IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: **37866 / 2014**

On 21 January 2016

Before: The Honourable Holland-Müter AJ

In the matter between:

THEMBA JAMES MNCUBE (ID: 760323 6263 087)	Applicant
and	
STANDARD BANK OF SOUTH AFRICA	1st Respondent
MARIA MAPONYA	2nd Respondent
THE REGISTRAR OF DEEDS, JOHANNESBURG	3rd Respondent
THE SHERIFF, TEMBISA	4th Respondent

In re:

STANDARD BANK OF SOUTH AFRICA	Plaintiff
and	
THEMBA JAMES MNCUBE	Defendant

JUDGMENT

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[1] This is an application for rescission of a default judgment granted by this court on 20 August 2014 as well as setting aside the sale in execution subsequently held on 3 December 2014. Only the 1st respondent opposed the

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

21/1/2016
DATE

SIGNATURE

application.

[2] The 2nd respondent, the purchaser of the immovable property in question on 3 December 2014, did not oppose the application although the application was served upon her personally on 9 February 2015. See return of service on p 110.

[3] In the heads of arguments on behalf of the applicant, in par 2 it is averred that no relief is sought against the 3rd and 4th respondents.

[4] The issues to be decided as argued on behalf of the applicant are:

4.1 Whether the 1st respondent's answering affidavit was delivered out of time and be disregarded by the court (par 5 of the heads of argument);

4.2 Whether the default judgment granted on 20 August 2014 was erroneously sought or granted as contemplated in Rule 42(1)(a) of the Uniform Rules of Court;

4.3 In the alternative, whether the default judgment should be rescinded in terms of the provisions of Rule 31(2)(b) or in terms of the common law; and

4.4 Whether the sale in execution of 3 December 2014 should be set aside?

[5] The applicant however nowhere deals with the aspect of the late filing of the replying affidavit, the filing thereof almost two months after the answering affidavit was filed. I am of the opinion that all the affidavits ought be accepted to enable myself to finalize the matter. It will serve no purpose to disregard the answering affidavit, leaving the replying affidavit in the air.

[6] Of more importance is the late bringing of the application for rescission of the default judgment. The applicant on his own version became aware of the judgment on 17 September 2014, the application only served on the 1st respondent on 2 February 2015, far outside the 20 days as required by Rule 31(2)(b). This is more than 4 months after 17 September 2014 when the applicant became aware of the judgment. See par 13 & 14 of the founding affidavit on p 23.

[7] On 17 October 2014, one month after obtaining knowledge of the default judgment, the applicant 'directed' a hand written letter to the 1st respondent. In this letter the applicant indicates that he has made alterations towards the property and that he was renting four rooms to tenants to derive an income. Of importance is that nowhere in this letter did the applicant inform the 1st

respondent that his domicilium address has changed.

[8] Despite receiving a rental income for the afore going two years, no explanation is given why this income was not used to service the bond account, nor is any viable proposition made how to pay the existing arrears.

[9] The explanation by the applicant in par 14 & 15 of the founding affidavit is with respect very vague. In par 9 of the founding affidavit the applicant explains that he contacted a certain Ronel Raath at the 1st respondent's attorney of record who informed him to submit a written proposal to be forwarded to the 1st respondent. This was only done on 1 December 2014. No explanation is given why this was not done earlier. More than a month expired before the applicant reacted.

[10] This lack of immediate reaction by the applicant is clearly what he was doing all along the process. Only after being informed that his proposal was rejected on 1 December 2014 does he consult with his present attorney, on 8 December 2014. On 11 December 2014 Venter Attorneys in writing informed the 1st respondent's attorneys that they are representing the applicant. See TM 7(1) on p 89. The application was only drafted on 2 February 2015

as indicated on p 4 of the application. The applicant tries to explain this delay in his par 9.18 as a lack of a deposit to Venter Attorneys. No confirmatory affidavit from Venter Attorneys' office in annexed to verify this allegation.

[11] The whole process on behalf of the applicant after receiving notice of the default judgment on 17 September 2014 is riddled with delays with no proper explanation for the delays. This must impact on the question to rescind the judgment in view of any proper bona fide defence.

[12] In view of the applicant's failure to bring this application within 20 days of being notified of the judgment, I fail to see any reason why the applicant now wants this court to disregard the answering affidavit being out of time, but condone his lack of acting timeously in bringing the application and thereafter filing his replying affidavit well out of time. The court has to apply the same measures to all the parties in the matter and cannot be more lenient towards the applicant. The argument on behalf of the applicant to disregard the answering affidavit is rejected.

[13] The next question is whether the default judgment granted on 20 August

2014 was erroneously granted. The main contention by the applicant in this regard is that he was not informed by the 1st respondent of the intended action and that the provisions of Section 120 of the National Credit Act were not complied with.

[14] It is clear that a notice in terms of section 129 was dispatched to the applicant by the 1st respondent. See annexure "C" on p 72. The only issue is whether the address of the applicant is the correct address in terms of the loan agreement between the parties.

[15] There is no proof by the applicant that he changed his chosen domicilium address as required by the provisions of clause 14.4 of the agreement between the parties. See p 70. The letter by the applicant referred to above cannot be seen as compliance with clause 14.4.

[16] The account statement as referred to on p 83 (annexure "TM-4") likewise is not proof of change of address. In clause 2.6 of the agreement (on p 67), it is clear that this address is the street address of the subject property of the agreement. This is not the chosen domicilium address for service of notices etc.

[17] The section 129 notice was therefore delivered at the correct address as held in ***Sebola v Standard Bank 2012 (5) SA 145 CC-*** *" Par 87- Where the credit provider posts the notice, proof of registered dispatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute proof of delivery".*

[18] The applicant did not collect the registered letter at the appropriate post office. In ***Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 CC*** it was held that it is sufficient to bring the section 129 notice to the attention of the consumer for the consumer agreed to receive notice by registered post. The applicant did not provide an explanation why he did not respond to the notice from the post office. This led to the practice that credit provider's attorneys now file affidavits attaching the "track-and-trace" reports. See the affidavit by Belinda Brauns on p 30, the track-and-trace report on p 75.

[19] There is therefore no merit in the argument on behalf of the applicant that there was non-compliance with section 129. There was service of the

summons at the chosen domicilium address the judgment was therefore not erroneously granted in the absence of the applicant.

[20] The next question to be answered is whether the judgment can be rescinded in terms of Rule 31(2)(b) or in terms of the common law.

[21] Rule 31(2)(b) requires an applicant to, within 20 days from having notice of the judgment, to apply for the rescission. From above it is clear that the applicant is well beyond the 20 day requirement with no sufficient explanation for his failure to bring the application in time.

[22] The applicant in my view does not show good cause for his default. He fails to show why he is in default, without any proof annexed to verify his averment that he was wounded during 2010. He does not explain why he did not use the rental income to make payments on the account, not that he approached the 1st respondent to reschedule his repayments after the incident. On his own version he is in arrear with the account. He fails to show any bona fide defence against the claim. See **Erasmus, Superior Court Practice, B1-201.** His application for rescission in terms of Rule 31(2)(b) cannot be successful.

[23] In ***Silber v Ozen Wholesalers (Pty)Ltd 1954 (2) SA 345 A at 352*** it was held that good cause includes the existence of a substantial defence. The applicant did not succeed to prove the existence of any defence, he admits being in arrears, there is no issue fit for trial. See **Erasmus supra, B1-204.**

[24] The last issue is whether the sale in execution should be set aside. The test to apply whether a property can be declared specially executable was formulated in ***Firstrand Bank Ltd v Fölscher and Another 2011 (4) SA 314 GNP.*** The applicant was informed of his constitutional rights and of the provisions of Rule 46(1)(s)(ii) in the summons.

[25] The applicant now avers that the property is his and his families prime residence. He however did not annex any confirmatory affidavits from his wife to verify his marital status. Although he resides in at the property, he rents portions of the property to derive income, income not utilized to pay any amounts of the outstanding account/debt. He earns a salary (without disclosing the amount), is far in arrear (more than 20 months) and the prejudice suffered by the 1st respondent far outweighs that of the applicant. Under the circumstances I am of the view that the sale in execution should

not be set aside.

[26] I am not inclined to grant the application and the following order is made:

The application is dismissed with costs, the costs to be on an attorney and client scale.

HOLLAND-MÜTER AJ

BY ORDER OF COURT
REGISTRAR

Date heard: 18 November 2015

Appearances:

Applicant's Counsel: Adv CA Boonzaaier.

1st Respondent's Counsel: Adv CGVO Sevenster.