IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION- EAST LONDON

Case no: EL: 283/2010
ECD: 583/2010
Date Heard: 15/05/2012
Date Delivered: 18/05/2012

In the matter between:

LETTITIA MOMAFAKU NDEMA	**APPLICANT**
And	
ABSA BANK LIMITED	**1ST RESPONDENT**
THE SHERIFF OF THE HIGH COURT, EAST LONDON	**2ND RESPONDENT**
REGISTRAR OF DEEDS, KING WILLIAMS TOWN	**3RD RESPONDENT**
DAVID BARKER	**4TH RESPONDENT**
ELSJE ELLIOT	**5TH RESPONDENT**

JUDGMENT

SMITH J:

Introduction

[1] On 23 September 2010 the Registrar of this Court granted default judgment against the Applicant in favour of the First Respondent in terms whereof:

(i) The Applicant was ordered to pay to the First Respondent an amount of R3 032 793.23; and

(ii) Immovable property described as "*Remainder of Erf 1098, East London*" was declared executable.

[2] The aforesaid property was owned by the Applicant and mortgaged in favour of the First Respondent as security for a loan granted by the First Respondent to the Applicant.

[3] The property was subsequently sold in execution to the Fourth and Fifth Respondents jointly.

[4] The Applicant now seeks an order rescinding the aforesaid default judgment and setting aside the sale of the immovable property to the Fourth and Fifth Respondents. Mr *Nzondo,* who appeared for the Applicant, has for the first time during his argument in court stated that the Applicant also requires the court to reconsider the matter in terms of Rule 31 (5) (d) of the Uniform Rules of Court. In terms of that sub-rule any party who is dissatisfied with a judgment granted by the Registrar may, within twenty days after he or she has become aware of the judgment, request the court to reconsider the matter. He submitted that where a court is called upon to exercise its jurisdiction in terms of this sub-rule, an applicant does not have

to establish the usual legal requirements for the rescission of a default judgment.

[5] The Fourth and Fifth Respondents purported to file a "*Contingent Counter-Application*" against the First Respondent in the event of the Applicant being successful. While the said application appears to be of doubtful validity, in the light of my findings below it is not necessary for me to rule thereon.

[6] The application rests on the following contentions:

(i) that the default judgment granted by the Registrar was *void ab origine.* In this regard the Applicant relies on the fact that the Constitutional Court has declared the practice in terms whereof Registrars granted default judgments declaring immovable property executable, as being unconstitutional. (See: **Gundwana v Steko Developments CC and others 2011 (3) SA 608 (CC)**);

(ii) that the Applicant has provided a reasonable explanation for the delay in bringing the application for rescission, she has established that she was not in wilful default and that she has a *bona fide* defence to the First Respondent's claim; and

(ii) the sale in execution was contrary to the provisions of s. 5 of the Insolvency Act, 24 of 1936 ("the Insolvency Act"), in that it had

proceeded despite the fact that the Applicant had published a notice of the voluntary sequestration of her estate on the 20th of October 2011.

I now turn to deal with these points *seriatum.*

Was the default judgment void *ab origine*?

[7] I agree with Mr *Beyleveld SC*, who appeared for the First Respondent, that the Applicant's contention that the default judgment granted by the Registrar was *void ab origine* is founded on a fundamental misconstruction of the ratio in the **Gundwana** case (supra).

[8] The court in that matter was at pains to state that the finding of constitutional invalidity did not automatically visit invalidity on all default judgments granted by Registrars prior to the ruling.

[9] The court stated in terms that the aggrieved debtors will be required to apply for rescission of the default judgments in the ordinary course and in doing so will have to set out *bona fide* defences to the claims against them.

[10] An additional burden was placed on aggrieved debtors wishing to challenge default judgments on the basis of the **Gundwana** decision *(supra)*. Froneman J held that only deserving cases should benefit from the

declaration of unconstitutionality and stated the following (at paragraph 59):

> "I consider that this balance may best be achieved by requiring that aggrieved debtors who seek to set aside past default judgments and execution orders granted against them by the Registrar must also show, in addition to the normal requirements for rescission, that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home"

[11] The Applicant's purported reliance on Rule 31 (5) (b) is in my view ill-conceived. It is trite law that this rule does not entitle a court to substitute its own discretion for that of the Registrar unless the latter has erred. **(Bloemfontein Board Nominees Ltd v Benbrook 1996 (1) SA 631 (OPD)).** Apart from the fact that the Applicant's notice of motion clearly seeks a rescission of the default judgment and does not purport to request a reconsideration of the matter in terms of the aforesaid sub-rule, the Applicant is in the event not exempted from establishing the abovementioned requirements enunciated in the **Gundwana** case *(supra).* The Applicant has not alleged that the Registrar has erred but relies on the declaration of constitutional invalidity in that case. I am therefore of the view that the Applicant's contention in this regard cannot be upheld and that it is incumbent on her to establish the usual legal requisites for rescission.

<u>Rescission of the default judgment</u>

[12] These being motion proceedings, I am constrained to resolve whatever factual disputes there are in accordance with the legal principles enunciated in **Plascon –Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).** I am therefore constrained to decide the matter on the basis of the facts alleged by the Respondents together with the admitted facts put up by the Applicant.

[13] The summons was served on the Applicant on 19 May 2010 by affixing a copy to the main entrance of her chosen *domicilum citandi executandi,* being 48 Irvine Road, Bonnie Doon, East London. The default judgment was granted by the Registrar on the 23rd of September 2010 on the basis that the Applicant had failed to enter appearance to defend within the time period prescribed by the rules of court.

[14] The Applicant has alleged that she never received the summons and that she only became aware of the impending sale in execution of her property on the 7th of October 2011 when she was advised by a friend from Cape Town that the property had been advertised for sale in the Government Gazette. Her friend also advised her to enlist the assistance of a firm called Consumer Guardian Services. It was with the assistance of this firm that she eventually became aware of the default judgment. She then instructed the aforesaid firm to take the necessary steps for the setting

aside of the default judgment and to stop the sale in execution. She also state "*in passing*" that the application would have been brought much earlier if it had not been for the fact that the First Respondent's Attorneys (and the Second Respondent) unnecessarily delayed in providing certain legal documents, including the conditions of the sale in execution of the immovable property. She states that these documents were eventually uplifted by her attorney, Mr Godongwana, from the court file after a request had been directed to the Registrar in Grahamstown.

[15] Regarding her defence to the First Respondent's claim, she states that she would have defended the matter if she had received the summons because she has had a longstanding dispute with the First Respondent regarding the outstanding amount and calculation of interest on her bond repayments. She had as a result instructed Consumer Guardians Services to conduct a forensic audit on her bond account because she suspected that she had been overcharged. She had also instructed them to apply for the voluntary sequestration of her estate as she was unable to pay creditors and it would have been to the advantage of all her creditors if her estate were sequestrated.

[16] She alleges further that the results of the forensic audit by Consumer Guardian Services established that, during the period 20 October 2009 to 21

July 2011, she had been overcharged by the First Respondent in the amount of R28 989. 89. The report compiled by Consumer Guardian Services - which is annexed to her affidavit - is a one page document that states only that the audits were based on bank statements and information supplied to them. There is no indication as to how that amount was calculated and on what basis they had concluded that the Applicant had been overcharged. It is on this basis that the Applicant asserts that she has a *bona fide* defence to the First Respondent's claim.

[17] It is trite law that a court may rescind a default judgment if the applicant has provided a reasonable explanation for his or her default and successfully established that the default was not wilful or due to gross negligence.

[18] It is also incumbent on the applicant to show that he or she has a *bona fide* defence and that the application is not merely brought in order to delay the plaintiff's claim. Although it is not necessary for an applicant to deal with the details of his or her claim, he or she is required to set out such averments which, if proven at a trial in due course, would constitute a comprehensive defence to the plaintiff's claim. (**Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (OPD),** at page 476 to 477.)

[19] The Applicant has in my view dismally failed to establish any one of the above-mentioned legal requisites. Mr *Beyleveld* has correctly submitted that the Applicant has failed to explain the reasons for the delay in bringing the application for rescission after she had allegedly become aware of the sale in execution during October 2011. The application for rescission was launched only during February 2012. The Applicant's attempt to explain the delay of more than five months within the space of a few perfunctory and broad sweeping sentences is, at best, unconvincing and at worst, draws one to the irresistible conclusion that the true reasons for the delay have been deliberately obfuscated. It is instructive though that her attorney was able to source the documents, which she allegedly required to launch the application, from court files. There is no explanation as to why this was not done immediately. The Applicant's difficulties in this regard is further exacerbated by the fact that her attorneys, Messrs Appoles Attorneys, wrote to the First Respondent's attorneys and the Second Respondent on 24 March 2011 informing them of the publication of the notice of voluntary surrender and demanding that the sale scheduled for 25 March 2011 be cancelled. The Applicant's assertion that she only became aware of the default judgment during October 2011 is therefore simply untrue.

[20] The Applicant however faces another insurmountable hurdle in this regard. It appears that she had, rather disingenuously, omitted to state in her founding affidavit that she had approached the First Respondent's

attorneys with settlement proposals a day after the summons was served.

[21] The Applicant has attempted to explain her way around this difficulty by averring that her visit to the offices of the First Respondent's attorneys was in consequence of the notice issued in terms s. 129 of the National Credit Act, 34 of 2005 ("the National Credit Act"). That letter was however dated 25 January 2010 and had been dispatched by registered mail on the 27th of January 2010. It is therefore unlikely that the Applicant would have been spurred on by this letter to seek a resolution of the matter more than nine months after she had received it. It is more probable that the attempts by the Applicant to have the matter resolved on the 21st of October 2010 were precipitated by the summons which had been served at her chosen *domicilium* the day before. The inference is therefore ineluctable that she had already been aware of the summons at that stage.

[22] The Applicant has in my view also failed to establish any semblance of a defence to the First Respondent's claim. The original summons was issued on the basis of an averment that the Applicant had failed to pay the mortgage bond instalments on the due dates. Nowhere in her papers has the Applicant averred that she was not in arrears and that the First Respondent was therefore not entitled to invoke the acceleration clause and to claim the full outstanding balance together with interest thereon.

[23] Although I am in agreement with Mr *Beyleveld's* submission that the certificate provided by Consumer Guardian Services has no evidentiary value because it amounts to hearsay, I am in the event of the view that this document does not in any manner assist the Applicant in establishing a *bona fide* defence to the First Respondent's claim. Firstly, the document is extremely vague regarding the basis on which the so-called "*over-charged"* amount of R28 989.89 had been calculated and secondly, there is no indication that this amount exceeded the amount of arrears and that the Applicant was therefore effectively not in arrears. In fact the terms of the settlement offer which was made by the Applicant to the First Respondent's attorneys during October 2010 suggests that the arrears were substantial indeed. The Applicant states that she had offered to make an initial payment of R100 000.00.

[24] I am also of the view that the Applicant has not been able to put up any additional facts which can convince me that a court, having been aware of all these facts at the time of the granting of the default judgment, would have refused to sanction the execution of the immovable property. She has, on the contrary, averred that she is unable to pay her debts and have not proffered any reason why, in the light of this financial disability, the First Respondent would not have been allowed to perfect its security. In addition,

apart from the fact that she owns other properties, she has also not explained why she has not pursued any of the remedies available in terms of the National Credit Act.

Validity of the sale in execution

[25] The argument which was advanced on behalf of the Applicant in this regard is that the sale was unlawful by virtue of the provisions of s. 5 of the Insolvency Act. That section provides as follows:

> "After the publication of a notice of surrender in the Government Gazette in terms of section four it shall not be lawful to sell any property of the estate in question, which has been attached under writ of execution or other process, unless the person charged for the execution of the writ or other process could not have known of the publication; provided that the Master..."

[26] Mr *Beyleveld* has convincingly argued that the Applicant has disingenuously used the provisions of this section as a stratagem to frustrate the First Respondent's attempts to have the property sold in execution.

[27] In this regard it is instructive that the Applicant has failed to disclose in her founding papers that the sale in execution was delayed on a previous occasion as a result of the publication of a similar notice of surrender. It appears that on that occasion the voluntary surrender of the Applicant's estate was withdrawn after the sale in execution was cancelled. The Applicant's explanation as to why she had not proceeded with the voluntary surrender on the second occasion after the sale in execution, is also

revealing. In this regard she has stated;

> "When I realised that the 2nd respondent had gone ahead with the sale in execution without no explanation whatsoever from the 1st respondent's attorneys, we abandoned the application as it would have been a futile exercise to proceed with it when my house had been sold to a third party."

[28] The ineluctable inference in my view is that the publication of the notice of voluntary surrender of her estate was merely a stratagem designed to frustrate the sale in execution of the property. Once this objective had been accomplished, there was no need for her to proceed with the surrender.

[29] The fact that the sale had been made subject to the suspensive condition that the Applicant would be unsuccessful or not proceed with the application for voluntary surrender, casts further suspicion on the Applicant's stated reasons.

[30] Mr *Beyleveld* has in my view correctly submitted that if she had successfully proceeded with the voluntary surrender, the sale would not have come into existence in any event. Her stated reasons for the withdrawal of the application for voluntary surrender therefore do not make any sense. Despite my strong reservations about the bona fides of the Applicant in this regard, I am of the view that the First and Second Respondents would not have been entitled to simply ignore the notice for these reasons and that they would have been constrained to apply to court

for an order setting the notice aside before proceeding with the sale of the property. It is however clear from the First Respondent's papers that the Second Respondent did not proceed with the sale in execution on this basis. The First Respondent was clearly of the view that the inclusion of the abovementioned suspensive condition had effectively put the sale on hold pending the fulfilment thereof and that the transaction did therefore not constitute a sale of the property as envisaged in s.5 of the Insolvency Act.

[31] Mr *Ndzondo* has submitted that the condition to the effect that the sale was subject to the Applicant being unsuccessful or not proceeding with the intended application for a voluntary surrender was a resolutive condition, which meant that the contract came into existence immediately and that the agreement would therefore have fallen foul of the aforementioned statutory provision.

[32] I do not agree with this submission. The condition was pertinently stated by the parties to be a suspensive one and had therefore effectively suspended the operation of the contract pending fulfilment thereof, in the sense that the parties' respective contractual obligations were put on hold. This meant that the seller could therefore not have insisted on payment of the purchase price and the Fourth and Fifth Respondents were not entitled to demand transfer of the property prior to the fulfilment of the condition. In

this sense therefore the condition was a typical suspensive one and no sale would therefore have come in existence prior to the fulfilment thereof. Mr *Beyleveld* has correctly pointed out that the Applicant herself has on numerous occasions in her founding affidavit referred to the aforesaid term as being a suspensive condition. I am accordingly in agreement with Mr *Beyleveld's* submission that the transaction did therefore not constitute a "*sale*" in legal parlance and the provisions of s. 5 of the Insolvency Act were for these reasons not applicable.

See: **Geue and Another v Van der Lith and Another 2004 (3) SA 333 (SCA)** at 339B.

[33] There are several other difficulties with this argument. The notice was published on the same day as the sale in execution. It is however not clear from the papers whether or not it was indeed published before the sale or that either the First or Second Respondents had known about it at the time of the sale. The notice was never published in a newspaper as is required in terms of s. 4 of the Insolvency Act and would also for this reason have been invalid in any event.

Costs

[34] While there can be no doubt that the First, Fourth and Fifth Respondents are entitled to their costs, I cannot agree with Mr Cole's

submission that the Applicant and the First Respondent should be jointly and severally liable for the Fourth and Fifth Respondents' costs. There is in my view simply no legal basis on which the First Respondent could be held liable for costs.

Order

[35] In the result I am of the view that the application must fail and the following order shall therefore issue:

(a) The application is dismissed;

(b) The Applicant is ordered to pay the First, Fourth and Fifth Respondents' costs, together with interest on such costs, at the legal rate from a date 14 days after the date of the Taxing Master's *allocatur* to the date of payment.

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J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Ndzondo
Attorney for the Applicant	:	Godongwana Ngonyama Attorneys 280 Oxford Street Southernwood EAST LONDON

		Ref: Mr L Godongwana/xm/NDE1
Counsel for the 1st Respondent	:	Advocate Beyleveld, SC
Attorney for the 1st Respondent	:	Russell Incorporated 10 Rochester Street Vincent EAST LONDON Ref: Mr C Breytenbach
Counsel for 4th and 5th Respondent	:	Advocate Cole
Attorney for 4th and 5th Respondent	:	Cooper Conroy Bell Richards Inc. 4 Epsom Road Stirling EAST LONDON Ref: GSB/Jan/BB7709
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