IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION,PRETORIA]

23517/2014

Reportable: No

Of interest to other judges: No

Revised.

1/4/2016

RAMMUTLANA BOELIE SEKGALA

(ID no:…) Applicant

and

STANDARD BANK OF SOUTH AFRICA LTD Respondent

IN RE:

STANDARD BANK OF SOUTH AFRICA LTD Plaintiff

and

RAMMUTLANA BOELIE SEKGALA

(ID no:…) Defendant

JUDGMENT

SKOSANA AJ

[1] In this matter, the applicant seeks the rescission of the judgment granted on 09 May 2014. He further seeks the reversal by the respondent of all legal costs debited to his home loan account with the respondent. The applicant appeared in person and the respondent was represented by Adv Van Niekerk.

[2] At the beginning of the hearing, an issue was raised with regard to the replying affidavit, namely that it was filed out of time, there was no condonation application for such lateness and with regard to the new matters raised therein. This issue was eventually resolved when the applicant decided not to rely on such replying affidavit thereby limiting himself to relying only on the founding affidavit. The respondent has filed an answering affidavit.

[3] The facts of the matter are briefly that the applicant and the respondent concluded a loan agreement in terms of which the respondent granted the applicant a loan of about R200 000-00 as well as a further loan of R50 000-00. A mortgage bond was registered over the immovable property of the applicant situated at section 29, Glenhurst Kew.

[4] The applicant failed to service the loan by making monthly repayment as agreed and therefore committed a breach of the loan agreement. The respondent initially issued notices in terms of section 129 of the National Credit Act 34 of 2005 ("NCA") as well as summons under case no. 50438/12. The action was not defended and a default judgment was obtained by the respondent ("the first default judgment").

[5] The respondent brought an application for rescission which succeeded. The main basis upon which the rescission application succeeded was that the initial process was flawed because the respondent was oblivious of the fact that the applicant had changed his domicilium in accordance with their contract. The court process had been served at the initial domicilium of the applicant.

[6] After the successful rescission application, new attorneys were appointed by the respondent who then withdrew the initial action by the respondent against the applicant including the notices issued in terms of section 129 of the NCA.

[7] On 28 March 2014, the respondent issued fresh notices in terms of section 129 of the NCA to which there was no response from the applicant. Thereafter new summons were issued under the present case number. Both the notices and the summons were served at the newly chosen domicilium of the applicant. The applicant did not defend the action as a result of which the second default judgment was obtained against the applicant and was handed down by Ms Justice Collins on 09 May 2014.

[8] After the second default judgment, the present rescission application was instituted apparently on 14 July 2014. There is a dispute as to when exactly this application was served on the respondent. Endeavours to execute the default judgment were interdicted by the court on 17 September 2014 pending the finalization of this rescission application after the applicant had brought an urgent application to that effect.

[9] It is clear from the arguments that the applicant's case was to a large extent hamstrung by his decision to forego any reliance upon the replying affidavit as stated earlier. He only could rely on the facts as raised in the founding affidavit in so far as they were not directly controverted by the respondent's answering affidavit.[1]

[10] The applicant relied on Rule 42(1)(a) of the Uniform Rules, the common law as well as Rule 31. As far as Rule 42(1)(a), he submitted that under Rule 42(1)(a), good cause is not a requirement as long as it is shown that the order was erroneously sought and/or erroneously granted in the absence of the applicant. This submission is correct.

[11] The applicant further submitted that the respondent had not attached a written loan agreement as required by Rule 18 of the Uniform Rules and that therefore the default judgment was erroneously granted. He stated that the only attachment that the respondent has made to the combined summons was a letter of grant as well as the mortgage bond document.

[12] The argument of the applicant was effectively dealt with by Ms Van Niekerk. She referred me to the letter of grant which shows the loan granted to the applicant as well as the applicant's acceptance thereof through his signature. He further referred me to

[1] See Plascon Events v Van Riebeck 1984 (3) SA 623 (A) at 634

the annexure to the mortgage bond document and particularly the definition of a loan agreement under paragraph 1.11 thereof which provides *"'loan agreement' means the loan agreement made up of the letter of grant (as accepted by the mortgagor), the bond and this annexure".* She submitted that the acceptance of grant, the bond and the annexures constituted a written agreement between the parties. There was no counter argument to this submission and I accept it.

[13] The other grounds relied upon by the applicant related to the section 129 notices issued before the summons were served in relation to the second default judgment. The main contention by the respondent against this submission is that this issued was not raised in the applicant's founding affidavit and therefore the applicant could not rely thereon. Moreover, Iwas referred to pages 147 to 149 of the paginated papers which show that the section 129 notice were properly issued and served. I am satisfied by such explanation and need not deal further therewith as in any event this is not supported by the applicant's founding affidavit.

[14] The applicant went further to deal with the issues under common law and in particular stated that when the. summons were served by annexing a copy to the main door of the chosen domicilium, there is always a possibility that the summons would not reach the applicant. He relied on the case of **Mphambela v Standard Bank of South Africa Ltd** case no. 15263/2010 decided by Lephoko, AJ. The applicant relied heavily on paragraph 17 of that judgment where the following is stated:

"[7] As the summons was served by affixing a *copy thereof to the outer principal door, I accept that* a *possibility exists that the summons may not have come to the attention of the applicant. For this reason I am of the view that the applicant has established that he was not in willful default".*

[15] The applicant has omitted to refer to paragraph 16 of that judgment where the acting Judge found that the summons had been properly served on the applicant. The conclusion of the case was the dismissal of the rescission application.

[16] It was argued on behalf of the respondent that the case of **Mphambela** is distinguishable since in this case the applicant has consistently given the impression to

the bank that the newly chosen domicilium was the address that he was using and from which he was receiving all process. There was no indication by the applicant as to what could have led to the summons not coming to his notice after they had been. annexed to the main door of his newly chosen address.

[17] In this case, I am satisfied that the applicant has not shown absence of willful default on his part as argued by the respondent's counsel. In **Loryan (Pty) Ltd v Solarshi Tea and Coffee (Pty) Ltd 1984 (3) SA 834 (W)** at 847, the following was stated:

"Where a *contract provides for* a *domicilium for notices under the contract, as well as for the service of process, there is* a *so-called double provision. See Gerber v Stoltze and Others 1951 (2) SA 166 (T) at 169G and the Mulbarton case supra at 332 in fine. The purpose of choosing* a *domicilium for the giving of* a *prescribed notice under* a *contract is the same as it is for the service of process, namely to relieve the party giving the notice from the burden of proving receipt thereof."*

[18] I am satisfied that in this case the summons leading to the second default judgment were served properly at the newly chosen domicilium of the applicant. If it were to be assumed in all cases that where the summons had been served by affixing a copy to the main door of the defendant, the possibility exist that they will not come to the attention of the defendant, the provisions of Rule 4(1)(a)(iv) would be rendered nugatory. The applicant must place facts before court which will show why in the circumstances of his case the summons did not or could not have come to his notice. despite such proper service.

[19] In the circumstances, the applicant has failed to make out a case for rescission.

[20] As far as the costs of 28 April 2014 are concerned, argument was presented that such wasted costs were occasioned by the applicant's late filing of the replying affidavit. Regarding the costs of 17 September 2014 relating to the urgent application leading to the interdict of the execution process, it was argued on behalf of the respondent that such interdict was served before the present rescission application was brought to the notice of the respondent's attorneys as set out in the answering affidavit, which is

contradicted by the apparent acknowledgement of receipt by the respondent's attorneys appearing on the notice of motion. The respondent's counsel also argued that the rescission application should be dismissed with costs on a scale as between attorney and client, which is provided for in the contract between the parties.

[21] Against this argument on costs, the applicant in reply only stated that it should be the *"winner takes all"* in the sense that the successful party in the rescission application should be given all the costs including the reserved costs. Notwithstanding this concession, I need to apply a judicious discretion with regard to the issue of costs.

[22] Before dealing with costs, I need only to deal with one aspect relating to the date of acceptance of the letter of grant. The date was hand written and it is not clear whether it is 30/11/2009 or 30/11/2004. The respondent's affidavit stated that this date was 30 November 2009.

[23] However, in argument Ms van Niekerk informed me that there was an error due to the unclear handwriting. The correct date is 30 November 2004 and not 2009 as stated in the respondent's answering affidavit. She tendered to file a further supplementary affidavit in explanation thereof. The applicant objected against the filing of this affidavit and I upheld the objection and indicated that I will decide on the basis of the papers as they stand.

[24] The original of that document was handed up by the respondent's counsel. First, the last figure on the original appears to be either a 9 or a 4. Second, the date of 30 November 2004 accords with the rest of the documents. Third, the mortgage bond could not have been concluded before the grant of the loan. It was signed on 01 December 2004. Fourth, the issue of this date was not raised in the applicant's founding affidavit but only during argument. Strictly speaking therefore the applicant was not entitled to rely on such argument, this being a factual issue.

[25] In the circumstances, I am convinced that the date inserted by hand in that document refers to 30 November 2004 and that the reference thereto as 30 November 2009 in the respondent's answering affidavit was done in error.

[26] As regards the costs referred to above, the respondent sought to argue before me that the replying affidavit of the applicant was filed out of time and intended to seek a postponement on that basis as stated earlier. It is on that basis that the applicant relinquished his reliance on the replying affidavit. In my view, the applicant will be penalized twice if he were to be mulcted with the wasted costs occasioned by the postponement of 28 April 2014 in the light of what happened at the beginning of these proceedings before me. Each party should therefore carry the wasted costs occasioned by the postponement of 28 April 2014.

[27] As far as the costs of the urgent application of 17 September 2014, it seems to me that there is a dispute of fact as to whether the respondent attempted to execute the default judgment after it had been served with the present rescission application or not. This in my view is pivotal to the question whether it was necessary for the applicant to bring such urgent application to interdict the execution. Although the respondent denies that it received the rescission application on 14 July 2014 as appears in the notice of motion, it is unknown as to how this acknowledgement of receipt came onto the notice of motion and whose signature appears thereon. In my view therefore, each party should carry the costs of that urgent application.

[28] As far as the costs of the rescission application, the costs must follow the results. As per the agreement between the parties such costs should be at a punitive scale as between attorney and client.

[29] In the result, I make the following order:

[a] The application is dismissed.

[b] The applicant is ordered to pay the costs of the application on an attorney and client scale.

[c] Each party is to carry its own costs with regard to the wasted costs occasioned by the postponement of 24 April 2014 and the urgent application heard on 17 September 2014.

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D T SKOSANA

Acting Judge of the High Court