

SOUTH AFRICA / JUDGMENT

Harbor Pointing CC v Absa Bank Ltd (13117/12) [2016] ZAGPPHC 891 (23 September 2016)

[2016] ZAGPPHC 891

COURT

North Gauteng High Court, Pretoria

BEFORE

NP Mngqibisa-Thusi

CASE / FILE NUMBER

13117/12

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REPUBLIC OF SOUTH AFRICA

GAUTENG

HIGH COURT DIVISION, PRETORIA

23/9/2016

CASE NO: 13117/ 12

Reportable:

No
Of
interest to other judges: No
Revised.
In

the matter between:

HARBOR
POINTING
CC Applicant
and
ABSA
BANK
LIMITED Respondent

JUDGMENT

MNGQIBISA-THUSI, J:

[1] The applicant seeks the following relief:

1.1 that the default judgment granted against it be rescinded.

1.2 that the applicant is granted leave to defend the action.

1.3 Costs.

[2] During 2007, the respondent and the applicant concluded a loan agreement for the purchase of an immovable property situated at Erf 29, Bushveld View Estate, Hartebeesfontein, Brits, ('the immovable property'). In the loan was secured by a mortgage bond over the immovable property. The loan agreement the applicant's domicilium address is the mortgaged property or any other mortgaged property (clause 10 of the agreement).

[3] As appears from the papers filed of record, on 11 April 2012 the responded issued summons against the applicant for the payment of an amount of R611 073.69 and that the immovable property be declared specially executable. In the summons the applicant is cited as Harbor Point Investments 6 CC. However, attached to the summons is a certificate of balance (in compliance with clause 9 of the mortgage agreement), indicating the client as Harbor Point Investments 3 CC. Furthermore, the summons were served at Erf 28, Bushveld View Estate, Hartebeesfontein, Brits, and not at the chosen domicilium address. It is the applicant's contention that there was no effective service of the summons which was served on a vacant stand.

[4] On 26 January 2015, the respondent sold the property to a third party, Mr William Teague. The property has since been registered in Mr Teague's name.

[5] The respondent has applied for the striking out of the applicant's replying affidavit in that it was filed out of time (i.e 10 months

after service of the answering affidavit)[1] and that the applicant has not sought condonation of its late filing of its replying affidavit.

[6] Cognisant of the failure by the applicant to seek condonation for the late filing of its replying affidavit, in view of the decision This court is going to make, I am of the view that the replying affidavit should not be struck out in order for this court to be apprised of all the relevant facts in this case and also bearing in mind that a third party's rights might be affected. Furthermore, I am also of the view that the respondent's application, in the alternative, that certain paragraphs[2] in the replying affidavit should be struck out as the applicant is only allowed to make its case in its founding affidavit. Having considered the paragraphs referred to, I am of the view that the applicant was entitled to respond to the issues raised by the respondent in its answering affidavit.

- [7] The applicant seeks the rescission of a default judgment on the grounds that at the time default judgment was granted the applicant

was not in arrears. Further, the applicant alleges that at the time judgment was obtained the parties had reached settlement and that it had subsequently paid an amount of R100 000.00 in terms of the settlement agreement. In support of its allegation, the applicant attaches to its founding affidavit a copy of a settlement agreement. However, it is apparent from the settlement agreement that reference is made to Harbor Point Investments 3 CC. I am of the view that the applicant's contention in this regard is misplaced in that the settlement agreement relates to another entity (Harbor Point Investments 3 CC) and not the applicant. Furthermore, the applicant contends that had the court been aware that service was not effected at the chosen domicilium address, it would not have granted the default judgment.

- [8] With regard to its default the applicant contends that it only became aware of the default judgment during May 2015 when it received information that the immovable property has been sold. This information was only confirmed by the respondent during May 2015.
- [9] The respondent is opposing the application that the respondent was in wilful default[3] in that it must have been aware of the judgment, particularly as execution over the property had been effected. Furthermore, it is the respondent's contention that the applicant should have been aware of the judgment in that the sale in execution was postponed on several occasions due to the fact that the each time the applicant had made payment shortly before the day of execution.
- [10] The main ground upon which the applicant is seeking the rescission of the default judgment granted against it is that it was not aware that the applicant had instituted an action against it as the summons were not served at the chosen domicilium address. In short, it is the applicant's contention that the judgment was erroneously granted in view of the defective service. Furthermore, the applicant relies on the fact that the summons was defective in that the certificate of balance related to a different entity and therefore the amount claimed as owing at the time the application was made could not have been correct. In its replying affidavit, the applicant clarifies that it is seeking the rescission of the default judgment in terms of the provisions of Rule 42, alternatively, under common law.
- [11] Rule 42(1)(a) provides that a court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. This means that the applicant has to show that the court in granting the default judgment had committed an error "in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record. *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECO). If the applicant can prove the error committed by the court, it is not necessary for him to explain his default.

- [12] Under the common law, in order for the court to grant an order rescinding a previous order or judgment the applicant has to show sufficient cause. In other words the applicant must give a reasonable explanation for his default, must show that he has a bona fide defence and must also show that he has a bona fide defence which prima facie has some prospect of success. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765.
- [13] In terms of clause 10 of the mortgage agreement, the applicant chose as its domicilium address the mortgaged property situated at Erf 29, Bushveld View Estate, Hartebeesfontein, Brits. Even though the respondent did not attach the return of service for the summons, from the summons it is clear that the domicilium address is indicated as Erf 28, Bushveld View Estate, Hartebeesfontein, Brits. Furthermore, the respondent's notice in the government gazette (dated 9 January 2015) the applicant's physical address is listed as Erf 28, Bushveld View Estate, Hartebeesfontein, Brits.
- [14] Rule 4(1) (a) (iv) provides that:
- "Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one of the following manners:
- ...
- (iv) if the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen".
- [15] In *Shepard v Emmerich*[4] the court held that where a domicilium address has been chosen in an agreement, strict compliance with the clause in the agreement is required. Erasmus[5] states that "To effect service on a neighbouring property, even if it belongs to the same owner, is not proper and effective service as required by this subrule". The risk of non-receipt of legal notices where a consumer has chosen a domicilium address lies with the consumer. *Rossouw v Firstrand Bank Limited* 2010
- (6) SA 439 (SCA); *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010
- (1) SA 549 (KZD).
- [16] As appears from the applicant's explanation for failing to defend that action, I am satisfied that the applicant was not in wilful default. As indicated above, there was no proper and effective service of the summons in that the summons were served at an incorrect address which was not the applicant's chosen domicilium address. I am satisfied that the applicant has shown sufficient cause for the rescission of the default judgment and that the prayers sought ought to be granted.
- [17] As the judgment was obtained erroneously and I intend granting the applicant prayer 2 of its notice of motion, Mr Teague is an interested party and ought to be joined in the main action.

[18] It is not necessary at this stage to determine the issue of costs and costs will be costs in the cause.

[19] Accordingly the following order is granted:

1. The default judgment granted against the applicant on 11 April 2012 is rescinded.
2. The applicant be granted leave to defend the action.
3. Mr Teague to be joined in the main action.
4. Costs to costs in the cause.

NP MNGQIBISA-THUSI

Judge of the High Court

Appearances:

For Applicant: Adv N Alli

Instructed by: Ramolao Ramotsehoa Attorneys

For Respondent: Adv J Eastes

Instructed by: Delport Van Dr Berg Inc

[1] In terms of Rule 6(5)(e) of the Uniform Rules of Court a replying affidavit may be delivered within 10 days of service of the

answering affidavit.

[2] Paragraphs 6; 9.2; 10.2-10.4; part of 18.1; 18.2-18.3; 22; 25 and 32-34.

[3] Rule 31(2)(b) provides that a defendant may within 20 days after he has knowledge of a judgment against him by default 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 to it seems meet. In terms of Rule 31(2) (b) an applicant for rescission of a judgment must show good cause. This means that the applicant has to give a reasonable explanation for the default, must show that his application is bona fide, and be able to show that he has a bona fide defence to the respondent's claim which prima facie has some prospect of success. *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O).

[4] 2015 (3) SA 309 (GJ).

[5] Erasmus Superior Court Practice at 01-34.

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