IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 18241/14

19/6/2015

(1) REPORTABLE: ¥E5 / NO
(2) OF INTEREST TO OTHER JUDGES: /NO
(3) REVISED.

19/06/2015 ................
DATE SIGNATURE

IN THE MATTER BETWEEN

SODUMO MASONDO First Applicant

THANDIWE SHIRLEY NDLOVU Second Applicant

and

NEDBANK LTD Respondent

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JUDGMENT

LEGODI J

[1] Before me there are two applications. The first one is an application for eviction against the respondents (Sodumo Masondo and Thandiwe Shirley Ndlovu) who had failed to perform in accordance with Mortgage Loan agreement. The second application is for the rescission of default judgment obtained by Nedbank Ltd (the respondent in the rescission application) against the applicants.

[2] For convenience, the parties will be referred to as in the main action, that is, Nedbank Ltd as the Plaintiff and the other parties as the first and second defendants respectively. I prefer to start with the application for rescission of the default judgment as any finding in favour of the defendants, might have a bearing on the application for eviction.

[3] As a brief background, on 18 April 2010, the plaintiff issued summons against the defendants, which was allegedly served by affixing at the *domicillium citandi* at [……..], Rooihuiskraal. The defendants contend that they have never received the summons and that the sheriff could never have affixed the summons to the principal door of the property regard been had to the following allegations and challenges made in paragraphs 6 and 7 of the founding affidavit:

3.1 In order for the sheriff to affix summons on the principal door, he had to gain first entrance into the premises area by passing through the security gate of the said *domiciliam citandi et excutande;*

3.2 There is also an intercom facility in which for one to gain access, they had to communicate to a person present at the house before they can be allowed access;

3.3 Furthermore, that at the time of the alleged affixing of the summons, there was an assistant working at the premises and that she indicated that no one came and left the summons at the main door.

3.4 Lastly, there were two dogs which were guarding the yard and the sheriff would have required the services of a person to whom the dogs were used.

[4] Before the issuing of the summons and the alleged service of the summons by affixing, the first defendant had agreed with the plaintiff that for any written communications between the parties, the address: [……….] IN KWAZULU – NATAL must be used. This was in line with clause 18.2 of the loan agreement which provides that either party, to the agreement may change the address by delivering to the other party a written notice of the new address by hand, registered mail or electronic mail, if that other party has provided an email address. The first defendant has attached to his founding affidavit, a letter of demand dated the 2 October 2009 in terms of which the plaintiff used the Gator Manor address. Based on this, the first defendant contended that the plaintiff knew which address to use to send whatever communication it needed to convey to the defendants. However, the plaintiff sent both the letter of 2 October 2009 bearing Gator Manor address and the summons at [………], Rooihuskraal, Gauteng Province.

[5] Two issues are raised by the nature of the dispute outlined above. That is, whether there has been proper service of section 129 of the National Credit Act and the summons. I deal later with the alternative defence to this.

SECTION 129 NOTICE

[6) In paragraph 12 of the founding affidavit, the first defendant stated:

> *"I have already indicated that the respondent sent a letter to me dated 2 October 2009 which is marked Annexure "SM1". <u>Subsequently I received that letter somewhere around the second week of March 2</u>006. The second page of the letter has registered post slip which bears the post office stamp and this is indicated of the time frame I could have received the letter".*

[7] The notice in terms of section 129 came to the attention of the first defendant before the issuing of summons and judgment was obtained thereafter. That in my view, destroys any defence, the first defendant might have had regarding section 129 notice.

SERVICE OF SUMMONS

[8] Clause 18.1 of the loan agreement provides as follows:

*"18.1 Whenever* a *party to this agreement is required or willing to give legal notice to the other party for any purpose contemplated in this judgment, the Act or any other law, the party giving notice must deliver that notice to the other party at the address of the other party as set out in clause 2 of this agreement or at the address most recently provided by the recipient in accordance with clause 18.1*".

[9] There are two addresses mentioned in clause 1. In clause 2.2.3 of the agreement, the address of the "client" i.e. the first defendant is recorded as:

*"[……….]"*

Then in clause 2.2.10 the address of the property is recorded as:

*"[……….]"*

[10] Neither of the address can be construed as "the address recently provided" by the first defendant, nor can it be said that the first defendant complied with the provisions of clause 18.2 which provides that either party to the agreement may change its address for the purposes of clause 18 by delivering to the other party a written notice of the new address by hand, registered mail or electronic mail, if that other party has provided an email address. The change of new address must be in writing and that is not what happened in this case. Both addresses are recorded in clause 2 and the plaintiff elected to use Rooihuiskraal address for service of the summons and I can find nothing wrong with this.

WHETHER THE SUMMONS WAS PROPERLY SERVED?

[11] The sheriff in this case did not file a supporting affidavit to deal with the challenge and allegations made by the first defendant as indicated in paragraph 3 of this judgment. The challenge is vaguely dealt with in the answering affidavit as follows:

*"6.1 The Respondent's summons was in fact served on the First Applicant at [...........], Rooihuiskraal, by the Sheriff affixing the summons to the*

> *principal door, and* was *in fact served on the second applicant at [……..], Redgeview, Cato Manor, Durban, by affixing* a *copy to the main entrance and the Applicant's allegations to the contrary are denied. [My emphasis].*

[12] It is not enough to deny the allegations in paragraphs 6 to 7 of the founding affidavit summed up in paragraph 3 above without filing a supporting affidavit by the sheriff. In paragraph 9 of the founding affidavit, the first defendant pleads as follows:

> *"In the light of the above I can confirm to the Honourable court that I have not have not (sic) at any point in that after the purported service had* a *copy of the summons and should I had them I would have approached an attorney for assistance".*

[13] I must say, experience had shown that service by affixing can sometimes be abused and when a red light is raised, it is incumbent on the court, to be cautious in accepting such service as a proper service. Failure to file the supporting affidavit of the sheriff on the challenge and allegations made, is in my view, fatal. Just on this point alone, rescission of judgment ought to be granted. It is because of the serious nature of the allegations made against the sheriff, which allegations are not refuted, that I am unwilling to condone any such conduct as alluded to by the first defendant. I now turn to deal with another issue

NOVATION

[14] On the 20 April 2015 this matter was laid before me in the unopposed motion roll. I made an order to the effect that the plaintiff files a supplementary affidavit to the defence of novation raised in the replying affidavit as follows:

> *"23.* ***Novation of the original loan agreement***
>
> *23.1 The respondent and I entered into* a *Distressed Restructure Agreement. This agreement amended the original loan agreement. It is important to note that the Distressed Restructure Agreement* was entered *into on the 25th August 2011.*

23.2 *It is further important to note that the default judgment* was *granted on the 05th October 2010. It is further important to note that the property* was *attached on the 15th February 2011. By entering into a new agreement with me, the respondent represented to me that our relationship will from then onward be governed by the new agreement, namely, Distressed Restructure Agreement.*

23.3 *In terms of the Distressed Restructure Agreement, the respondent was not entitled to fall back on the benefits of the original loan agreement in the event of default under Distressed Restructure Agreement. The terms and conditions of the Distressed Restructure Agreement imply that the respondent has waived its right to the judgment obtained. This is son, when clause 19 and 21 of the Distressed Restructure Agreement are properly considered.*

23.4 *I own substantial movable* assets. *This constitutes mostly of furniture and household goods. The realization of these assets would have been close to sufficient to satisfying the judgment debt."*

[15] I do not intend to waste much time on this defence. Clause 19.1 of the loan agreement provides as follows:

*"19.1 Should the Client breach any condition contained in this Agreement, or should the Client breach a condition of any other agreement with Nedbank (which breach shall constitute a breach of this Agreement), Nedbank will have the right, to the extent permitted by the Act, to claim repayment of the Loan or the balance thereof outstanding which will thereupon become immediately due and payable, together with interest and all other amounts owing to or claimable by Nedbank in terms of this Agreement, and to have the Property declared executable".*

[16] The plaintiff in its supplementary affidavit dealt with clause 19 as follows:

*"10.7 Clause 19 of the ORA deals with default by the First Applicant in terms of the ORA, and in particular clause 19.1 provides for immediate repayment by the First Applicant of the balance outstanding in the event of non-payment by the First Applicant. Clause 21 of the ORA provides for the debt enforcement procedure as envisaged in terms of section 129 and 130 of the NGA, in respect of the ORA.*

*10.8 Neither clause 19 nor clause 21 of the ORA in their terms effect any prior judgment granted against the First Applicant or the Second Applicant, and neither these terms nor any other terms of the ORA are such that it can be inferred that the Respondent has waived the default judgment and attachment of the immovable property that had already taken place.*

*10.9 There is no conduct on the part of the Respondent, whether in the form of the conclusion of the ORA or otherwise, from which it can be inferred that the Respondent waived its rights in regard to the judgment by it or in regard to the attachment of the immovable property.*

*10.10 It is common cause that the First Applicant default in his obligations to the Respondent in terms of the ORA and in particular that he failed to make payments in terms of the ORA and only made a payment of R30 000,00 on 4 June 2013.*

*10.11 Thus, the Respondent was entitled to proceed to execute its judgment already obtained prior to the ORA and to proceed to execute against the immovable property already attached prior to the ORA".*

[17] I cannot agree more with what is stated above and therefore a defence of novation and or waiver ought to be rejected. I now turn to deal with the application for eviction.

EVICTION

[18] Judgment by default was granted on the 5 October 2010 by the Registrar in terms of which the property in question was declared especially executable.

[19) In *Gundwana v Skelo Development* CC *and Others* 2011 SA 608 (CC) the court declared the Uniform Rules and practice to the extent that they allow the Registrar to grant orders declaring immovable property that is a person's home executable, to be constitutionally invalid. The court considered also prospective and retrospective effect of such orders. It was held that declaration of invalidity of the legislative provisions did not entail that all transfers made subsequent to invalid execution sales were automatically invalid. Individual persons affected by the ruling still needed to approach the courts to have the sales and transfers set aside if granted by default. In order *to* turn the clock back in these cases, aggrieved debtors will first have to apply for the original default judgment to be set aside. The mere constitutional invalidity of the rule under which the property was declared executable is not sufficient to undo everything that followed. It was further held that the aggrieved debtors who seek to set aside past default judgment and execution orders granted against them of the Registrar, must also show in addition to the normal requirements for rescission that a court with the full knowledge of the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home.

[20] In other words judicial oversight is required when dealing with specially hypothecated property that is the debtor's home. In paragraph 3 of this judgment I dealt with the challenge by the first defendant to the service of the summons. Furthermore in paragraphs 11 *to* 13 above, I dealt with service of the summons and in particular whether they were properly served. I do not intend to repeat what has already been said in the aforementioned paragraphs. It suffices to state that, had the Registrar or the court have the full knowledge of all the relevant facts existing at the time of granting of the default judgment, would nevertheless have refused to execute specially against hypothecated property in question.

[21] There are other factors which have been set out by the first defendant in resisting the eviction as follows:

*"11.*

*The first respondent had been staying in that premises for more than three years and the applicant had only given the first respondent 30 days to vacate the premises.*

*12.*

*REASONS WHY EVICTION SHOULD NOT BE GRANTED*

*(i)* *I* am *currently staying in this property in issue with my wife and three minor children.*

*(ii)* *All my children go to school in Centurion.*

*(iii)* *It will not be just and equitable that the children be evicted from the property* as *it is near their schools.*

*(iv)* *It would be very prejudicial for all my children to be evicted here* as *this would affect their schooling and it would not be in the interest of justice.*

*(v)* *The other reason is based in the rescission that I have made and I attach the copy hereof* as *annexure "JM?" the contents thereof must be incorporated herein.*

*(vi)* *The Act also requires that the applicant find* a *suitable accommodation for the respondent and in this instance the applicant has done* so".

[22] In paragraphs 24 and 25 of the replying affidavit in the rescission application, the first defendant states as follows:

*"24. I own substantial movable assets. This constitutes mostly of furniture and household goods. The realization of these assets would have been close to sufficient to satisfy the judgment debt.*

25. *I was and still* am *employed and earning* a *salary. If these was any shortfall on the realization of the movable assets, I would have been able to make the necessary arrangement to pay off that short fall. Had the* *<u>known of these facts at the time the default was granted, it would</u>*

*nevertheless have refused to order mv home specially executable".* [The underlining my emphasis].

[23] I tend to agree with the latter statement quoted above. The default judgment granted against the first defendant did not enjoy judicial oversight. It was granted by the Registrar and I want to believe that if he or she was aware of the challenge to the service of the summons and other personal factors alluded *to* in the preceding paragraphs, he or she would not have granted the default judgment and based on the same facts, eviction order cannot be granted.

[24] Consequently an order is hereby made as follows:

1. Condonation for the late filing of the application for rescission of judgment is hereby granted.

2. The judgment granted by default by the Registrar of this Court on 5 October 2010 is hereby rescinded and set aside.

3. The plaintiff to pay the costs of the application.

4. Application for eviction is hereby dismissed with costs.

**M F LEGODI**
**JUDGE OF THE HIGH COURT**

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