

SOUTH AFRICA / JUDGMENT

Duma v Absa Bank Limited (82471/2016) [2017] ZAGPPHC 616; 2018 (4) SA 463 (GP) (2 October 2017) [2017] ZAGPPHC 616

COURT

North Gauteng High Court, Pretoria

BEFORE

G Rautenbach

CASE / FILE NUMBER

82471/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 82471/2016

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED.

2/10/2017

In

the matter between:

VERONICA
NONHLANHLA
DUMA Applicant
and
ABSA
BANK
LIMITED Respondent

JUDGMENT

Rautenbach AJ:

1. This is an application by the Applicant (Duma) for a rescission of judgment granted against her. The application is based on Rule 42.
2. The Applicant resides at [...]Street, her chosen address for domicilium in respect of this application.
3. The Applicant alleges that she was retrenched by her employer and was for a period of time during the past six months unable to make any payments as agreed with the Respondent earlier. The Applicant engaged the Respondent to extend the terms of the mortgage bond as to cover all outstanding debts.
4. The Applicant's correspondence to the Defendant was apparently ignored and judgment was granted against her on the 1st September
2015. The judgment granted was a judgment in the amount of R459 584.55 together with interest on it as well as declaring the property

executable.

5. In the application for rescission there does not seem to be any ground for the Applicant to succeed based on Rule 42. According to paragraph 4.16 of the Respondent's answering papers it seems quite clear that there was nothing irregular about the process of the service of the Notice of Set Down and the enrolling of the application on 1 September 2015.
6. It seems that the only reason this application is brought is a spes Duma has that she may in future be in a position to come to some sort of agreement with the Bank after all these years. It is to be taken into account that the sale in execution was scheduled to take place on the 11th November 2015 but the sale in execution was however cancelled upon receipt of the Applicant's rescission application. When this application was initially heard the Applicant was given an opportunity to file Heads of Argument, we were already approaching the middle of August 2017. The prejudice to the Respondent is quite apparent.
7. In the Applicant's Heads of Argument the Applicant relies mainly on the fact that the Bank did not negotiate in good faith and that the Bank ignored her suggestions and imposed their own solution of restructuring on the Applicant. The Court is not in a position to dictate to the Bank how it should negotiate. The reason for the inquiry by the Court into the matter before a property is declared executable is amongst others to give a home owner the opportunity to engage with the Bank in order to see if the loss of the home can be prevented.
8. In the circumstances as there is no other defence even if I should have regard to the provisions of Rule 31 of the Uniform Rules of Court, no basis exists to grant the rescission application and start this process afresh. The Applicant simply has no defence against the

claim of the Respondent. For purposes of this Judgement I would like to emphasize two aspects of the process namely the initial order that was granted as well as a warrant of attachment for immovable property specially executable. The warrant which appears on page 26 of the papers reads as follows:

"Whereas the aforementioned property has been declared executable in terms of the aforesaid Judgment

Now therefore you are directed to attach and to take into execution the immovable property of the said Defendants being

1. A unit consisting of
 - (a) section no. [...] and as shown and more fully described on sectional Title Plan Number 88[...] in the Scheme known as [...] in respect of ground and building/buildings situate at [...], Local Authority: City of Tshwane Metropolitan Municipality of which section the floor area, according to the said sectional plan is 82 squares in extent; and
 - (b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan situate at [...], Pretoria (being the Defendant's chosen domicilium citandi et executandi) held under Deed of Transfer ST97[...] to the cause to be realised therefrom the sum of R459 584.55 together with interest thereon at the rate of 9,25 per annum from 8/03/15 to date of payment, the said rate on interest to be calculated and capitalised monthly, together with costs as between attorney and client scale being the costs hereof and your charges in and about the same, and therefore to dispose of the proceeds thereof in accordance with Rule of Court No. 46."

9. The Court Order reads as follows:

"The Court grants summary judgment in favour of the Plaintiff against the Defendant for:

- (a) Payment of the sum of R459 584.56.
- (b) Interest on the amount of R459 584.56 at the rate of 9.25% per annum capitalised monthly from 8 March 2015 to date of payment.
- (c) An order that the property, being a unit consisting of Section No. [...] as shown and more fully described on Sectional Plan No. S[...], in the Scheme known as [...] in respect of the land and building or buildings situated at [...], City of Tshwane Metropolitan Municipality of which section the floor area, according to the said sectional plan, is 82 square meters in extent and

An undivided share in the common property in the Scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan, held by the Respondent under Deed of Transfer number ST97[...] be declared executable.

- (d) An order in terms of Rule 46 for the issuing of a Warrant of Execution against the immovable property to obtain an attachment over the property and an ultimate sale in execution.
- (e) Costs of the suit on a scale as between attorney and client."
- 10. The reason why I have fully quoted from both the Warrant of Execution and the Court Order will become apparent below.
- 11. In regard to the Court's oversight it was dealt with by the Full Court of this Division in *First Rand Limited v. Folscher and Another* and similar matters.[1] The following was stated in paragraph 55:

"A creditor applying to Court for the granting of a writ for execution after obtaining judgment by default must file an affidavit setting out all the applicable circumstances enumerated in paragraph 41 above of which the creditor is aware or is able to reasonably establish from the information at its disposal."
- 12. Since the Judgment in *Folscher* above it has become clear that the legal position as set out in *Folscher* was not necessarily accepted by some other Courts of a similar status in other divisions of the High Court.
- 13. It is not necessary for me to deal with this issue because what is at least the legal position throughout South Africa is that judicial oversight must take place before a property is declared executable.[2]
- 14. One of the most important factors that the Court will have to take into account will always be the outstanding arrears. It is for this reason that Courts often refuse to grant an order to declare a property executable where the arrears are relatively small compared to the full outstanding amount in terms of the bond and encourage the parties to find a solution to prevent the selling of the property.
- 15. All the other factors that have to be taken into account serve to protect the owner of his primary residence to come to an arrangement

with the Bank, if possible, and so prevent the property to be sold in execution. In some of the matters that came before me on the unopposed roll in this Division, I have noticed that the Affidavit as per paragraph 11 above, appeared in some of these applications

setting out the circumstances applicable without serving the Affidavit on the debtor. This is a practice that should be discouraged. There exists no reason why the Affidavit as referred to in paragraph 11 above should not be served on the debtors in all circumstances.

- 16. I alluded in paragraph 14 above that the arrears are probably the most important factor to take into account. This is so because if it is impossible to address the arrears somehow, the prejudice to the Bank becomes of such a nature that the Court will declare the property executable and grant judgment against the debtor.

17. In *Nkata v. FirstRand Bank Limited* 2016 (4) SA 257 (CC) the Constitutional Court, (majority), came to the conclusion that Section 129(3) of the National Credit Act has brought about a radical change in collection proceedings. Execution of the property is interpreted by the Constitutional Court to mean when the proceeds of the sale (of the house) are realised. The Constitutional Court further came to the conclusion that such interpretation enables a debtor in respect of a house to pay the arrears up and until that stage. It means plainly that the agreement if it was not cancelled, is reinstated by the Defendant and the parties will be placed in the position they were before the arrears eventuated, which means that the debtor may proceed to pay his/her monthly instalments in terms of the bond.
18. In terms of the National Credit Act and the *Nkata* matter (*supra*) the Defendant will be liable at least for the agreed or taxed costs emanated from the proceedings to obtain judgment in execution against the debtor. An owner of a primary residence thus not only enjoy judicial oversight when a property is declared executable but in fact has the further remedy available to him and that is by paying the arrears before the house is sold in execution.
19. I take note that the Constitutional Court in *Nkata* dealt with section 129(3) and (4) of the National Credit Act before it was amended which came into effect on the 13th March
2015. However the. amendments to paragraphs 129(3) and (4) were of such a nature that it does not have any impact on the Judgment of the Constitutional Court, it only being a use of different words by specifically stating in the amendment of section 129(3) "that the consumer may at any time before the credit provider has cancelled the agreement remedy a default". (My emphasis)
20. I have quoted above in paragraph 8 the writ of attachment in this matter as well as the Judgment of the Court. All judgments in these matters look more or less the same as the order made by this Court in paragraph 8.
21. The people affected are lay people who in the nature of their predicament finds it difficult to defend themselves against proceedings of this nature. This is why these people defaulting on the payments are almost always unable to obtain legal advice or legal assistance in Court.
22. In practice the debtor is presented with an order of Court and an attachment which requires him to pay the full outstanding amount on the bond. In this case it was R459 584.56.
23. In my view the normal reaction by any lay person receiving such an order or writ of attachment is to throw in the towel. The order itself as well as the attachment informs the person of the Judgment in this case, as in many other cases, in an amount far exceeding the arrears in terms of the bond.

24. It is in this sense that I am of the view that the Court will pay lip service to the Constitution if it does not in its orders either make an order or some note to the effect that should the arrears be paid before the sale of execution, the parties would be in a position that they were in before the debtor fell into arrears provided of course as the Constitutional Court stated that a debtor would be liable to pay all the costs incurred by the creditor in terms of the processes it followed to collect the debt.
25. In general the Court has no duty to provide legal advice to people appearing before it. Certainly it is the duty of the Court where lay people appearing before it to advise them of this important right they have which has serious consequences for people affected if they are not so informed.
26. In the light of the circumstances I make the following order:
1. The application for rescission is dismissed with costs.
 2. The Applicant is entitled to reinstatement of the original agreement with the Respondent should she pay the arrears before the proceeds of the sale in execution is realised.

J G Rautenbach

Acting Judge of the High Court

Gauteng Division

Pretoria

[1] 2011 (4) SA 314 (GNP) at 336 A - G.

[2] Gundwana v. Steko Development 2011(3) SA 608 (CC).

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