

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – EAST LONDON**

EL: 1135/13
ECD: 2635/13
Date Heard: 18/09/14
Date Delivered: 30/09/14

In the matter between:

SENATE MOSHESH

APPLICANT

AND

THE STANDARD BANK OF SOUTH AFRICA

RESPONDENT

JUDGMENT

SMITH J:

[1] The applicant seeks an order rescinding the default judgment in favour of the respondent granted against her on 11 December 2013, for payment of the sum of R628 414. 08, and declaring her mortgaged immovable property executable.

[2] The applicant failed to file replying affidavits, and the matter was consequently set down for hearing by the respondent. Mr *Sandi* was belatedly briefed to appear on her behalf, and Mr *De la Harpe* appeared for the respondent.

[3] It is trite law that in order to succeed the applicant must establish that:

- (a) her default was not willful;
- (b) the application is *bona fide* and not solely aimed at delaying the respondent's claim and ;
- (c) she has a *bona fide* defence to the respondent's claim.

[4] The applicant has fallen woefully short in her attempt to establish the first ground. As Mr *de La Harpe* correctly argued, the reasons proffered for her default are palpably disingenuous and demonstrably false. She claimed that the summons was served at her address in East London, and on her mother's domestic worker, who only handed the summons to her mother in January 2014. She claimed that her mother had thereafter negotiated with the respondent's attorney, Mr Pringle, and an agreement was concluded in respect of the payment of the arrear installments. At the time she was not resident in East London, and consequently only became aware of the judgment during the first week of May 2014.

[5] The sheriff's return however indicates that the summons was served at the applicant's place of employment in Sandton on 23 October 2013. She had been contacted telephonically by the sheriff, and had confirmed that the summons should be served on the receptionist at her workplace. The summons had also been served at another address in Sandton, which had been identified by a tracing agent as that of the applicant. I am, in addition, also constrained to accept the respondent's version to the effect that the applicant's mother did in fact not negotiate with Mr Pringle after she had become aware of the summons, but had only met with him after the writ of execution had been served, which was during February 2014. The negotiations between her mother and Mr Pringle, or for that matter any alleged agreement relating to the settlement of

the judgment debt, therefore occurred only after judgment had already been granted, and can thus not assist the applicant in her attempt to prove a *bona fide* defence.

[6] There can be little doubt that she also failed to establish that she has a *bona fide* defence to the respondent's claim. She averred in this regard that:

- (a) the respondent had agreed that the action would be stopped if she paid R34 000 of the admitted arrears of R84 000; and
- (b) she did not receive the notice in terms of section 129 of the National Credit Act, 34 of 2005 ("the Act").

[7] The difficulty with the first defence is, as I have already said, that the applicant has failed to establish that the alleged settlement agreement was concluded prior to judgment. The evidence clearly shows that her mother only went to see Mr Pringle after the writ of execution had been served. Any arrangements with the respondent or its legal representative, could therefore only have related to the settlement of the judgment debt, and can thus not form the basis for a valid defence to the respondent's claim.

[8] Her claim that she did not receive the notice in terms of section 129 of the Act has also been soundly refuted by the respondent. First, it is clear that from the track and trace report that the registered item had in fact been collected and second, it is evident from the affidavit of Estelle Swart, Mr Pringle's secretary, that the applicant deliberately attempted to evade service of the notice.

[9] I am therefore of the view that the applicant has failed to establish any of the prerequisites for rescission of judgment. In the result I make the following order:

- (a) The application is dismissed with costs, including all reserved costs.

J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Advocate Sandi
Attorney for the Applicant	:	Makhanya Incorporated Suite 203-207 Werners Building EAST LONDON Ref: enm/Moshesh
Counsel for the Respondents	:	Advocate De La Harpe
Attorney for the Respondents	:	Drake Flemmer and Orsmond Tewkesbury House Southernwood EAST LONDON Ref: AJ Pringle/KK/VS/s1056
Date Heard	:	18 September 2014
Date Delivered	:	