10/11/17

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 3858/2007

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED: NO

10 November 2017 .....

In the matter between:

THAMSANQA MBOTSHWA MPOFU	1st APPLICANT
LUNGILE MPOFU	2nd APPLICANT
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	1st RESPONDENT
THE DEPUTY SHERIFF OF THE HIGH COURT RANDBURG WEST	2nd RESPONDENT

JUDGMENT

MUDAU, J

[1] This is an application for rescission of the judgment granted by this Court (per Murphy J) on 19 January 2016, for payment of the amount of R4 116 710.74 with interest thereon as well as the sale and execution of the property known as Erf 1009, situated in the township of Dainfern, Extension 6, Registration Division J.R., province of Gauteng, measuring 1173 (one thousand one hundred and seventy three) square meters and held by Title Deed No. T38694/2009, better known as Nr. 1009 Woodchester Place, Riverwood Village, Riverwood Village Extension 6 ("the property"). The applicable sub-rule provides that the Court has the power to reconsider a judgment upon good cause shown, granted by default, if an application is brought by a defendant, within 20 days after he or she has acquired knowledge of such judgment.[1]

[2] The first respondent opposes the application and filed its opposing affidavit dated 16 February 2017, after which the applicants took no further steps.

[3] The applicants were the registered owners of the said immovable property. The first respondent held a mortgage bond in the amount of R3, 440,000.00 and an additional amount of R860, 000.00 registered over the property in respect of monies lent and advanced to the applicants at the latter's special instance and request, which arose from the loan agreement. The applicants at the time of

[1] Rule 31 (5) (d) of the Uniform Rules of Court.

summons, were in arrears with their monthly instalments as at 13 October 2015 in the amount of R273,702.32 and the amount outstanding in terms of the credit agreement at the said date amounted to R4,116,710.74 together with interest thereon at the rate of 8.28% per annum. After issuing summons, the applicants, on 3 November 2015, gave notice of their intention to defend the action and appointed CSM Attorneys as their attorneys of record.

[4] Subsequent to the filing of an intention to oppose however, no opposing affidavit was filed to resist summary judgment. In support of an application for rescission of judgment the first applicant avers that on or about the beginning of 2015, he made arrangements with the first respondent's Collection Department that he would make payments toward the arrears due as well as the regular instalment amounts, as and when his invoicing for his business was satisfied and as and when his cash flow becomes available. From around the beginning of 2015 he continued to make regular payments, as and when he could whereby he communicated same to the first respondent's Collection Department.

[5] During late 2015, according to the first applicant, he made progressive steps towards rectifying his cash flow situation and continued to communicate that with the first respondent's Collection Department. On or about the middle of 2015, after extensive conversations and also due to the fact that the first applicant was at an advanced stage of rectifying his cash flow situation, he requested the first respondent's Collection Department to allow him to make payment in full settlement of all outstanding arrears as well as a regular payment towards his

mortgage bond. The first respondent's Collection Department, according to the first applicant, advised him that they would revert to him with a suitable response; however that did not come to fruition.

[6] On or about 12 February 2016, the first applicant further avers that he received a writ of execution from the Sheriff, in respect of which the first respondent had obtained a default judgment against him. The first applicant further averred essentially that:

1.1 he did not receive any notice in terms of section 86(10) of the National Credit Act, 34 of 2005, and;

1.2 that there was no compliance with section 129 of the said Act.

2 The first applicant further submits that during the beginning of 2016 he obtained a valuation for the involved property which was conducted by Pam Golding Properties. The cautious valuation of the property in an open market sale was for an amount between R4, 950,000.00 and R5, 350,000.00. This amount would apparently be over and above the outstanding amount owing to the first respondent.

[7] The first applicant submitted that he has no alternative accommodation and that the property is his primary residence. It is furthermore submitted that residing within the premises are the applicants' children and an elderly man. The first applicant submits that execution towards his immovable property

limits his right to adequate housing as provided for by in section 26 of the Constitution of the Republic of South Africa.

[8] It is evident from the papers and not in issue that the applicants received the summons and had attorneys on record but however, failed to file any opposing affidavits towards the summary judgment application. The applicants were aware that the action was being brought against them, but the instructing firm of attorneys had no proper mandate to carry out the instructions. It was submitted on behalf of the first respondent with which I respectfully agree that summons was not issued prematurely as the 10 day notice period lapsed on 9 October 2015, and that summons was to be issued any day from 9 October 2015 onwards. The section 129 notices were issued (and dated) on 25 September 2015 and summons was issued on 19 October 2015, 10 clear business days lapsed between the two said periods.

[9] Section 26 of the Constitution of the Republic of South Africa states that:

"Everybody has the right to have access to adequate housing."

The right to have access to adequate housing is not an unfettered right and it is trite that such a right is neither absolute nor does it disbar the first respondent from selling the property in execution of a judgment debt. The applicants have no entitlement to stay in a house beyond their means.

[10] There have traditionally been requirements which an applicant is generally

expected to establish to succeed in a rescission application, as intended in Rule 31 (2) (b), *viz* a reasonable explanation by the applicant for the default; an absence of wilfulness; a *bona fide* defence which has some prospects of success and that the application is *bona fide* and not made with the intention to delay the respondent (plaintiff)'s claim. [2]

[11] When dealing with the words "good cause" and "sufficient cause" in other rules and enactments, the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge nor fetter, in any way, the wide discretion implied by these words.[3] It is trite, however, that the Court's discretion to grant rescission must be exercised judicially after a proper consideration of all the relevant circumstances. In *Silber*[4], the Appellate Division held that good cause includes but is not limited to the existence of a substantial defence. Further to this, Erasmus notes:

It has been held that the requirement of 'good cause' cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, of the bona fide presently held desire on the part of the applicant for relief actually to raise the defence concerned in the event of judgment being rescinded." [5]

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[2] *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476
[3] *Silber v Ozen Wholesalers* (Pty) Ltd 1954 (2) SA 345 (A) at 352-353
[4] At 352.
[5] Erasmus **Superior Court Practice** OS, 2015, at D1-368.

[12] The applicants did not, in my view, put forward any *bona fide* defence towards the merits of the first respondent's case. In my judgment they were also in wilful default. In addition, the applicants provided a poor explanation for their default. It is clear from the affidavit by the first applicant that he is advancing a defence simply to delay the obtaining of a judgment to which he knows the first respondent is justly entitled.[6] This is amplified by the fact that not only was there no replying affidavit filed, but also by their absence after due notice of set down by the first respondent on 22 August 2017 in the hearing of their matter. There is no real dispute between the parties which justifies the rescission of judgment.

[13] For all the reasons given above, it follows that the application in the present case must be dismissed, as it is without merit. It is an abuse of the Court processes which justifies an adverse costs award.

[14] The following order is made:

1. The application is dismissed with costs on the scale as between attorney and client.

[6] *Skead v Swanepoel* 1949 (4) SA 763 (T) at 766-7

T P MUDAU

Judge of the High Court,

Gauteng Division,

Pretoria

Date of Hearing:	30 October 2017
Date of Judgment:	10 November 2017
APPEARANCES	
For the Applicant:	No Appearances
Instructed by:	H L M Ngwenya c/o Mabuli Attorneys, Pretoria
For the Respondent:	Adv Jaco van Heerden
Instructed by:	Hannes Gouws & Partners Inc.