



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: YES NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED
DATE	<u>2015.08</u> <u>2</u> SIGNATURE

CASE NUMBER: 30497/12

DATE: 11 Aug 2015

MBELELO BADELA

Applicant

V

FIRSTRAND BANK LIMITED

First Respondent

LIZELLE SUSAN STRAUSS

Second Respondent

THE SHERIFF JOHANNESBURG NORTH

First Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG

Second Respondent

JUDGMENT

MABUSE J:

- [1] On 30 July 2012 this Court granted default judgment against the applicant in favour of the respondent. The judgment was for payment of a sum of R565,058.69 and, apart for an order of costs, also for a declaration that a certain immovable property ("the property") belonging to the applicant specially executable.
- [2] The applicant describes himself as a major male businessman who resides at [.....], Doornkop, Soweto. According to the applicant the purpose of this application is twofold. The first purpose of this application is to set aside the aforementioned judgment and secondly to set aside the subsequent sale in execution of the said property.
- [3] The applicant seeks rescission of the aforementioned judgment on two grounds, firstly, that it was erroneously granted as contemplated by Rule 42 of the Uniform Rules of Court. In the alternative it is contended by the applicant that the application is brought on the foundation that good cause exists on the basis of which the judgment could be assailed. He contends, in respect of these grounds, that he was not in wilful default in defending the first respondent's action and furthermore that he has a *bona fide* defence.
- [4] In addition he seeks an order setting aside the aforementioned sale in execution. He contends that the attachment and subsequent sale of the said property are null and void as they were followed on an invalid judgment. He seeks in effect an order in terms of which the said property is de-registered from the second respondent's name and re-registered in his names.

[5] The application is opposed on such grounds as are set out in the first respondent's answering affidavit and to which I will in due course refer. The orders sought are strictly speaking sought against both the first and second respondents. Notwithstanding the relief sought in respect of the property, the second respondent has not filed any papers. This seems to be so as a result of the applicant's failure to serve a copy of the application on the second respondent. I have not seen any proof in the papers of any proof of service of the application on the second respondent nor has there been any explanation by the applicant as to whether there has been service of the application on the second respondent. Equally I was not able to establish from the papers that copies of the application were served on the third and fourth respondent. The fact that it was contended that no specific order against them did not relieve the applicant to serve copies of the application on them.

[6] The applicant has set out the facts of the matter as follows. By a financial loan of R522 000.00 ("the loan") which he had obtained from the first respondent, the applicant had purchased the property. The loan was secured by a mortgage bond. While the property was registered in the names of the applicant, a mortgage bond was registered over the property in favour of the first respondent. The first respondent had granted the applicant the said loan on certain terms and conditions. The terms and conditions of the loan agreement which are relevant for the purposes of this application were as follows:

6.1 that the said loan was refundable by the applicant to the first respondent in monthly instalments of R4679.80 ("the instalment");

6.2 that failure by the applicant to pay any instalment or any amount in respect of his liability would be regarded as the default;

6.3 that in the event of the applicant defaulting the first respondent would be obliged to send him a written notice in which he would demand that the applicant should remedy or cure the default within ten days of such notice;

6.4 that in the event of the applicant failing to remedy the default the first respondent would, as it chose, claim immediate payment of the full outstanding balance of the loan. The first respondent would also be entitled to sue for an order declaring the property executable; and,

6.5 lastly that the applicant had chosen the address [.....], Houghton Estate as the address where all the legal proceedings with regard to the loan should be served.

[7] The applicant states that after the sale of the property to him and the grant of the loan to him by the first respondent and even after the property had been registered in his names, he did not reside at the property. In terms of an oral agreement that he had concluded with one Dumile Robert Badela, his brother, he had rented the property to him. Furthermore, in terms of the said oral lease agreement, he and his brother had agreed that his brother should pay the levies and the instalments in terms of the loan agreement that he himself had with the first respondent. His brother stayed in the property from 2 December 2009 up to 30 March 2013.

[8] The applicant has raised a number of reasons why the judgment should be rescinded.

Firstly, he contends that the amount of R565,058.68 claimed by the first respondent is incorrect; secondly that he was unaware that his brother failed to pay the monthly instalments due in terms of the loan agreement; thirdly that he was unaware of the first respondent's action against him until several months after judgment had been granted

against him; fourthly that there was no proper service of the papers relating to the action that resulted in the impugned judgment on him and; sixthly, that at the time the proceedings were instituted by the first respondent against him the first respondent did not have a claim for the full amount outstanding on the home bond.

[9] As correctly pointed out by Mr. Pool in his heads of argument, in terms of our law, an application for rescission of a judgment may be brought in one of the following three ways:

11.1 in terms of common law;

11.2 in terms of Rule 31(2)(b); and,

11.3 in terms of Rule 42.

This judgment is not designed to be a treatise on all the aforementioned three ways. On the contrary it is designed to deal with the manner in which the applicant contends he brought this application.

[10] It will be recalled that the applicant asserted in his founding affidavit that he brought this application for rescission of the judgment in terms of Rule 42 or in the alternative that there is good cause to rescind the judgment. Rule 31(2) (b) provides as follows:

"A defendant may, within 20 days after he or she has the 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 the judgment on such terms as to it seems meet."

Rule 31(2) (b) is employed to set aside default judgments granted in terms of Rule 31(2) (a). It is evident that, based on the allegations contained in the founding affidavit, this application is brought in terms of Rule 31(2) (b) and neither in terms of Rule 42 nor in terms of common law. Applications in terms of Rule 42 can only be brought in order to set aside or vary; (a) an

order or judgment erroneously sought or erroneously granted in the absence of any other party affected thereby; (b) an order which is ambiguous, or contains a clear error or omission; (c) an order or judgment granted by the court following a common mistake to the parties. The purpose of Rule 42 clearly is to correct obviously wrong judgments or orders. The judgment granted by the Court on 30 July 2012 against the applicant in his absence and in favour of the first respondent is not such a judgment. It cannot be said to have been granted by error. In his heads of argument Mr Pool referred the Court to the case of *Lodhi 2 Properties Investments CC v. Bondev Developments (Pty) Ltd* 20070(6) S.A. (SCA) at p. 950-E and submitted that a judgment to which a Plaintiff is procedurally entitled to in the absence of the defendant cannot be said to have been granted erroneously as contemplated in Rule 42 in the light of the subsequently disclosed defence. Such a defence cannot transform a validly obtained judgment into an erroneous one.

[11] No case has been made out in the application for an application brought on common law grounds.

[12] I now turn to deal with the applicant's reasons for bringing this application and I deal with them singly.

[12] 1. The amount of R565 058.69 claimed by the respondent in the main action is incorrect.

The applicant and the first respondent had agreed that the nature and amount of the applicant's indebtedness to the first respondent as well as the annual financial charge rate payable would at any time be determined and proved by a written certificate purporting to have been signed by a Manager or Accountant, for the time being, of any branch or Head Office of the first respondent whose capacity or authority it would not be necessary to prove and which certificate would upon its mere production be binding on the applicant and be *prima facie* proof of its contents of the fact that such amount was due and payable in legal proceedings against the applicant. This is a clause in the agreement of loan to which the

applicant has agreed. Such certificate was annexed to the application by which payment of the aforementioned amount was claimed as Annexure 'E'. It was signed by the Manager Foreclosures. Accordingly there is no merit in the argument that the amount that the first respondent claimed was incorrect.

[12.2]. He was unaware that his brother failed to pay the monthly installments due in terms of the loan agreement.

In 2008 the applicant concluded a loan agreement with the first respondent. In terms of the said agreement the applicant had himself undertaken to pay the monthly instalments. Accordingly the applicant was a party to the loan agreement responsible for due performance. The applicant's brother was no party to the said agreement. From the point of view of the first respondent the applicant's brother had no obligation arising from the loan agreement requiring him to pay anything. When no payment was forthcoming in respect of the loan agreement the first respondent was entitled to look to the applicant for payment. The applicant has provided no proof of cession to his brother of his contractual responsibilities to pay the instalments of the loan agreement. The duty was on the applicant to make sure that the debt was paid, whether by him as he had undertaken in the loan agreement, or by his brother, as they had agreed between the two of them.

[12.3.] The applicant signed an agreement of loan with the first respondent. In the said agreement of loan he undertook to make payments of certain amounts on a regular basis. He certainly was made aware of the repercussions of failure to comply with the terms of the agreement. And he takes his brother and puts him in the house and arranges with him to continue with payment of the instalments in respect of the said property. However, he failed to make sure that his brother makes regular payments of the loan agreement. He has not checked on him, he fails to make enquiry on both his brother and the first respondent as to whether the

first respondent was receiving any payment of the loan agreement. For a further period of 7 months after his brother had left the premises he fails to check on the property and to make sure that everything is in good condition.

[12.4]. That he was unaware of the respondent's actions against him.

The law requires that a party should be warned about a case against him and that he be given chance to defend himself. Such warning is constituted by serving a copy of the claim documents on a party who is notified about a claim against him after which it is expected that as soon as that party receives a copy of the summons he will take steps fend off the claim. According to the papers before us there is proof that a copy of the summons was served upon the applicant in this matter. The return of service states that on 9 day of June 2012 and at 10h30 at Unit 198, door G32 Houghton Village Estate, 32 Boundary Road Houghton Estate annexed the notice of motion was served on the applicant by affixing a copy of the original notice of motion, founding affidavit and annexures to the main door of the given address, such address being the applicant's chosen *domicilium citandi et executandi*. In that manner it is accepted by this Court that a copies of the first respondent's claim documents were properly served on the applicant at the designated address.

[12.5]. Secondly there seems to have been an inordinate and long delay in the applicant bringing this application. He contends that he only became aware of the action on 31 October 2013 when he had gone to prepare the property so that his new tenant could move in. On that day he discovered that the property had been sold to the second respondent on 25 April 2013. He then made enquiries with the first respondent and on 30 October 2013 he was advised by email that the property had been sold in a sale of execution. It is argued by counsel for the first respondent that

had the applicant paid a reasonable amount towards his asset he would have been able to stave off the execution that took place prior to 31 October 2013.

[12.6]. After receiving the email from the first respondent he immediately contacted his attorney, a certain Mr. Eli Chitowitz who investigated further and who ascertained the identity of the first respondent's attorneys. The said attorneys requested to be furnished with the relevant documents relating to the matter in which judgment was taken and the documents were only received on the 10th of December 2013. By this point his attorney was already on leave and he only came back from leave on the 13th of January 2014. The attorney was available for a period of more or less three months and then all of a sudden he was again away for seven days in April 2014. The applicant has furnished no explanation as to why firstly, there was such a long and inordinate delay in obtaining the documents from the first respondents or why the documents were only received on 10 December 2013. There is also no explanation as to why the application was not brought during the three months period to the applicant's legal representative's absence in April 2014. The applicant's main affidavit dated 12 June 2014 by the applicant was only issued from this Court on 20 July 2014. From 12 June 2014 to 20 July 2014 a period of six weeks passed and there has been no explanation forthcoming from the applicant as to why there was such a long delay. To exacerbate matters his averments have not been supported by Mr Eli Chatowitz.

[12.7]. In my view there has been a long unnecessary and unexplained delay in bringing the application for rescission by the applicant.

[12] 8. According to the first respondent, the applicant was sent a notice in terms of s 129 of the NCA on 23 March 2012. The said notice, whose purpose was primarily to draw the attention of the applicant his failure to comply with the terms of the loan agreement, to request him to take steps

to regularise the situation within a given time, to advise him to seek assistance from certain institutions and to warn him of the dire consequences if failed to hearken their advice, was posted to his designated address by registered post on 23 march 2012. The applicant contends that said notice was not delivered in terms of the loan agreement; that no such notice was delivered to him in terms of the NCA. This assertion by the applicant has its genesis in a report to the applicant by his afore mentioned brother in which he denied ever receiving such any documents or registered post office slips notifying him of any item sent to him by registered post. On this basis he denied that he was in default with the terms of the loan agreement. Furthermore he contend that even if the first responded proved that it complied with s. 129 of the NCA, the said notice was premature as he was not in arrears at the time such a notice was dispatched to him.

[12.9]. According to the Randurg Post Office's list of registered item dated 23 March 2012 there was a registered item to the applicant's designated address. It is not the applicant's case that the said address is not his address or that it is wrong. It is for the court difficult to fathom out why a postman would fail to deliver the necessary document at the given address. In the premises this court must accept that in the absence of any explanation, the notice in terms of s 129 was delivered properly delivered at the applicant designated address. In terms of *Kubyane v Standard Bank of S A Ltd* 2014 (3) S A 56 CC the court had this to say:

TJ9 In sum, the Act does not require the credit provider to bring the contents of a section 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be to make the section 129 notice available to the consumer by having it delivered to a designated address. When a consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver generally consists of dispatching the notice by registered mail ensuring that the notice reaches the correct branch of the Post Office for collection

and ensuring that the post Office notifies the consumer (at her designated address) that a registered item is awaiting her collection."

According to *Sebola v Standard Bank of S A Ltd* 2012 (5) 142 CC:

"When a consumer has elected to receive notifications through the postal service, the credit provider must show that-

(i) the section 129 notice was sent by registered mail and delivered to the correct branch of the Post Office, generally to be deduced from a track and trace report,·

(ii) the Post Office informed the consumer that a registered item was available for collection,·

(iii) the notification from the Post Office reached the consumer ,which may generally be inferred if the notification was sent to the correct postal address (as designated by the consumer), unless there is an indication to the contrary; and

(iv) a reasonable consumer would have ensured retrieval of the registered item from the Post Office."

[13] The relevant notice convincingly shows that as at 22 march 2012, the applicant was in arrears in the total sum of R65694. 29. Clause 4.28 of the loan agreement provided that if the applicant should be in default of the agreement, the first respondent may choose to claim immediate payment of the entire amount outstanding from the applicant or terminate the said agreement. Upon termination of the agreement, all the amounts owing by the applicant to the first respondent would forthwith become payable. Accordingly this Court is satisfied that the s 129 notice was properly delivered to the applicant's designated address; that at the time it was dispatched the applicant was in arrears; that therefore the said notice was not sent prematurely and that in terms of clause 4.28 the first respondent was entitled to claim from the applicant immediate payment of the entire outstanding amount. This Court is not satisfied that the applicant has not shown any bona fide defence at all

[14]

[14] In my view, the applicant has failed to satisfy the Court that the judgment obtained against him by default should be rescinded.

Accordingly the application for rescission is dismissed with costs.

P. M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:

Instructed by:

Counsel for the respondents:

Instructed by:

Date Heard:

Date of Judgment"

No Appearance

Attorneys

Adv. D . P o o l

/Re Bezuidenhout van Zyl Inc.

11 August 2015

11 August 2015