



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: ^{644.13/12.}~~47730/2010~~

Date: ~~28~~ May 2014

28.

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO OTHERS JUDGES: YES/NO
 (3) REVISED

29/5/2014

DATE

SIGNATURE

In the matter between:

DAVID NKUBE LANGA

1st Applicant

MPHO LIZZAH LANGA

2nd Applicant

And

ABSA BANK LIMITED

Respondent

JUDGMENT

PRETORIUS J.

[1] The applicants apply for a rescission of a default judgment granted on
 28 February 2013 by the registrar of the High Court.

Background:

[2] A mortgage bond was granted on 25 October 2006 in favour of the applicant for R280 000.00 and R56 000.00. The applicants bonded their immovable property as security. They were obliged to pay an amount of R2803.06 monthly to the respondent to settle the loan.

[3] The applicants paid these instalments for up to six years, but during 2012 they fell behind. The first applicant was retrenched and had difficulty in paying the monthly instalment.

[4] Summons was issued by the respondent and it was served personally on the first applicant on 13 November 2012. The amount of arrears, at the time, was R16 809.21.

[5] Default judgment was granted on 28 February 2013 as the applicants did not enter an appearance to defend. The applicants, throughout, kept on paying an amount of R2200.00 per month to the respondent. The property was sold in execution for an amount of R51000.00.

[6] This application was launched when the applicants sought legal advice.

[7] The applicants aver that the reason for not defending the action against them, were that they had immediately contacted the respondent after

having received the summons. According to the first applicant he had come to an agreement with the respondent that he would pay R2200.00 per month and would be able to cover the full outstanding loan when he had sold a second property belonging to him.

[8] According to the applicants this agreement was not in writing, but the respondent informed the first applicant that this conversation had been recorded. The applicants kept on paying instalments in the amount of R2200.00 per month, which they were still doing when the application for default judgment was launched. The respondent received the monthly payments whilst continuing to apply for default judgment.

[9] The applicant thought the matter had been resolved and therefor kept on paying the R2200.00 per month.

Rule 31 (2) (b):

[10] In terms of Rule 31(2)(b) default judgments may be set aside if an application for rescission of judgment is made within 20 days after the defendant had obtained knowledge of the judgment. The defendant has to show good cause for the rescission. The applicants have to show that they were not wilful, that they have a reasonable explanation for the default, that the application is *bona fide* and not made to delay the respondent's claim and that they have a *bona fide* defence to the respondent's claim.

[11] The applicants became aware of the default judgment when a third party claimed to own their house. This resulted in their attorney making enquiries and launching the rescission application in December 2013. I find that condonation should be granted in this instance to extend the 20 day period and will deal with the rescission application.

[12] This is not an instance where the applicants stopped paying and not caring to let the respondent know, but they had telephonically made arrangements with the respondent, although there is a dispute as to what the terms of the arrangement were. They believed that this, arrangement would stay the action against them. This can be gathered by their actions as they kept on paying R2200.00 per month. The court cannot find that they were in wilful default, but that they had believed that the application for default judgment was stayed.

[13] In **Silver v Ozen Wholesalers (Pty) Ltd SA 345 (AD)** Schreiner JA held at p 352 G - H that the applicant has to prove good cause for rescission, which would include the existence of "a substantial defence".

[14] It is clear from the papers that both parties are ad idem that the applicants and the respondent had had a conversation to make an arrangement after summons was served on the applicants. The terms

of the arrangement are disputed by the respondent, but there is no proof of what the actual terms were. It is clear that there was a relatively small amount in arrears when the applicants and the respondent communicated with one another. It makes sense that the parties, in such circumstances, would have come to some arrangement. This court cannot find what the terms of the arrangement was, as the parties disagree as to the terms they had agreed to.

[15] I find that the applicants have established a *bona fide* defence, which *prima facie*, carries some prospect of success at trial.

[16] Therefore I make the following order:

1. Condonation is granted to the applicants for the late filing of this application, outside of the time period of 20 (twenty) days allowed in terms of the Rules;
2. Default judgment granted by the Registrar of this Court on 28 February 2013 under case number 64413/2012 against the first and second applicants in favour of the respondent under above case number is rescinded and set aside.
3. Each party to pay its own costs

A handwritten signature in black ink, appearing to read 'Pretorius', is written over a horizontal line.

Judge C Pretorius

Case number	: 64413/2012
Heard on	: 26 May 2014
For the Applicant	: Adv du Toit
Instructed by	: Johan Scheepers
For the Respondent	: Adv Sanders
Instructed by	: Hack Stupel & Ross
Date of Judgment	: 29 May 2014