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

05 /02 /2015

CASE NUMBER: 28822/11

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

11/12/2014 ....

In the matter between:

CALVIN MOGALE MAKHUDU	**FIRST APPLICANT**
ELSIE SEWELA MAKHUDU	**SECOND APPLICANT**
and	
STANDARD BANK	**RESPONDENT**

JUDGMENT

MOSEAMO, AJ

[1] This is an application for rescission of judgement obtained by the respondent against the applicants in their absence on the 28 July 2011 in terms of Rule 42 of the Uniform Rules of Court.

[2] This matter relates to a mortgage bond registered over the property of the applicants registered as ERF 1169 Norken Park Extension 2 Township, Registration Division IR, Gauteng. It is common cause that the applicants fell into arrears with their monthly bond repayments. The respondent issued summons and when applicant failed to file Notice of intention to defend, respondent obtained default judgment.

[3] The grounds on which the applicant relies for bringing this application are as follows (a) that they did not receive the summons in this matter; (b) did not receive Notice in terms of section 129 of the National Credit Act (section 129 notice).

[4] The respondent opposes the application on the basis that summons and section 129 notices were served on the applicants. It is contended that the respondent followed the requisite procedure in serving both summons and the section 129 notice.

[5] The respondent also raised an issue with regard to the fact that the applicants failed to file a confirmatory affidavit of the second applicant. The applicants then in their replying affidavit filed the confirmatory affidavit and indicated that the non compliance was as a result of an oversight. In my view the respondent will not suffer any prejudice as a result of the late filing of the confirmatory affidavit. I therefore condone the late filing of the confirmatory affidavit.

BACKGROUND

[6] Respondent obtained default judgement against the applicants on the 28th July 2011. The applicants first became aware of the judgement when they discovered that their property was to be sold in execution by the sheriff on the

27 October 2011.First applicant met with the attorneys for the respondent after he was referred to them by the respondent. The respondent's attorneys advised him to pay 50% of the amount in arrears in order to avoid the sale in execution. He paid the amount and the sale in execution was cancelled.

[7] First applicant was again informed that their property was scheduled to be sold in execution on the 27 September 2012. He then took out a loan and settled the arrears in order to stop the sale.

[8] The applicants fell again into arrears with the monthly instalments after the first applicant lost his job. They were once again informed of another sale in execution of their property which was scheduled to take place on the 4th December 2013. First applicant entered into negotiations with the respondent and the sale was cancelled.

[9] First applicant approached his current attorneys of record immediately after the respondent informed him of another sale in execution scheduled for the 9th February 2014. He was advised by his attorneys of record to bring an application for rescission.

CONDONATION

[10] The applicants brought an application for condonation for the late filing of this application. The reasons provided by the applicants for the delay in bringing this application are as follows: (a) their erstwhile attorneys failed to advise them to bring an application for rescission of judgment earlier; (b) the applicants fell into financial difficulties when the first applicant lost his job.

[11] Uniform rule 27 provides for the condonation of the non-compliance with the rules where good cause is shown.

[12] In Federated Employers Insurance Co. v McKenzie 1969 (3) SA 361 at 362 F-G the main principles governing condonation were outlined. It was stated that

the factors to be weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the Respondent's interest in the finality of his judgement, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

[13] In Uitenhage Transitional Local Council v South African Revenue Services 2004 (1) SA 292 (SCA) at 297 para 6, the court stated that 'condonation is not to be had merely for the asking; a full detailed and accurate account of the causes of delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if non-compliance is time related then the date, the duration and the extent of any obstacle on which reliance is placed must be spelled out.'

[14] The applicants brought an application for rescission of judgement in terms of Rule 42 (1). Although the abovementioned rule does not specify the time-limit within which the application for rescission of judgment must be brought, the applicant must bring the application within a reasonable time (see First National Bank of South Africa Ltd v Van Rensburg NO: In re First National Bank of Southern Africa Ltd v Jurgens 1994 (1) SA 677 (T) 681 B-G.)

[15] With regard to the applicants' first reason that their erstwhile attorneys failed to advise them to bring an application for rescission of judgment earlier. The negligence of the applicant's attorney is however not in itself a ground for rescission. See Tshabalala and Another v Peer 1979 (4) SA 27 (T) 30 TPD para A. The second reason provided by the first Applicant is that as a result of him losing his job he struggled financially. He approached his attorney of record as soon as he started working. He did not wilfully fail to bring this application within the required time limit.

[16] Although the applicants do not indicate the date on which they became aware of the default judgement, it can however be concluded that the applicants were aware of the default default judgement as at the 27th October 2011 being the date on which the the first sale in execution was scheduled to take place.

It is common cause that the application for rescission of judgment was served on the Respondent on the 5th February 2014, approximately 27 months after applicants became aware of the judgment.

[17] There are huge gaps in the chronological sequence advanced by the applicants. The applicants were aware of the judgment as early as the 27 October 2011 which was the date for the intended first sale in execution. Despite the second sale in execution scheduled for 27th September 2012 and the third sale in execution scheduled for 4th December 2013, the applicants did not bring application for rescission of judgement. The applicants only brought this application on the 05th February 2014. There is no satisfactory explanation provided by the applicants for the delay.

[18] A delay of over 27 months is quite extensive and requires a detailed explanation. In the absence of a satisfactory explanation the abovementioned period cannot be said to be reasonable.

[19] Applicants submitted that respondent will not suffer any prejudice as there is a settlement agreement in place and the said account has not been in arrears ever since. They submitted that they are suffering prejudice in that their property is constantly put on auction and further that the judgement is affecting first applicant professionally. I must however point out that the fact that a judgement is not prejudicial to the respondent is not a cause for a rescission. See Swart v ABSA 2009 (5) SA 219 (C).

[20] There is no doubt as to the importance of the matter to the applicants as this matter relates to their place of residence. However when it comes to the date, the duration and the extent of the obstacle on which the applicants rely, the founding affidavit is seriously inadequate.

PROSPECTS OF SUCCESS

[21] I now turn to consider whether the applicants have shown a reasonable prospect of success on the application for rescission.

[22] The applicants contend that the judgement was erroneously sought or erroneously granted as they did not receive the Notice in terms of section 129 and they also did not receive copies of the summons. They further contend that they have a bona fide defence against the Respondent's claim in that they had an agreement with the respondent's attorneys that if they pay 50% of the arrear amount then the judgment would not be reflected on their names.

[23] It was submitted on behalf of the respondent that the Notice in terms of section 29 was properly served on the first and second applicant. Counsel for the respondent referred me to proof in the form of registered mail slip indicating that the section 29 notice was sent to the Applicants and return of service indicating that sheriff served the summons on both the first and the second Applicants at their chosen domicillium citandi et executandi by affixing copy of summons to the main entrance as he found the adressees to be absent.

[24] It is the respondent's contention that the summons and Notice in terms of section 29 were properly served at the Applicants' residential address. The sheriff's return of service is prima facie evidence of the truth of its contents. Since there is no explanation is given rebut proof of proper service of the Notice in terms of section 29 and summons, it can therefore be concluded that there was proper service upon the Applicants.

[25] In Weare v ABSA Bank Ltd 1997 (2) SA 212 D at 217 para D the court rejected the submission that judgement would not have been granted had the Court been aware that the summons in fact had not come to the attention of the applicant. The Court held that even if it had been aware of this, the court could not have refused to grant judgment once it was sought by the respondent on the basis that there had been lawful service of the summons and the summons disclosed a cause of action for the relief sought.

[26] Meskin J went on to state as follows: 'In my opinion, to argue the contrary is in fact to invite one to conclude that long-established principles of civil procedure

in South Africa are in law unsound and to enjoin a court, in every case where default judgment is sought on a lawful return of service which shows that service has not been personal, to refrain from granting judgment without first enquiring whether in fact the defendant is aware of the summons, on pain, if it omits to do so, of its judgment being one "erroneously granted", within the meaning of Rule 42(1)(a). I think that such conclusion would be a manifest absurdity.'

[27] With regard to the section 129 notice the respondent needs only to prove that the notice was sent to the correct address. In this case the notice was sent to the correct address. The requirement for the respondent to attach a track and trace report from the post office as laid out in the case of Sebola and Another v Standard Bank of South Africa and Another 2012 (5) 142 (CC) is not applicable in the present case. The requirement that the credit provider needed to establish that section 129 notice came to the attention receipent as required in Sebola was only laid down by the Constitutional Court on the 7th June 2012 and does not apply retrospectively.

[28] At the time the judgment was granted, it was sufficient for the credit provider to establish that section 129 notice had been dispatched by registered post to the selected address, not that it had reached the receipient. See Rossouw and Another v First Rand Bank Ltd 2010 (6) SA 439 SCA.

[29] In my view the applicants were properly served with copy of the summons and section 29 notice and therefore the default judgment obtained by the Applicants was properly obtained.

[30] It was submitted on behalf of the applicants that there was an agreement entered in to between the first applicant and the respondent's attorneys that the judgement will be set aside if the applicants can pay 50% on the outstanding arrears.

[31] It is common cause that at the time when judgement was obtained, the Applicants were in arrears with their monthly instalments and they paid 50% of the the arrears in order to stop the sale in execution.

[32] The applicant's affidavit at paragraph 4.3 of the founding affidavit reads as follows: 'I submit that the bank then referred me to their attorneys, Joubert Scholtz Incorporated, who advised me to pay 50% of the outstanding amount <u>to avoid the sale in execution</u> (My emphasis) I followed their advice and made the required payment on an understanding that should I pay the outstanding amount judgment will no longer reflect on my name.' This conclusion by the first Applicant that once he paid the required payment judgment will no longer reflect in his name is not supported by the facts alleged by him in his founding affidavit.

[33] The applicants have no defence to the respondent's claim as set out in the summons. The fact that the first applicant was under the impression that judgement would be reversed or set aside after payment of 50% of the arrears does not constitute a defence to the respondent's claim.

[34] Factors to be considered in the granting of an application for condonation, when taken into consideration both individually and cumulatively are decisive against condoning the default. Failure to explain the degree and the cause of the delay, the non-existent prospects of success, in particular, make it difficult to justify the exercise of the discretion in favour of the applicants. In my view the applicants have failed to show good cause for the default.

In the result I make the following order:

(1) The applicant's application for condonation for the late filing of this application is dismissed with costs

P.D MOSEAMO

ACTING JUDGE OF THE HIGH COURT

On behalf of the Applicants:	Snail Attorneys@Law Inc. 101, Java Building 285 Lynnwood Road Menlo Park Pretoria
On behalf of the Respondents:	Joubert & Scholtz Inc. 11 Heide Street Kempton Park