REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 7264/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED. 19/08/2013

16/08/2013

In the matter between:

PEARL, KLOBERIE	**APPLICANT**
And	
ABSA BANK LIMITED	**1st RESPONDENT**
ATHOL GEOFFREY HARDING	**2nd RESPONDENT**
REGISTER OF DEEDS: PRETORIA	**3rd RESPONDENT**

JUDGMENT

MODIBA AJ:

[1] This is an application for the rescission of a default judgement granted against the Applicant in favour of the First Respondent on 7 May 2010 for an amount of R1 829 258.60 including an order declaring the Applicant's property executable.

[2] On 16 August 2013 I granted an order dismissing the application for condonation for the late filing of the rescission application. I indicated that the reasons for the order would follow. These are the reasons.

[3] The Applicant filed her application for rescission of the default judgment on 27 February 2013, approximately 34 months after the default judgement was granted against her.

[4] This rescission application falls within the ambit of Rule 31(5)(d) as it was granted by the Registrar. This rule requires that a rescission application for a default judgment granted under that rule be brought within 20 days after she acquired knowledge of the judgment.

[5] The Applicant alleges that she became aware of the default judgment on or about 23 November 2012. The Respondents however contend that the Applicant became aware of the default judgment much earlier than 23 November 2012. The First Respondent alleges that the Applicant became aware of the default judgment in May 2010 when she met with Ms Helen du Plessis (hereinafter referred as du Plessis) at the offices of the attorney for the First Respondent; alternatively that the Applicant became aware of the default judgment on 13 September when she was informed of the sale in execution against her property scheduled for 25 September 2012. The Second Respondent also alleges that the Applicant became aware of the default judgment on 13 September 2012.

[6] From these allegations, there are three possible dates on which the Applicant became aware of the default judgment namely, in May 2010, on 13 September 2012 or on 23 November 2012. If I determine that the Applicant knew about the default judgment on any of these dates, then the period within which the Applicant is required to bring the application for rescission is reckoned from the date so

determined. As I have already stated, the Applicant filed her application for rescission of the default judgment on 27 February 2013. Approximately 34 months after the earliest date on which she possibly knew of the default judgment and approximately 3 months after the latest date on which she possibly knew of the default judgment.

[7] In such a case, the Applicant is required to file an application for condonation for the late filing of the rescission application.[1] The court will only grant such an application on good cause shown for the delay. Rule 27(3) requires the Applicant to provide reasons for the delay by bringing the application with sufficient detail to enable the court to understand the cause for the delay and to assess the Applicant's motive for bringing the application.[2] A condonation application is an interlocutory application. In terms of Rule 6(11) this application ought to be brought on notice to the other party and supported by an affidavit. The Applicant did not follow this procedure.

[8] Although the Applicant expressed an intention in her reply to the First Respondent's answering affidavit to amend her notice of motion to include a prayer for condonation,[3] she did not effect such an amendment. Instead counsel for the Applicant sought an order for condonation orally from the Bar.

[9] I first consider whether in the circumstances it is appropriate for me to consider the Applicant's condonation application brought orally from the bar.

[10] Counsel for the Applicant requested the court to consider the condonation application despite the fact that counsel for the Applicant brought the application from the bar. He argued that although such an application is normally brought on notice, the court may hear an application brought orally from the bar if the other parties will not suffer prejudice.[4] He submitted that the other parties will not suffer prejudice because the Applicant had laid the basis for this application in her founding

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[1] Rule 27 (3).
[2] *Silver v Ozen Wholesaler (Pty) Ltd* 1954 (2) SA 345 (A) at 352.
[3] Paragraph 36 of the Applicant's reply to the First Respondent's Answering Affidavit
[4] Counsel for the Applicant relied on the following authority for his request: Joffe et al 'High Court Motion Procedure: A Practical Guide' Issue 5 Chapter 1.9.

affidavit as well as in her reply to the First and Second Respondent's answering affidavits. Counsel for the Second Respondent contended that there is no proper condonation application before court. She contended that the Applicant should have brought a written condonation application, and that the court should not condone a flagrant disregard for court rules by the Applicant. For this reason counsel for the Second Respondent submitted that the court should not consider the Applicant's request for condonation.

[11] In *McGill v Vlakplas Brickworks (Pty) Ltd* 1981 (1) SA 637 (W) at 643 the court held that the court may hear a condonation application brought orally from the bar where the objection to the application is technical and the other party(s) will not suffer prejudice. I am satisfied that the other parties will not suffer prejudice as the Applicant laid the basis for this application in her papers in which she explained the reasons for her delay in bringing the rescission application. Both Respondents had the benefit of considering and responding to these averments ahead of this hearing and will not suffer any prejudice. I am of the view that the Second Respondent's objection is technical and dilatory. It is in the interest of the parties that I hear the condonation application as doing so will bring finality to this matter with the required urgency.

[12] I now turn to consider the application for condonation for the late filing of the rescission application.

[13] To determine whether the Applicant has shown good cause for the delay, I am guided by the following factors: the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the Respondent's interest in the finality of its judgment, and the avoidance of unnecessary delay in the administration of justice.[5]

[14] It is important to consider the chronology of events that occurred from the time the default judgement was granted until the Applicant filed the rescission application. These events are common cause between the parties:

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[5] *Byron v Duke Incorporated* 2002 (5) SA 482 (SCA)

14.1 On 7 May 2010, the First Respondent obtained default judgment against the Applicant.

14.2 During May 2010, the Applicant was contacted by an estate agent who informed her that there is a possible claim against her property and that her house may have been repossessed. The estate agent also informed her who the First Respondent's attorneys of record were.

14.3 The Applicant immediately attended the offices of the First Respondent's attorneys. She met with du Plessis, an administrator at the First Respondent's attorney's collections department. During this meeting, the Applicant alleges that a monthly payment arrangement was entered into between her and the First Respondent represented by its attorneys of record. On the basis of this agreement, the First Respondent agreed to stay legal proceedings against the Applicant.

14.4 The Applicant made monthly payments of various amounts to the First Respondent between July 2010 and February 2011 and a further payment in August 2011. The latter payment was the last payment made by the Applicant to the First Respondent.

14.5 The First Respondent caused the Applicant's property to be attached during April 2012.

14.6 On 13 September 2012, the Applicant received a text message from a person named Zola. She immediately called Zola who informed her that her property will be auctioned on 25 September 2012.

14.7 The Applicant immediately contacted her attorney, a certain Mr Hunter and instructed him to send a letter to the First Respondent's attorneys informing them that she is under debt review and for that reason the scheduled sale in execution ought to be cancelled. Her attorney accordingly addressed a letter to the First Respondent's attorneys dated 19 September 2012.

14.8 On 25 September 2012, the Applicant's property was sold in execution to the Second Respondent who on the same day attended at the same property and informed the Applicant that he has bought her property.

14.9 On 28 September 2012, Applicant's attorneys addressed a second letter to the attorneys for the First Respondent requesting them to provide the Applicant with the documents pertaining to the sale in execution of her property.

14.10 On 15 November 2012, the Applicant's attorneys addressed a letter to the sheriff of Sandton requesting him to provide the Applicant with the documents pertaining to the sale in execution of her property.

14.11 On 23 November 2012, Second Respondent attended at the property and handed to the Applicant's daughter a letter dated 22 November 2012. The letter was addressed to the Applicant by attorneys for the First Respondent confirming registration of the transfer of property to the Second Respondent and giving her notice to vacate the property by 30 November 2012.

14.12 Subsequent to the registration of the transfer of the property, the Second Respondent made several unsuccessful attempts to get the Applicant to vacate the property. He also offered the Applicant an amount of R15 000 to assist her with the costs of finding and relocating to her new home.

14.13 On 15 December 2012 the Second Respondent applied to the Randburg Magistrates Court for an order to evict the Applicant from the property. This application was served on the Applicant on 20 December 2012 and heard on 14 February 2013, when it was postponed by agreement between the parties pending the outcome of this application.

14.14 On 27 February 2013, the Applicant filed this rescission application.

[15] The content of the discussion between the Applicant and du Plessis when the Applicant attended the offices of the First Respondent's attorneys during May 2010 is disputed by the parties. According to du Plessis, during the May 2010 meeting, she

informed the Applicant that the First Respondent obtained default judgement against her. This is denied by the Applicant. Counsel for the Applicant sought to argue that this dispute is material and renders the matter incapable of resolution on the papers. I disagree with Counsel for the Applicant. The condonation application does not turn on the contents of the May 2010 meeting between the Applicant and du Plessis. It is for the same reason that I elect not to make a probability finding on whether or not du Plessis, at the said meeting, informed the Applicant of the default judgment against her.

[16] The First and Second Respondents allege in the alternative that the Applicant became aware of the default judgment on 13 September 2012. I now turn to consider whether the Applicant became aware of the default judgment on this date.

[17] On the Applicant's own version, on 13 September 2012, she was alerted to the sale in execution of her house by a person who works for a company that provides assistance to people whose property is in distress. The sale in execution was scheduled to take place on 25 September 2012. The Applicant avers that she immediately contacted her attorney who addressed a letter to attorneys for the First Respondent dated 19 September 2012. The letter reads as follows:

> 'We act for Pearl Kloberie who has instructed us that she is under administration under reference number: Graham DR600. The contact person is...
>
> We are instructed that in the circumstances you are to cancel the sale in execution of the property to be held on 25.09.2012 and provide us and Mr Graham with your confirmation.'

[18] It must be noted that at this point, the Applicant was no longer dealing with this matter alone. She was represented by an attorney. Any reasonable practicing attorney would know that a sale in execution is only held after a default judgement is granted declaring *inter alia* the property executable. A reasonable attorney who is informed by his client that she is not aware of any legal proceedings against her, that she did not receive a letter of demand or summons and that it has just come to her attention that a sale in execution of her house has been scheduled would view this matter in a very serious light and would upon receipt of appropriate instructions, take urgent action to avoid further prejudice to his client.

[19] I find it incongruous that on hearing that his client's property is lined up for sale in execution, the only step the Applicant's attorney took to assist his client was to attempt to stop the sale in execution by writing the letter outlined in para 16 above. If the Applicant indeed did not know that default judgment has been granted against her, a reasonable step to take in the circumstances is to launch an application for rescission of the default judgement and to interdict the Sheriff not to proceed with the sale in execution. Instead the Applicant's attorney accepted instructions from his client to address a letter to the First Respondent's attorneys directing them to stop the sale in execution on the basis that his client is under debt review. In this important first contact with the First Respondent's attorneys, the Applicant does not ask for a copy of the default judgement, the case number, the notice of attachment or even the sale in execution documents. The step taken by the Applicant's attorney lends itself to a strong probability that his client was aware of the default judgment against her and had informed him accordingly. Given the Applicant's probable knowledge of the default judgment against her, the step taken by her attorney indicates that the Applicant was more interested in stopping the sale in execution. If the Applicant indeed did not have knowledge of the default judgement, her attorney would have on the probabilities advised her to apply for rescission of judgment.

[20] The Applicant's debt review certificate mentions that she applied for debt review on 19 September 2012, the same date her attorney wrote to the attorney for the First Respondent informing them that she was under debt review. Counsel for the First Respondent argued that the Applicant's sole purpose for applying for debt review was to create a valid reason to stop the sale in execution. Counsel for the First Respondent further argued that the Applicant made the debt review application one year after she had made the last payment to the First Respondent. Accordingly Counsel for the First Respondent submits that in terms of the National Credit Act No. 34 of 2005 the Applicant was out of time to seek protection under the debt review dispensation.

[21] Again on the Applicant's own version, she became aware of the sale in execution of her property on 13 September 2012. However she did nothing to nullify

the sale in execution or to prevent the transfer of the property to the Second Respondent.

[22] On 28 September 2012, three days after the sale in execution, the Applicant instructed her attorney to address a second letter to the First Respondent's attorneys requesting them to provide her with documents pertaining to the sale in execution. This supports the probability that what was foremost on the Applicant's mind was stopping the sale in execution and not rescinding the default judgment. On 15 November 2012, the Applicant's attorneys addressed a similar letter to the Sheriff of Sandton. By this date, on the probabilities, it would be absurd to believe that the Applicant still did not know about the default judgement. Instead of instructing her attorneys to apply for default judgment and to stop the sale in execution of her property, she opted to devote three months to seek the sale in execution documents. I cannot fathom why the Applicant was fixated on getting these documents when she was not aware of the default judgment authorizing the sale in execution. The Applicant's behaviour strengthens the probability that she was aware of the default judgement, that she had no reasonable explanation for the default and that she had pinned her hopes on challenging the sale in execution.

[23] According to the Applicant, she became aware of the default judgment on 23 November 2012 when her attorney advised her on the basis of a letter she received from the Second Respondent that it is clear from the contents of the said letter that the First Respondent had obtained judgment against her. I find it incongruous that the Applicant's attorney waited two months after he was informed of the sale in execution to inform the Applicant that if her property has been sold in execution this implies that the First Respondent had obtained default judgment against her. The Applicant nevertheless wasted a further two months before bringing this application. The Applicant submitted that she did not bring the application immediately after 23 November 2012 as her attorneys were closed for the December period. However, the Applicant still did not bring the application immediately at the beginning of the first court term of 2013. On the other hand despite the December period, the Second Respondent was so determined to take occupation of the property that he initiated eviction proceedings on 15 December 2012 and caused the relevant process to be served on the Applicant on 20 December 2012. The hearing of the eviction

application that took place at the Randburg Magistrates Court during February 2013 seems to be what really prompted the Applicant to finally bring the rescission application before this court.

[24] If I accept that du Plessis did not inform the Applicant in May 2010 that the First Respondent obtained default judgment against her, then I must accept that the Applicant has shown good cause why she did not bring a rescission application between May 2010 and 13 September 2012. The events after 13 September 2012 support the probability that on or soon after that date, the Applicant became aware of the default judgment. I am of the view that between 13 September 2012 and 27 February 2013 when the Applicant ultimately brought the rescission application, the Applicant had failed to provide a reasonable explanation for the delay in bringing the rescission application.

[25] I am of the further view that the degree of non-compliance is extensive particularly when one has regard to the fact that as at the date of filing of the rescission application, 34 months had lapsed since the default judgment was granted and the Applicant had not made any payment to the First Respondent since August 2011. On the probabilities, the Applicant had known of the default judgement from 13 September 2012. The property has been sold in execution, transfer has been registered to the Second Respondent, and the Second Respondents has been paying for rates and services on the property since registration of transfer. It is accordingly in the interests of the Respondents as well as the need to avoid further delay in the administration of justice that this matter is finalized.

[26] The Applicant submitted that she has a bona fide defence against the First Respondent's claim. She raised a number of issues she purports are her grounds of defence. These include an allegation that she did not receive a letter in terms of section 129 of the National Credit Act. Save for the allegation relating to the section 129 letter, I do not deem it necessary to deal extensively with the Applicant's

grounds of defence because they are dilatory in nature and do not go to the root of the First Respondent's claim.[6]

[27] The Applicant alleges that she did not receive a letter in terms of section 129 of the National Credit Act. She alleges that there is also no system of receiving post in her complex hence she did not receive the section 129 letter. The First Respondent attached a track and trace report showing that the section 129 letter was sent to the Applicant's chosen domicilium. I am satisfied that the First Respondent complied with section 129 of the National Credit Act.

[28] For reasons set out in paragraph 24 of this judgment, I am also of the view that the Applicant's behaviour after becoming aware of the default judgment as well as her delay in bringing the rescission application further brings her bona fides into question.

[29] In the premises the Applicant has not shown good cause for the delay in bringing the rescission application, accordingly the application for condonation for the late filing of the rescission application stands to fail.

Order:

1. The application for condonation for the late filing of the rescission application is dismissed.

2. The Applicant is ordered to pay the First and Second Respondents costs of the application for condonation for the late filing of the rescission application as well as wasted costs occasioned by the rescission application.

[6] See *Ice Breakers Number 83 v Medicross Healthcare* 2001 (5) SA 130 (KZN) 131 F cited with approval by Horn J in *Butler v ABSA Bank Limited and Others* SGHC Case no 08649/08 delivered on 19 March 2013.

Modiba AJ

Counsel for the Applicant:
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Instructed by: J Tarica Attorneys

Date of hearing: 6 August 2013

Date of judgment: 16 August 2013