REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

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

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DATE SIGNATURE

CASE NO: 10449/2016

In the matter between:

NDWALANE: LULAMA CONFIDENCE	APPLICANT
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	FIRST RESPONDENT
ALPHONSE MBWENBWE MUKONGA	SECOND RESPONDENT
ELON ILUN MUTONJI MUKONGA	THIRD RESPONDENT
THE DEEDS OFFICE	FOURTH RESPONDENT

JUDGMENT

DREYER AJ:

[1] This is an application for rescission of a judgment granted by default by this Court on 3 October 2016, in favour of the First Respondent, the Standard Bank of South Africa Limited ("Standard Bank"), for payment of the sum of R373 157,34, together with interest on the sum calculated from 15 March 2016 and costs on an attorney and client scale; in addition, a declaration that the immovable property, Erf […], Orange Grove Township, Registration Division IR, Province of Gauteng, was executable.

[2] The applicant appeared in person. The second and third respondents filed opposing papers, but did not file heads of argument or appear before me to make oral submissions.

[3] The basis for the rescission application is that the Applicant contends that he was not served with the summons commencing action, consequently, that the judgment by default was erroneously sought and granted[1]. This contention is not born out by the facts.

[3.1] Summons initiating action was served on the Applicant on 18 May 2016, at the property being his chosen *domicilium* address.[2]

[3.2] The Applicant disputes that he received this Summons. Service at a *domicilium* address is a mere presumption, which can be defeated by

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1 Uniform Rule of Court 42

2 **Amcoal Colliers Ltd v Truter** 1990(1) SA 1 (AD)

direct evidence that there was no service[3], but no such evidence was placed before me.

[3.3] On 14 September 2016, the application for default judgment declaring the property executable was personally served on the Applicant. The Applicant does not deny that the application was served on him. He argues that he does not recall receiving it.

[3.4] The application for default judgment contained the affidavit required in terms of paragraph 10.17 of the Practice Manual. This affidavit sets out the amount of the arrears and informed the Applicant of his right to place information before the court if he objected to the property being declared executable.

[3.5] The applicant did not avail himself of this opportunity.

[4] In these circumstances, where there was not only proper service of the Summons commencing service, but also personal service of the application for default judgment, it cannot be said that the judgment was erroneously sought and granted. The applicant was informed of his rights to approach the court to place facts before the court to prevent the court from declaring the property executable. The applicant did not do so. It was legally competent for the Court to have granted this order. The Applicant has pointed to no irregularity in the default judgment proceedings or to the conduct of Standard Bank.

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[3] The fact that a domicilium address has been chosen does not preclude service in another manner prescribed by the rules, see **Sandton Square Finance (Pty)Ltd v Biagi, Bertola and Vasco** 1997 (1) SA 258 (W) @ 260. However, service at a domicilium address well knowing the defendant no longer resides there is male fides see **Thomani & another v Seboka No & others** 2017 (1) SA 51 (GP)@para [35]

[5] The Applicant acknowledges that the Standard Bank was entitled to take judgment against him in 2016, as he was in arrears with his bond instalment payments. The Applicant disputes that the Standard Bank could declare the property executable and sell the property.

[6] The reason the Applicant disputes that Standard Bank could sell the property in execution was that the Applicant had invested moneys in the property and had improved the property, which investment has been lost in the sale of the property in execution. This is not a legal basis for rescission of judgment.

[7] The Applicant acknowledges that he was a serial defaulter. He contends that these arrears were brought up to date when demand was made by the Standard Bank.

[8] The Applicant entered into an *"easy sell"* agreement with the Standard Bank by placing the property on the market. The mandate period of the *"easy sell"* came to an end on 18 May 2017. The Applicant contends that the estate agent continued to market the property after the expiry of the mandate period, without success. This is common cause.

[9] Standard Bank contends that the Applicant would have known about the judgment at the time he entered into the *"easy sell"* option. The Applicant contends he was not aware of the judgment and he was not informed of the judgment. The undisputed facts show otherwise. Both the application for default judgment and the warrant of execution were served personally on the applicant.

[10] The Applicant' contends that before the sale in execution he was not *"fairly treated by the Standard Bank's legal representatives as they would not consider his proposal"* on the settlement of the arrears. The First Respondent's representatives wanted immediate payment of the arrears and would not wait a period of five days after the sale in execution for the applicant to be placed in funds to settle the arrears. While the applicant may be aggrieved by the First Respondent's conduct: - this is not a legal basis for a rescission of judgment

[11] On the facts before me, I am of the view that the judgment was neither erroneously sought nor granted.

[12] In these circumstances, the Applicant has failed to bring himself within the parameters of Rule 42 for an order of rescission of the judgment and the setting aside of the warrant of execution. The application must fail.

[13] Moreover, the immovable property was sold in execution to the Second and Third Respondents on 26 October 2017. Registration of transfer of the immovable property was effected on 10 January 2018. These proceedings were only instituted in March 2018. There is no explanation for this. The consequence of the launch of the rescission application after the perfection of the sale in execution by registration of transfer, is that the sale and transfer cannot be impeached and is unassailable. [4]

[14] The applicant was not represented, he appeared in person. While the monetary value of the claim falls within the jurisdiction of the magistrate court, the effect of the judgment was significant to the applicant. The immovable property was a

[4] **Knox v Mafokeng & Others** 2013 (4) SA 46 (GSJ) @ para 5-6

substantial asset to him, one that he had invested in, effected improvements and increased its value. The sale of the property in execution resulted in a loss of that investment. While such loss may rankle the Applicant, it is not a legal basis for the rescission of the sale in execution, particularly not after the immovable property was transferred. This legal construct was not understood and appreciated by the applicant. It would in these circumstances be an injustice to mulct the applicant with costs.

[15] In the result, I make the following order: the application is dismissed, no order as to costs.

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C.J. DREYER
Acting Judge of the High Court of South Africa
Gauteng Local Division
Johannesburg

APPEARANCES:

Date of hearing:	18 August 2019
Date of judgment:	__ December 2019
Applicant:	Appeared in person
Counsel for the First Respondent: Instructed by:	ADV. J.C. VILJOEN STUPEL & BERMAN INC.