IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 48706/2011

Date: 2 September 2014

Not reportable

Not of interest to other judges

In the matter between

CALUZA SANELE **Applicant**

And

MOODLEY KRISNA **First Respondent**

MAGISTRATE MNYAMBO **Second Respondent**

JUDGMENT

BAM J

1. On 30 October 2007 the Registrar of this Court granted judgment by default in favour of Nedbank against the applicant, due to non-payment of his bond payments, including an order for execution of the immovable property in question, situated at 1[...] K[...] Street, N[...]. Subsequently, on 4 August 2010 the property was sold in execution to the first respondent. The property was transferred in the first respondent's name on 24 November 2010. Accordingly the first respondent is the registered owner since that date.

2. The applicant however remained in occupation of the property and the first respondent applied for his eviction in terms of the Prevention of Illegal Eviction and Unlawful Occupation Act. On 23 March 2011 the application was granted by the second respondent in her official capacity as magistrate.

3. On 27 July 2011, in this Court, he applicant was granted stay of the eviction order in accordance with Part

A of his application, pending the relief sought in terms of Part B of the Notice of Motion for the review of the eviction order granted by the second respondent.

4. From the papers it appears that the applicant for the past 3 years did not prosecute this review application. It was eventually enrolled by the first respondent. The applicant did not explain his failure to enroll the matter.

5. The relief sought in his application is for:

> (a) The review and setting aside of the eviction order granted on 27 July 2011 by the second respondent in her official capacity as magistrate, stationed at the Magistrate's Office, Pretoria;
>
> (b) That the second respondent is declared to have no jurisdiction in view of the fact that the immovable property in question is situated within the area of the City of Johannesburg.

6. The applicant contended that the second respondent failed to grant him the opportunity to properly oppose the eviction application. In this regard it appears from the papers that the eviction application was postponed on several occasions. On two occasions apparently upon the applicant's request; from 16 February 2011 to 2 March 2011; and from 2 March 2011 to 10 March 2011. On 10 March the matter was postponed to 18 March 2011. On the latter date the matter was heard. It was then postponed to 23 March for judgment. On 23 March 2011 judgement was given against the applicant and the matter was then postponed *sine die* for the applicant to lodge an application in this court for the rescission of the default judgment granted against him by the Registrar on 30 October 2007 . On 6 July 2011 the matter was on the role for hearing but again postponed to 27 July, apparently for the applicant to obtain new legal representation. On the last mentioned day the second respondent refused to postpone the matter any further.

7. The respondent eventually enrolled this application on the unopposed motion court role for 19 May 2014. On that day the applicant and the first respondent were represented by counsel and the matter was by agreement postponed to the opposed roll of 4 August 2014. The first respondent's practice note and heads of argument were filed on 7 July 2014. Attached to the first respondent's practice note and heads of argument was a copy of letter faxed on 2 July 2014 to the applicant's attorneys of record, to which letter first respondent's heads of argument was attached. In the same letter the applicant's attorney was reminded that the matter was placed on the opposed role of 4 August 2014. The applicant's heads of argument was not in the court file. On 4 August 2014 when the matter was called at about l0hl0, counsel representing first respondent, Mr Schoeman, appeared. There was nobody representing the applicant. Mr Schoeman successfully moved for the dismissal of the application. Subsequently, between the hearing of other opposed applications, Mr Ngqwangele arrived and on my enquiry informed me that he was representing the applicant.

I was requested to revoke the order I have made. I was not inclined to do so, especially in the absence of M Schoeman. Mr Ngqwangele explained to me that he was late due to the fact that he had some difficulty in establishing on which court roll the matter appeared. When I enquired about the applicant's heads of argument Mr Ngqwangele informed me that the heads had been in filed on 28 July 2014, as reflected by the Registrar's date stamp on his copy. The heads were clearly not filed timeously in accordance with the Practice Rule and I requested Mr Ngqwangele to advise his attorney of record that I require an explanation under oath before I would be prepared to consider revoking the order. The affidavit by the applicant's attorney was filed on 5 August as requested. It suffices to say that although I was not impressed by the explanation advanced by the applicant's attorney, on 6 August, after I have heard argument of both counsel, I indicated that I was inclined to revoke the order, albeit reluctantly, and that I would accordingly consider the application on its merits.

8. The first problem the applicant experienced was that there is no indication on record what happened to the purported rescission application for the default judgment obtained by Nedbank on 30 October 2007. On 23 March 2011, when the eviction application was postponed, according to what the applicant stated to the second respondent, pending the "*finalization" o*f the rescission application. In this regard the applicant stated that the second respondent was *"made aware"* that the rescission application was pending. The Notice of Motion, Annexure REV 6 (p82), to the applicant's founding affidavit, reflecting that the rescission application would have been lodged in the High Court under case number 44310/2007, was signed by the applicant's attorneys on 16 March 2011. Although it purports to have been received by Nedbank and the present first respondent on 18 March 2011, it does not bear the stamp of the Registrar or any other indication that it was in fact officially issued. No founding affidavit is attached to the application. The first respondent, in the answering affidavit, denied that the rescission application was issued and served as alleged by the applicant. The applicant did not file a replication and the situation pertaining to the purported rescission application remained unexplained by the applicant. Accordingly there is no indication that the rescission application is still pending as alleged by the applicant, and if the applicant indeed intended to lodge the rescission application what the explanation is for the delay in properly issuing the application, or enrolling it, after more than 3 years. In this regard the applicant stated that Nedbank failed to file any opposing papers. This is clearly no reason for the applicant's failure to enroll the said application.

It follows that this Court was constrained to find that no such rescission application is presently pending.

9. The applicant's reliance on Rule 49(11), in terms of which rule the eviction order was allegedly suspended after the purported rescission application was allegedly served can therefore not be sustained.

10. The applicant further submitted that the second respondent lacked jurisdiction to grant the eviction order. It was the applicant's case that the property in question, with the address 1087 Karee Street, Noordwyk, is

situated outside the jurisdictional area of the Magistrate's Court, Pretoria and actually fell within the boundaries of the City of Johannesburg Local Municipality within the Johannesburg's Magistrate's district. This contention is apparently based on the fact that the area where the property is located falls under the municipality of Johannesburg pertaining to municipal services. The papers however indicate that the property is in Centurion, of which this Court can take judicial cognisance, is in the jurisdictional area of the Magistrate's Court, Pretoria. From the return of service of the Sheriff, Centurion, dated 27 January 2011, it appears that the first respondent's application in terms of section 4 of PIE, under case number 127967/10, Magistrate's Court, Pretoria, was served at Erf 106, Noordwyk ext 9,1076 Karee Street, Noordwyk, Centurion, on the mother of the applicant. This is the street address of the property. From the Deed Search Details document, annexure KM1 to the first respondent's replying affidavit, it appears that the property was registered at the Registrar's office, Pretoria. In support of his contention that the second respondent lacked jurisdiction the applicant referred to a document, annexure CA-002 to his affidavit resisting the eviction application before the second respondent, in which it is allegedly reflected that the loan agreement with Nedbank was concluded in Johannesburg. That averment is however not substantiated by the said document. What it does reflect is that on 31 August 2010, the applicant was in arrears with his bond payment in the amount of R24 754.40.

11.The applicant's contention in respect of the jurisdiction issue is without substance and has to be rejected.

12. Mr Ngqwangele, with reliance on *Gundwana v Steko Development and Others* 2011(3) SA 608 CC, submitted that the default judgment granted by the Registrar against the applicant on 30 October 2007 was unconstitutional and thus not valid.

13.However, it was clearly stated in *Gundwana* (par [58]) that persons affected by the ruling referred to above will have to approach the court to have the original default judgment set aside. As alluded to above, the applicant failed to do so. What is more is that it was also stated in *Gundwana* that an aggrieved debtor will have to show that a court, with full knowledge of all relevant facts existing at the time of the granting of default judgment, would nevertheless have refused an application for execution. The only information on the papers before this Court in that regard is, as remarked above, is that the applicant was substantially in arrears with his bond payments.

14.The applicant's reliance on the *dictum* in *Gundwana* must also be considered against the fact that the applicant did not raise it in his founding affidavit. As pointed out above no founding affidavit supporting the applicant's purported application for rescission, REV 6, forms part of the papers before this Court. It is therefore unknown upon what grounds the purported rescission application is based. From the papers before this Court it appears that the only reference to the default judgment made by the applicant since 16 March 2011, it appears in paragraphs 2.6.1 and 2.6.2 of his founding affidavit where he referred to the stay of the

eviction "*pending finalization of the rescission application"*, that the judgment has "*officially been challenged"*, and that the second respondent was *"made aware of the application"*.

15.In regards to the applicant's purported application for rescission of the Nedbank default judgement Mr Schoeman urged the Court to find that no such application exists. In view of the circumstances alluded to above and the applicant's unexplained delay to prosecute that application since November 2011 this Court is obliged to agree.

16.The applicant, in his founding affidavit, signed on 13 August 2011, stated that at the time he was residing at the property with his 10 year old child and his sick and partially blind unemployed mother aged 56. In the founding affidavit the applicant however concentrated on the issues pertaining to the eviction.

17.In the answering affidavit to the eviction application lodged by the first respondent, the applicant alleged that the first respondent did not have *locus standi* in that he falsely alleged that the property in question was sold to him on 4 August 2010 whilst in reality the property was sold to a certain Wayne du Toit and a certain Janice du Toit and that the property was registered in their names on 25 October 2010. In this regard the applicant attached copies of the relevant documents including a Deed of Transfer. This issue was however adequately addressed by the first respondent who pointed out that on the Deed of Transfer the Registrar made an endorsement that the property was transferred to him, reflected as a transfer to K and M M Moodley on 24 November 2011. This point was apparently abandoned by the applicant.

14. It follows that the applicant's application has to be dismissed and that the first respondent will therefore be entitled to proceed with the applicant's eviction. The applicant is clearly liable for the costs of 19 May 2014 and the wasted costs of 4 August 2014

ORDER

1. The application is dismissed.

2. The applicant is ordered to pay the costs, including the costs of 19 May 2014 and the wasted costs of 4 August 2014.

A J BAM

JUDGE OF THE HIGH COURT.

18 August 2014