IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no. **3300/2013**
969/2014

In the matter between:

STANDARD BANK OF SOUTH AFRICA Plaintiff

and

SEBUSE DAVID CHABANE 1st Defendant
MPHO JOYCE CHABANE 2nd Defendant

HEARD ON: 26 MARCH 2015

DELIVERED ON: 23 APRIL 2015

S J REINDERS (AJ):

[1] The Standard Bank of South Africa under case number 3300/2013 issued summons against the two defendants for *inter alia* payment of the amount of R115 661.43 together with interest thereon as well as a further order declaring Erf 29, Mangaung, district Bloemfontein specially executable.

[2] In its summons the plaintiff relied thereon that on or about the 13th March 2008 the plaintiff and the defendants entered into a written agreement in terms of which monies were loaned and advanced to the defendants in terms of a home loan agreement and further that a mortgage bond was registered as security for the repayment of the money. Plaintiff averred that due to the failure to repay instalments on the due date as agreed upon, the plaintiff is entitled to the said judgment. Service was effected on the defendants on the 9th day of September 2013 by the Sheriff by placing a copy of the said summons in the post box of the *domicilium citandi et executandi* of the defendants.

[3] On the 11th November 2013 the Registrar granted a judgment by default against the defendants jointly and severally, the one to pay, the other to be absolved in the amount of R115 661.43 together with interest and costs. The request ordering Erf 29, Mangaung, specially executable was referred to Open Court. This application was served on the defendants according to the Sheriff on M P Chabane on the 17th January 2014.

[4] On the 4th of March 2015 the defendants (now the applicants) issued this application (969/2014) wherein they seek an order condoning the non-compliance with the rules of Court and rescinding the order obtained by default against them on the 11th November 2013.

[5] The plaintiff criticises the defendants' application and state that the defendants have failed to set out fully the facts why condonation should be granted. Plaintiff's view is that

defendants are in wilful default and that the defendants failed to sufficiently set out what their whereabouts were on date of the service of the summons as same has been served on the *domicilium* address. Defendants do not deal herewith. Plaintiff avers that the allegations in this regard is particularly bold and clearly not making a full disclosure. Regarding a *bona fide* defence plaintiff submits that the defendants in fact have ultimately two defences to the plaintiff's claim which are self-destructing in that on the one hand the second defendant (second applicant) denied that any agreement was ever entered into in respect of the obligations owed to the plaintiff, but on the other hand substantial payments were made in terms of the said obligations to plaintiff, which shows an intent to be bound by the agreement.

[6] The two defendants are married in community of property. In short Mpho Chabane avers that during 2008 they received a letter from the plaintiff in terms whereof it was alleged that the latter had loaned and advanced an amount of about R100 000.00 to the defendants. This came as a surprise to her and she enquired from her husband (the first defendant) but he averred to have no knowledge of the said obligation. At the time Lesedi Radio Station was running a program dealing with public complaints and after she approached the station she did not hear of the matter again and considered the matter to be settled. However in January 2014 she received the application for the attachment of their immovable property. She never received any summons and, on the 24th February 2014 they went to Court but were told that the matter was already dealt with on the 20th

February 2014. Three days later, they received a warrant for the attachment of the immovable assets. They immediately went for advice and assistance and consulted on the 3rd of March 2014 whereafter this application for rescission was drafted. I might mention that on reading the Court file I did not find any order that the property had been declared specially executable on the 20th of February 2014.

[7] The essence of the defendants' defence is stated by Mpho Chabane as that she never applied for any loan and never signed any agreement nor received any monies from the plaintiff. In fact she calls upon the plaintiff to provide proof thereof. From a reading of the said affidavit, Mrs Chabane would seem to suggest that her husband has entered into these agreements with the banker without her knowing it. Her husband's affidavit in this regard is clearly vague merely stating that he has read the affidavit of Mpho Chabane and confirm the contents thereof in as far as same relates to him.

[8] Having read these affidavits by the defendants I expected the plaintiff to file opposing papers confirming the whole of the transaction and in particular the signatories of the defendants. On face value I notice that the home loan agreement (Part A thereof) is signed by the borrower as well as his/her spouse as well as a signature of the bank representative. Notwithstanding same, no affidavit was filed by the bank representative detailing the negotiations and signing of the said documents. On the contrary, the plaintiff filed an opposing affidavit by Mr Van der Walt, employed as a Senior Manager in the Specialized Legal,

Personal and Business Banking Credit Division of Standard Bank who states that as a result of his designation and position held at the bank, he has insight into the defendant's account and that upon investigation from the plaintiff's records, the plaintiff established that a comprehensive application for finance for the home loan facility has in fact been submitted, supported by copies of identity documents.

[9] Upon receipt of the application for rescission, the plaintiff instructed its fraud department to analyse and investigate the defendants' allegations. The matter was investigated by home loans fraud analyst, Hlekane Chauke and a copy of the said correspondence confirming the findings is attached. The said report states that no fraud was involved and also particularly that the signature on the founding affidavit for Mr Chabane matches the one from their compliance pack but Mrs Chabane's signature does not match.

[10] On the papers before me (and I stress that only on the papers before me) it would seem that Mrs Chabane's defence is confirmed. In fact, the plaintiff confirms that the said document was not signed by her. As mentioned, the bank official who was ostensibly present when the documents were filled out, did not file any affidavit.

[11] In the circumstances the judgment obtained cannot stand and stands to be set aside. Mr Chabane (as a co-applicant) was in a good position to explain to Court how this loan was obtained at the bank. He failed to do so and no replying affidavit was filed.

He will benefit from the rescission of the said judgment. In the circumstances I am of the view that the joint estate (the defendants) should pay the costs hereof.

[12] In the circumstances I make the following order:

1. Condonation is granted for the late filing of this application.

2. The default judgment granted on the 11th November 2013 by the Registrar is set aside.

3. The defendants are to file their notice of defence within ten (10) days of this order.

4. The defendants to pay the costs.

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S. J. REINDERS, AJ

On behalf of the Applicant:	S. Visser Instucted by: Symington & De Kok BLOEMFONTEIN (SVisser/nvdm/MMC1322)
On behalf of the Respondent:	M. Khang Instructed by: Mphalfi Khang Inc BLOEMFONTEIN