IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case Number : 9385/2007

In the matter between:-

AMOS MZOKHONA NSINDANE	First Applicant (First Defendant)
JOYCE NONHLANHLA NSINDANE	Second Applicant (Second Defendant)

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent (Plaintiff)
NOKWETHEMBA JUBILEE NDLANZI	Second Respondent
THE SHERIFF OF THE HIGH COURT, PINETOWN	Third Respondent
GARLICKE & BOUSFIELD INC.	Fourth Respondent
THE REGISTRAR OF DEEDS, KWAZULU-NATAL	Fifth Respondent

JUDGMENT

VAN ZÿL, J.:-

1. The applicants seek an order *inter* alia that a judgment of this Court, entered against them by default, be rescinded so that they may defend

the action instituted against them by the first respondent, as plaintiff in the action.

2. The matter originates from a loan admittedly advanced by the first respondent to the applicants, who are husband and wife, and which was secured by a mortgage bond over the immovable property of the applicants.

3. It is also common cause that the applicants fell into arrears on their bond repayments, that the fourth respondent issued summons on behalf of the first respondent against the applicants and that such summons was served upon them.

4. Subsequently, in the absence of appearance to defend, judgment by default was sought and obtained, execution initiated and the immovable property which was the subject of the mortgage bond was sold in execution to the second respondent and registration of transfer recorded by the fifth respondent.

5. There are various grounds upon which the applicants contend that they are entitled to relief. In the first instance they allege that prior to the institution of the action the first applicant had telephonically contacted a consultant in the employ of the first respondent to seek advice on the issue of the applicants' financial difficulties in maintaining their bond instalment payments. They claim that they

were advised to pay whatever they were able, but to ensure that some payment was made every month. This, the applicants contend lulled them into a false sense of security whereby they did not anticipate legal action against them for their failure to strictly adhere to the original payment regime.

6. There is a dispute as to the extent to which the applicants complied with the advice allegedly given to them, but the main difficulty in this regard is the paucity of information contained in the applicants' founding papers so that the first and fourth respondents complain with some justification that it is not possible to verify the allegations relied upon by the applicants.

7. The applicants further allege and rely upon alleged non-compliance by the first respondent with its obligations as a credit provider with the requirements of sections 129(1) and 130(1)(a) of the National Credit Act 34 of 2005 (the NCA). As a result the applicants allege that the first respondent's action against then was premature and legally ineffective.

8. In addition the applicants dispute that the constitutional warning contained in the summons and drawing to their attention the rights to housing embodied in section 26 of the Constitution of the Republic, was properly brought to their notice due, *inter alia*, to their limited

formal education and their very limited grasp of the English language in which the summons was couched.

9. The applicants further rely upon alleged misinformation or misleading information imparted to them prior to the judicial sale of their immovable property to the effect that if they brought the arrears up to date, the sale would not proceed. It is common cause that the first applicant contacted one "Shane" before the judicial sale in an endeavour to prevent the sale from taking place.

10. It is further clear that he was informed that he needed to settle the arrears to prevent the sale from taking place. The person he spoke to was no doubt Mr Shane Julien Chundergasen (Chundergasen), an employee of the fourth respondents who at all times acted as the first respondent's attorneys. It was also he who deposed to the main answering affidavit relied upon by the first and fourth respondents herein.

11. According to Chundergasen he advised the first applicant that the arrears to be settled was in the sum of R5 657-44 but according to the first applicant he was advised to pay "about R8 000-00". In any event, it is common cause that the applicants paid a sum of R4 500-00 and then a further sum of R4 000-00 in response and that the first payment came to the notice of the said Chundergasen prior to the sale.

12. However, his attitude was that such payment was insufficient to cover the arrears and he claims only to have become aware of the second payment after the sale. What terms and conditions were imposed, if any, during their telephonic conversation is disputed as between the first applicant and the said Chundergasen.

13. The applicants also allege that the judicial sale is invalid because a lawful attachment of their property had not come about. This is by reason of the fact, so it is alleged, that the first respondent had failed to serve upon them as owners of the property the necessary notice of attachment in compliance with the requirements of rule 46(3).

14. The first and fourth respondents on the other hand contend that there was due compliance with the rule in that the Sheriff (the third respondent) had given notice of attachment to the applicants by way of registered post.

15. The second respondent, who was the purchaser of the applicants' immovable property at the judicial sale, initially opposed the relief sought by the applicants and delivered an answering affidavit in support thereof, but did not appear at the hearing of the matter to persist in her opposition. It is clear from her affidavit, however, that very shortly after the auction she was made aware of the applicants' intention to dispute the validity of the legal proceedings against them,

as well as that of the resultant sale of the property. Insofar as she later proceeded to seek and obtain registration of transfer she was not unaware of the situation.

16. At the outset the first question to be considered is whether the applicants have made out a case for the rescission of the judgment granted against them by default by the registrar in terms of the provisions of rule 31(5).

17. In Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (OPD) at page 476 the court held that in order to show good cause for rescission an applicant should give a reasonable explanation for his default, show that his application is made *bona fide* and that he has a *bona fide* defence to the plaintiff's claim.

18. In the present matter the dispute is not directly relevant to the applicants' explanations for their default and the delays. But even if they were negligent in all the circumstances of the case, that would not necessarily result in the failure of the application for rescission. In Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd 1975 (1) SA 612 (D) at page 615B, Howard J (as he then was) held that even gross negligence in relation to the default was not an absolute impediment to the granting of relief under Rule 31 (2) (b). (See also HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E), Smalberger J (as he then was) at page 301 A-C).

19. In Kavasis v South African Bank of Athens Ltd 1980 (3) SA 394 (D) at page 395 C-D James JP remarked in relation to an application for rescission that;

> "*The only issue, therefore, which I have to decide is whether the defendant has shown that he has a bona fide defence to the action. In other words whether he has made averments on oath which, if established at the trial, would entitle him to the relief he asks for. He need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour.*"

20. It becomes necessary then to consider in relation to the claim for rescission whether the applicants have shown that they have a *bona fide* defence to the plaintiff's action. In this regard it should be borne in mind that;

> "*Unlike the provisions of Rule 32 dealing with summary judgment, Rule 31(2) does not give the Judge power to allow the applicant to defend only a portion of the claim. Furthermore, if the defendant is granted leave to defend he is entitled to put in issue the question of whether any payments other than the R250 already referred to were made to the plaintiff by the principal debtors. It seems to me that if a defendant establishes a bona*

fide defence against a portion of a plaintiff's claim he is entitled to a rescission of the whole judgment."

Per James JP in Kavasis (supra) at page 396 B-C

21. As indicated above the applicants pertinently raised in their founding papers the issue of the first respondent's alleged non-compliance with the requirements of sections 129(1) and 130(1)(a) of the NCA. In his founding affidavit the first applicant goes so far as to state that he doubts that any notice as envisaged in section 129(1) had been sent out by or on behalf of the first respondent.

22. The first applicant denies emphatically that either applicant ever received such notice. He expands as to what he claims their reaction would have been had they received such a notice and concludes that the applicants would have jumped at the opportunities offered in the NCA to avoid litigation.

23. The response in opposition by the first and fourth respondents is interesting. In their main answering affidavit relied upon by the first and fourth respondents and deposed to by the said Chundergasen, he does not purport to have personal knowledge of any actual compliance by or on behalf of the first respondent with the requirements of the NCA. Instead he merely asserts his belief that the first respondent would have complied with the requirements of the Act prior to the institution of the action.

24. In the supporting affidavit delivered on behalf of the first respondent and deposed to by a Ms Shelly Anne Cianfanelli (Cianfanelli) she qualifies herself the first respondent's home loans manager based in Johannesburg with access to all its records. She states that it is the standard practise of the first respondent's "*pre-legal department*" in all debt collection matters to send out notices in compliance with section 129 of the NCA.

25. What is, however, striking in its absence is any information directly relevant to any notice(s) which may actually have been sent out to the applicants. There is no suggestion in her affidavit that a search was made of the records of the first respondent to locate a copy of the notice(s) allegedly sent to the applicants, or how and when such notice was sent and if by registered post, that any effort was made to locate and produce proof of such posting.

26. Instead she merely purports to "*confirm that the first respondent would indeed have sent the applicants notice in compliance with section 129 of the Act prior to instructing the fourth respondent*". There is also no clear indication to when or to which address such notice would have been sent.

27. If reference is had to the certificate, attached to the first respondent's summons in an attempt to comply with practise directive 28, then this document is equally uninformative. It reads as follows;

> "*We, The Standard Bank of South Africa Limited represented by JAMES JONES, he being duly authorised hereby certify that the Plaintiff has complied with the provisions of Section 129 of the National Credit Act, No 34 of 2005*"

28. There is, however, nothing in the certificate to suggest that the said Jones personally attended to the issuing of the section 129 notice or that he had any personal knowledge of the matter, nor does it even indicate his position in the employment structures of the first respondent.

29. The certificate and the summons need to be read together in regard to compliance with the requirements of the NCA. In this regard it is noteworthy that the summons merely alleged compliance by the first respondent and in this regard referred to ".. *a certificate indicating such compliance (is) annexed hereto..*"

30. The relevant portion of the practise directive read;

".. the summons must allege that there has been compliance with section 129 of the Act and a certificate must be attached to the summons indicating compliance therewith.".

31. The certificate and the summons, whether read individually or together are entirely devoid of factual matter and merely state compliance as a conclusion. Indeed, in my view they are so uninformative as to be worthless.

32. In Munien v BMW Financial Services (SA) (Pty) Ltd and Another 2010 (1) SA 549 (KZD), Wallis J (as he then was) held that the onus of proving that the required notice was indeed given rested upon the credit provider, who needed to show that the notice was given in the manner chosen by the consumer and that such manner was one specified in section 65(2)(a) of the NCA. (See paragraphs (20) and (22) at page 557F to 558B and page 558D - F.)

33. On the facts in the present matter it is clear that the first respondent has not placed sufficient evidence before the court to support its claims. The fact that it produced no facts relevant to the issuing and delivery of any section 129 notice to the applicants, despite the direct challenge issued by the applicants, is significant in this regard.

34. It follows that the applicants have demonstrated a *bona fide* defence, at least at the level of a triable issue, to the first respondent's claims

in the action and it therefore becomes unnecessary to consider the remaining grounds upon which the applicants seek rescission of the judgment granted by default.

35. However, the applicants seek not only rescission of the judgement granted by default, but also by way of the present application, the setting aside of the judicial sale and the restitution of the *status quo ante.* Such relief may have serious and unintended consequences.

36. The granting of rescission in relation to the default judgement has the effect that the issues in the litigation become live again and in due course are likely to be the subject of evidence before and decision by a trial court.

37. It is that court which will then be in a position to decide and pronounce authoritatively upon whether in fact the first respondent's action was premature or ineffective. The findings of that court will also affect, if not determine, the claims for the setting aside of the judicial sale and the consequences thereof.

38. In my view, to determine anything more than the fate of the rescission of the default judgment at this stage would not be justified in all the circumstances.

39. In the light of the conclusions to which I have come above, it appears undesirable to make any firm orders as to costs. It might come about that at the trail of the action facts emerge which indicate that the applicants should fail in their resistance to the first respondent's claims and that their application for rescission should not have been brought.

40. In my view caution accordingly dictates that I should reserve costs at this stage, even in respect of the rescission portion of the application, for ultimate decision by the trial court.

41. <u>Order:</u>

In the result the following order is made:

a. Insofar as may be relevant condonation is granted in respect of the late delivery of the application for rescission.

b. In terms of prayer (e) of the applicants' notice of motion the judgment granted by default in favour of the first respondent against the applicants under case number 9385/2007 on 11 October 2007 is hereby rescinded.

c. The remaining relief sought by the applicants and as set out in prayers (a), (b), (c), (d) and (f) of the notice of motion are reserved for decision by the trial court deciding the action in respect of which the default judgment has herein been rescinded.

d. All issues of costs are likewise reserved for decision by the trial court hearing the action.

VAN ZYL, J.

APPEARANCES:

For Applicants	:	Adv G. D. Goddard Instructed by Messrs Bongani Sibisi & Company of Pinetown c/o Shembe Attorneys of Durban.
For First & Fourth Respondents	:	Adv L. D. Pistorius Instructed by Garlicke & Bousfield Inc. of Durban.
For Second & Fifth Respondents	:	No appearance.
Date argued	:	18 SEPTEMBER 2009.
Delivered	:	22 NOVEMBER 2012