



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 6478/2016

In the matter between:

MARLON TERENCE ROELF

Applicant

and

**THE STANDARD BANK OF SOUTH AFRICA
LIMITED**

First Respondent

**THE SHERIFF OR HIS DEPUTY –
WYNBERG SOUTH**

Second Respondent

J U D G M E N T

MACWILLIAM AJ:

[1] The Applicant applies to rescind and set aside the default judgment granted against him by this Court on 31 May 2016, as well as the order declaring Erf 74732 Cape Town specially executable.

[2] The First Respondent opposes this application.

[3] The Applicant was up until the day before the hearing unrepresented. On that day his present attorneys of record came on record and Attorney Quintin Zimmerman appeared on his behalf and handed up brief heads of argument.

[4] The following chronology is common cause:

1. Service of the First Respondents summons was affected on a number of different addresses between the period the 29th April to 5th May 2016. It was submitted by the First Respondent that service had taken place in accordance with the rules and Mr Zimmerman did not suggest otherwise.
2. Default judgment was granted on the 31st May 2016, at which time the property was declared executable.
3. The writ of attachment was issued on 29th June 2016 and served on the Applicants partner on the 18th July 2016.
4. The Applicant and the First Respondent concluded a payment arrangement in relation to the payment of the arrears on 28th July 2016.
5. The Applicant made the first payment in terms of the payment arrangement on the 2nd August 2016.

6. The next payment was due on the 7th September 2016, however it was no paid - no further payments due in terms of the payment arrangement were paid by the Applicant.

7. The rescission application was brought on the 1st December 2016 and served on the 2nd December 2016.

[5] The First Respondent argues that as the application was not brought within the 20 day period prescribed in terms of Rule 31(2)(b), or within a reasonable time after the Applicant obtained knowledge of the judgment, the application falls to be dismissed on this ground alone.

[6] The First Respondents submitted that the commencement of the 20 day period, as well as and the reasonable time, was the date when the writ of execution was served.

[7] While the reason for the delay in bringing the application was not addressed at all in the Applicant's Founding Affidavit and no Replying Affidavit was filed, it is apparent from the opposing papers that at least until 7th September 2016 the Applicant was entitled to accept that the First Respondent would not proceed with execution pending payment in terms of the payment arrangement.

[8] However once the Applicant stopped making payments in terms of the payment arrangement, he was under an obligation to bring his application to have the default judgment set aside if he thought he

had good grounds to do so. The time to do this must have started to run from no later than 7th September 2016.

[9] The Applicant did not file a Replying Affidavit and he has not disputed that subsequent to the payment which he made on 2nd August 2016, he made no further payments in terms of the payment arrangement. In fact he has not placed any evidence before this Court that he has ever paid any further amount to the First Respondent since then.

[10] In the absence of any explanation as to why the application was only brought on the 1st December 2016, it is not possible for me to conclude that the application was brought within a reasonable time or that the Applicants failure to bring the application within the 20 days prescribed by Rule 31(2)(b) could be disregarded. See in this regard First National Bank of South Africa Limited v Van Rensburg N.O. and Others: in re First National Bank of Southern Africa Limited v Jurgens and Others 1994 (1) SA 667 (T) at 681 B and Nkata v First Rand Bank Limited and Others 2014 (2) SA 412 (WCC) at para 27.

[11] In its opposing affidavit the First Respondent answered each of the grounds upon which the Applicant alleged that there had been procedural irregularities in the obtaining of the judgment and the execution in terms thereof. None of these answers were disputed by way of a Replying Affidavit.

- [12] The summons was served on the Applicant at the Applicant's chosen domicilium address as well as at the address of the mortgaged property. On one of these occasions service was received by the Applicant's brother. The Applicant does not state that he did not obtain a copy thereof from his brother.
- [13] The applicant alleged that the default judgment order had not been served on him. However, it seems clear that by no later than 28th July 2016, when he concluded the payment arrangement with the First Respondent, he must have had knowledge of the default judgment. Much water has passed under the bridge since then, yet it is still not in dispute that the arrears due in terms of the credit agreement have not been paid nor has the credit agreement been reinstated.
- [14] The Applicant further complains that the notice of set down of the default judgment application was not served on him, but in terms of Rule 31(4) that service was not necessary.
- [15] Finally the Applicant contended that the First Respondent should have used means, other than execution against the Applicant's immovable property, to recover the judgment debt. However, at this stage after the passing of many months when the arrears have still not been paid, there are no grounds to think that those alleged other means would have served any purpose.

[16] In these circumstances the Applicants application is dismissed with costs.

MACWILLIAM AJ

Date of Hearing: 12 September 2018

Date of Judgment: 17 September 2018

APPEARANCES

For the Appellant: Mr. Q Zimmerman (Attorney)

Instructed by: Liddle & Associates, Woodstock

For the Respondent: Adv. D Rabie

Instructed by: Smith Tabata Buchanan Boyes Attorneys,
Tygervalley