IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No. 49738/2017

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
15/12/2020

In the matter between

DA KGANARE Applicant

and

NEDBANK LIMITED First Respondent
SHERIFF OF JOHANNESBURG NORTH Second Respondent
REGISTRAR OF DEEDS Third Respondent

JUDGMENT

MAHOMED, AJ

1. This is an application for recission of a judgment granted 5 November 2018 by Alberts AJ in terms of R31(2) (a).

2. The judgment was for payment of the sum of R1 157 679.62 (being the full outstanding balance), plus interest at 10.25% compounded to date of final payment, an order for the sheriff to issue a writ of execution for sale of a

mortgaged property and for the registrar of deeds to attend to the transfer of the said property.

3. On this date the applicant was present in court when default judgment was granted.

4. Subsequently, on 20 February 2019, the applicant applied for leave to appeal the judgment. This application for leave was dismissed with costs when Alberts AJ advised the applicant, inter alia, that he should apply for a rescission of the judgment.

5. In this application for recission, the applicant seeks the following order:

    5.1. *The late filing of this application be condoned.*

    5.2. *That all judgments obtained by the First Respondent against the applicant under the above case number be rescinded,*

    5.3. *That the sale of property known as "Portion 1 erf [....] Northcliff Extension [....] Township Gauteng Province be stayed pending the finalisation of this application or on grounds stipulated in the founding affidavit,*

    5.4. *That the Fourth (?) respondent be ordered not to register the property known as Portion 1 erf [....] Northcliff Extension [….] Township, Gauteng Province, for the grounds mentioned in the founding affidavit and pending the finalisation of this application.*

    5.5. *That the respondent be ordered to pay costs in the event of opposition*

    5.6. *Further and /or alternate relief*

BACKGROUND

6. The applicant and the first respondent concluded an agreement of loan, in terms of which the first respondent agreed to lend a sum of R1.4 million to the applicant.

7. The loan served as finance for the purchase of “the immovable property”, which is situated at 4 Tessa Place, Northcliff Extension [....], Johannesburg. This is the applicant’s family home.

8. The amount loaned is secured by a mortgage bond registered over the property, which is fully described as “Portion 8 (A portion of Portion 1) of erf [....] Northcliff Extension [....] Township, registration Division I.Q. province of Gauteng measuring 1731 (one thousand seven hundred and thirty one) square metres and held by Deed of Transfer No.T39944/04 (‘the immovable property”).

9. He has defaulted with the repayment of this loan amount for over 2 years, his last payment of R300 was in 2017. I noted from the transcript of the proceedings before Alberts AJ, the arrears were more than R400 000, then.

10. In November 2017, the first respondent served notices in terms of section 129 and 130 of the National Credit Act, 34 of 2005 on the applicant. The statutory notice/letter was sent to the chosen domicilium address of the applicant, being, the home the applicant purchased as financed by the loan and secured by the covering/mortgage bond.

11. In that regard first respondent furnished the court with proof of posting by registered mail and the track and trace reports from the Cresta post office.

12. In December 2017, the first respondent launched the application for default judgment ("the main application") which was served by the sheriff at the same chosen domicilum address.

13. This application was served on the applicant during the months of January, May (upon service of the notice of set down) and October 2018 (with amendment in compliance with R46, R46A) at the domicilium address.

14. The first respondent furnished proofs of services of the main application on each of the occasions, the last time being in October 2018 which included a supplementary affidavit in compliance with the amended rules 46 and 46A of the Uniform Rules.

15. The first respondent received no response to either the notices nor the application and proceeded to obtain default judgment against the applicant, which I referred to earlier.

THIS APPLICATION

16. In the application before me the applicant seeks a recission of the judgment on the grounds set out earlier.

17. The application for recission of the judgment was launched in November 2019, approximately 11 months after the applicant knew of this judgment and almost 9 months after he was advised by the Court at the leave to appeal hearing that he could apply for a recission of the judgment granted in November 2018, if he so wished. The applicant knew of this judgment since 5 November 2018 and a year later brings this application for rescission.

CONDONATION

18. The applicant applies for condonation of the late filing of this application.

19. In his affidavit the applicant has failed to provide any reason for the long delay other than to state that he followed the wrong procedure and did not have legal representation.

20. In terms of Rule 31(2)(a) of the Uniform Rules of Court a judgment debtor who has not filed a notice to defend or a plea and from whom is claimed a debt for an unliquidated amount is permitted 20 days from date that the judgment has come to his knowledge to apply for recission of the judgment.

21. The applicant admitted he knew of the judgment on 5 November 2019 (although this should read 2018, it is perhaps a typographical error), given his confirmed attendance at court on the date of judgment.

22. A court has a discretion to condone non-compliance with rules of court when it must consider whether the explanation given for delay is sufficient and acceptable in the circumstances.

23. In considering condonation a Court is to balance two factors, the merits of the applicant's case and the applicant's default.

24. An applicant must provide an explanation for default in his affidavit together with a factual outline of his case to demonstrate that it has merit. Based on those facts a court can consider the strength of applicant's case on the merits, his reasons for his default and the prejudice that may have been suffered by both parties.

25. The applicant denied that he received the statutory notice in terms of the National Credit Act of 2005 or the main application for default judgment on any of the three instances that they were served by sheriff. Furthermore, he followed the wrong procedure by applying for leave to appeal instead of an application for recission of judgment and he simply makes a bald statement that his matter has prospects of success.

26. This court has no details on which to assess the merits of his matter and no explanation has been furnished for the long delay in launching this application. All the applicant offers in explanation, is he did not know of the application and he followed an incorrect procedure.

27. In fact, the applicant fails to explain his “further” delay in applying for recission after he was advised of the proper procedure way back in February 2019. He launched this application only in November 2019.

28. Clearly the applicant was in no hurry to resolve this matter nor did he consider the judgment of any importance. He remained complacent until perhaps he realised, he would have to look for alternate accommodation for his family.

29. On the facts above, this application for condonation must fail.

RECISSION OF JUDGMENT

30. As set out earlier, a judgment was granted in terms of R31(2)(b), by default, when the applicant failed to file a notice to defend or a plea.

31. A court has a discretion to grant a recission of judgment where an applicant sets out “good cause” for a rescission.

32. That is, the applicant for a recission must furnish a court with (i) a reasonable explanation for his default, demonstrating that he was not in wilful default, furthermore, (ii) he must convince a court that he is bona fides in making this application and (iii) he must present the court with a bona fide defence, i.e. he must demonstrate to a court that he has a triable issue which will allow him an opportunity to have his matter heard at trial.

33. The applicant alleged that he did not receive the statutory notices in terms of s129 and 130 of the National Credit Act of 2005.

34. He alleged that had he received them he would have responded to the notices. The applicant submitted that over the years he tried to pay his instalments regularly however he had lost his job and therefor he fell into arrears.

35. Furthermore, he denied having received the application for default judgment which was served at his domicilium address, which is also his place of residence, on all three occasions that first respondent has sent them to him via the Sheriff.

36. Therefore, he alleges that he was not in wilful default.

37. In **Friand v Nommann 1991 (3) 837 W at 839** the court held that where there is no service it is a good reason to disprove wilful default.

38. Mr van Tonder for the first respondent submitted that the notice and the application were served on the domicilium address and that the sheriffs returns is prima facie evidence of proper service.

39. He further submitted that the service was at a chosen domicilium address and that the post office and the sheriff on three occasions served on the same address. Mr van Tonder argued that the applicant failed to explain why he had not gone off to the post office to collect his mail. A track and trace report are annexed to the pleadings.

40. Mr van Tonder submitted that first respondent complied with procedures in the posting and service of papers on the applicant and reminded the court that on the last occasion, when an order was served to compel filing of

heads of argument for this matter, the applicant accepted service from the sheriff, at the same address.

41. In **Rossouw and Another v FirstRand Bank 2010 (6) SA 439,** the court held that: *(a) when registered post is the mode of delivery, despatch of the registered item is all that the credit provider need prove, and (b) the fact that the letter does not reach the address (of the consumer) is of no consequence in the enquiry as to whether there has been compliance with s129 of the National Credit Act, where the registered post is properly employed, despatch on its own constitutes compliance with s129.*

42. In **SEBOLA v STANDARD BANK 2012 (5) SA 145 CC at [87],** the court required that the credit provider go further,

" Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery of the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. It in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim".

43. I was reminded that the domicilium address is the family home that the applicant occupies with his family.

44. Mr van Tonder directed me to the proofs of service annexed to the pleadings. I have noted that the Cresta Post office has issued its stamp and I have read the various reports of the Sheriff, where the documents were served, either by affixing to the main gate or service on a person apparently above 16 years of age. Each time in compliance with service in terms of Rule 4 of the Uniform Rules of Court.

45. Mr van Tonder submitted the applicant was simply employing tactics to frustrate the first respondent in recovering the debt due and owing.

46. An applicant must also demonstrate to the court his bona fides in applying for recission.

47. It is noteworthy that the applicant presents no evidence of any efforts he may have made after the date of judgment to pay the arrears outstanding on the loan or even evidence that he may have contacted the first respondent in that regard.

48. The Applicant, furthermore, fails to present any details of a defence that he intends to raise at trial, other than to state that he has prospects of success. I note he does not dispute the debt.

49. The applicant alleged that he ran a business and “hopes to repay the loan in the near future”. I noted that in the application before Alberts AJ, the applicant was advised that “he is living on a hope” and must realise that he is in fact costing himself more as he delays the inevitable, as the interest on the loan adds up and is compounded.

50. In oral submissions, the applicant continues to “live on a hope” as he informed me that he was still awaiting payment from a business deal. He also advised the Court that had recently secured employment and will pay his debt.

51. It is clear the applicant is no longer able to afford this home and is delaying finalisation of this matter. Not only does the first respondent suffer prejudice for as long as this matter is delayed but the applicant himself is compounding his problem as he continues to be liable to pay interest on this loan.

52. In fact, the applicant through this process has already incurred legal costs, which was granted to the first respondent in the leave to appeal application and which costs were awarded on a higher scale as per the contractual agreement between the parties.

53. The amount in arrears was already high when the matter was before Alberts AJ, a year ago.

54. Furthermore, Mr van Tonder informed the court that the applicant failed to file a replying affidavit and that the first respondent's version remains undisputed and must stand. He is correct.

55. A replying affidavit affords the applicant an opportunity to answer to the respondent's version and present his defence to the respondent's case. If he fails to do so, then the court is obliged to accept the version that remains uncontested.

56. In oral submissions the applicant replied that he is unrepresented and that he was of the understanding that the heads of argument served as the reply to the respondent's case.

57. The applicant has failed to persuade me of his bona fides in bringing this application.

58. In addition to his bona fides, an applicant is required to set out a bona fide defence to first respondent's claim.

59. The applicant must raise a substantial defence to the claim in law. He must set out the nature of the defence, the main facts and thereby demonstrate that a prima facie case exists. He must demonstrate that he intends to raise this defence to have his case heard at trial.

60. In **Central New Agency Limited v Celliers 1972 (4) SA 351 NC at 354A**, was stated a party cannot make loose statements.

61. In **Pansera Building Suppliers (Pty) Ltd v Van der Merwe 1986 (3) SA 654 C at 658B-659H** was stated that a party cannot rely on a Court to make deductions. A defence must exist and be disclosed.

62. He cannot bring a defence to delay the execution of the judgment. In **Silverthorne v Simon 1907 TS 123 at 124, Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 O at 479, Smith NO v Brummer NO 1954 (3) SA 352 O at 358A,** it was stated that the application must be bona fide and not made with the intention of delaying the opposite parties claim.

63. The applicant in casu has failed to set out any defence in law to the first respondent's claim. It is clear from the facts overall that he is no longer able to afford the loan and that he is simply delaying the execution of this judgment.

64. His personal financial position cannot serve as a defence. In **Scoin Trading v Bernstein 2011 (2) SA 118 SCA at 124A**, the SCA stated, *"The law does not regard mere personal incapability to perform as constituting an impossibility"*

65. He fails to present sufficient detail to assure the court of a bona fide defence and accordingly this application must fail.

66. The applicant argued that his right to housing is affected. The applicant was advised by Alberts AJ, of his chances of making a profit on the date the judgment was granted, way back in 2018, based on a reserve price.

67. I am of the view that the applicant could have considered that advice and taken steps to mitigate his loss. He should have acted much earlier to determine his best course of action, given that the property had been declared specially executable on 5 November 2018. The evidence is that his last payment in the sum of R300 was made way back in 2017.

68. In **Government of Republic of South Africa v Grootboom 2001 (1) SA 46 CC [36-37] ,** the court sets out that s26(1) of the Constitution does not confer a right of access to housing per se but only a right of access to adequate housing, and each case has to be viewed on it facts.

69. The applicant submitted that the first respondent could have executed against his movables first which would have realised sufficient value to meet all his debts. I was advised that the arrears amount outstanding is in excess of R400 000, and the first respondent's counsel correctly submitted that the property was declared specially executable in November 2018 and in terms of Rules 46 and 46A, accordingly the first respondent is not required to first execute against the applicant's moveable property.

70. In **First Rand Bank Limited v Folscher and Another and similar matters 2011 (4) SA 314 at 330, Jaftha v Schoeman Other, van Rooyen v Stoltz & Others 2005 (2) SA 140 (4) at 161** it was confirmed that a court was to consider all the circumstances before ordering execution against the property if such property is the debtor's primary residence.

71. This court did not grant the judgment, however it is noteworthy that in this application no evidence was presented to me on the items and values of the movables that would have been sufficient to pay off the arrears as is alleged by the applicant. I noted from the judgment of Alberts AJ, that Mr van Tonder advised that the arrears amount was too high for the first respondent to enter any further negotiations on repayment of this debt.

72. On an overall view of facts before me and the applicant's failure to furnish this court with sufficient details of his defence, the applicant does not satisfy the requirements for a recission of this judgment.

73. Accordingly, I make the following order:

    73.1. The application is dismissed with costs.

73.2. The applicant is to pay costs on an attorney client scale.

S MAHOMED
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 December 2020.

Date of hearing: 09 September 2020

Date of judgment: 15 December 2020

Appearances:

Appearance for Applicant:	In person
Appearance for First Respondent:	Adv R van Tonder
Instructed by	Lowndes Dlamini Attorneys