

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case no.: 3591/2012

In the matter between:

NEDBANK LIMITED

APPLICANT

and

RZT ZELPY 4808 (PTY) LTD
(REGISTRATION NO: 2006/016287/07)

FIRST RESPONDENT

THEMBA WELCOM MTETWA
(IDENTITY NO:)

SECOND RESPONDENT

GEORGINA MTETWA
IDENTITY NO:)

THIRD RESPONDENT

JUDGMENT

Date of Judgment: 08 November 2012

Vahed J:

[1] The applicant seeks an order evicting the respondents (but essentially the second and third respondents) from certain immovable property situated at 15 Greenacre Place, Kloof, KwaZulu-Natal ("the property"). The application is brought in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19

of 1998 ("PIE"). The respondents resist that relief. The basis for their opposition will become clear after I recount briefly the relevant background facts.

[2] It is common cause or not seriously in dispute that:-

- 2.1 During September 2006 the first respondent and the applicant concluded an agreement in terms of which, against the security of a mortgage bond over the property, the applicant lent and advanced the sum of R1 685 500,00 to the first respondent. In terms of that agreement the second and third respondents agreed to bind themselves as sureties and co-principal debtors, together with the first respondent, for the repayment of that debt. In due course the mortgage bond was registered and the suretyship agreements by the second and third respondents were concluded.
- 2.2 During August 2010 the applicant instituted action against the respondents out of the KwaZulu-Natal High Court, Pietermaritzburg under case number 7046/2010, for the repayment of that loan and for an order declaring the property specially executable. In that action it was alleged that the first respondent had breached the loan agreement thereby entitling the applicant to proceed as it did.
- 2.3 On 28 September 2010 judgment by default was granted against the respondents.
- 2.4 On 2 December 2010 the respondents were notified of a sale in execution of the property which was scheduled to take place on 26 January 2011.
- 2.5 On 26 January 2011 the sale in execution scheduled for that day was cancelled as result of entreaties made by the second and third

respondents concerning the repayment of the judgment debt. Further correspondence was exchanged between the parties during that month.

2.6 On 10 February 2011 the respondents were again notified of a further sale in execution scheduled for 13 April 2011. There is a suggestion in the papers that the second respondent was also advised, both by electronic mail and telephonically, of that sale, those communications having taken place on 31 March 2011.

2.7 On 12 April 2011 an exchange of correspondence took place with the respondents attempting to settle the matter with the applicant. Nothing came of that and on 13 April 2011 the applicant bought the property at the sale in execution.

2.8 On 2 August 2011 the property was transferred to the applicant.

[3] In its founding papers the applicant indicates that it has now sold the property to a third party to whom it has promised vacant possession. It cannot deliver on that promise and comply with its obligation to give vacant possession because the respondents remain in occupation of the property and refuse to vacate it.

[4] The respondents contend that the judgment taken against them, in default of entry of an appearance to defend, on 28 September 2010 falls to be rescinded. They contend further that once that rescission takes place everything that flowed from the grant of that judgment, including the sale to the applicant and transfer to it, and indeed the subsequent sale by the applicant to a third party, is of no moment and falls to be set aside as well.

[5] The facts underlying that contention appears to be the following:-

- 5.1 On 15 September 2010 the respondents' attorney wrote to the applicant's attorneys advising them that he had been approached by the respondents after receipt of the summons and indicated that the respondents were "in an unfortunate position" and as a result thereof made certain settlement proposals. That letter reflected two indicated methods of delivery, firstly by telefax and secondly via a courier service. For reasons which are not explained, and although the letter is dated 15 September 2010, it was only telefaxed to the applicant's attorneys at 15H27 on 27 September 2010. It appears that the courier may have delivered a copy of the letter to the applicant's attorneys on the previous day.
- 5.2 On 28 September 2010 the respondents' attorney wrote to the applicant's attorneys indicating that he was anxious to receive a response to the settlement proposal. That letter was telefaxed to the applicant's attorneys at 15H06 on 29 September 2010.
- 5.3 On the same day the respondents' attorney telefaxed a copy of the Notice of Intention to Defend to the applicant's attorneys. That notice was also forwarded to the Registrar of the High Court in Pietermaritzburg and to the applicant's attorneys via courier and it was lodged with the Registrar on 29 September 2010 and physically delivered to the applicant's attorneys on 1 October 2010.
- 5.4 On 1 October 2010 the applicant's attorneys acknowledged receipt of the letters of 28 September and the Notice of Intention to Defend of 28 September but by then default judgment had already been applied for and was granted on 28 September 2010.
- 5.5 Thereafter correspondence was exchanged between the parties with a view to settling the debt and avoiding the sale in execution. During that interaction there does not appear to have been a suggestion either from the respondents or from their attorney that the judgment had been incorrectly

applied for or erroneously granted or that the respondents intended applying for its rescission.

5.6 Be that as it may, the respondents now contend that given that interaction at about the time the judgment was obtained, the respondents were not in wilful default of entry of appearance and that therefore the judgment falls to be rescinded.

[6] That point is taken in the respondents' answering papers and indeed, to bolster it, they have instituted a counter application asking for the application to be stayed pending the final determination of their application in the Pietermaritzburg High Court for an order rescinding the judgment.

[7] During argument I was informed by counsel that the application for rescission had been launched the previous day and that the applicant's counsel had been furnished with an informal copy of the papers in that application. Neither side thought it necessary to disclose the contents of that application to me and I was not furnished with a copy of those papers.

[8] Almost the entire argument that unfolded before me was devoted to whether the eviction order ought to be granted against the backdrop of the facts I have outlined above. In other words the question was whether I ought to either refuse or stay the application for eviction pending the outcome of the rescission application. It followed then that the argument turned on whether there were decent prospects of success with regard to the application for the rescission of the judgment.

[9] The facts reveal that the notice of intention to defend was received after default judgment had been entered by the Registrar in the Pietermaritzburg High Court.

[10] I pause to mention that it is obvious that the judgment by default granted by the Registrar was competent at the time in that predates it the order of the Constitutional Court in *Gundwana v Steko Development and others* 2011 (3) SA 608 (CC).

[11] On the face of it it seems to me that the Registrar was quite entitled to enter default judgment against the respondents because the Notice of Intention to Defend had only been delivered after that had taken place. Whether the respondents were in wilful default of delivery of that Notice of Intention to Defend is the real question. There is simply no explanation on the papers as to why a Notice of Intention to Defend was not delivered earlier. Indeed it appears that as early as 15 September 2010 the respondents' attorney was alive to the fact that he had to deliver such notice but sought only to engage in correspondence, and then too delayed in transmitting that correspondence to the applicant's attorneys. There is no suggestion in the papers that some fact or circumstance lead the respondents attorney to conclude that there was no urgency with regard to the delivery of that Notice of Intention to Defend and in those circumstances must conclude that the delay in delivering the Notice of Intention to Defend is something that must be laid at the respondents' door. However the enquiry does not end there.

[12] In the intended application for rescission of the judgment the respondents will have to demonstrate that they have a bona fide defence to the applicant's action. It is with regard to that second leg of the test that the respondents' raised the defence that they were not favoured with a Notice in terms of Section 129 of the National Credit Act, Act 34 of 2005 ("NCA"). It is common cause that no such notice was sent to the respondents alternatively, if one was sent it was sent to the incorrect address.

[13] That, however, is of no assistance to the respondents. In my view, on a proper interpretation of the NCA, the respondents were not entitled to a Notice in terms of Section 129 of the NCA. It is clear that the credit agreement governing the transaction between the respondents and the plaintiff is hit by both Sections 4(1)(a) and 4(2)(c) of the NCA. On the probabilities a mortgage bond over a property securing a loan in excess of R1,6 million is suggestive of the fact that it is more than reasonable to conclude that the property itself is worth at least that amount, or probably something more than the amount of the bond. The threshold value determined for the applicability of Section 4 of the NCA is R 1 million and the amounts we are concerned with here are

well in excess of that threshold value. As first respondent being a juristic person as referred to in the section, the NCA does not apply to it or to the credit agreement (i.e. the loan agreement) concluded between it and the applicant. It follows therefore that the suretyship agreements concluded by the second and third respondent are agreements hit by section 4(2)(c) and accordingly the NCA does not apply to those agreements as well.

[14] Accordingly, there was no obligation upon the applicant to furnish the respondents with Notice in terms of Section 129 of NCA and that defence is bad in law. That forces me to the conclusion that the respondents do not enjoy reasonable prospects of success in the intended rescission application.

[15] Having reached that conclusion it is necessary to ascertain whether or not the respondents have set up any facts or circumstances which constitute relevant circumstances entitling me to deny the applicant the relief it seeks. The respondents have shown no relevant circumstances.

[16] When the argument was all but concluded the respondents' attorney then indicated that there was nevertheless still a bar to the applicant being granted the relief sought. That was so, according to him, because the applicant had not delivered a Notice in terms of Section 4(2) of PIE. It will be recalled from a consideration of the judgment in *Cape Killarney Property Investments (Pty) Ltd v Mahamba and others* 2001 (4) SA1222 (SCA) that a Notice in terms of Section 4(2) of PIE is a necessary precursor to an application for the eviction of any person in occupation of residential property.

[17] Indeed, when this application was launched it was envisaged that such a notice would be served, the notice being an annexure to the founding papers and it being intended that a preliminary order would be sought to authorise the delivery of that notice. However, matters overtook themselves when, upon receipt of the founding papers, the respondents opposed the application. Affidavits were exchanged in the "principle" case and it was completely overlooked that the applicant had not delivered a Notice in terms of Section 4(2) of PIE. Section 4(5) of PIE indicates that the purpose of

a Notice in Terms of Section 4(2) is four-fold. It requires an applicant to firstly indicate that proceedings were being instituted for an order for the respondents' eviction, secondly to indicate the date and time that the matter was to be heard, thirdly to set out the grounds of the proposed eviction and, finally, to indicate to the respondents that they were entitled to appear at court, defend the case and, where necessary, had the right to apply for legal aid. The question that then arises at this stage of the proceedings is this: Have the respondents been prejudiced in any of the respects that Section 4(5) was intended to address? I think not.

[18] In *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA199 (SCA) Brand JA said (at paragraph 22) that "... it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the objects of the statutory provision had been achieved (see *eg Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433 h – 434 b; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) in para [13])".

[19] Brand JA went on, in paragraph 24 of *Unlawful Occupiers*, to say that "...the question whether in a particular case a deficient s 4(2) notice achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew."

[20] In this matter the applicant's failed to deliver the section 4(2) Notice separately. However a draft copy had already been served amongst the founding papers and was already with the respondents when they delivered their Notice of Opposition and thereafter delivered their answering affidavits and counter application. By the time the matter was argued before me as an opposed motion they had had all the benefits of those matters set out in Section 4(5) of PIE such that the further delivery of a notice that complied with Section 4(2) of PIE would have been completely unnecessary. Accordingly, and relying upon the authority of *Unlawful Occupiers* and the authorities there cited, I am of the view that the failure to serve the Section 4(2) Notice is not fatal.

[21] In the result, and for the foregoing reasons, the conclusion I reach is that I must find for the applicant but before doing so must say something about the date upon which the respondents would be required to vacate the property. In the order sought the applicant requires that the respondents vacate within 48 hours of the service of the order upon the respondents. In some way that is sought to be justified by the applicant when it says that the property has already been on sold to a third party and requires vacant possession in order to deliver vacant possession to that third party. While that may be so I am of the view that requiring the respondents to vacate at such short notice will operate against them unduly harshly. To my mind it would be just and fair to allow them some time within which to get their affairs in order and effect their move from the property with some measure of decency. I will reflect this attitude in the order I am about to make by allowing them until the end of November this year in order to vacate the premises. In this matter I accordingly make the following order:-

1. The first, second and third respondents, and all persons occupying under their authority, be and are hereby ordered to vacate the property described as Erf 1727 Kloof (Extension 7), Registration Division FT, Province of KwaZulu-Natal, in extent 6391 (six thousand three hundred and ninety one) square metres, held by Deed of Transfer No T54263/2006 situate at 15 Greenacres Place, Kloof, KwaZulu-Natal ("the property") on or before 30 November 2012 and simultaneously to deliver the keys to the property to the applicant or its appointed agent.
2. In the event of the first, second and third respondents and all persons occupying under their authority failing to comply with the order in paragraph 1 above, the Sheriff of this Court or his Deputy be and is hereby authorised and directed to eject the first, second and third respondents and all those occupying under their authority from the property and to take all steps as may be necessary to give effect to the order in paragraph 1 above.
3. The counter-application is dismissed.

4. The respondents, jointly and severally, the one paying the others to be absolved, are directed to pay to the applicant the costs of the application and of the counter application, such costs to include costs reserved on previous occasions.

Vahed J

CASE DETAILS:

Date of Hearing	:	17 October 2012
Date of Judgment	:	08 November 2012
For the Applicant	:	J F Nicholson
Instructed by	:	Shepstone and Wylie 24 Richefond Circle Ridgeside Office Park Umhlanga Rocks Tel: (031) 575 7000
For the Respondents	:	J Surju 5 Murry Court 375 Anton Lembede Street Durban Tel: (031) 306 3663