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

Case No: 1292/2014

In the matter between:-

PHILLIP ABRAHM SCHOONWYK	1st Applicant
PHILANDA MARTINA SCHOONWYK	2nd Applicant

and

THE STANDARD BANK OF SOUTH AFRICA	Respondent

JUDGMENT BY: TSATSI, AJ

HEARD ON: 7 AUGUST 2014

DELIVERED ON: 9 OCTOBER 2014

INTRODUCTION

[1] This is an opposed application by the first and second applicants ("the applicants"), for the rescission of a judgment granted on 14 May 2014 in favour of the respondent for payment in the sum of R159 973, 19 and interest on the aforesaid amount at the rate of 9% per annum, calculated daily and compounded monthly in arrears from the 4th day of March 2014 until date of final payment.

[2] The applicants asked the court to grant them the order in the following terms:

2.1 That condonation be granted for the bringing of this application after the prescribed time limit;

2.2 That the judgment as given by the Honourable court on 14 May 2014 in favour of the respondent and against first and second applicants for payment in the sum of R159 973, 19 and interest on the aforesaid amount at the rate of 9% per annum, calculated daily and compounded monthly, in arrears from the 4th day of March 2014 until date of final payment be rescinded;

2.3 That leave be granted to the first and second applicants to defend the main action;

2.4 That the matter be referred back to the Magistrate's court to make a finding in terms of section 86(11) of the National Credit Act 34 of 2005;

2.5 Costs of the application; and

2.6 Further and/or alternate relief.

FACTS

[3] The applicants purchased residential property, Erf 3539 Ashbury (Ext 6) district Bloemfontein, ("the property"). A mortgage agreement was entered into between Standard Bank of South Africa Limited and the applicants, the total cost of which was R360 249,60. They have been paying for the mortgage since 1991. In terms of the mortgage bond the

property served as security for the loan. During March 2014 the applicants fell in arrears with their monthly repayments. On March 2014 a summons was served on the applicants. The respondent applied for default judgment in terms of Rule 31(5) of the Uniform Rules of Court on the basis that the applicants failed to enter an appearance to defend on or before 9 April 2014. On 14 May 2014, the Registrar granted default judgment against the applicants at the respondent's instance for payment of R159 973, 19. In addition interest on the aforesaid amount of R159 973, 19 at the rate of 9.00% per annum calculated daily and compounded monthly in arrears from 4 March 2014 until date of payment.

[4] The Registrar referred the following prayers to open court: Leave to be granted in open court for an order declaring the under mentioned property, Erf 3539 Ashburn, Extension 6, district Bloemfontein, Free State Province in extent 350 square metres held by deed of transfer no. T1065/1991 subject to the conditions therein contained and further subject to a reversionary right executable (ii) authorizing the Registrar to issue a writ of execution against the property in question (iii) costs as between attorney and own client to be taxed.

[5] The respondent subsequently brought an application under case number 1292/2014 in this court for an order declaring the property, subject to the conditions therein contained and further subject to a reversionary right executable. In addition the application was brought for an order authorizing the Registrar to issue a warrant of execution in respect of the property and also for an order of attorney and own client costs against the applicants.

[6] The application was set down for 19 June 2014 but postponed *sine die* as per the agreement between the parties.

[7] Before the summons was issued against the applicants, the latter applied for a debt review on 3 September 2013 with Zuné Coetzer. Zune' Coetzer is a debt counsellor, duly registered with the National Credit Regulator in terms of section 44 of the National Credit Act, Act 34 of 2005 ("the Act"). On 4 September 2013 notice of the applicants' application to be placed under debt review was sent to all of the applicants' credit providers including the respondent. On 27 November 2013 an application was issued in the Magistrate's court of the district Bloemfontein, under case number 28553/2013 where an order was sought to declare the applicants over-indebted as contemplated in section 79 of the Act. The said order was to re-arrange the applicants' debts in accordance with a debt repayment scheme proposed as drafted by the debt counsellor as contemplated in Section 86(7)(c)(11) of the Act. The respondent gave its intention to oppose the application for debt review. The matter was postponed several times, subsequently *sine die* by agreement between the parties in this court.

<u>ISSUES</u>

[8] The main issue in this application is whether or not the applicants' default is a wilful one and whether the applicants have a *bona fide* defence.

SUBMISSIONS

[9] Counsel for the applicants argued that condonation be granted to the applicants for bringing this application after the prescribed time. It was submitted on behalf of the applicants that they were not in wilful default. The reasons given were that when the summons was served on the applicants, the latter were under the false impression that the summons formed part of the review application. This was because the applicants, were informed by the debt-counsellor that the debt review application would be heard in the Magistrate court on 28 March 2014, which was two days after the summons was served. Counsel for the applicants submitted that the applicants entrusted their debt review application in the hands of the debt counsellor and their legal representatives.

[10] The only time when the applicants realised that something was amiss, was when the notice of the default judgment application brought by the respondent under case number 1292/2014 was served on them. Subsequently the respondent obtained a default judgment against the applicants on 15 May 2014. The property in question is a primary residence for the applicants and their minor child. The minor child was born on 26 January 2001. The applicants did not have any alternative accommodation available.

[11] Even though this was not an application before me, counsel for the applicants argued that Section 26 of the Constitution of 1996 provides that everyone has the “right to have access to adequate housing”. Subsection (3) provides that: “no one may be evicted from their home … without an

order of court made after considering all the relevant circumstances." It was argued on behalf of the applicants that the respondent cancelled the debt review. Further submission by the applicants' counsel was that the applicants never received the termination notices despite the fact that the respondent alleged that they sent same to the applicants by registered mail.

[12] Counsel for the respondent made the following submissions: that the applicants were in wilful default, therefore there was no *bona fide* defence. The applicants should have shown good cause that they had a reasonable explanation for the default. Wilful default was normally fatal but gross negligence may be condoned. Wilful in this context connoted knowledge of the action and its legal consequences and a conscious decision, freely taken to refrain from entering an appearance to defend, irrespective of the motivation. The applicants should have shown that they had a bona *fide* defence against the plaintiff's claim. Counsel for the respondent referred me to this authority. (Harms: "Civil Procedure in the Superior Court", B-2014: **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 476 (O)).

[13] A further submission by the respondent's counsel was that summons was issued through the Registrar of the High Court on 18 March 2014 and the summons was served personally on the first applicant on 26 March 2014. The summons referred the applicants to the fact that the debt review process had been terminated by the respondent in terms of Section 86 (10) of the National Credit Act, Act 34 of 2005. Attached to the summons were notices of termination sent to the applicants, the debt counsellor and

the National Credit Regulator. Counsel for the respondent made the court aware of the "Track and trace" registered slip from the Post Office. The dates when and where the notices were delivered appeared on the said slip. Counsel for the respondent further submitted that the respondent was entitled to cancel the debt review because the 60 business days elapsed since the applicants applied for the debt review. Based on the "track and trace" registered slip from the post office it was evident that the applicants received the termination notices.

[14] Even though this was not an application before me, the respondent's Counsel argued that Section 26(3) of the Constitution did not apply in this case. The Supreme Court of Appeal found that the effect of the registration of a mortgage bond was that the borrower, by his or her own volition compromised his or her right of ownership until the debt was repaid. The right to continued ownership and occupation depended on repayment. Counsel for the respondent referred me to this authority. (**<u>Standard Bank of South Africa Ltd v Saunderson and Others</u>** 2006 (2) SA 264 (SCA)).

<u>THE LAW</u>

[15] Rule 31(2) (b) of the Uniform Rules of High Court provides that *"A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside the default judgment on such terms such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."*

[16] The requirements for the rescission of judgment are similar to the ones of removal of bar, in that the applicant must give:

(1) a satisfactory explanation for the delay;

(2) the application must be *bona fide* and not simply to delay;

(3) a *bona fide* defence must be established which is not patently unfounded and is based on facts, if proved, constitute a valid defence. **Nathan (Pty) Ltd v All Metals (Pty) Ltd** 1961 (1) SA 297 at 300.

[17] In **Chetty v Law Society, Transvaal** 1985 (2) SA 756 AD Miller JA, on behalf of unanimous court, dealt with the term “sufficient cause” or “good cause” when used in the context of an application for rescission of a judgment. At 765D-E he said:

> “For the obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanations of his default other than his disclaims of rules was nevertheless permitted to have a judgment against him rescinded on the grounds that he had reasonable prospects of success on merits.”

[18] The *onus* was upon the applicants for rescission to establish that “good cause” existed. Good cause cannot be satisfied unless there was evidence that a substantial defence existed and that the applicants had a *bona fide* desire to raise the defence if the application was granted (**Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd** 2011 (3) SA 477 (KZN).

[19] Section 86(11) provides that: "If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce the agreement in terms of part C of Chapter 6, the Magistrate Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances."

APPLICATION OF THE LAW

[20] The applicants gave an explanation for noncompliance with the uniform rules of Court. Counsel for the respondent did not oppose condonation. I am inclined to grant condonation as I am of the view that the respondent will not suffer any prejudice.

[21] I am of the view that the explanation that the applicants gave as to why they are in default was not satisfactory. Such explanation was not adequate and complete. It is highly improbable that the debt counsellor, the legal representatives of the applicants and the applicants themselves would not have known the significance of summons served on the applicants. It also highly improbable that none of the parties would not have known that such summons initiated a legal process against the applicants that had a potential of getting them evicted from their home. I am inclined to think that it was because of an error of judgement on the part of the applicants' failure to attend to the summons at the material time. I am mindful of the fact that although the applicants did not have legal background, they are not illiterate people. One of the applicants is a lecturer at one of the academic institutions. I am not convinced that the

applicants had reasonable prospect of success on the merits, therefore leave to defend will not take the matter any further. I am therefore not inclined to grant leave to defend.

[22] The respondent complied with the practice note issued by the Supreme Court of Appeal in **Standard Bank of SA Ltd v Saunderson and Others** 2006 (2) SA 264 (SCA) at 277D-E which provides as follows: *"the Defendants' attention is drawn to Section 26 (1) of the Constitution of the Republic of South Africa which accords everyone the right to have access to adequate housing. Should the Defendants claim that the order to execution will infringe that right it is incumbent on the Defendants to place information supporting that claim before the Court".* The respondent inserted the preceding clause in the summons served on the applicants. I am not inclined to believe that the debt counsellor and legal representatives of the applicants ignored a legal action instituted by the respondent against the applicants. The problem did not end there, as the applicants also alleged that they did not receive the termination notices. This was despite the fact that the respondent registered the termination notices. The registered post slip and "parcel tracking results" were attached to the court papers. There was no allegation that the respondent sent the termination notices to the wrong address. I fail to understand why the applicants did not receive the termination notices if same were sent to the correct address and registered.

[23] The registered termination notices were sent to the applicants on 21 February 2014. The summons was served on the applicants on 26 March 2014. Issue and service of summons occurred after the expiry of

the prescribed ten day notice in terms of section 86 (10) and section 130 (1)(a) of the National Credit Act. The purpose of the minimum ten day period that must elapse after the delivery of the notice in terms of section 86 (10) and the commencement of enforcement proceedings appears to enable the consumer to urgently bring an application to the Magistrate in terms of section 86 (7) (c) or 86 (8) (b) if that has not already been done. If such an application is already pending to give the consumer an opportunity to approach the magistrate for an order in terms of section 86 (11) of the National Credit Act) that the debt review should be resumed (**Changing Tides 17 (Pty) Ltd v Erasmus** 2010 JOL 25358 WLC). In this matter the respondent complied with the requirements of section 129 (1) and 130 (1) of the Act. I am therefore not required to deal with the application for default judgment in terms of section 130 (4) (b) of the Act. I am satisfied that I did not have to adjourn the matter to set out steps that the credit provider must follow before the matter could be resumed. I am of the view that by failing to attend to the termination notices, the applicants missed the ten day period opportunity to urgently bring the matter to the magistrate in terms of section 86 of the Act that the debt review be resumed. In light of the preceding I am of the view it will not be necessary to revert the matter to the magistrate to enable the magistrate to make a finding in terms of section 86 (11).

[24] The applicants’ purported reliance on Section 3(g), (h), (i); 86(1) and 11 of the Act, in my view was ill conceived. The said sections were not relevant in determining whether or not the applicants were in wilful default and whether or not they had a *bona fide* defence.

[25] As regards section 26 of the Constitution, I am accordingly in agreement with counsel for the respondent that "the effect of the registration of a mortgage bond was that the borrower, by his or her volition compromised his/her rights of ownership until the debt was repaid. The right to continued ownership, and hence occupation, depended on repayment." The mere fact that the property was the home of the applicants did not by itself justify an inference that section 26 rights are implicated. I echo the words of Rogers AJ in **Standard Bank of South Africa v Hunkydony Investments 1B8 (Pty) Ltd and Others** (NO.2) 2010 (1) SA 634 (WCC) at para 30, that *"section 26 of the Constitution enshrines the right of access to "adequate" housing, not a right to continue living in a house of one's choice even though one cannot afford it."*

[26] Summons was served on the applicants personally nothing was done by the applicants. The respondent sent registered termination notices, still the applicants allege that they did not receive the said notices. The applicants only acted when a default judgment was served on them. I am of the view that the applicants did not put up sufficient facts which convinced me that, a court having been aware of all the facts at the time of the granting of the default judgment, would have ordered otherwise.

[27] In light of the preceding I am not convinced that the explanation given by the applicants for their default was satisfactory and *bona fide.* Neither am I convinced that the applicants' default was *bona fide.*

[28] In the result I make the following order:

28.1 Condonation for the late filing of the applicants' papers is granted.

28.2 Application for the rescission of judgment in favour of the respondent and against the applicants for payment in the sum of R159, 973.19 and interest on the aforesaid amount at the rate of 9% per annum, calculated daily and compounded monthly, in arrears from 4 March until date of final payment, is dismissed with costs.

E. K. TSATSI, AJ

On behalf of the applicants:	Adv. R van der Merwe Instructed by: Neuhoff Attorneys BLOEMFONTEIN
On behalf of the respondent:	Adv. P. Zietsman SC Instructed by: Matsepes Inc. BLOEMFONTEIN

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