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 14/9/18 SIGNATURE

CASE NO: 19754/08

DATE DELIVERED:

IN THE MATTER BETWEEN

MADIKANE, LUNGILE APPLICANT

AND

NEDBANK LIMITED FIRST RESPONDENT

(FORMERLY KNOWN AS NEDPERM AND SA PERM BANK LTD)

MOLEMANE, LESEGO MICHAEL SECOND RESPONDENT

MOTAPANYANE NTSOAKI SYLVIA THIRD RESPONDENT

SHERIFF OF THE HIGH COURT FOR THE DISTRICT OF ALBERTON FOURTH RESPONDENT

JUDGMENT

ERASMUS, AJ

INTRODUCTION:

[1] When a party learns that a default judgment has been granted against him or her and that party believes there are grounds upon which to rescind it, it is imperative that such party acts promptly. Not only does a judgment have consequences for the parties immediately involved, but it may also affect third parties as the facts of this case illustrate. It is therefore not surprising that an application in terms of Rule 31 needs to be launched within 20 (twenty) days and in terms of Rule 42 and the common law, it needs to be instituted within a reasonable time.

BACKGROUND:

[2]

[2.1] First Respondent obtained default judgment against First Applicant and his wife in a sum of R58 449.58 on 8 August 2008 ("the judgment"). The judgment also declared Applicant's house executable.

[2.2] A sale in execution was held on 5 October 2009 during which sale First Respondent bought the house for R10 000.00.

[2.3] First Respondent sold the property for R157 500.00 to a third party – during or about 2010, if regard is had to a Deeds search attached by First Respondent to its Answering Affidavit at page 161 of the papers.

[2.4] Applicant says he became aware of an advertisement to sell his property in 2011.

[2.5] In January 2007 an eviction application was brought against Applicant in the Johannesburg High Court by Third and Fourth Respondents. Applicant consulted with his lawyers on or about 25 January 2017 and only then became aware of the judgment – according to his version.

[2.6] The current application was only served on 1 September 2017, allegedly because Applicant's lawyer struggled to obtain copies of the Summons, return of service, etc.

BASIS FOR APPLICATION:

[3] Applicant says he never received the Summons, neither did he receive the demand addressed to him prior to the Summons in terms of Section 129 of the National Credit Act. He was therefore not in wilful default according to him.

[4] He paid his bond by means of a monthly stop order in the sum of R1 089.00 for 20 years until "the bond was finally paid up".

[5] According to him the arrears on his loan were only R16 942.78 at the time of the sale in execution and First Respondent had not established first if there were any movables upon which to execute.

[6] He also sought condonation for not launching the current application within 20 days after 25 January 2017 and relied on the fact that his attorneys battled to obtain the content of the court file.

CONDONATION:

[7] Since the application was launched more than nine years subsequent to the judgment; six years after Applicant allegedly became aware of a sale of his property and approximately 7 months after he allegedly became aware of the judgment, condonation is not a formality in this case.

[8] It is however trite that the court will ordinarily not merely look at the explanation for the delay and the length thereof, but also assess whether the Applicant has prospects of succeeding on the merits.

[9] I intend therefore to adjudicate the condonation aspect in conjunction with the consideration of the merits of the application.

REQUIREMENTS FOR A RESCISSION APPLICATION:

[10] Since Applicant refers to a period of 20 days, it appears as if he bases his application on Rule 31(2)(b). Even if he bases it upon the common law, he has to satisfy the same requirements, namely an explanation for his default and a *bona fide* defence, as well as the important third requirement, namely a *bona fide* held desire to actually have his defence ventilated in a court.[1]

[11] I may mention that Applicant also sought to base his relief on *"the erroneous granting of default judgment"* i.e. irregularities in terms of Rule 42. I may also mention that in the Founding Affidavit Applicant did not rely on the ground that Summons had not been served at the correct domicilium address – he merely stated that he never received the Summons as it was allegedly served by affixing it to the main entrance.

EXPLANATION FOR DEFAULT:

[12] As stated above, Applicant relies in his Founding Affidavit only upon the fact that he had been unaware of the Summons after service thereof on 13 May 2008. I am prepared for purposes hereof to accept such version – at least until the sales in execution were arranged.

[13] However, the enquiry does not end there. On Applicant's own version, he became aware of a newspaper advertising his house for sale in 2011. He was "shocked" when

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[1] Galp v Tansley N.O., 1966 (4) SA 555 (C) at 560

he saw the advertisement as he had thought his bond with First Respondent was paid in full.

[14] The obvious step to take was to contact the mortgagee (First Respondent), which step he apparently took, but he was allegedly only informed that he had defaulted on his payments and therefore his house was sold (paragraph 15 of the Founding Affidavit).

[15] It "later transpired" that his house was sold on auction. He refers in this regard to a letter which First Respondent addressed to the Ombudsman for Banking Services, which letter is attached as an annexure to the Founding Affidavit. Such letter is dated 15 November 2011. The letter explicitly refers to service of Summons and the judgment granted on 8 August 2008. It is telling that the Ombudsman apparently made his finding on 8 February 2012 if regard is had to Annexure "AA20" to the Answering Affidavit of First Respondent at page 142 of the papers. Evidently, Applicant took cognisance of the finding, as is evident from paragraph 20 of his Founding Affidavit.

[16] A further factor that casts serious doubt on Applicant's alleged ignorance of the judgment until 2017 is the following:

First Respondent sets out in the Answering Affidavit that it arranged sales in execution on no less than 4 occasions, namely on 22 September 2008, 6 April 2009, 29 June 2009 and lastly on 5 October 2009 – which sale proceeded. According to First Respondent the first three sales were cancelled after Applicant had promised to settle his arrears and details of amounts are provided. Applicant's retort to this in the

Replying Affidavit is simply that he did not conclude any payment arrangements and even if he did, he was not aware of the judgment.

[17] It is simply inconceivable that First Respondent would firstly cancel or postpone a sale in execution if some arrangement had not been put in place. It is even more inconceivable that First Respondent would not have alerted Applicant to the sales in execution. Such sales that would have been its obvious leverage or the proverbial "sword hanging over Applicant's head".

[18] In the premises Applicant has simply failed to convince this court that he has a credible explanation for his default. In fact, it appears as if he acquiesced in the judgment by making payment arrangements, instead of applying for rescission on the first available opportunity when he became aware of the judgment – which is probably in 2008 already and at the latest when he was told by the Ombudsman of the judgment during February 2012.

***BONA FIDE* DEFENCE**:

[19] Applicant's defence appears to be that he had made regular payments of R1 089.00 per month for 20 years and therefore his bond was finally paid up. He also says he took an additional loan of R9 000.00, which he "repaid in full" without stating how and when he did so.

[20] As is the case with his explanation for default, there are difficulties with this version on Applicant's own papers, of which I mention the following:

[20.1] Applicant annexes a statement from First Respondent to his Founding Affidavit as Annexure "LM3". From this statement it appears that as at May 2008 – when Summons was served – there was a significant balance of over R60 000.00 outstanding and that Applicant was still making sporadic payments.

[20.2] Even more damning is his admission in paragraph 19 of the Replying Affidavit that his outstanding balance as at 1 January 2008 (i.e. before service of Summons) was R57 788.08. His payments subsequent to judgment – on occasion as large as R6 000.00 – is also irreconcilable with a factual settlement or a belief that his bond had been paid up.

[21] His belated complaints of not receiving the Section 129-demand in terms of the National Credit Act cannot by itself establish a defence – especially if regard is had to the fact that the sale in execution was repeatedly postponed in view of the payment arrangements. The purpose of Section 129 was therefore achieved in any event. In the premises Applicant has also failed to establish a *bona fide* defence.

IRREGULAR SERVICE OF SUMMONS:

[22] As stated before, Applicant did not rely on this ground in his Founding Affidavit. Only in his Replying Affidavit did he state that the Summons and Warrant were served at the wrong address, namely Erf 2172 Likole X1 and not 217 Mfundo Street, Siluma View, Katlehong, Germiston.

[23] Applicant cannot expect a court to set aside the judgment pursuant to this alleged irregularity for the following reasons:

[23.1] It is trite that an applicant must make his case in the Founding Affidavit so that the respondent knows which case to meet and to react thereto. This was not done.

[23.2] The one address is an erf number and the other a street address. Applicant did not place proper evidence before this court to indicate that Erf 2172 has a different street address than the one stated in the papers.

[23.3] Even if this "irregularity" were established, it is trite that in terms of Rule 42 a rescission needs to be launched within a reasonable time and that inordinate delay is in itself good reason for refusing relief.[2] I have already shown above that Applicant must have known about the judgment in 2008 and at the latest in 2012. Yet he chose to wait until 2017, after third parties had already obtained title to the property in question. It is certainly not in the interest of justice to entertain this issue now.

RULING ON CONDONATION:

[24] Applicant's delay in launching the application is inexcusable. In addition, he has not shown a *bona fide* case for rescission, either in terms of Rule 31, the common law or Rule 42. Prayer 1 can therefore not be granted and the application fails at inception.

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[2] Roopnarain v Kamalapathy, 1971 (3) SA 387 (D)

DECLARING THE PROPERTY EXECUTABLE:

[25] Applicant relies on the fact that the Registrar granted the order declaring the property executable and that the lack of judicial oversight was found to be unconstitutional. Firstly, the Registrar's power as such was only declared unconstitutional by the Constitutional Court in the matter of *Gundwana v Steko Development & Others, 2011 (3) SA 608, CC* which judgment was granted on 11 April 2011. Secondly, Froneman J explicitly stated at paragraph [58] of such judgment as follows:

"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. In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier, and they will have to set out a defence to the claim for judgment against them."

[26] I have shown above that Applicant has failed to satisfy the requirements stated by his Lordship Froneman and therefore the unconstitutionality of the Registrar's order cannot assist him.

CONCLUSION:

[27] In the premises I make the following order:

The application is dismissed with costs.

F J ERASMUS
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 12 September 2018
FOR THE APPLICANT: Adv Marule
INSTRUCTED BY: Sineke Attorneys
FOR THE RESPONDENT: Adv J Minnaar
INSTRUCTED BY: Hammond Pole Majola Inc