

**NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

STATEMENT OF DEFENSE: YES/NO: ☒ YES
NOT ON TABLE: YES/NO: ☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO: ☒ YES
(3) REVISED: ☐
14/06/2012
In the matter between: SIGNATURE

Gase No.: 6851/2007

15/6/2012

PULE VICEROY HILLARY MAOKA
DIKELEDI REBECCA MAOKA

1st Applicant
2nd Applicant

and

CHANGING TIDES 17 (PTY) LIMITED
SAMUEL MASHABANE MTSHWENI
SHERIFF OF WONDERBOOM
REGISTRAR OF DEEDS, PRETORIA
CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent

JUDGMENT

MNGQIBISA-THUSI, J

[1] The applicants are seeking an order rescinding the default judgment granted on 2 August 2007 against them. Further, in their notice of motion, the applicants seek the following relief:

1.1 an order directing the fourth respondent to reverse the registration of the property, Erf 1742, The Orchards, Extension 11, Pretoria ("the property"), which is

currently registered in the name of the second respondent and to register it in their names.

1.2 that the first respondent be ordered to refund to the applicants all rent and rates paid to the second respondent; and

1.3 that the first respondent and any other respondent opposing this application pay the costs of this application on an attorney and client scale.

[2] The first and second respondents are opposing the application for rescission of the default judgment. Further, the second respondent is seeking an eviction order against the applicants.

[3] It is common cause that:

3.1 during 2003 the applicants and the first respondent concluded a loan agreement for the acquisition of the property. The loan was covered by a mortgage bond in favour of the first respondent.

3.2 during 2007 the applicants defaulted on their repayments. As a result of the default, the first respondent issued summons on 26 February 2007 and served them on the applicants on 6 March 2007.

3.3 The applicants did not enter an appearance to defend. Instead, on 23 March 2007 the applicants signed a confession to judgment in terms of Rule 31(1) of the Uniform Rules of Court which provided, *inter alia*, that:

"WHEREAS the Summons was served upon the First and Second Defendants on the 6th March 2007.

...

BUT WHEREAS the Plaintiff is for the present refraining from taking Judgment by Default against the First and Second Defendants in pursuance of an agreement entered into between the parties.

NOW THEREFORE THESE PRESENT WITNESSES:

...

3. In terms of the aforesaid summons the First and Second Defendants confirm that in the event of the Plaintiff taking Judgment in terms of this document against them they acknowledge that an order declaring the aforesaid property specifically executable shall also be granted.
4. The Defendants undertake to effect payment of the following amounts to the Plaintiff:
 - 4.1 Payment of the sum of R 17 000.00 on or before the 31st March 2007.
 - 4.2 Payment of the sum of R9 351.25 on or before the 15th April 2007.
 - 4.3 Payment of the Plaintiff's legal costs.
 - 4.4 Further bond instalments in terms of the mortgage bond registered by the Plaintiff over the First and Second Defendants' property as from the 17th of April 2007 and thereafter on the same day of each and every month.

- ...
6. Should the First and Second Defendants fail to effect timeous payments of any amounts payable in terms hereof or breach any condition or term contained herein or the mortgage bond registered over the property, the entire balance of the Plaintiff's claim shall immediately become due and payable without any notice whatsoever to the First and Second Defendants.
 7. In such an event the First and Second Defendants hereby expressly agree and consent to Judgment by Default in respect of the outstanding balance of the Plaintiff's claim as also that the property referred to herein before be declared specifically executable being granted against the First and Second Defendants on the strength of this Confession without any notification whatsoever in this regard to the Defendants."

3.4 although the applicants made some payments in accordance with the schedule set out in the confession to judgment in order to pay off their arrears, the applicants again defaulted on their repayments.

3.5 as a result of the applicants' default, the first respondent applied to the Registrar for a default judgment under rule 31(5) which was granted on 2 August 2007. Thereafter a writ of execution was issued.

3.6 several executions against the applicants' property were suspended as each time the applicants had paid the arrears in order to stave off the sale in execution.

3.7 on 16 July 2010 the property was eventually sold in execution when the applicants again fell into arrears.

3.8 the property was sold to the second respondent at an auction sale and the property was transferred into the second respondent's name on 12 January 2012.

[4] The applicants are seeking the rescission of the default judgment under Rule 42(1)(a) on the ground that the default judgement was erroneously sought and/or erroneously granted. Rule 42(1)(a) provides that a court may, in addition to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. This means that the applicant has to show that the court in granting the default judgment had committed an error "in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record. *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD). If the applicant can prove the error committed by the court, it is not necessary for him to explain his default.

[5] The applicants' contention that the default judgment was erroneously sought and erroneously granted is based on the following:

5.1 The applicants contend that since the parties had signed a confession to judgment in terms of Rule 31(1), the first respondent were not entitled to seek default judgment against them under Rule 31(5) but should rather have used Rule 31(1).

The authorities cited in the applicants' heads of argument and on which the applicants rely do not assist. These authorities do not support the applicants' contention that once a confession to judgment is sought, an aggrieved party cannot seek relief using any other applicable rule except Rule 31(1). The authorities cited highlight the fact that the requirements for a valid confession to judgment are peremptory. The applicants have indicated that at the time they signed the confession to judgment they did not have an attorney who would also have signed. There is no indication also that a verifying affidavit exist. This does not assist the argument of the applicants that the first respondent should have relied on the confession to judgment in seeking default judgment.

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- 5.2 When applying for default judgment, the first respondent did not disclose the existence of the confession to judgment. It is the applicants' contention that the confession to judgment was a relevant fact which the Registrar would have considered in deciding whether or not to grant default judgment.

The facts in *Keenan-Smith and Another v Changing Tides 17 (Pty) Ltd* [2010] ZAGPH 272; 13381/2009(17 JUNE 201), referred to by the applicants in their heads of arguments, are distinguishable from the facts in this case. In that case the applicant was, at the time the default judgment sought to be rescinded, under debt review. The respondent did not disclose this fact which was pertinent to the proceedings and which might have influenced the decision to grant default judgment. The existence of the confession to judgment is not of relevance in view of the procedure the first respondent elected to use to obtain default judgment against the applicants.

- 5.3 The applicants also challenge the competency of the first respondent to have applied for default judgment when they were not at the time in arrears. However, the first respondent has shown that the applicants were indeed in arrears not only

at the time the default judgment was sought but also subsequent thereto.

- 5.4 The applicants also contend that it was not competent for the Registrar when granting default judgment to have declared their property to be specially executable without referring the matter to open court to be considered by a judge. One has to bear in mind that at the time default judgment was granted the decision in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) had not been made and the Registrar then had the power to declare immovable property specially executable.

However, in view of the fact that the *Gundwana* decision (*supra*) has retrospective effect, the applicants are within their rights to seek the rescission of a default judgment which provides for execution against their property.

- [6] In order to succeed in having the default judgment rescinded, the applicants need to explain their default and to show that they have a bona fide defence to the first respondent's claim. In this regard the constitutional court in the *Gundwana* matter (*supra*) stated at 628 that:

"There may be a fear that the decision in this matter will lead to large-scale legal uncertainty about its effects on past matters, where homes were declared specially executable by the registrar, and sales in execution and transfers followed. The experience following *Jaftha* may be an indication that this fear is overstated. It must be remembered that these orders were issued only where default judgments were granted by the registrar. 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. In other words, the mere constitutional invalidity of the rule under which the property was declared executable, is not sufficient to undo everything that followed. In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier, and they will have to set out a defence to the claim for judgment against them. It may be that in many cases those aggrieved may find these requirements difficult to fulfil".

- [7] It is common cause that the applicants knew about the default judgment on 15 August 2007 when the notice of attachment and the writ of execution were served on them. The applicants have not given an explanation as to why they have not sought the rescission of the default judgment earlier, particularly in view of the grounds on which they sought to have the judgment rescinded. Further, having knowledge of the default judgment, it is common cause that each time the first respondent scheduled a sale in execution, the applicants would pay the accrued arrears in order to stop the property from being sold. Although on 18 September 2011 the applicants' attorney had written a letter to the first

respondent's attorney giving notice that the applicants intended bringing an application for the rescission of the default judgment, nothing came of it. Furthermore, on 22 February 2011 the applicants and the second respondent agreed that the applicants could remain on the property until the end of March 2011 and that the applicants would pay occupational rent to the second respondent

[8] Through their conduct the applicants have acquiesced to the judgment. At no stage until the property was sold did they indicate an intention to challenge the validity of the default judgment or to have it rescinded. The second respondent has acquired the property for value. There does not seem to be any evidence of any irregularity in the sale in execution. The claim that the first and second respondents colluded in the sale seems far-fetched. The second respondent has now acquired real rights in the property and I see no reason why these rights should be taken against him, particularly as there is no evidence of any fraud in the transaction of the sale of the property.

[9] As indicated in paragraph 2 above, the second respondent brought a counter application in which it is seeking the eviction of the applicants from the property. On 24 October

2011 this court granted an order authorisation the second respondent to serve the applicants and the fifth respondent with a notice in terms of section 4(2) of the **Prevention of Illegal Evictions from and Unlawful Occupation of Land Act** 19 of 1998 ("the PIE"). The second respondent is now seeking the eviction of the applicants from the property. The provisions of section 4(2) of the PIE do not apply since the eviction that is being sought is founded on a sale in execution based on a mortgage bond.

[10] I am satisfied that it will be just and equitable to order the eviction of the applicants from the property as the second respondent has shown sufficient cause for the granting of an eviction order.

[11] Accordingly the following order is made:

1. The application for the rescission of the default judgment granted on 2 March 2007 is dismissed with costs.
2. The first and second applicants are ordered to vacate the property situated at 1742, Orchards extension 11, Pretoria, Gauteng) ("the property") within 60 days from the date of this order.

3. Should the first and second applicant fail to vacate the property within the period state in paragraph 1, the sheriff is authorised to evict the applicants from the property.
4. The sheriff is authorised to request members of the South African Police Service to assist in the eviction of the applicants from the property.
5. The applicants are ordered to pay the costs of the counter application.



NP MNGQIBISA-THUSI
Judge of the High Court