IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/ NO.

(3) REVISED.

DATE 13/06/14 SIGNATURE

13/6/2014

CASE NUMBER: 15263/2010

ANDREW ALLEN TSHEPO MPHAMBELA **APPLICANT**

And

THE STANDARD BANK OF SOUTH AFRICA LTD **RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] This is an application for the rescission of a default judgment granted against the applicant on 19 October 2010. The judgment declared the

applicant's property executable which led to it being advertised for sale in execution on 18 January 2011.

[2] On 17 January 2011 the applicant brought an urgent application to interdict the sale in execution and this court interdicted the respondent from selling the property pending the outcome of an application for rescission. The applicant then brought this application for rescission.

[3] In order to succeed with the application for rescission the applicant must show that he was not in willful default, that the application is *bona fide* and not made with the intention to delay the plaintiff's claim and that he has a *bona fide defence,* which *prima facie* has some prospects of success: Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476 – 477, Morkel v ABSA Bank Bpk 1996 (1) SA 899 (C) at 903D – E, Standard Bank of SA Ltd v EL-Naddaf 1999 (4) SA 779 (W) at 784.

WILLFUL DEFAULT

[4] According to the sheriff's return the summons was served on the applicant by affixing a copy thereof to the outer principal door at the

defendant's chosen domicilium citandi et executandi, being 314 Zone 7 Pimville.

[5] The respondent alleges that the summons was served at the correct address as per clause 5.1 of the mortgage bond. The applicant denies that this is his chosen *domicilium citandi et executandi* as he never nominated or chose a *domicilium citandi et executandi.*

[6] Clause 5.1 reads as follows:

"The mortgagor chooses the street address set out below as the address to which notices and documents in any legal proceedings against the mortgagor, including notices of attachment of the property, may be served".

The address set out in clause 5.1 is 314 Zone 7 Pimville. A *domicilium citandi et executandi* is simply a place chosen by a person where process in legal proceedings may be served on him. The applicant's argument is without any merit as clause 5.1 clearly and unambiguously stipulates an election of the address 314 Zone 7 Pimville as his chosen *domicilium citandi et executandi.* I am satisfied that the applicant has chosen this

address as *his domicilium citandi et executandi.* I also accept that there was proper service of the summons on the applicant as service was effected at his chosen address.

[7] As the summons was served by affixing a copy thereof to the outer principal door, I accept that a possibility exist that the summons may not have come to the attention of the applicant. For this reason I am of the view that the applicant has established that he was not in willful default.

BONA FIDE DEFENCE

[8] It was submitted on behalf of the applicant that his defence is based on the following grounds:

- The applicant made several payments towards settling the alleged arrears or his indebtedness to the plaintiff. In this regard the applicant referred to a payments of R5 000-00 and R17 000-00 made on 2 July 2009 and on 5 May 2010 respectively.
- The agreement in annexure "A" (namely, the agreement setting out the terms and conditions of loans secured by mortgage bonds)

should be disregarded as the real agreement between the parties was as set out in the mortgage bond.

- The nominated street and postal addresses that appear on the mortgage bond and annexure "A" as addresses for service were not the applicant's addresses and accordingly the notice in terms of section 129 of the National Credit Act 34 of 2005 (the NCA) was not brought to his attention, alternatively was delivered at an incorrect address and as a result the respondent was not entitled to institute the legal action that culminated in the default judgment and the intended sale in execution.

[9] In its answering and supplementary answering affidavits the respondent alleges that:

- The applicant and the respondent entered into a written agreement whose terms and conditions are set out in annexure "A" to the answering affidavit. (the terms and conditions of loans secured by mortgage bonds).
- The mortgage bond in issue was registered pursuant to the agreement in annexure "A"

- 314 Zone 7 Pimville is the applicant's chosen street address for delivery of notices and documents in any legal proceedings against the applicant as appears in clause 5.1 of the mortgage bond.
- 317 Zone 7 Argyle, 2001 is the applicant's chosen postal address for delivery of letters, statements and documents in any legal proceedings against the applicant, as appears in clause 5.2 of annexure "A".
- The applicant has not made any further payments since 05 May 2010 and as on 16 September 2013 the arrears on the applicant's account amounted to R480 236-33.

[10] The applicant did not file a replying affidavit in response to the averments made in the answering affidavits. The purpose of a replying affidavit is to respond to the averments made by the respondent in the answering affidavit. In the absence of a replying affidavit the respondent's averments not dealt with in the applicant's founding affidavit must be considered as new facts requiring a response from the applicant. If the applicant fails to respond to these new facts or averments they must be taken as admitted.

[11] Clause of annexure "A" states that: "*Loan" means any amount which the Bank has lent or agreed to lend to the Mortgagor.*

"Loan Agreement" means the loan agreement made up of the letter of grant (as accepted by the Mortgagor) these terms and conditions and the bond"

According to the definition these documents, read together, constitute the agreement between the parties. It is common cause that on 27 November 2009 the respondent issued two separate notices in terms of section 129 of the NCA which were dispatched by registered post to 314 Zone 7 Pimville and 317 Zone 7, Argyle, 2001. It was argued on behalf of the applicant that these addresses were not the applicant's addresses and the respondent had a duty to ensure that the applicant receive the notice in terms of section 129 (the notice). The respondent argued that by sending the notice to both addresses it had done enough to bring the notice to the attention of the applicant.

[12] The applicant contends that the addresses to which the notice was sent are not his addresses. The addresses appear in a written agreements signed by the applicant. The applicant does not place the agreement in dispute nor does he set out any basis why the addresses must not be

accepted as correct. He does not, for example, allege that the agreement is void for mistake or that it was induced by fraud, duress or misrepresentation. In the absence of any satisfactory explanation why the terms of the written agreement should not be accepted as correct, the court is entitled to accept them as correct.

[13] The respondent had to comply with section 129 of the NCA by sending the requisite notice to the address nominated by the applicant before it could institute legal proceedings. In Kubyana v Standard Bank of South Africa Ltd [2014] ZACC 1 (20 February 2014) the Constitutional Court stated that it is sufficient to bring the section 129 notice to a consumer's attention for that consumer to have agreed to receive the notice by way of registered mail and then to receive a notification that a registered item is awaiting her attention unless a reasonable consumer would not, in the circumstances, have taken receipt of the notice.

[14] The applicant does not deny that the notice in terms of section 129 was sent to the correct addresses as nominated in the agreement or that if the address is correct it would have been reasonable for him to respond to that notice. I am satisfied that the respondent has duly complied with the

provisions of section 129 of the NCA and was therefore entitled to institute legal action against the applicant.

[15] The applicant does not dispute that he is in breach of the agreement, his arrears are in excess of R400 000-00 and that he has not made any payment for a period of four years since 5 May 2010. The conduct of the applicant including the fact that this application was launched on 02 February 2011 and he has not taken any reasonable steps to have it finalized supports the respondent's contention that it is not *bona fide* and was instituted solely for the purpose of delaying the plaintiff's claim.

[16] I have already found that the notice in terms of section 129 of the NCA was sent to the address nominated by the applicant and that the summons was properly served on the applicant. The applicant has failed to show good cause for the setting aside of the default judgment as he failed to show that the application is made *bona fide* and that he has any *bona fide* defence which *prima facie* has some prospects of success. In the absence of good cause the application must fail.

[17] The agreement between the parties provides for costs on an attorney and own client scale and the respondent asked for such costs. No argument was advanced on behalf of the applicant as to why costs should not be awarded on the agreed scale. I see no reason why costs should not be allowed as agreed between the parties.

In the circumstances the following order is made:

1. The application for rescission of the default judgment granted by the court on 19 October 2010 is dismissed.
2. The interdict granted by the court on 17 January 2011 is hereby discharged.
3. The applicant is ordered to pay the costs of the application on an attorney and client scale.

A L C M LEPHOKO
(ACTING JUDGE OF THE HIGH COURT)

Heard on: 05 May 2014.

Judgment delivered on: 13 June 2014

For the Applicant: Adv.: C Tshavhungwa

Instructed by: ROTHBART INC

For the Respondent: Adv.: R van der Heever

Instructed by: HACK STUPEL & ROSS