**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 82660/2014**

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

4/6/2018
DATE

SIGNATURE

In the matter between:

| | |
|---|---|
| **SENZOSENKOSI TEMPLETON MENEMELA** | First Applicant |
| **AVRIL MENEMELA** | Second Applicant |
| **EUCLIDE KHUMBULANI LUTHULI** | Third Applicant |
| **SIZAKELE LYNETTE LUTHULI** | Fourth Applicant |

and

| | |
|---|---|
| **ABSA BANK LIMITED** | First Respondent |
| **SHERIFF: KEMPTON PARK** | Second Respondent |
| **REGISTRAR OF DEEDS: PRETORIA** | Third Respondent |

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**J U D G M E N T**

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**DEWRANCE AJ**

[1] The applicants launched two applications. They are:

1.1 a rescission of judgment application ("the rescission application"); and

1.2 an application to stay the sale in execution pending the outcome of the rescission application ("the stay application").[4]

[2] In the notice of motion in support of the rescission application, the applicant seeks the following relief:

> "1. *rescinding and/or setting aside judgment granted in default against the Applicants*
>
> 2. *Granting the Applicant leave to oppose the main application*
>
> 3. *condoning the Applicants late service and filing of this application for rescission of judgment*
>
> 4. *costs of suit*
>
> 5. *further and/or alternative relief.*"

[3] In their stay application, the following relief is sought:

"1) *That the respondents be and are hereby granted and restrained from sale in execution dated 10 March 2016, granted against the applicant, in their favour, bythe [sic] Registrar, pending the outcome of the Application for Rescission Application proceedings relating thereto.*

2) *That a rule nisi do [sic] issue calling upon the respondents to show cause to this Honourable Court or so soon as why the order referred to in prayer 1 Thereof [sic] should not be confirmed.*

3) *That the order referred to in prayer 1 hereof shall be an order provisionally staying the sale in execution herein.*

4) *That the respondent be ordered to pay the costs of this application only in the event of this application being opposed.*"

[4] Only one affidavit has been deposed to in respect of the two separate notices of motion. Although the affidavit reads "*Affidavit in support of the rescission application*", I am prepared to accept that the affidavit is made in support of both notices of motion.

[5] However, the deponent fails to state whether the application is brought in terms of the provisions of Rule 31(2) or Rule 42(1) or the common law. The application similarly does not contain sufficient allegations to support the relief the applicants seek in the stay application.

[6] The deponent in both applications is the first applicant, Senzosenkosi Templeton Menemela. He is the first applicant in both the rescission and stay applications. He does not show that he brings the application on behalf of the

other applicants nor does he show that he is entitled to do so in law. In this judgment, I will refer to the first applicant as "the applicant".

[7] Despite having received the answering affidavit, the applicant has failed and/or neglected to file a replying affidavit. In the absence of a replying affidavit, it is the first respondent's submission that the first respondent's version, as it stands in the answering affidavit, stands to be accepted as uncontested on those allegations that have challenged the contents of the founding affidavit.

[8] The applicant has further failed and/or neglected to file heads of argument and a practice note. In the heads of argument delivered on behalf of the first respondent, it is submitted that the applicant:

8.1 does not have any *locus standi*; and

8.2 has failed to meet any of the requirements of Rule 31 and/or Rule 42 or to make out a case for rescission under the common law;

[9] As such, so the applicant argues, the application stands to be dismissed with costs only against the applicant as neither of the other applicants are a party to this application. Such costs should be on the scale as between attorney and client, not only for the reasons set out in the preceding paragraph but also because the application lacks any *bona fides* and because this application is

an attempt to frustrate the first respondent from executing a validly-obtained judgment.

***LOCUS STANDI***

[10] The third and fourth applicants concluded a written loan agreement with the first respondent. Monies were lent and advanced in terms thereof to the third and fourth applicants. As security for the loan amount a mortgage bond was registered over the immovable property. The third and fourth applicants fell into arrears and, after taking all the necessary steps and after proper service of the summons, default judgment was granted on 5 February 2015 by his Lordship Mister Matojane J. Subsequently, the property was declared executable and further steps were taken.

[11] The applicant and the second applicant were not parties to the said proceedings and they were also not co-owners in and to the mortgaged immovable property.

[12] Subsequent to the default judgment and attachment of the property, the third and fourth applicants served an application for leave to appeal and an application to stay the sale in execution. The third and fourth applicants also issued an application for rescission of judgment. The application for leave to appeal and the third and fourth applicants' application for rescission of judgment were withdrawn on 7 July 2015.

[13] On or about 9 March 2016, the applicant issued and served the current application. Nowhere in the founding affidavit is there any mention that the third and/or fourth and/or second applicants are supporting the application for rescission of judgment or that the applicant is authorised to act on their behalf. The applicant refers to the immovable property as 'his' property but fails to attach any prove to substantiate this allegation.

[14] Counsel for the first respondent submits that the applicant has no legal interest in the matter as he was not a party to the secured loan agreement which was concluded between the first respondent and the third and fourth applicants. He is also not a co-owner in and to the immovable property. It is only the third and fourth applicants' rights that are adversely affected by the judgment. It is they who are indebted to the first respondent and they are the owners of the immovable property.

[15] It is the first respondent's submission that the applicant is not in a position to provide the necessary material upon which this application is founded. He has no personal knowledge to depose to an affidavit concerning issues which only the third and fourth applicants bear knowledge, specifically in respect of any defence to the merits.

[16] I agree with counsel for the applicant that the applicant's averments, that he has been residing in the property since June 2002 with the consent of the owner, that he is a lawful occupier together with his wife and six children and

that their occupation is for a period in excess of six months, do not assist him in any way and can in no way clothe him with the required *locus standi.*

[17] The grounds mentioned in the previous paragraph might come into play in an application in terms of the provisions of section 4(7) of the Prevention of Eviction from and Unlawful Occupation of Land Act 19 of 1998 but it is, with respect, irrelevant for purposes of this application.

[18] I further agree with the submissions of counsel that the applicant does not have any *locus standi* to launch this application. There is no privity of contract between the applicant and the first respondent.

[19] Therefore, for this reason alone, the application is dismissed.

[20] It follows that the application to stay the sale in execution should also be dismissed and is accordingly dismissed.

[21] In relation to the issue of costs, the first respondent seeks a punitive costs order. The applicant was already alerted thereto in the first respondent's answering affidavit.

[22] I am of the view that this application warrants a punitive costs order. Firstly, the applicant has initiated an application and failed to prosecute the application expeditiously by failing to deliver his replying affidavit, heads of argument and

setting the matter down. To compound matters further, the applicant did not even have the necessary *locus standi* to launch these proceedings. I am of the view that such conduct amounts to an abuse of the court processes and that, as a result of such conduct, the first applicant, Mr Menemela, must be mulcted with a punitive costs order.

[23] Accordingly, I make the following order:

23.1 both applications are dismissed;

23.2 the first applicant, Mr Senozesenkosi Templeton Menemela, is to pay the costs of both applications on the attorney and client scale.

**DEWRANCE, AJ**

**ACTING JUDGE OF THE HIGH COURT**