IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 80251/14

DATE: 4 AUGUST 2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

FOLEY TANIA MARIA Applicant
(ID NO 640…)

and

NEDBANK LIMITED Respondent

(REG NO 1951/000009/06)

IN RE:

NEDBANK LIMITED **APPLICANT**

AND

TANIA MARIA NORA FOLEY **RESPONDENT**

1. This is an application for rescission of the judgment granted by Preller J on 12 March 2015 against the applicant for payment of the amount of R 1581 173.82 for monies lent and advanced to the applicant that were secured by way of a mortgage bond over the applicant's property which was declared executable.

2. Pursuant to this Order, the applicant's property was sold in execution but the transfer has been suspended in view of the service of this application for rescission.

3. The current application for rescission was launched on 15 September 2015 notwithstanding that the applicant had been advised that judgment would be sought via e-mail on 18 February 2015 and the notice of set down was served on her on 24 February 2015, some weeks prior to the hearing on 12 March 2015 (although this had been said to be 27 February 2015 in the return of service on the set down). This notwithstanding, the applicant, an attorney, failed to enter a notice of intention to defend or to

appear on the date of the hearing and thus default judgment was entered against her as aforementioned.

4. The application for rescission is brought in terms of Rule 42 on the basis that it was erroneously sought and granted. The grounds upon which this is stated are as follows:

4.1. The averments in the founding affidavit are hearsay as the deponent does not have personal knowledge of the facts upon which the claim is based, namely the status of the applicant's account;

4.2. The applicant did not receive the notice of motion as it was served at the incorrect address;

4.3. The applicant did not receive the Section 129 notice which was also sent by registered post to the incorrect address;

4.4. The respondent no longer has *locus standi* in that it has sold the applicant's debt to Greenhouse Funding (pty) Ltd pursuant to a securitization agreement.;

4.5. The property executed **against** is her primary residence and her eviction would breach her Constitutional rights to housing;

4.6. Reckless credit was afforded to her in breach of the National Credit Act;

4.7. Disputes of fact with regard to the amount owing and the veracity of the aforementioned defences preclude a judgment on the papers;

5. I will deal with each of these defences in tum.

6. **Hearsay**

6.1. The deponent to the founding affidavit has averred that although she is a Manager in the Home loans litigation department, she has under her control and in her possession all the files and documents relating to the respondent's home loan account and has access to the applicant's system and computer records relating to the applicant's account.

6.2. In *Schack/eton Credit Management V Micrpzone Trading 88 CC and another 2010 (5) SA 112 (KZP)* it was held at paragraph 13 that:

"First *hand knowledge of every fact which goes to make up the applicant's cause of action is not required, and.... Where the applicant is* a *corporate entity, the deponent may*

legitimately rely on records in the company's possession for their personal knowledge of at least certain relevant facts and the ability to swear positively to such facts."

6.3. I am satisfied that although the deponent is not the account manager, she has sufficient knowledge of the facts to depose to the affidavit.

7. **Service of the Notice of Motion**

7.1. The notice of motion was served at the applicant's chosen *domicilium* address set out in clause 18.1 read with clause 2.2.1O where the property is defined as the remaining extent of PTN 1 of erf 2014 Northcliff, Johannesburg situated at[2.. Rocky Northcliff, Johannesburg].

7.2. In terms of clause 18.3 of the mortgage bond, it is provided that unless the respondent is informed of an alternative address in writing as set out in clause 18.2, service of any process will be regarded as having been properly served at the *domicilium* address set out in the agreement.

7.3. The notice of motion with annexures was served at [2..Rocky St Northcl[ff] by affixing same to the main outer door.

7.4. The applicant maintains that [2.. Rocky St Northcliff] does not exist and that the proper address is[3.. B Rockey Drive Northcliff.] She also states that the latter address is a pan-handle and thus it would not be possible to affix the notice of motion and annexures to the outer door.

7.5. However, the notice of motion and annexures must have come to the applicant's attention as she states in her reply that:

> *"I cannot recall how and when I first got to know of the main application of the respondent other than on an informal basis, and I humbly submit to the above Honourable Court that it in any event will not rectify the fatal defective service of the Sheriff."*

7.6. That the notice of motion and annexures indeed came to the attention of the applicant furthermore is confirmed by the fact that subsequent hereto, the applicant entered into a payment arrangement with the respondent. At no stage did she take any steps to file a notice of intention to oppose or to oppose the application. She also took no steps to secure debt restructuring.

7.7. Moreover, the service of the application was not defective- it was served at the applicant's chosen *domicilium* and the applicant did not inform the respondent of the correct address as required in

terms of clause 18.2 of the mortgage bond until after the application had been launched. Hereafter and having been informed of the correct address, the notice of set down for 27 February 2015 was served at her new *domicilium* address on 24 February 2015. As service of an application is to inform the respondent of the application, this was achieved. As judgment was entered where service of the application was *ex facie* the bond documents at the *domicilium* address, the judgment was not erroneously granted.

7.8. The applicant complains that she was not afforded sufficient time between the service of the notice of set down to engage an attorney to attend to her matter, but, she was informed hereof by e-mail on 18 February 2015 and that the date of the hearing would be 12 March 2015 (not 27 February 2015 as set out in the notice of set down served according to the return of service.)

7.9. This notwithstanding, the applicant took no steps to serve a notice of intention to oppose. On 27 February 2015, the date of the hearing reflected in the return of service of the notice of setdown, the applicant sent an e-mail to the respondent responding to its earlier e-mail of 18 February 2015 some 9 days earlier, disputing that she was in breach of the payment arrangement and stating that she had just that day received the notice of set down in her postbox. She stated that:

"My understanding of the rules of Court is that I am entitled to oppose the application and thereafter file an answering affidavit. Unless the rules of Court have changed, then with respect your notice of set down is premature. A notice of intention to oppose the application will be served on your offices during the course of next week.•

7.10. The respondent responded on 9 March 2015 reiterating that the applicant had failed to adhere to the payment arrangement entered into on 24 November 2015 to pay R 41 000 per month commencing from December 2014 until the arrears were settled in that, **save** for the December 2014 payment, she had failed to make any further payments. In the circumstances the applicant was told that the matter had been set down for hearing.

7.11. Knowing full well that the applicant intended to proceed with the hearing scheduled for 12 March 2015, the applicant still failed to serve the notice of intention to oppose she had stated she would serve some 10 days earlier in her e -mail dated 27 February 2015 or to take any steps to attend the hearing or to brief counsel to so appear. She states that she did not have sufficient time to do so.

7.12. The applicant's conduct in this regard must be judged on the basis that she is an attorney and would have known full well that should

she fail to take such steps, default judgment would be granted against her.

7.13. It is trite that in seeking rescission of a default judgment in terms of Rule 31 or the common law, the applicant is required to provide a reasonable explanation for her default which she has failed to do, although there is authority for the proposition that where rescission is sought on the basis that the judgment was erroneously granted, this is not required.

7.14. But as I have said, I am not satisfied that the judgment was erroneously granted as it was served at the chosen *domicilium* address.

8. **The Section 129 Notice**

8.1. In terms of the National Credit Act 34 of 2005 (" the Act") it is required that a debtor be informed of his/her rights to apply for debt restructuring by the personal service of a notice to this effect or by dispatch thereof by registered post to the debtor's *domici/ium* address.

8.2. The respondent dispatched the notice to the applicant by way of registered post to her *domici/ium* address prior to her informing it of the change to such address as set out above. The notice was

thus correctly dispatched as required by the Constitutional Court in ***Sebo/a and Another v Staml@rd Bank of South Afrlg• Ltd and Another*** *2012(5)SA 142(CC).*

8.3. In any event, in terms of section 130 of the Act, the non-delivery of a section 129 notice is not an absolute defence to the respondent's claim for payment and merely requires that the matter be stayed pending the delivery of the requisite notice.

8.4. Moreover, it is incumbent upon the applicant to satisfy the Court that she would have availed herself of and qualified for debt restructuring had she been informed thereof.

8.5. The applicant entered into an arrangement with the respondent to repay the arrears on her account but failed to adhere to that arrangement. She thus was afforded an opportunity to enter into an arrangement to cure her breach of her mortgage bond, but she failed to avail herself of this opportunity (although I am mindful that no arrangements were made for her to restructure her payments over a longer period).

8.6. In the circumstances I am satisfied that the judgment was not erroneously granted for want of compliance with section 129 of the Act.

9. **Securitization**

9.1. There is no substantiation for this defence which is pure speculation and conjecture on the basis of the bald assertion that the respondent has sold its debts to Greenhouse Funding.

9.2. The averment was denied by the respondent and there has been no further substantiation hereof by the applicant in reply.

10. **Reck-less Credit**

10.1. The applicant alleges that the respondent failed to comply with section 80(1) (a) of the Act prior to affording her credit in terms of the mortgage bond averring that no type of assessment was done regarding her credit worthiness .

10.2. Failure by a credit provider to comply with the peremptory provisions in section 80(1) of the Act renders an agreement to afford credit to such a consumer liable to be set aside by the Court in terms of section 83 of the Act.

10.3. However, on 11 June 2011 the applicant completed and signed a written agreement of loan and an application for a home loan in terms of which the respondent assessed the applicant's financial position and whether she could afford the home loan applied for by

her. She stated that she owned immovable property, was employed as a legal advisor to AdvTech Group and earned a net income of R43 545.88, which was confirmed by her bank statements. A credit check was performed to determine if she had other credit agreements or if any judgments had been granted against her.

10.4. In the circumstances the applicant would be precluded, in terms of section 81(4) of the Act from setting the loan and mortgage bond agreements aside.

11. Eviction

11.1. The applicant **avers** that the property **executed against is** her primary residence and accordingly her eviction would be contrary to her right to housing guaranteed in the Constitution. However, I agree with the respondent that this right to housing does not encompass a right to live in a house worth in **excess** of R2 million house which she is no longer able to afford to pay for. In this respect, it is pointed out that pursuant to the judgment the applicant's house was sold by way of public auction for R 2.3 million. **(See** *FirstRand Bank Ltd v Folcher and Another, and Similar* ***Matters*** *2011* ***(4)*** **SA** ***314*** *(GNP))*

11.2. The applicant was, when the judgment was granted, in arrears in excess of 15 months and was at the time the application was launched in arrears in the amount of R 206 874. 15 (which was subsequently reduced prior to the judgment by the applicant's payment of R 41 000 made pursuant to the repayment arrangement entered into by her. However, she only made one such payment and thereafter failed to adhere to the payment arrangement. In the circumstances I am satisfied that the respondent complied with the requirements set out in the Practice Manual as prescribed in the matters *of Folscher supra at p 315 E to 316B, Standard Bank of South Africa Ltd v Saunderson and Others 2006 (2) SA 264(SCA) at paragraph 27; Nedbank Ltd v Jessa and Another 2012 (6) SA 166 (CC) at paragraph 12; Standard Bank v Dawood 2012 (6)* SA *151 (WCC) at para 37 and Nedbank Ltd v Martinson 2005(6)* SA *462(w) at para 33.1).*

11.3. The amount of her indebtedness has also been reduced by the sale of the property subsequent to the judgment.

12. **Dispute of Fact**

121. The applicant has failed to demonstrate a serious or material dispute of fact that requires the ventilation at a trial. Although it is true that the parties entered into a payment arrangement to afford the applicant an opportunity to rectify her default, she failed to

adhere to that payment arrangement and the respondent accordingly proceeded to set the matter down for judgment.

122. The applicant was informed hereof by way of e- mail affording her a reasonable time to attend to the matter and serve a notice of intention to oppose. One would have thought that the service on her of the notice of set down by sheriff hereafter would have galvanized her into action but it did not.

123. It was only the sale of her property by public auction pursuant to the judgment that she was galvanized into action.

124. However, the defences raised by her are spurious and she has failed to raise a real dispute as to the amount claimed or to the declaration of her property especially executable pursuant to the mortgage bond.

125. Indeed, the essential facts are common cause:

125.1. The amount of the debt at the time of the judgment save that one payment had been made towards the arrears;

125.2. The fact that the notice of motion and set down were served at the applicant's chosen *domicilium;*

12.5.3. The applicant failed to file a notice of intention to oppose or to appear at the hearing.

126. Accordingly, the Court was justified in terms of the well-known principles laid down in the case of *Plascon-Evans Paints Ltd v Van Riebeck Paints Ltd* 1984 (3) SA 623 (A) at 643-5 to grant judgment.

127. The respondent has denied that she was in breach of the mortgage bond as R700 000 was available in her access bond to meet the installments due thereunder. The respondent's counsel disputed that the fact that her bond was in credit negated her obligation to continue making her monthly installments; it just rendered her outstanding balance in respect of which interest was levied reduced. However, I do believe that had the applicant wished to do so, she could have accessed those funds to meet her installments. The difficulty is that her arrears exceeded this amount and thus she remained in breach rendering the full amount outstanding owing.

128. The applicant has thus not raised serious and genuine disputes of fact which would have precluded judgment had she filed an answering affidavit. These disputes also do not warrant my not making a finding on the papers in this matter and referring this matter to trial or the hearing of oral evidence.

129. In the circumstances I am not satisfied that the judgment was erroneously granted.

1210. Moreover, I believe that there is a serious non-joinder of the person who purchased the applicant's house on the auction to these proceedings and do not believe that rescission could be granted, had I been mindful to grant it, without the joinder of such party and the Sheriff.

1211. I accordingly dismiss the applicant's application for rescission with costs.

Applicant's attorney C A Schieman; Counsel J Brenkman
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Respondent attorneys DSRM Attorneys; Counsel J Minnaar
Tel no; 011 447 8478

S,M WENTZEL

Acting Judge of the High Court of South Africa Gauteng Division, Pretoria