IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 69686/09

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: ~~YES~~ / NO.
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3)	REVISED.
19/8/2015 DATE	SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -08- 19
JUDGE'S SECRETARY
REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

EMILIA LUCILLE SUSSANA LOPES APPLICANT

and

STANDARD BANK OF SOUTH AFRICA LIMITED RESPONDENT

Coram: HUGHES J

JUDGMENT

Heard on: 21 April 2015

Delivered on: 19 August 2015

HUGHES J

[1] This is an application for rescission. The applicant seeks to rescind a judgment granted in favour of the respondent on 14 September 2010 in the amount of R812 904.74.

[2] The applicant as the registered owner of ERF 1275 Bonaero Park Extension 3 (the ERF) had two mortgage bonds registered over the property. The first mortgage bond registered over the ERF was on 28 March 2007. In this instance the *domicilium* address was recorded as "33 PIACO AVENUE BONAERO PARK EXTENSION 3". The second mortgage bond registered over the same ERF was concluded on 30 May 2007 and a different *domicilium* address was recorded, this being "24 JOHNSON RD BEDFORDVIEW BEDFORDVIEW 2008".

<u>Service of the section129 notice and the summons</u>

[3] The respondent sent the section 129 notice in terms of the National Credit Act 34 of 2005 (the NCA) to 24 Johnson Road Bedfordview and served the summons at 33 Piarco Avenue Bonaero Park Ext 3. The applicant contends that she did not receive both the section 129 notice and the summons. The explanation advanced is that she did not receive the section 129 notice as she had changed her address which was provided to the respondent when she registered the second mortgage bond.

[4] With regards to the aforesaid address she submits that she had tenants living in the property, if the summons had been served, her tenant would have brought this to her attention. The *prima facie* inference regarding the address where the summons was served is that this is the actual physical address of the ERF, being 33 Piarco Avenue Bonaera Park Ext 3.

[5] The respondent submits that the section 129 notice and the summons were served at the *domicilium* addresses provided by the applicant in respect of the entire debt. She had not changed her address as she alleges but had provide the respondent with a second *domicilium* address and as such the respondent argues, in terms of the Rules of Court, they are entitled to serve the section 129 notice and summons at any one of those address.

[6] In addressing the respondent's argument regard is had to the case of SANDTON SQUARE FINANCE (PTY) LTD v BIAGI, BERTOLA AND VASCO 1997 (1) SA 258 WLD at 260F-G :

"There is nothing notionally wrong in a party choosing more than one domiciliary address. Where this is done, service at either chosen address will in my judgment be sound in law. There is consequently no merit in the first point raised"

In *causa,* as submitted by the respondent, this is exactly what happened with the applicant. She opted to provide the respondent with two *domicilium* addresses for her debt with the respondent. In the circumstances the respondent is at liberty to serve on any one of the said addresses chosen by the applicant as her *domicilium* address. The service was proper as it was served on the applicant's chosen *domicilium* and at the mortgaged property. The fact that it was not brought to her attention by her tenants is no fault of the respondent. This defence must therefore fail.

<u>Judgment erroneously granted</u>

[7] The next defence that the applicant raised is that at the time when judgment was granted her account with the respondent was not in arrears, thus the judgment was erroneously granted in favour of the respondent. In addition she seeks to recover what she avers was an additional charged levied by the respondent on her account of R173 000.00 to which the respondent was not entitled.

[8] I pause to acknowledge that after the judgment was granted the parties entered into an agreement and the applicant has since paid the outstanding arrears. It is notable from the papers that the applicant had omitted to advance what the delay was in seeking the rescission of this judgment was granted in 2010, the application having been launched in April 2014.

[9] The respondent disputes that the judgment against the applicant was erroneously granting. The respondent persist that at the time when the judgment was granted the account of the applicant was in arrears. In illustration of the arrears the respondent demonstrated by the production of the applicants account history.

[10] The monthly debit order of the applicant's was in the amount of R10 156.45, the monthly interest on the loan account was R10 037.00, the service fee was R42.00 and the insurance premium amounted to R274.19. On 20 October 2009 the applicant account reflected an arrears amount of R79 542.29 with her instalment payments. Further, when summons was issued on 27 November 2009, for the period 8 June 2009 until 5 November 2009, the applicant had only paid an amount of R4 800.00 on 5 November 2009 towards payment to her account.

[11] The account history reflected the following payments having been made by the applicant, payments of R5 000.000 for a few months that being December 2009, February 2010, April 2010 and June 2010, which were substantially below what was require. A payment of R5 250.00 was then made in August 2010, a payment of R98 600.00 on 25 January 2011, a payment of R5 250.00 on April 2011 and a payment of R11 000.00 in October 2011.

[12] The respondent conceded that the applicant made payments but emphasised that this was done after the judgment on 14 September 2010. The respondent rubbished the applicant's argument that she did not know of the legal proceedings being pursued against. It argued that it was clear from the huge payment made in January 2011, of R98 600.00, that she was well aware of the respondent's proceedings against her when she made that payment.

[13] The respondent addresses an issue that the applicant makes much of in her papers, which is the letter she received stating that as at 11 February 2011 no arrears were reflected on her account. The respondent submits that this was five months after judgment had been granted on 14 September 2010 and the arrears had been paid by the applicant. The respondent submits that it was not an error when judgement was granted as the account of the applicant was in arrears.

[14] A further defence raised falls within Rule 42(1)(a) the order having been granted by the registrar erroneously sought and granted in the absence of the applicant. It is only logical that the registrar would only be aware of facts in the papers, which were before him/her, and not aware of facts which were not before the registrar when considering to grant judgment. Thus the applicant must demonstrate

that there are facts which the registrar was not aware of which would have prevented the registrar from granting the judgment. In this instance from the papers that were before the registrar requesting default judgment, to me, all that was necessary to grant the judgment was before registrar in order to grant a valid judgment.

[15] Even if I examine the applicant's version that her account was not in arrears, which was not before the registrar when judgment was granted, the documentary evidence clearly set out by the respondent, is that the applicant's account was in indeed in arrears at the time when summons was served and judgment granted. In fact the manner in which she conducted the account leaves much to be desired in that the big payment to settle the debt is made is in January 2011, some five months after judgment was granted in September 2010. Thus in the face of the information which the applicant places reliance upon, which was not before the registrar, there is no basis on the applicant's version that could have precluded the registrar from granting the judgment that was granted.

[16] I am satisfied, that the respondent has demonstrated that it was procedurally entitled to the judgment that had been granted by the registrar. See LODHI 2 PROPERTIES INVESTMENTS CC AND ANOTHER v BONDEV DEVELOPMENTS (PTY) LTD 2007 (6) SA 87 (SCA) at 94 paragraph [25] Streicher JA had the following to say:

"[25] However, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware, as was held to be the case by Nepgen J in *Stander*. See in this regard *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*2003 (6) SA 1 (SCA) ([2003] 2 All SA 113) in paras 9 - 10 in which an application in terms of Rule 42(1)*(a)* for rescission of a summary judgment granted in the absence of the defendant was refused notwithstanding the fact that it was accepted that the defendant wanted to defend the application but did not do so because the application had not been brought to the attention of his Bellville attorney. This Court held that no procedural irregularity or mistake in respect of the issue of the order had been committed and that it was not possible to conclude that the order had erroneously been sought or had erroneously been granted by the Judge who granted the order."

Applicant's claim for excessive amount levied against applicant's account

[17] Besides the rescission the applicant also seeks to recover the amount of R173 000.00 which she alleges was additional charges that were levied against her account for which the respondent was not entitled to. The applicant sought that the amount charged stood to be refunded, alternatively credited against the capital amount that was outstanding on the account.

[18] The respondent explains that the amount of R170 240.08 is made up of interest from 30 September 2009 up to 28 February 2011. The interest had accumulated and was added to the account when final settlement was reached after it was handed back from the legal department.

[19] The way I understand this amount is that, interest that the respondent would have levied against the account during the period that the account was being pursued by the legal cost department, is factored in when a final figure is required to settle the arrears in total. The respondent to my mind is entitled to this amount.

[20] Though it is not raised as a stand-alone defence in the applicant's papers I will address this issue as a purported counter-claim. This information was not before the registrar when the judgment was granted. Could it have precluded the registrar from granting the judgment? To my mind I do not think so as the payment history put up in the papers at page 35 clearly reflect that interest had not been debited for the aforesaid period that is when at the legal department.

[21] This issue is address aptly by Streicher JA in *LODHI* on 91 and 92 at paragraphs [17] and [18] of the judgment:

"[17 In any event, a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the Judge who granted the judgment. In support of their contention to the contrary the applicants relied on authorities such as *Nyingwa v Moolman NO*1993 (2) SA 508 (Tk) and *Stander and Another v Absa Bank*1997 (4) SA 873 (E) to the effect that in an application for rescission of a default judgment in terms of Rule 42(1)*(a)* a Court may in certain circumstances have regard to facts of which the Judge who granted the judgment was unaware in order to determine whether the judgment had been granted erroneously

[18] In *Nyingwa* at 510F - G White J relying on *Topol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W); *Frenkel, Wise & Co (Africa) (Pty) Ltd v Consolidated Press of SA (Pty) Ltd*1947 (4) SA 234 (C); *Holmes Motor Co v SWA Mineral and Exploration Co*1949 (1) SA 155 (C) said:

'It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment.'"

[22] In the circumstances on the defences raised by the applicant dealt with above the applicant has failed to make out a case for the rescission of the judgment that was procedurally correct even in the face of that which was not before the registrar.

[23] In the result the following order is made:

[21.1] the application for rescission is dismissed with costs.

W. Hughes Judge of the High Court