IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG)

JOHANNESBURG

CASE NO: 50275/2010

DATE:10 APRIL 2013

DELETE WHICHEVER IS NOT APPLICABLE.

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

12/6/13 .....
DATE

.....

In the matter between:

MAGOO: PRAVESH LLOYD	**Applicant**
and	
FIRSTRAND BANK LTD	**First Respondent**
THE SHERIFF OF THE COURT, BRAKPAN	**Second Respondent**
MNTUNGWA: HLENGIWE	**Third Respondent**

JUDGMENT

NOBANDA A.J

[1] The applicant has brought this application seeking orders in the following terms:

1. condonation for non-compliance with the Rules of this Court;

2. rescission of a default judgement granted in favour of the first respondent on 22 February 2011;

3. setting aside of the sale in execution of the immovable property situated at 9 Redheart Street, Dalpark Extension 6, Brakpan;

4. costs against the first respondent alternatively against the respondents jointly and severally in the event of opposition by the respondents.

[2] I will deal firstly with the issue of condonation as this will determine whether the application for rescission should be considered.

[3] It is trite law that the court can condone non-compliance with any Rules prescribed by this Court. In considering whether condonation should be granted, the court has a discretion which has to be

exercised judicially having regard to all the facts of the case, which in essence is the question of fairness to both parties[1].

[4] For the applicant to succeed in an application for condonation, the applicant has to show "*good cause*". The meaning of "*good cause*" has been dealt with in numerous cases dealing with *inter alia*, condonation or rescission[2]. In **Silber v Ozen Wholesalers (Pty) Ltd**[3] the Court held that the minimum that the applicant "*must show in proving "good cause", the applicant must at least furnish an explanation for his default sufficiently full to enable the court to understand how it really came about [in order for the court] to assess his conduct and motives*" in addition to showing the existence of a substantial defence. The applicant has the burden of actually proving as opposed to merely alleging "*good cause*"[4]. Hence, the finding by the courts that condonation for non-observance of the Rules is by no means a mere formality[5].

[5] Some of the other relevant factors the court has to consider include *inter alia:*

(a) the degree of non-compliance;

---

[1] United Plant Hire (Pty) Ltd v Hills and Others [1976] All SA 253(A) at 254
[2] Erasmus, Superior Court Practice (1994) at B1-171
[3] 1954(2) SA 345(A) at 353
[4] Ibid
[5] Saloojee v Another, NNO v Minister of Community Development 1965(2) SA 135(A) at 138; Torwood Properties (Pty) Ltd v South African Reserve Bank 1996(1) SA 215(W) at 228.

(b) the explanation for the lateness;

(c) the respondent's interest in the finality of the judgment; and

(d) the avoidance of unnecessary delay in the administration of justice[6];

(e) prejudice to the other side that cannot be compensated by a suitable order as to postponement and costs[7].

[6] The extent of the applicant's application for condonation appears at page 65 stating:

" *28. I became aware of the fact that judgment had been granted against me when I approached my attorney on or about 15 May 2012.*

29. I am advised that I should have launched this application within twenty (20) days thereafter. However, I was only able to raise funds to fund the application by 20 June 2012. I submit that I was not in wilful default of

[6] United Plant Hire (supra) at 720.
[7] Marais v Aldridge 1976(1) SA 746(T) at 752C; Torwood Properties(supra) at 228.

defending the action, and that the slight delay in launching this application should be condoned".

[6] From the documents filed, the first respondent applied for judgment against the applicant during December 2010 for:

1. Payment of the sum of R325 312.88.

2. Payment of interest on the above amount at the rate of 9.75% per annum calculated and capitalised monthly in advance from 30 October 2010 to 18 November 2010 and at a rate of 9.25% per annum with effect from 19 November 2010 to date of payment, both dates inclusive.

3. An order declaring the [applicant's] property ERF 1770 DALPARK EXT 6 TOWNSHIP, Registration Division I.R, Province of GAUTENG (situated at 9 REDHEART STREET, DALPARK EXTENSION 6) under Mortgage bond No. B26701/2006 to be specially executable for the said sum plus costs.

4. Attorney and client costs as provided for in the mortgage bond.

[7] It is common cause that:

a. The applicant did not file a notice of intention to oppose.

b. Default judgment was granted in favour of the first respondent on 22 February 2011.

c. The first respondent has since sold the immovable property to the third respondent.

[8] The applicant brought this application sometime in July 2012, some approximately 1 year 3 months after default judgment was granted. Applicant's explanation for the delay is intertwined with his defence on the merits. As such, they will be dealt with intermittently.

[9] Applicant's explanation for the delay in bringing the application for rescission is that he was not aware all along that default judgment had been granted against him until 15 May 2012 after being advised by his attorney. Applicant alleges that on 24 February 2012 his tenant advised him that the Sheriff has served a notice. Upon enquiry, the first respondent's employee, one Nosipho (Nosipho) explained that it was a notice of attachment of his immovable property.

Notwithstanding, applicant alleges that he was still not aware that it meant judgment had been granted against him.

[10] As a result, he made arrangements with Nosipho to pay the arrears of R29 000.00 in instalments, the first payment being R7 500.00 and the balance in monthly instalments of at least R3 500.00. That on 27 February 2012 he deposited the R7 500.00 and thereafter made a further payment of R3 500.00 on 2 April 2012.

[11] The applicant's defence on the merits is that after he received the application for judgment against him, he contacted the first respondent and entered into a re-arrangement agreement with Nosipho, who was dealing with his matter, for the repayment of the arrears, which he eventually paid. As a result of the alleged re-arrangement agreement, it appears the applicant assumed that the first respondent will not proceed with its application for judgment against him.

[12] The applicant contends that the first respondent acted unlawfully and contrary to the re-arrangement agreement by taking default judgment against him and subsequently attaching and selling his immovable property in execution to the third respondent.

[13] Furthermore, applicant alleges that the first respondent failed to give him notice in terms of s129 of the National Credit Act 34 of 2005 (the

Act). Accordingly, that the issuing of the "*summons*" by the first respondent was premature.

[14] The first respondent denies that there was such a re-arrangement. First respondent contended that in terms of clause 16.1 and 16.2 of the loan agreement, the variation of the terms and conditions of the loan agreement had to be recorded in a "*facility letter*". That, no such document evincing the variation exists or has been attached by the applicant.

[15] Furthermore, the first respondent contended that in terms of clause 16.3 of the loan agreement, the first respondent could relax the conditions of the agreement or grant an indulgence without prejudicing any of its rights. Accordingly, the first respondent argued that the applicant's allegations do not constitute a legal defence.

[16] The applicant's explanation for the delay of approximately 1 year 3 months in bringing this application is unsatisfactory. From the Sheriff's return of service, the writ of execution was served on the domestic worker at applicant's immovable property on 8 March 2011. There is no explanation from the applicant why his tenant only notified him of the writ in February 2012, almost a year later since it was served. Neither is there an affidavit from the applicant's tenant giving an explanation to that effect and/or confirming applicant's allegations.

Therefore, it is improbable that the applicant only became aware of the writ in February 2012.

[17] In any event, assuming that the applicant only became aware of the writ in February 2012, which is improbable, applicant still failed to bring the application for rescission. Applicant alleges that he was still not aware at that time that judgment had been granted against him. That, he only became aware on 15 May 2012 through his attorney. Had the applicant bothered to read the writ, the applicant would have realised that judgment was granted against him on 22 February 2011 as is evident from the writ.

[18] Regarding his defence, on the applicant's own version, after allegedly paying the first respondent in terms of the first alleged re-arrangement with Nosipho, which is also a bare allegation, no other steps were taken by the applicant in pursuing this matter until towards the end of February 2012 when he again entered into allegedly another re-arrangement with Nosipho after being notified of the writ. By then, it was too late anyway as first respondent had already obtained default judgment against the applicant the previous year.

[19] With regard to the none receipt of the s129 notice, the first respondent alleges that it dispatched two (2) s129 notices by registered post, one to the applicant's chosen *domicilium* and the other to the applicant's PO Box address in November 2010. Applicant denies receiving any of

the notices. Applicant's reason for not receiving the notices appears to be that the first respondent sent the notices by post which is contrary to its previous practice of hand delivering notices.

[20] The majority judgment in **Sebola**[8] has since established a principle of what would constitute delivery of the s129 notice in circumstances where the credit provider avers that it has posted the notice. To that end, Cameron J provides:

> *"Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. If, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim"* [9].

[21] The first respondent was not obliged to hand deliver the s129 notice to the applicant. The first respondent has attached proof of having sent the notices to the said addresses by registered post. Applicant does not dispute the correctness of his chosen *domicilium* address where the notice was sent. From the track and trace report, it is evident that both notices were delivered to the relevant post offices in November

[8] Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC).
[9] Sebola at [87]

2010 but were never collected. As a result, both notices were returned to sender.

[22] Accordingly, the above conduct by the applicant evinces the recklessness with which the applicant dealt with this matter.

[23] As stated by Heher JA in ***Madinda v Minister of Safety and Security*** [10] " *"good cause for the delay" is not simply a mechanical matter of cause and effect. The court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his or her part which attaches to the delay in serving the notice timeously. Strong merits may mitigate fault; no merits may render mitigation pointless...If the merits are shown to be strong or weak, that would colour applicant's explanation for conduct while (sic) bears on the delay. An applicant with an overwhelming case is hardly likely to be careless in pursuing his or her interest, while one with little hope of success can easily be understood to drag his feet or her heels*".

[24] As a result, I find the applicant's explanation for non-compliance with the Rules of this Court and the disclosed defences unsatisfactory and unconvincing. Accordingly, to borrow from Heher JA statement

[10] 2008(4) SA 312 (SCA) at [12]

above[11], this would explain why the applicant was careless in handling this matter and dragging his feet.

[25] In the light of the above, the applicant has failed to prove "*good cause*" for the condonation of his late filing of the application for rescission. Consequently, it is not necessary to deal with the rescission application.

[26] Accordingly, I make the following order:

1) condonation is refused;

2) the application is dismissed with costs.

[11] Ibid