

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024-125983

(1)	REPORTABLE: YES ☒ NO
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO
(3)	REVISED: YES/ NO
22/11/24 DATE	
 SIGNATURE	

In the matter between:-

NZUZO FEZEKA

Applicant

And

ABSA BANK LIMITED

Respondent

JUDGMENT

Raubenheimer AJ:

Summary

Order

[1] In this matter I make the following order:

1. The application is dismissed with costs on scale B

[2] The reasons for the order follow below.

Introduction

[3] The matter came before me on 6 November 2024 in urgent court for an application to stay a sale in execution pending an application for a rescission of a default judgment.

[4] Default judgment was granted in favour of the respondent on 24 January 2023 for payment of arrears monthly instalments on a bond granted by the applicant in favour of the respondent over an immovable property and declaring the property especially executable in the amount of R390 064.73.

[5] The rescission application was launched in February 2023.

[6] Since the respondent filed its answering affidavit to the rescission application on 22 June 2023 no progress has occurred in this matter.

[7] On 20 July 2024, a writ of attachment and a warrant of execution was issued and served at the premises on the tenant occupying the premises.

[8] The applicant avers that she received notice of the sale in execution on 18 October 2024 for the sale to be conducted on 8 November 2024.

Procedural chronology

- [9] The parties entered into a mortgage loan agreement in 2008 for an amount of R432 000.00 payable in 341 monthly instalments of R 3, 030.68.
- [10] The applicant fell in arrears and in August 2020 the arrears amount was R 28, 436.52 which amounts to in excess of 9 months unpaid monthly instalments.
- [11] By the time the default application was launched in June 2021 the outstanding amount had escalated to R58, 608.52.
- [12] Summons was issued and the applicant filed a Notice of Intention to Defend on 18 October 2021. She did however not file a plea.
- [13] The respondent filed a Notice of Bar on 1 December 2021 and served it on the same date on the applicant.
- [14] By the time the matter came before the Default Judgment court the outstanding amount had escalated further to R 122,672.11.

Urgency

- [15] The writ of attachment and the warrant of execution was served on the premises already in July 2024. The applicant did not institute any procedure to stop the execution then.
- [16] The applicant launched the application for Rescission of Judgement already in February 2023 and has since then taken no steps to enrol or set the matter down for hearing. The last action in this application was when the respondent filed its answering affidavit. The respondent has still not filed a relying affidavit.

[17] The applicant waited for a notification that the property stands to be sold in execution and even then still waited another two weeks before springing into action.

[18] The applicant does not provide proof that the property serves as her primary residence. It transpired during the course of the litigation that she does not reside in the property as the service of documents at the premises was accepted by a tenant.

[19] *The rescission application*

[20] The applicant's rescission application is brought in terms of Rule 31(2)(b) read with Rule 42(1) including the principles of the common law.

[21] The high water mark of the rescission application in terms of Rule 42(1) is that the amounts mentioned in the application for default judgement could be incorrect as she alleges that she made regular payments and that some of the payments is not reflected on the statements.

[22] These averments are devoid of detail in respect of amounts allegedly paid and when such payments were in fact made. The applicant makes general statements without specific averments, neither does she provide substantiation for the averments..

[23] She alleges that she has not succeeded to obtain bank statements from the respondent in order to reconcile the payments.

The legal principles

[24] A court has a wide discretion when considering whether to grant a stay in

execution.¹

[25] The general principles applicable in a stay of execution application are²:

25.1 A stay of execution will as a general rule be granted only where real and substantial justice requires it or where injustice would otherwise result.³

25.2 In determining the above the court will be guided by the factors that is usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.

25.3 The court must be satisfied that:

25.3.1 The applicant has well-grounded apprehension that the execution is taking place at the instance of the respondent;

25.3.2 Irreparable harm will result if the execution is not stayed, and the applicant ultimately succeeds in establishing a clear right.

25.4 Irreparable harm will result if there is a possibility that the underlying causa may ultimately be removed.

25.5 The merits of the underlying dispute is not considered by the court as the focus is on whether the causa is in dispute.⁴

¹ BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and Another and a Similar Matter 2022(1) SA 162 (GJ)

² Gois t/a Shakespeare's Pub v Van Zyl and Others 2011(1) SA 148 LC

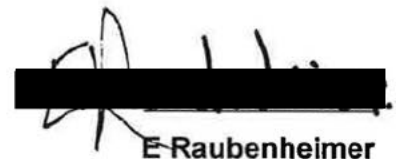
³ Road Accident Fund v Strydom 2001 (1) SA 292 (C)

⁴ Strime v Strime 1983 (4) SA 850 (C)

- [26] A rescission application amounts to an attack on the underlying *causa*⁵
- [27] That the respondent was entitled to payment and could seek payment immediately after judgment weighs heavily in the exercising of the discretion whether to grant the stay or not.
- [28] The applicant does not deny the indebtedness nor the arrears or that the respondent is entitled to payment.
- [29] The applicant does not apply for the Notice of Bar to be lifted and does not apply for condonation for not complying with the court rules in respect of the filing of a plea.
- [30] On this basis alone the rescission application is at risk of being dismissed.⁶

Conclusion

- [31] The matter is devoid of urgency.
- [32] The applicant has furthermore not made out a case on the prospects of success in the rescission application.
- [33] For all the reasons as set out above I make the order in paragraph 1.


E Raubenheimer

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

⁵ Gois t/a Shakespeare's Pub (n 1 above)

⁶ Ingostrakh v Global Aviation Investments and Others [2021] 3 All SA 316 (SCA)

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **22 November 2024**

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Date of Argument:

06 November 2024

Date of Judgment:

22 November 2024