IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 7896/2000

Date heard: 27 October 2014

Date of judgment: 05 November 2014

Not reportable

Not of interest to other judges

In the matter between:

TSEDING WINTON RAKOLOTA **Applicant**

and

FIRST NATIONAL BANK **1st Respondent**

(Previously known as BOE BANK LIMITED)

REGISTRAR OF DEEDS, JOHANNESBURG **2nd Respondent**

SHERIFF OF THE HIGH COURT, BENONI H **3rd Respondent**

MURIEL GUGULETHU MADELA **4th Respondent**

In re:

FIRST NATIONAL BANK **Plaintiff**

(Previously known as BOE BANK LIMITED)

And

TSEDING WINTON RAKOLOTA **Defendant**

A.M.L. PHATUDI J:

Introduction

[1] The applicant seeks condonation of the late filing of this application for rescission of judgment apparently granted on 13 February 2001.[1] The applicant further seeks an order setting aside the warrant of execution of the immovable property and its sale that took place on 20 March 2014.[2]

[2] At the commencement of the hearing, I enquired from the applicant's counsel[3] as to why the applicant pleaded the law instead of setting out facts in the founding affidavit. Counsel concedes that the founding affidavit deals to a greater extent, with the law. He submits that there are facts upon which this court can adjudicate on. He further submits that he will mostly rely on the factual background set out in the answering affidavit. I enquired further as to why the applicant failed to file the replying affidavit. Counsel submits that the applicant did not deem it necessary to file the replying and that this court should adjudicate on the facts set out in the founding and answering affidavits respectively.

Factual background

[3] The factual synopsis set out by the applicant is that he cannot recall having received summons.[4] He, however, states that the judgment was granted on 15 February 2000.[5] He only became aware of 'my primary property being auctioned on or about June 2012 ...'[6] He then effected payment of full arrears and legal costs as at that date.[7] The second sale in execution of the property was brought to his attention during March 2014 with the sale thereof being scheduled for 20 March 2014. He then consulted with his attorney, thus this application.

[4] The undisputed facts as set out by the respondent[8] are that the summons was issued on 27 March 2000. The applicant consented to judgment on 17 April 2000. Apparently the applicant defaulted with payments. This prompted the respondent to cause service of the summons on the applicant on the 26 January 2001. Default judgment and warrant of execution were then granted on the 13 February 2001. Attachment was effected on 20 February 2001. The first sale of execution was scheduled for 31 January 2002. The applicant succeeded in staying the said sale by concluding a settlement agreement on the 29 January 2002. (i.e. two days before the scheduled date) The applicant defaulted on the terms he bound himself to the settlement agreement. The sale in execution was then rescheduled on numerous occasions. The said sales in execution were stayed at the special instance of the applicant. The said dates start from 3 October 2002 up to 18 April 2013.[9]

[5] On the 3 October 2013, the 21 sale in execution was scheduled. The applicant stayed same by launching the application for surrender of his estate. The surrender of estate was never prosecuted. In the respondent's eager to recover the judgment debt, the 22 sale in execution was scheduled for 20 March 2014. Frustrating the respondent, the applicant filed an application for leave to appeal against the default judgment granted against him on the 19 March 2014. However, the respondent proceeded with the sale of execution as scheduled.

[6] It is not clear from the record as to when was this application issued. It is clear from the notice of motion that the application was drawn on 26 March 2014 and served on the respondent's attorney on 28 March 2014.

The Law

[7] It is trite law that a defendant may at any time consent or confess in whole or in part the claim contained in the summons. Such confession shall be signed by the defendant personally. The plaintiff may apply in writing for judgment according to such confession.[10] Once the default judgment is granted, the defendant may, within twenty (20) days after he or she has knowledge of such judgment, apply to court upon notice to the plaintiff, to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.[11] If the judgment is granted by the registrar as envisaged in terms of Rule 31(5)(b), then any party dissatisfied with a judgment so granted may within twenty days after such party has acquired knowledge of such judgment, set the matter down for reconsideration by the court.[12]

[8] It is further trite that under common law, the court has the power to rescind a default judgment provided the applicant provides:

> '8.1 a reasonable and acceptable explanation for his default and
>
> 8.2 that the applicant must have a *bona fide* defence which on the face of it, there are prospects of success.'[13]

[9] When a litigant applies for condonation of the late filing of an application, he/she merely approach the court with a hat in hand for the court's indulgence for non-compliance with the rules of court. It is settled law that in considering the application for condonation, the court has discretion that must be exercised judicially upon good cause shown of all the facts.[14] The courts usually consider, among others, the degree of the lateness and its explanation, the prospects of success[15] in the main action and importance of the case to both parties.

[10] The applicant's counsel submits, without facts been set out in the founding affidavit, that the applicant's delay in bringing this application is premised on the applicant's ignorance of his right until such time as he

consulted with his current attorneys of record. He submits that the applicant's rights envisaged in this matter rest on three pillars, being: (i) the respondent's non-compliance with the National Credit Act; (ii) the defence regarding payments made and; (iii) the defence regarding lack of consideration of section 26 of the Constitution of the Republic of South Africa.

Condonation

[11] Considering the applicant's contention set out in this founding affidavit, it seems the applicant relies on the point of law prevalent with regard to the amendment of Rule 46(1) of the Uniform Rules of this Court which was effected from 24 December 2010. The amendment requires judicial evaluation of all the circumstances surrounding the debtor before a writ of attachment is issued against the debtors primary residence.

[12] The applicant's explanation coupled with submissions proffered by his counsel that he (the applicant) only became aware of his rights pertaining to the sale in execution of the primary residence in March 2014 creates doubt in my mind of its correctness. In fact, the applicant, on his own version, contradicts the proffered explanation. The applicant stated in paragraph 10 of his founding affidavit that he 'became aware of my primary property being auctioned on or about June 2012 ...'

[13] The applicant, at that moment was legally represented. It is not in dispute that 'during the period 2006 to 2007, the applicant was duly represented by attorneys and even arranged through these attorneys to cancel some of the ... sales in execution ...'[16]

[14] The applicant fails to explain the 13 years delay in bringing this application for rescission of judgment. He further fails to show a good cause for his lateness for the application for rescission.

[15] In my evaluation of the evidence tendered by both parties, it is clear that the applicant has since 17 April 2000 been aware of the judgment. The judgment debt has since then being alive. The applicant did nothing to cause rescission of the judgment debt. All he tried to do was to extinct the judgment debt through his endeavours as set out in the answering affidavit. He at some stage caused delivery of the "settlement agreement."

[16] In the said typed settlement agreement, which he personally signed and personally faxed through to the respondent's attorney in 2002, it is stated:

> '1. Defendant admits liability for and hereby consents to judgment for:
>
> 1.1 Payment of the capital sum of R 155 293.20

1.2 ...

1.3...

1.4 Order declaring the mortgage property being ERF [...] C[...] P[...] EXTENSION 2 TOWNSHIP, also known as 6 O[...] STREET, C[...] P[...] EXT 2 special executable;'[17]

[17] There is, in my view, no good cause shown for the 13 years lateness in bringing the application for rescission of judgment. The question to be determined next is whether there exists the *bona fide* defence in the main action in respect of the judgment debt.

[18] Considering the evidence tendered, the applicant always had knowledge of the judgment debt which he was and most probably still is, eager to pay off. The applicant knew very well, at all material times from 17 April 2000 that he had no *bona fide* defence. I find no *bona fide* defence with regard to the judgment debt.

Defence Regarding Payments made

[19] The applicant placed on record in paragraph 10 of his founding affidavit where he stated that upon becoming aware of the primary property was to be auctioned following the judgment he consented to, he 'proceeded to effect an(sic) payment of R 32,000.00 in regards to the full arrears plus legal costs on my bond account with the Respondent ...'[18]

[20] The applicant's counsel submits that payments made by the applicant constitute a defence in that the credit agreement gets reinstated. He refers me to **Nkata v Firstrand Bank Limited and Others**[19] and to **section** 129(3) **(a) of the National Credit Act.**

[21] It must be born in mind that **section** 129 **of the National Credit Act** governs the procedure required before debt enforcement. The procedure is invoked prior to the summons are issued or before judgment. If the consumer is in default under the credit agreement, the credit provider is obliged to draw the default of payment in accordance with the credit agreement to the notice of the consumer in writing with proposal of options available to the consumer.[20]

[22] The options available to the consumer are, among others, to reinstate a credit agreement that he/she is in default by paying to the creditor or credit provider all amounts that are overdue together with default charges and reasonable costs incurred in enforcing the credit agreement.[21] The court in **Nkata v Firstrand Bank Limited and Others** held that 'a credit agreement can only be reinstated if it has not already been cancelled by the credit provider.'[22]

[23] In my evaluation of the applicant's submissions pertaining to the payment of R 32, 000.00 made, I find no merit to sustain the submission that such payment reinstated the agreement. In this case, the agreement had already been cancelled by the judgment the applicant had consented to at least twice. **Section** 129 **of the National Credit Act** deals with the procedure the credit provider is obliged to follow prior to the institution of summons up to judgment.[23] There is thus, no reinstatement of the "agreement." This brings me to the last leg upon which the applicant relies on.

Non-compliance with Rule 46(1) of the Uniform Rules vis-á-vis section 26 of the Constitution of the Republic of South Africa

[24] In his founding affidavit, the applicant pleaded mostly the law in relation to this aspect. He relies on the Constitutional Court's decision in **Jaftha v Schoeman and Others**[24] and more emphatically on **Gundwana v Steko Development CC and Nedcor Bank Ltd.**[25] The applicant submits that the amendment of **Rule 46(1) of the High Court Rules** requires judicial evaluation of all circumstances before a writ of attachment is issued against a debtor's primary residence, which is lacking in this case, thus rendering the writ of attachment and subsequent sale invalid.

[25] I find it inevitable to repeat certain factual background, regrettable as it may be found to be unnecessary. The applicant consented to judgment as early as 17 April 2000. Default judgment and warrant of execution were then granted as at 13 February 2001. Sale in execution was then stayed at the applicant's instance. The applicant, assuring the respondent of honouring the judgment debt, concluded what is recorded as "settlement agreement." As indicated in paragraph [16] above, the applicant consented on the 29 January 2002 to an order declaring the mortgage property specifically executable.[26]

[26] In **Gundwana v Steko Development CC and Nedcor Bank Ltd,** the applicant only became aware of the default judgment in the High Court when the execution of sale was imminent[27] whereas in this case, the applicant had since at least, 29 January 2002 been aware of the execution. The applicant on numerous occasions kept causing stay of the execution.[28] The court in **Gundwana case** stated that 'to agree to a mortgage bond does not without more entail agreeing to forfeit one's protection under section 26(1) and (3) of the Constitution.'[29] Further thereto, the court echoed in referring to Jaftha's case that '[a]nother factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his

or her house up in some manner as security for the debt, a sale in execution should ordinarily be permitted where *there has not been an abuse of court procedure'*[30]

[27] The applicant in this matter willingly put his house up for consenting to it being specifically executable in his settlement agreement. The sale in his primary property should be permitted more over that there is no evidence of an abuse of the court procedures by the judgment creditor. Instead, the abuse of court procedure is evident from the applicant's conduct up to and including application to appeal against the default judgment.[31]

[28] The purpose of amending Rule 46(1) to give effect to judicial oversight is to caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes.'[32]

[29] The applicant, in my view, cannot be clothed with "a judgment debtor who is poor" clothes in that he described himself as a businessman. A businessman in the position of the applicant is, in my view, not a poor man. The applicant managed to secure R 32,000.00 for payment of what he called arrears which enable him to stay the sale.

[30] Froneman J penned further in Gundwana that 'it must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to alarm the same end, execution may not be avoided.'[33]

[31] It is evident from the record and facts set out that there is no other proportionate means available at the respondent's disposal to exact payment of the judgment debt other than to execute the property. In fact, the execution has been effected. The property has already been sold.

[32] Froneman J penned with regard to the retrospectiveness of the operation of amended Rule 46(1) that 'amendment does not operate retrospectively.'[34] In settling this retrospectiveness issue, the court penned that 'individual persons affected by the ruling still needed to approach the courts to have the sales and transfers set aside if granted by default.'[35] The court further stated that 'in order to turn the clock back in these cases aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule under which the property was declared executable is not sufficient to undo everything that followed.'[36]

[33] It is clear that the applicant who intends to rely on non-compliance with Rule 46(1) in relation to execution orders granted prior to the amendment must first jump the rescission of judgment granted by

default hurdle. Did the applicant in this case pass the rescission of judgment mark? I am afraid, the applicant failed to show good cause and to set out the *bona fide* defence for granting of rescission of judgment. The applicant's application unfortunately stands to be dismissed.

[34] It is trite law that costs follow the event. The respondent succeeds with their defence. They are thus entitled to their costs.

The following order is thus made.

Order:

The applicant's application is dismissed with costs.

A.M.L. Phatudi

Judge of the High Court

On behalf of the Applicant: Lombards Attorneys

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Monument Park

Pretoria

Adv. P. Van Den Ordel

On behalf of the Respondent: Hack Stupel and Ross

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1 Answering Affidavit - Page 39; paragraph 6 read with annexure F4 at page 60

2 Notice of Motion - paginated page 2

3 Adv. Van den Ordel

4 Founding Affidavit - paginated page 18 paragraph 10

5 Founding Affidavit - paginated page 10 and 11 paragraph 7.1 and 9.2 respectively

6 Founding Affidavit - paginated page 18 paragraph 10

7 Ibid

8 The facts are set out in the answering affidavit. The applicant failed to file his replaying affidavit.

9 The dates are set out in Answerinf Affidavit - paginated pages 40 and 41 paragraph 11

10 Rule 31 (1) (a) (b) and (c) of the Uniform Rules of this court.

11 Rule 31(2) (b) of the Uniform Rules of this court.

12 Rule 31 (5)(d) of the Uniform Rules of this court as amended by GN R471 of 12 July 2013

13 Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills 2003 (6) SA 1 SCA

14 See: United Plant Hire (Pty) Ltd v Hills 1976 (1) SA 717 (A) at page 720 E - G; Melane v Santam Insurance 1962 (4) SA 531 (A) at page 532

15 S v Senkhane 2001 (2) SACR (SCA) - The principle also apply in civil cases.

16 Answering Affidavit – paragraph 13 paginated page 41

17 Settlement agreement - paginated page 65

18 Founding Affidavit - paragraph 10 paginated page 18

19 2014(2) SA 412 (WCC)

20 (1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date;

21 (3) Subject to subsection (4), a consumer may-

(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and-

(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.

22 2014 (2) SA 412 (WCC) para [39]

23 Sebola v Standard Bank of South Africa and Others 2012 JDR 0949 (CC)

24 2005 (2) SA 140 (CC)

25 2011(3) SA 608 (CC)

26 See: Settlement Agreement - paginated page 65

27 Gundwana v Steko Development CC and Nedcor Bank Ltd 2011(3) SA 608 (CC)

28 Answering Affidavit - paragraph 11 paginated page 40 - 41

29 Gundwana Case- Op cit para [46]

30 Op cit para [47] emphasis added, footnotes omitted.

31 Application for leave to appeal filed on the 19 March 2014.

32 Gundwana v Steko Development CC and Nedcor Bank Ltd 2011(3) SA 608 (CC) para [53]

33 Gundwana v Steko Development CC and Nedcor Bank Ltd 2011(3) SA 608 (CC) para [54]

34 Gundwana v Steko Development CC and Nedcor Bank Ltd 2011(3) SA 608 (CC) para [33]

35 Gundwana v Steko Development CC and Nedcor Bank Ltd 2011 (3) SA 608 (CC) para [57]

36 Gundwana v Steko Development CC and Nedcor Bank Ltd 2011(3) SA 608 (CC) para [58]