Credit act, 34 of 2005.
- On 15 April 2014, the property was sold in execution to the fourth respondent for a purchase price of R2 645 000.00.
- On 6 May 2014, the applicant's attorneys filed a notice of withdrawal of the application for leave to appeal and simultaneously filed an application for rescission of the judgment granted on 21 May 2013 in terms of the confession to judgment, for an order setting aside the warrant of execution issued in terms of the judgment and for setting aside the sale in execution that had taken place on 14 April 2014. Condonation was also sought for the late filing of the application. The grounds relied upon for the relief sought were in essence the same as those contained in the notice of appeal which was withdrawn. The same respondents as in the present application were cited. The application was opposed by the first and fourth respondents and they filed opposing affidavits.
- The applicant states in her founding affidavit that her attorneys instructed counsel on the aforementioned application. Counsel's advice was that because of

the confession to judgment, there was no merit in the application and that it should be withdrawn. The applicant states that she reluctantly accepted the advice that the application should be withdrawn. It is not clear when the application was withdrawn.

- Registration of transfer of the property into the name of the fourth respondent was effected on 4 July 2014.
- On 5 August 2014, the fourth respondent launched an application to have the applicant evicted from the property.
- On 8 December 2014, the applicant filed a notice of opposition to the eviction application but failed to file an answering affidavit. Her attorneys of record subsequently withdrew.
- On 4 February 2015 an eviction order was granted against the respondent in favour of the applicant.
- The applicant thereafter brought an urgent application for an order to suspend the eviction order for a period of 14 days to give her an opportunity to file two applications for, firstly, the rescission of the eviction order and, secondly, for the rescission of the default judgment granted against her pursuant to the confession to judgment which she had signed. The urgent application was heard by Kubushi J who dismissed it on 7 April 2015. The judgment of Kubushi J is annexed to the applicant's founding affidavit. The court considered whether the applicant had any prospects of success in the intended rescission applications. The court found that she did not, and accordingly dismissed the application and ordered the applicant to vacate the property within 45 days from the date of the order.
- The applicant did not vacate the property within the time ordered by the court.

On 9 June 2015, and despite the judgment of Kubushi J, the applicant launched the present application in which the an order is again sought for the rescission of the default judgment granted pursuant to the confession to judgment, for the setting aside of the warrant of execution issued in terms of the confession to judgment and for setting aside the sale in execution that had taken place on 14 April 2014. The grounds relied upon are again in essence the same as those contained in the notice of appeal, in the previous rescission application and in the urgent application.

The application for condonation

[5] The application for rescission is made in terms of Rule 31(2). I shall assume for purposes hereof that the rule also applies to a judgment which was granted by default against a defendant in terms of a confession to judgment in which a defendant consented to judgment being granted without notice.

[6] In terms of Rule 31(2)(b), a defendant against whom judgment has been granted by default has 20 days after he or she has knowledge of such judgment, to apply to court to set it aside. The applicant accepts that the application is brought out of time and therefore applies for condonation for the late bringing of the application.

[7] The applicant must have been aware that the first respondent would apply for judgment in terms of the confession to judgment if she failed to meet the payment arrangement, which she admittedly failed to do. The applicant must have become aware that a judgment had been granted against her not later than the date in 2013 when she was informed by *"some people from Cape Town"* that her house was up for auction. She did nothing about it until she was informed *"some time thereafter"* that her house was advertised to be sold on auction again. She then consulted an attorney who did not file an

application for rescission of the judgment, but rather a notice of appeal which was filed a few days before the execution sale of the property. The notice of appeal was withdrawn on 6 May 2014, which was after the sale of the property to the fourth respondent. She then caused an application for rescission of the judgment to be launched which was subsequently also withdrawn. The withdrawal must have occurred before fourth respondent launched an application on 5 August 2014 to have the applicant evicted from the property. An eviction order was granted on 4 February 2015 after the applicant, who had opposed the application, failed to file an answering affidavit. She thereafter filed the urgent application to set aside the eviction order, which was dismissed by the court on 7 April 2015. The present application was served on 9 June 2015.

[8] It is clear from the history of the matter which I have set out above that the steps which were taken by the applicant were taken with a single aim in mind, namely to delay her eviction from the property for as long as possible by any means possible. Apart from a few payments which were made by the applicant to the first respondent in terms of the payment arrangement concluded on 24 July 2012, she has been living in the house on the property ever since without paying anything. Since purchasing the property at the sale in execution on 15 April 2014, the fourth respondent has been obliged to pay the rates and taxes in respect of the property. The conduct of the applicant, which obviously was to the substantial prejudice of the first and fourth respondents, smacks of a lack of *bona fides*. The applicant's decision to resort to other avenues and not to apply for a rescission of the default judgment was clearly intentional. The applicant cannot now, almost three years after the judgment was granted, rely on the other steps which she took as an excuse for the delay of almost three years in the bringing of the present rescission application.

[9] I therefore find that the applicant has failed to prove that her delay in bringing the

present application has not been willful. I accordingly find that the application for condonation cannot succeed. It follows that the entire application must be dismissed.

The counter applications

[10] As mentioned earlier, the first and fourth respondents each filed a counter application in which they claim an order that no legal proceedings may be instituted by the applicant against any person in any Provincial or Local Division of the High Court or any inferior court without the leave of that court or any judge of the High Court, alternatively that no legal proceedings may be instituted by the applicant against either the first or the fourth respondent in any Provincial or Local Division of the High Court or any inferior court without the leave of that court or any judge of the High Court.

[11] The counter applications are brought in terms of the Vexatious Proceedings Act 3 of 1956. Sec. 2(1)(b) of the Act provides the following:

"(b) If, on an application made by any person against whom legal proceedings have been instituted by any other person or who has reason to believe that the institution of legal proceedings against him is contemplated by any other person, the court is satisfied that the said person has persistently and without any reasonable ground instituted legal proceedings in any court or in any inferior court, whether against the same person or against different persons, the court may, after hearing that person or giving him an opportunity of being heard, order that no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of the court, or any judge thereof, or that inferior court, as the case may be, and such leave shall not be granted unless the court or judge or the inferior court, as the case may be, is satisfied that the proceedings are not an abuse of the process of the court and that there is prima facie ground for the proceedings."

[12] In *Beinash and Another v Ernst & Young and Others*^[2] the Constitutional Court said

the following with regard to the purpose of the Act:

"This purpose is 'to put a stop to persistent and ungrounded institution of legal proceedings'. The Act does so by allowing a court to screen (as opposed to absolutely bar) a 'person (who) has persistently and without any reasonable ground instituted legal proceedings in any Court or inferior court'. This screening mechanism is necessary to protect at least two important interests. These are the .. interests of the victims of the vexatious litigant who have repeatedly been subjected to the costs, harassment and embarrassment of unmeritorious litigation; and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings. "

[13] The respondents therefore have to show, firstly, that the applicant has persistently instituted legal proceedings and, secondly, that such proceedings have been without reasonable ground.

[14] As to the first requirement, the conduct of the respondent has no doubt been a great irritation to the first and fourth respondents. She has not only instituted legal proceedings against them, but has opposed proceedings instituted by them against her, more specifically the summary judgment application brought by the first respondent (which was settled) and the eviction application brought against the applicant by the fourth respondent (which led to the granting of an eviction order against the applicant after she failed to file opposing papers). But can it be said that the applicant has persistently instituted legal proceedings against the applicants? The legal proceedings which the applicant has instituted against the respondents were the application for leave to appeal (served on 14 April 2014, but which was withdrawn), the previous rescission application (served on 6 May 2014, but also withdrawn), the urgent application (which was dismissed

on 7 April 2015) and the present rescission application. In my view, the legal proceedings which have to date been instituted by the applicant have not quite reached the point where they can be labeled as persistent, although they come perilously close thereto. Any further proceedings which the applicant may institute against the first and/or fourth respondents may lead to such conclusion, especially if regard is had to the overall pattern of litigation between the parties.

[15] Having concluded that the first requirement for an order in terms of s 2(1)(b) of the Act has not been met, it is not necessary to consider whether the respondents have satisfied the second requirement, i.e. that the proceedings which have been instituted by the applicant were without any reasonable ground.

[16] In the result, I make the following order:

[a] The applicant's application is dismissed with costs.

[b] The first and fourth respondents' counter applications are dismissed with costs.

Applicant's attorney: Mr. L du Preez, au Preez Attorneys, Nelspruit

First Respondent's counsel: Adv. U Lettering Instructed by Hack Stupel & Ross Attorneys

Fourth Respondent's counsel: Adv. J de Swardt Instructed by: Liesl van Rensburg Attorneys

[\[1\]](#) The heading of the document refers to Rule 31 of the High Court Rules.

[\[2\]](#) 1999 (2) SA 116 (CC) para [15].