REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **23213/2011**

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

11/8/17

Date: **WHG VAN DER LINDE**

In the matter between

Nkutha, Bonginkosi Selby	**First Applicant**
Nkutha, Nogufa Alina	**Second Applicant**
and	
Standard Bank of South Africa Limited	**First Respondent**
Dikobe, Maosi Abel	**Second Respondent**
Sheriff of the High Court (Soweto West)	**Third Respondent**
The Registrar of Deeds (Johannesburg)	**Fourth Respondent**

Judgment

Van der Linde, J:

Introduction

[1] This is an application for a rescission of a default money judgment, as well as for the setting aside of the sale in execution and the subsequent transfer of the immovable property that had been declared executable, to a bona fide purchaser. The first and second respondents, respectively the creditor bank and the purchaser at the sale in execution and separately represented in this application, oppose the relief claimed.

[2] The position of the second respondent as bona fide purchaser of the property at the sale in execution was nominally challenged by Mr Matimbi who appeared for the applicants, but the affidavit assertion by the second respondent of his bona fides cannot be rejected on these papers. The relief aimed at setting aside the sale in execution and the transfer of the immovable property must therefore be approached on the basis of the second respondent's status as an innocent purchaser of immovable property at a sale in execution.

The background

[3] It is necessary first to set out the relevant history of the matter. The applicants passed the mortgage bond in favour of the first respondent bank on 19 August 2008 to secure a home loan agreement that had been entered into between the applicants and the first respondent bank. Some three years later, after the applicants had fallen in arrears, Victor J granted a default judgment on 6 December 2011 in favour of the bank against the applicants for

payment of the capital amount of R417 365, 03 and interest. The learned judge also declared the immovable property over which the bond had been registered, specially executable for the said sum, interest, and costs.[1]

[4] The learned judge granted the default judgment on the basis that there was no appearance for the applicants despite the fact that the summons had been served on 5 July 2011 at the agreed domicilium citandi et executandi as expressly agreed in the mortgage bond. Indeed, it was common cause in these proceedings that the notice in terms of s.129 of the National Credit Act 34 of 2005 had been sent earlier on 24 May 2011 by registered post to that address, and that the summons had subsequently been served there.

[5] However, the applicants argued that they had since moved to take up residence in the bonded property, their primary residence, and they no longer retrieved their post from the agreed domicilium citandi et executandi which, as it happened, was not their chosen domicilium citandi et executandi. They did not explain, neither on affidavit nor through their counsel from the Bar, why they did not advise the bank of a changed domicilium citandi et executandi.

[6] Subsequently a warrant of execution was issued and the property concerned attached. It was sold in execution on 19 July 2012 to a bona fide purchaser, now the second respondent. This is an important date, since as will appear later, the applicants knew from before this date, since 30 March 2012, of the default judgment that led to this sale in execution. Transfer to the second respondent occurred later on 6 November 2012. In his affidavit the second respondent confirms ignorance of any irregularity and asserts his bona fides. He asserts too that he had fully performed his obligations in terms of the sale in execution, and has paid the full purchase price and all moneys owed to the relevant service providers, but

[1] Although there was some debate as to whether the order originally also included the paragraph declaring the property executable, the original order is in the court file, initialled by Victor, J, and expressly provides for the property to be declared executable.

has not been allowed, through the resistance of the applicants, to take occupation of the house that he had purchased and paid for.

[7] In the middle of the next year, on 13 June 2013 the applicants brought an application for rescission of the judgment but, as will appear later, the applicants never pursued that application. On 17 February 2014, under a different case number in this court, being case number 12862/2013, at the instance of the second respondent Nicholls, J after personal service of that application on the applicants, granted an order evicting the applicants from the property.

[8] A year later, on 18 February 2015 the applicants were, according to a sheriff's return of service, evicted from the property. However, although the applicants also say that they were evicted from the property then, they have since moved back into the property since they are now resident in it.

[9] On 12 May 2016 the applicants brought the current application for rescission of the default judgment granted back on 6 December 2911 by Victor, J. The application is said to be brought in terms of rule 31(5)(d) read with rule 42 (1) (a), as well as the common law.

The explanation for the delay in bringing the application

[10] Concerning their delay in bringing the application, the founding affidavit explained that the applicants consulted, successively, two attorneys who both advised that their case had no prospect of success. They then instructed a third attorney and through him established on 30 March 2012 that default judgment had been granted.

[11] They instructed that attorney to apply to rescind the judgment. They only next heard of the matter when on 8 May 2013 the second respondent applied for their eviction. Their attorney then told them not to worry since the rescission application would stay the eviction proceedings. After the second respondent had filed his answering affidavit in the applicants' rescission application, the applicants heard nothing further of that application.

[12]The next milestone is when on 7 January 2014 the applicants received the notice setting down the second respondent's eviction application for hearing. Their attorneys told them it was not necessary to attend the hearing. They say in their affidavit that the hearing would take place on 11 September 2013, but that must be incorrect, because it is clear that the set-down was served personally on them, and that Nicholls, J then granted the eviction order on 17 February 2014. The applicants are not in this application applying for the rescission of that judgment.

[13]The applicants then followed up the matter with their attorneys and learnt that their then attorney had ceased practicing. They explain that subsequently they were evicted from the property on 18 February 2015 pursuant to the order of Nicholls, J. They eventually instructed their current attorneys of record and after investigations by them, it was decided in May 2016 to launch this fresh rescission application.

The applicants' defence

[14]The sole defence relied upon in the founding affidavit is that the applicants were prevented from exercising their rights under the National Credit Act, because the s.129 notice did not actually come to their attention. However, the applicants do not disclose their financial position at the time when the s.129 notice was sent to them, nor currently. They do not suggest what would probably have occurred had the notice in fact come to their attention, except to say that they would have exercised their rights.

[15]They do not suggest, nor do they put up any material that would support such a suggestion, that had the s.129 notice in fact come to their attention, they would have been in a position effectively to avail themselves of the options in terms of s.129 of the National Credit Act.[2] There is no suggestion that they do not owe the money to the first respondent; they admit, in fact, the indebtedness to the bank.

[2] Compare ABSA Bank Ltd v Petersen, WCHC case no 2011/934, delivered 20 September 2012, at [29].

Discussion

[16]It seems to me that the first enquiry must in this case start at the back end of the events, and to ask whether the registration of transfer into the name of the innocent purchaser, the second respondent, is impeachable. In the area of the setting aside of registrations of transfer of immovable property to bona fide purchasers at sales in execution, our law is now clear. In principle, this can be achieved – but only if the sale in execution itself can be impugned as having conferred on the sheriff no legal power to effect transfer of the property to the purchaser. And that would only have been the case if the peremptory statutory requirements relating to the sale in execution had not been complied with, or if the underlying default judgment was a nullity ab initio and thus conferred, ex tunc, no power on the sheriff to have conducted the sale in execution.

[17]If these circumstances pertain, and if therefore the real agreement (also known as the transferring agreement) whereby the transferor intended to transfer of ownership and the transferee in turn intended to receive ownership is void, then despite the reigning abstract theory in our law of the passing of ownership also of immovable property, ownership will not have passed and may be vindicated right down the line of the subsequent successive innocent purchasers. Authority for these propositions are all handily collected in **Knox NO v Mofokeng and Others, 2013 (4) SA 46 (GSJ).**

[18]When is a default judgment void ab initio? At best for the applicants, this would be the case where there was no power to have granted it in the first place, such as where service of the process did not occur in accordance with the rules of the court. The effect of the rescission of such a judgment, which would operate ex tunc, would therefore be different from the effect of the rescission of a judgment where although service of the summons had occurred in accordance with the rules of court, the summons did not, as a fact, come to the attention of the defendant. In such a case, a rescission would operate pro nunc. This is because there was a power to have granted the default judgment; it was not erroneously granted.

[19]This proposition may also be put this way: a distinction is necessary between service of a summons which is not effected in accordance with the rules of court and for that reason does not come to the attention of the defendant and s/he therefore does not enter appearance to defend; and the case where service of the summons actually occurs in accordance with the rules of the court, but the summons simply does not come to the attention of the defendant. In both cases a rescission of the judgment may be granted, but in the former the judgment will have been void ab initio, yet not so in the latter.

[20]In this matter the sale in execution took place back on 19 July 2012 and the property was subsequently transferred into the name of the bona fide second respondent. It is not suggested that there was any error in the process preceding the sale in execution itself. The case is founded on the summons not having come to the applicants' attention, and the notice in terms of s.129 of the National Credit Act not reaching the applicants either.

[21]It appears however that the summons was served at an agreed domicilium, a perfectly lawful method.[3] The s.129 notice was sent by registered post to the agreed domicilium, and it actually reached that post office, but the registered letter was simply not collected by the applicants from the post office.

[22]The applicants' defence to this manner of service is that by then they had already moved away from that area. But they do not say why they had not changed their chosen domicilium by notification to the bank as bond holder, conduct which in my view can be expected of a reasonable consumer.[4] In the circumstances there does not appear to be a basis on which it can be held that the service of the summons or the despatch of the s.129 notice was not in accordance with respectively the court rules or the NCA.

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[3] Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd 1984 (3) SA 834 (W) at 847; Shepard v Emmerich 2015 (3) SA 309 (GP).

[4] Compare Kubayana v Standard Bank of South Africa Ltd, 2014 (3) SA 56 (CC) at [39]; [54].

[23]In consequence the default judgment was therefore not given without there having been any power to have given it; it was not erroneously[5] granted, and the sale in execution itself is unimpeachable. Put differently, even if the default judgment could be rescinded on the basis that the summons did not come to the applicants' attention, the judgment was not a nullity ab initio. It had legal effect so long as it stood. The result, from the perspective of the passing of ownership, is that the sale in execution conferred good title on the second respondent and the relief which is sought to impeach the sale and the subsequent transfer, cannot be granted.

[24]Concerning the rescission of the judgment, an issue which then still has relevance then from the perspective of the extent of the applicants' indebtedness to the first respondent bank, it appears that the only defence that is raised is that, had the s.129 notice come to their attention, the applicants would have consulted a debt counsellor or the Banking Ombud. But as already alluded to above, no evidence is put up to show why these steps of themselves would have led to a successful debt-review application, even if this would have served as a successful bar to a sale in execution, which I doubt.[6] It follows that no defence, certainly not one which carries prospects of success, has been shown and, in the result, entitlement to rescission of judgment at common law has not been shown.

[25]In the context of an application for rescission of judgment under rule 31, I do not believe that the applicants have provided a reasonable and acceptable explanation for the inordinate delay from back on 30 March 2012 until 12 May 2016. The explanation, one that one often sees, is delay and inaction on the part of attorneys. But the explanation becomes thin when time and again one sees the applicants confronted, on their own version, with both the creditor's process and the purchaser's process rolling forward, despite repeated assurances, supposedly, by the attorneys that the rescission application will prevent these threatened actions and consequences eventuating.

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[5] For the purposes of rule 42(1)(a).
[6] Standard Bank of SA Ltd v Panayiotts 2009 (3) SA 363 (W).

[26]In my view a case has accordingly not been made out for any of the relief sought, and the application is dismissed with costs.

WHG van der Linde
Judge, High Court
Johannesburg

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