IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

Case number: 49280/2013

Date: 17 September 2014

Not reportable

Not of interest to other judges

In the matter between:

BASIL QUINTON DAVID MOSS First Applicant

FELICITOUS MORONGOA MAPONYA Second Applicant

and

ABSA BANK LIMITED Respondent

JUDGMENT

PRETORIUS J,

[1] The applicants apply for stay of proceedings in which the sale of execution of Erf [...], The R[...] ("the property") be stayed until the main action has been finalised and that the writ of execution issued on 10 February 2014 under case number 49280/2013 be suspended *sine die.* In a further prayer the applicants apply for condonation to enter into the main action and that the applicants be allowed to file a notice of intention to defend.

[2] On 7 July 2014 the first applicant served and filed a supplementary affidavit where he set out that the purpose of the affidavit was to incorporate a rescission of judgment prayer for the judgment granted on 8 November 2013. Although the notice of motion was not amended, it is clear from this affidavit that this relief was requested as well. The respondent's counsel dealt with this application for rescission of judgment in his

heads and during argument. This supplementary affidavit was filed and served before the applicant deposed to the replying affidavit.

[3] In these circumstances the court will entertain an application for rescission of judgement in terms of Rule 31(2)(b) of the Uniform Rules of Court.

[4] The issues in dispute are whether the respondent had complied with the provisions of section 129 (1) (a) read with section 130 (2) of the National Credit Act; whether condonation should be granted to enter into the main action and whether the original agreement still exists.

[5] The applicants purchased the property as a residence during 2007. The purchase price was financed by a mortgage loan agreement by the respondent. Since 2009 the applicants suffered financial difficulty and defaulted on their obligation to the respondent. The respondent issued summons against the applicants for the full amount lent and advanced in terms of the mortgage loan agreement, which was an amount of R71 418.91.

[6] An agreement was reached between the parties in terms of which the respondent would proceed with its legal action, but would pend all execution steps subject to the applicants complying with the agreement.

[7] During December 2013 the applicants made a payment of R5 500.00 and during January 2014 a further payment of R5 500.00. This was contrary to the agreement between the parties that the applicants would pay R11 000.00 per month, which would include the arrears. Thereafter the applicants paid the full amount of R11 000.00 each month for February, March and April 2014. On 27 February 2014 the applicants received confirmation that the respondent intended proceeding with the sale in execution scheduled for 12 May 2014.

[8] In terms of Rule 31 (2) (b):

> "*A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet. "*

[9] It has been reiterated time and again that the reasons for the applicants default is an essential ingredient of the good cause that has to be shown. In this instance the applicants had agreed to the granting of default judgment and cannot rely on any reasons for default.

[10] The applicants has to show "good cause", which includes the existence of a substantial defence. The applicants have to have the *bona fides* to raise the defence as set out in **Sibler v Ozen Wholesalers (Pty) Ltd 1954 (2) SA** at paragraph 353 A by Schreiner JA:

"*It is enough for present purposes to say that the defendant* ***must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives.''*** (Court's emphasis)

[11] There is no defence disclosed by the applicants at all, as the applicants had consented to the judgment. No reason or grounds have been set out by the applicants for the relief sought. The parties had agreed that the execution of the judgment would be stayed, subject to the applicants adhering to the terms of the agreement by paying R11 000.00 each and every month. The applicants did not comply with the terms of the agreement and the respondent was entitled to proceed to the execution of the judgment.

[12] It is clear from the application that the applicants did not adhere to the agreement reached with the respondent. The respondent complied with the provisions of section 129 and 130 of the National Credit Act. In this instance, I must emphasize, that the applicants had agreed to the court granting default judgment, but not proceeding with execution as long as the applicant paid the arrears as agreed.

[13] According to the respondent this was the 13th occasion where certain agreements between the parties had been entered into and which the applicants failed to adhere to.

[14] I find that there is no real dispute that should be ventilated as the judgment was granted by consent. The applicants failed to pay the agreed amount in December 2013 and January 2014 and therefor the respondent was entitled to proceed to make arrangements for the execution of the judgment.

[15] The following order is made:

The application is dismissed with costs.

Judge C Pretorius

Case number : 49280/2013

Heard on : 8 September 2014

For the Applicant : Adv Mudau

Instructed by : AP Ledwaba

For the Respondent : Adv Raubenheimer

Instructed by : Tim Du Toit

Date of Judgment : 17 September 2014