

SOUTH AFRICA / JUDGMENT

Ditsele and Another v ABSA Bank Limited (25789/2020) [2024] ZAGPPHC 1177 (22 November 2024) [2024] ZAGPPHC 1177

COURT

North Gauteng High Court, Pretoria

BEFORE

SA Thobane

CASE / FILE NUMBER

25789/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 25789 –

2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO THE JUDGES: NO

(3)

REVISED: YES

SIGNATURE:

DATE:

22 NOVEMBER 2024

In the matter between: TSHEPO
 JOHN DANNY DITSELE
 FIRST APPLICANT
 BENEDICTA
 MMAMOLEPO DITSELE
 SECOND APPLICANT
 and
 ABSA
 BANK
 LIMITED
 RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

[1] The circumstances of this application are very anomalous. The respondent and the applicants entered into a written loan agreement during 2007. A mortgage bond was registered in favour of the respondent as security for repayment of the loan by the applicants. When the applicants defaulted on their repayments and their accounts fell into arrears, the respondent approached this court and obtained judgment by default before Phahlamohlaka AJ, with the reserve price set at R1 600 000-00. Subsequently, a writ was issued, the property was attached and a sale in execution took place. When the house could not be sold at an auction arranged by the sheriff at his office, as there were no bids, the respondent approached the court for reduction of the reserve price. Retief AJ granted an order reducing the reserve price to R 1 243 378-21. A second sale in execution was held and once again the sheriff indicated that there were no bids. The respondent once again returned to court to apply for reduction of the reserve price. The application came before Munzhelele J who kept the reserve price unchanged at R 1 243 378-21.

The anomaly in this application is that the applicant seeks to rescind the latter order which did not change the reserve price set by Retief AJ.

[2] The application, which is opposed by the respondent, is moved by the first applicant in person.

[3] The following facts, which are largely common cause need to be restated for context and perspective;

3.1. On 29 June 2020 the plaintiff (the respondent in this matter), issued a summons out of this court against the defendants (the applicants herein). The action was premised on a written loan agreement between the parties which was concluded in 2007. As security for the loan, a mortgage was registered in favour of the respondent, as aforesaid.

3.2. In the particulars of claim the respondent asserts that it performed in accordance with the loan agreement, on the one hand and on the other, that the applicants failed to do so, with the result that at the time of issue of summons, the applicants were in arrears on the loan account and the arrears represented 8.27 months' arrears.

3.3. The summons was served on the applicants personally at the registered address on 9 July 2020 and when there was no appearance to defend entered, the respondent approached this court for default judgment.

3.4. On 12 October 2020 the first applicant was served personally with an application for default judgment which was to be heard on 5 November 2020. On that day an order was obtained against the respondents before Phahlamohlaka AJ, in the following terms;

1. Payment of the sum of R1 243 378.21;
2. Interest on the amount of R1 243 378.21 at the rate of 7.85 % per annum with effect from 18 March 2020 to date of payment, both days inclusive;
3. An order declaring the following immovable property specially executable:

ERF 1[...] AMANDASIG EXTENSION 23 TOWNSHIP

REGISTRATION DIVISION: J.R, PROVINCE OF GAUTENG

IN EXTENT 1227 SQUARE METRES

HELD BY DEED OF TRANSFER NOT 85787/07

SUBJECT TO THE CONDITIONS THEREIN CONTAINED.

4. An Order in terms whereof the Registrar is directed to issue a Warrant of Execution against Immovable Property mentioned in Prayer 3 above, in terms of Rule 46(1) of the Uniform Rules of Court;
5. An order authorising the issuing of a writ of execution.
6. An order that the Plaintiff may proceed to instruct the sheriff of the High Court to sell the above-mentioned immovable property of the Defendants at a sale in execution, on a date to be arranged with the sheriff of the High Court, subject to a reserve price of R R1 600 000-00.
7. Costs of suit on the attorney and client scale, to be taxed.

3.5. On 17 November 2020 the respondent issued, out of this court, a writ to attach the immovable property which had been declared specially executable.

3.6. The sheriff was instructed to and did in fact hold a sale in execution on 30 July

2021. The immovable property could not be sold and the sheriff reported in his return that the sale was made “NO BID NO SALE” due to the fact that the bidders who attended the auction at the sheriff’s offices and who were present thereat, were not willing to pay the reserve price of R1.6 million.

3.7. The court was thereafter approached by the respondent for reconsideration of the reserve price. The respondent sought an order that the sale in execution be carried out without any reserve price.

3.8. On 13 May 2022 the respondent caused to be served on the applicants an application for amendment of the reserve price. The application was served on the second respondent.

3.9. On 13 June 2022 Retief AJ granted an order that the reserve price be set at R1 243 378-21.

3.10. On 30 September 2022 once again, the sheriff held a sale in execution in respect of the immovable property. After opening the bit at the reserve price there were again no bids. The sheriff reported that the auction was a “NO BID NO SALE”.

3.11. On 17 January 2023 another application for amendment of the reserve price was served at the applicants’ place of residence. The application was set down for 29 March 2023.

3.12. On 29 March 2023 Munzhelele J granted an order effectively keeping the reserve price, that of R1 243 378-21 unchanged.

3.13. On 23 August 2023 the applicants launched the current application, purporting to be in terms of Rule 46(A)(1) and (2) and section 26 of the Constitution.

[4] In the Notice of Motion the applicants pray for an order;

4.1. Rescinding the default judgment granted against them on 29 March 2023;

4.2. Declaring that it is void ab origine and was erroneously granted;

4.3. No order as to costs.

The law and its application

Application for rescission in terms of Rule 46(A)(1) and (2)

[5] The applicants state in the Notice of Motion that the application for rescission is brought in terms of Rule 46(A)(1) and (2) of the Uniform Rules of Court as well as section 26 of the Constitution of South Africa[1]. It is trite that an application for rescission of judgment can only be brought in terms of Rule 42(1)(a) or Rule 31(2)(b) as well as Common Law. The applicants are representing themselves in these proceedings. Presumably they drafted their own papers. One can

surmise that what the applicants meant to say in the Notice of Motion was that they were seeking to rescind a judgment obtained in terms of Rule 46(A)(1) and (2) as well as section 26 of the Constitution.

The application in terms of Rule 42(1)(a)

[6] One of the vehicles for bringing an application for rescission of judgment is through Rule 42 (1) (a) of the Uniform Rules of Court. The Rule provides as follows;

‘42. Variation and rescission of orders

- (1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary—
 - (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
 - (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
 - (c) an order or judgment granted as the result of a mistake common to the parties.’

[7] The onus is on the applicant to show that the order sought to be rescinded was granted in his absence and that it was sought or granted erroneously. Once these requirements are met, the court has a discretion to rescind the order and this discretion must be exercised judicially. In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture*[2], Justice Khampepe, writing for the majority, said in this context that:

‘... these sorts of proceedings have little to do with an applicant's right to seek a rescission and everything to do with whether that applicant can discharge the onus of proving that the requirements for rescission are met. Litigants are to appreciate that proving this is no straightforward task. It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence and that it was erroneously granted or sought. Both grounds must be shown to exist.’

The Court also said in the preceding paragraph, para. [53];

‘...the words “granted in the absence of any party affected thereby”, as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.’

[8] The summons was served personally on the first applicant, so was the application for default judgment. Upon being served with the summons the applicant did not enter an appearance to defend and to the application for default judgment, notwithstanding personal service, he chose not to file a notice to oppose. The applicant knew when judgment was to be sought and chose not to participate in the proceedings. The contention by the applicant that he became aware of default judgment only on 31 July 2023 cannot be correct, regard being had to his own version. Besides, the fact that the applicant was served personally with the application for default judgment means that he reasonably would have become aware that judgment was being sought against him. He states in his founding affidavit that he attended

court on 13 June 2022 and raised the point that the immovable property was his primary residence and that were it to be sold, he would become indigent. If there was any doubt before 13 June 2022, as to whether or not judgment had been obtained, then it would have been dispelled because it was the day on which the respondent applied for revision of the reserve price from R1,6 to R1.3 million, as per the order of Retief AJ, in respect of a judgment that was obtained 5 November 2020.

- [9] The applicants therefore knew of the summons, knew that the application for default judgment was on the Court roll and would proceed, and that nothing had been done to resolve or finalise the action as alleged. There is therefore no reasonable explanation for their inaction. The reach of the rule is limited to procedural matters, not matters of substantive law[3]. If brought in terms of Rule 42, the application must fail.
- [10] There is also no basis for finding that the order was erroneously sought or erroneously granted, regard being had to the facts of the case, set out above. An order is not granted erroneously or sought erroneously when the plaintiff or applicant was entitled procedurally to the order. Moreover, the applicants were served with the application for default judgment personally. Their absence in court was by choice.

Rule 31(2)(b) and the common law

- [11] In terms of Rule 31(2)(b) and the common law, an applicant for rescission is required to show good cause. The rule reads as follows;

“31. ...

2.

(a)

- (b) A defendant may within 20 days after acquiring 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 it deems fit.

- [12] An applicant who seeks rescission of a default judgment in terms of Rule 31 or at common law is required to show good cause. This requirement has two parts to it, namely a reasonable explanation for the applicant's default and presence of a bona fide defence to the claim on the merits. It is patently clear that granting a rescission when the applicant has no defence to the plaintiff's

claim would be a futile exercise and would merely delay the claim of the plaintiff and the application would not be bona fide.

- [13] There is no exhaustive definition of what amounts to good cause. The court will however not come to the aid of an applicant who was in willful default or who was grossly negligent.

- [14] In *Grant v Plumbers (Pty) Ltd* [4] Brink J said:

“(a) He [the applicant] must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

- (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.
 - (c) He must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. (Brown v Chapman (1938 TPD 320 at p. 325).)”
- [15] The applicants offer no explanation for their default. The summons, the application for default judgment and the application to lower the reserve price were served on them in person. There is no doubt that the applicants elected not to participate in the proceedings. The first applicant submitted that they fell on hard times. They admit that their loan account with the respondent is in arrears. They admit that they made arrangements to pay, however, such payments were reversed seemingly due to insufficient funds in the bank account from which monthly instalments were debited. The defence of payment is not availed to the applicants because they defaulted on those payments. There is no defence to speak of let alone one that if established at the trial, would entitle them to relief. It follows that the application for rescission if brought in terms of Rule 31(2)(b), of the Uniform Rules, must fail.

The order dated 29 March 2023

- [16] There is another reason why the application must fail. The applicants seek an order to rescind “a default judgment granted against them on 29 March 2023 on the basis that it was void ab origine”. The Notice of Motion states that the application is brought in terms of Rule 46A (1) and (2) as well as section 26 of the Constitution of the Republic of South Africa. It is common cause that no default judgment was granted on 29 March 2023. It is also common cause that Rule 46A deals with execution against residential immovable property and section 26 of the Constitution, the right to have access to adequate housing. Firstly, an application for rescission of judgment cannot be brought under the abovementioned rule or section. Secondly, the applicant has failed to show why they contend that the judgment was void ab origine. Thirdly, and perhaps most importantly, what the applicants seek to do, is to rescind the order of Munzhelele J, in terms of which the reserve prices set at R1.3 million, was set. The applicants have failed to advance any reason why that order should be “rescinded”, let alone the judgment obtained by default. Even if the order were to be rescinded or set aside, the judgment would still remain intact. Lastly, counsel for the respondent advised that in any event the horse has bolted in that the immovable property has since been purchased at a sale in execution. The application therefore must fail and the costs must follow the result.

Order

[19] I therefore make the following order;

1. The application for rescission of judgment is dismissed with costs.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For Applicants:

In person,

For Respondent:

Adv. Barreiro,

Instructed by:

Haasbroek & Boezaart Incorporated,

Pretoria.

Date of the hearing: 11 June 2024

Date of

judgment:

22 November 2024

This judgment was handed down electronically by circulating to the parties' legal representatives by e-mail, by being uploaded to the CaseLines platform of the Gauteng Division. The date and time of hand down is deemed to be 10:00 on 22 November 2024

[1] Constitution of the Republic of South Africa No. 108 of 1996.

[2] Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector

Including Organs of State and Others (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September

2021) para [54].

[3] See Mohamed NO and Others v National Director of Public Prosecutions and another: In re National Director of Public Prosecutions v Mohamed NO and Others (CCT44/02) [2003] ZACC 4; 2003 (1) SACR 561; 2003 (5) BCLR 476 ; 2003 (4) SA 1 (CC) (3 April 2003) [2005] 1 All SA 33 (W) at para 13; Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003

- (6) SA I (SCA) at para [8] – [10]; Lodhi 2 Properties Investment CC v Bondev (Pty) Ltd 2007
- (6) SA 87 (SCA).
- [4] Grant v Plumbers (Pty) Ltd 1949
- (2) SA 470 (O) 476–7.
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