

SOUTH AFRICA / JUDGMENT

Hlatshwayo N.O and Another v Nedbank Limited and Another (48595/2007)

[2024] ZAGPPHC 127 (12 February 2024)

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COURT

North Gauteng High Court, Pretoria

BEFORE

SM Maritz

CASE / FILE NUMBER

48595/2007

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 48595/2007

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE:

12 FEBRUARY 2024

SIGNATURE:

SM MARITZ AJ

In

the matter between:

RAMASELA
LUCY HLATSHWAYO N.O.
FIRST APPLICANT
(In
her capacity as the representative of Deceased Estate
Enock
Mazibiya Hlatshwayo)
RAMASELA
LUCY HLATSHWAYO
(In
her capacity as a surviving spouse of the deceased
SECOND APPLICANT
Enock
Mazibiya Hlatshwayo)
and
NEDBANK
LIMITED
FIRST RESPONDENT
(Previously
known as NEDCOR BANK LTD)
THE
MASTER OF THE HIGH COURT, PRETORIA
SECOND RESPONDENT

JUDGMENT

MARITZ AJ

- [1] The Applicants seek the rescission of an order granted by default on 4 December 2007 against them as well as condonation for the late filing of their rescission application. Pursuant to the default judgment granted their immovable property situated at ERF 9[...] S[...] A[...], TOWNSHIP, REGISTRATION DIVISION J.R., THE PROVINCE OF GAUTENG, IN EXTENT: 450 (FOUR HUNDERED AND FIFTY) SQUARE METERS, HELD BY CERTIFICATE OF RIGHT OF LEASEHOLD NO. T 2[...] (hereinafter referred to as “the immovable property”) was attached and sold in execution.
- [2] The Applicants’ rescission application is premised on Rule 42(1)(a) of the Uniform Rules of Court namely that a court may rescind or vary “An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby”, alternatively on Rule 31(2) (b) of the Uniform Rules of Court which states that “A defendant may within 20 days after he or she has knowledge of such judgement apply to court...and the court may, upon good cause shown, set aside the default judgement”, further alternatively in terms of the common law. See in this regard paragraph 5.1 of the Applicants’ founding affidavit. The First Respondent opposes this application. No relief was sought against the Second Respondent.

- [3] The legal nexus between the parties arises from loan agreements concluded between Nedcor Bank being the predecessor in title of the First Respondent, and Enock Mazibiya Hlatshwayo (hereinafter referred to as “the deceased”) and the Second Applicant. As security for the indebtedness arising from the said loan agreements, the deceased and Second Applicant (these parties being married in community of property to each other) caused a first, second, third, fourth and fifth mortgage bond to be registered in favour of the First Respondent over the immovable property. The deceased passed away on 29 June 2004 and the First Applicant, being the surviving spouse of the deceased and cited in her personal capacity as the Second Applicant, was appointed as the representative of the deceased estate as contemplated in terms of section 18(3) of the Administration of Estates Act, 66 of 1965.
- [4] Subsequent to the passing of the deceased, payments were made in respect of the outstanding debt due to the First Respondent, as follows:
- 4.1 Two instalment in the amount of R 953.00 and
- 4.2 A life insurance policy of the deceased paid an amount of R 9 159.42.
- [5] Subsequent to receipt of the policy payment, a balance remained of the account of R 48 121.98. No further payments were made towards the remaining outstanding balance.
- [6] Due to no payments having been made towards the outstanding indebtedness or any further steps taken by the Second Applicant, the First Respondent, during October 2007, issued a summons against the Applicants. At the time of the institution of the action, the balance on the account in terms of which the loan agreements were concluded was R 58 717.08. The Second Applicant does not dispute that an indebtedness amount remained on the account at the time of the passing of the deceased as is evident from paragraph 6.2 of the Applicants’ founding affidavit where it is stated: “The deceased at the time of demise, the mortgage bond was in arrears in the amount of R 58 717.08”.
- [7] I pause to mention that prior to the service of the summons a notice in terms of section 129 and section 130 of the National Credit Act, 34 of 2005, was sent to the Second Applicant on 3 August 2007 and subsequent thereto the summons was duly served on the chosen domicilium citandi et executandi, being 9[...] B[...] A[...], Soshanguve, of the Second Applicant/Second Defendant (in the action) on 30 October 2007 by leaving copies thereof at the said premises. Service was effected in terms of Rule 4(1)(a)(iv) of the Uniform Rules of Court. The dies expired on 14 November 2007 and the Applicants/Defendants did not enter an Appearance to Defend.
- [8] Pursuant thereto the First Respondent issued a request for judgment in terms of Rule 31(5), which judgment was granted on 4 December 2007 in favour of the First Respondent/Plaintiff against the Applicants/Defendants for payment in the sum of R 58 717.08, as well as interest on the said amount at the rate of 10.50% per annum from 12 April 2006 to date of final payment and for an order declaring the immovable property executable. The Applicants seek to rescind this

judgment.

[9] Subsequent to the default judgment been granted the immovable property of the Applicants/Defendants was attached and sold at a sale in execution on 31 July 2008. Pursuant to the sale the First Respondent received the total amount of R 168 160.85. The amount received in pursuance of the sale in execution of the immovable property was in excess of the indebtedness amount due by the Applicants/Defendants. The outstanding amount at that stage was R 88 367.60. The excess amount, of R 79 793.27 (i.e. R 168 160.85 minus R 88 367.60) was subsequently paid to the account of the deceased estate. The Applicants are not disputing receipt of this payment.

[10] I will briefly deal with the legal framework as applicable to the

facts.

[11] As previously stated, the rescission application is primarily premised on Rule 42(1)(a) of the Uniform Rules of Court. The purpose of Rule 42 is "to correct expeditiously an obviously wrong judgment or order". An Applicant must prove that there is a procedural issue present which causes the judgment to have been erroneously sought or granted. In other words Rule 42(1)(a) caters for a mistake in the proceedings. A judgment cannot be said to have been granted erroneously in the light of a subsequent disclosed defence which was not known or raised at the time of the default judgment (See: *Kgomo v Standard Bank* 2016 (2) SA 184]. Furthermore, the Supreme Court of Appeal in *Lodhi 2 Properties v Bondev* [2007] SCA 85 (RSA) held that default judgment to which the Plaintiff is procedurally entitled cannot be said to have been granted erroneously in the light of a subsequent disclosed defence.

[12] Even in the instance where a matter may have been erroneously sought or granted, the judgment or order will not be rescinded in the instance where the party against whom it was granted has acquiesced to the judgment. (See: *Schmidlin v Multisound (Pty) Ltd* 1991 (2) SA 151 (C) at 156A-D).

[13] As the Applicants are requesting condonation for the late filing of their rescission application it is necessary to briefly state the time periods applicable within which the rescission application should be brought. Rule 31(2)(b) requires the Applicant to bring the application within 20 days after the he/she became aware of the judgment. In terms of the common law as well as Rule 42 the application must be brought expeditiously and within a reasonable time. An unreasonable long delay may indicate acquiescence to the court order.

[14] I will briefly deal with the requirements to be met by an Applicant before a court may rescind a judgement in terms of Rule 31 as well as in terms of the common law. These requirements are practically the same for both Rule 31(2)(b) and the common law namely that the Applicant must show "good cause" (Rule 31) or "sufficient cause" (common law), which entails that the Applicant must (a) give a reasonable and acceptable explanation for his/her default for the entire period of default; (b) by showing that his/her application is made bona fide; (c) by showing that he/she had a bona fide defence to the Plaintiff's claim

which carries some prospects of success.

- [15] Before dealing with the merits of this application, I will briefly deal with the Applicants' grounds for condonation as set out in their Founding Affidavit.

CONDONATION

- [16] It is important to note that the present application was instituted during 2022 pertaining to a judgment granted in 2007, therefore a 15 years period lapsed since judgment was granted.
- [17] The Applicants' grounds for condonation are set out in paragraph 11 of their Founding Affidavit where the Second Applicant states in paragraph 11.1 thereof as follows: "I only knew about the error in the judgment, recently when my Attorneys requested me to obtain copy (sic) of the judgement at court, at all material time (sic), I knew that my house was sold, and thought everything was above board." In paragraph 11.2 it is stated: "It was when on the 09 December 2022, when the order was scrutinized and the error was identified." Based on this the Applicants submitted that they only became aware of the judgment on 9 December 2022.
- [18] Counsel for the First Respondent submitted in his heads of argument that from the above remark, it seems as if the Applicants were aware of the sale of the immovable property, and therefore by implication the judgment, since

2008. A submission that I agree with.

- [19] Moreover, paragraph 9.1 of the Applicants' founding affidavit states: "I and my child were rendered homeless because of this judgment, the house was sold, we were chased out, and we have been without shelter, of our own for the part 14 (fourteen) years." This statement suggests that the Second Applicant was aware, based on her own account, of the sale of the property and the subsequent eviction of herself and her child for a period spanning 14 years prior to filing the current application. Consequently, it is reasonable to infer that she should have been aware of the judgment rendering the property executable at the time of the sale in execution, dating back to 2008.
- [20] I conclude that the Applicants have not provided a reasonable and satisfactory explanation for the significant delay in filing of their application for rescission considering the substantial period of almost 15 years since judgment was granted. No justifiable reason has been offered for the prolonged delay. Based on this primary reason alone, the condonation application and the application in its entirety should be dismissed. Nonetheless, I will briefly address the grounds for rescission below.

APPLICATION FOR RESCISSION

- [21] The crux of Applicants' grounds for instituting the rescission application can be summarised as follows:

21.1 Firstly, that the First Defendant/Applicant being cited as an Executor in the summons, instead of a section 18(3) representative of the deceased estate. See paragraphs 6.7 to 6.10 of the Applicants' founding affidavit. As a result thereof the Second Applicant/Defendant did not defend the summons, because according to the Second Applicant the summons referred to a totally different person, namely the Executor, and at that time she knew that she was not the Executor, but a representative duly appointed by the Master in terms of section 18(3) of the Administration of Estate Act, 66 of 1965.

21.2 Secondly, the heading of the Request for Default Judgment references that the First Applicant/Defendant was the representative of the estate of "the Late SB Murray" instead of the deceased. See in this regard paragraphs 6.12 to 6.16 of the founding affidavit.

21.3 In light of the above it is submitted by the Applicants that the judgment was erroneously granted.

[22] The First Respondent opposes the application on the following basis:

22.1 That the above grounds raised by the Applicants amount to typographical issues.

22.2 That the Applicants do not disclose a bona fide defence to the relief contained in the judgment and more specifically-

22.3 That the Applicants do not deny the conclusion of the underlying loan agreements nor the registration of the relevant mortgage bonds;

22.4 That the Applicants do not deny that the account of which the relevant loan agreements were concluded was in fact in arrears or that all obligations in terms of the relevant loan agreements were being honoured by the First Respondent;

22.5 The Second Applicant did not provide any information on which steps she, as the representative of the deceased estate has taken to ensure that the obligations of the deceased estate (and she in her personal capacity) towards the First Respondent were honoured subsequent to the passing of the deceased. No steps were taken in transferring or repaying the indebtedness amount which remained due to the First Respondent;

22.6 That there is no issue that can or should be ventilated in the event that the rescission application is granted as no bona fide defence exists;

22.7 That the present application has been instituted during December 2022 i.e. subsequent to receipt of the excess amount recovered pursuant to the sale of the immovable property; and

22.8 That the acceptance of the payment of the excess amount, amounts to an acquiescence of the execution steps taken pursuant to the order and therefore the Applicants are barred from applying for a rescission of the underlying error.

[23] After hearing Counsel on behalf of both parties and reading the documents filed, I find nothing to deviate from the submissions made by the First Respondent and therefore I agree therewith. In addition thereto I find that the application is instituted with an ulterior motive, without merit and ill-founded for the following reasons:

23.1 Even if I condone the late filing of the Applicants' rescission application (which is not condoned) I find no submission made by the Applicants in which procedural irregularities pertaining the record of the proceedings are addressed which occurred during the granting of the default judgment as is required in terms of Rule 42 (erroneously granted) in order to succeed with the rescission application. I find that the First Respondent duly complies with all statutory requirements and court rules. The Applicants have further failed to show "good cause" or "sufficient cause" to rescind the judgment granted against them in terms of Rule 31 or the common law.

23.2 The First Respondent was entitled to the default judgment as is evident from the fact that the Applicants do not dispute the loan agreements and the registration of the subsequent bonds as well as their indebtedness to the First Respondent. Apart from the payments made by the Applicant, as referred to previously, the Second Applicant, as the administrator/representative of the deceased estate, took no steps to repay the outstanding amount, which remained due. No bona fide defence is raised, which carries any prospect of success and which can be ventilate in the event that the judgment is rescinded.

23.3 The summons was served on the chosen domicilium address of the Applicants in terms of the relevant court rule. I find that the summons was duly served. The fact that the First Defendant/Applicant was cited as an Executor in the summons, instead of a section 18(3) representative of the deceased estate is purely a bona fide mistake alternatively a typographical error and it does not rendered the summons and the subsequent service thereof defective. At all relevant times the Second Applicant should have been aware that the summons pertained to the said immovable property and that it was directed at her and the estate of the deceased. Her full names and surname appeared on the summons as well as her identity number. Furthermore, the Second Respondent was cited correctly on the summons in her personal capacity, which is not denied. I find that the Second Respondent was in wilful default as she was aware of the process, but opted not to oppose it. Even if she was uncertain whether the summons was directed at her and the deceased estate, she could have and should have contacted the First Respondent's Attorneys, whose contact details appeared on the summons, to enquiry what the position was. She wilfully ignored the summons.

23.4 In addition, the Applicants do not dispute service and/or receipt of the notice in terms of section 129 and 130 of the National Credit Act. These notices set out a specific time period within which payment should be made as well as alternative remedies in the event that a party is unable to effect payment. It also clearly states that summons will be issued in the absence of payment or alternative arrangements being made. No notice to defend was served and no payment was made. Thus, the First Respondent was entitled to apply

for default judgment. The existence or non-existence of a defence on the merits is an irrelevant consideration when granting a default judgment. If a defence is subsequently disclosed it cannot transform a validly obtained judgment into an erroneous judgment (See: *Lodhi 2 Properties investments CC & Another vs Bondev Developments (Pty) Ltd* (2007) SCA 85 (RSA)). Thus, the default judgment obtained against the Applicants is valid.

23.5 Secondly, the submissions of the Applicants that the judgment is null and void as it was erroneously granted due to the fact that the heading of the Request for Default Judgment references that the First Applicant/Defendant was the representative of the estate of “the Late SB Murray” instead of the estate of the deceased, is without merit. The incorrect reference to the deceased estate is in all probabilities a bona fide “copy and paste” error, alternatively, a typographical error. The aforementioned “mistakes” are not material. There is no evidence that any subsequent execution steps were taken against the estate of the “the Late SB Murray”. Instead it was correctly taken against the estate of the deceased. On the Second Applicant’s own version the said immovable property was sold in execution. Despite any amendments made by the First Respondent to its summons and request for default judgment, it remains indisputable that the Applicants were in arrears at the time the judgment was granted. Consequently, the First Respondent rightfully obtained the judgment granted.

23.6 I find that the present application was instituted with an ulterior motive being the ill-founded attempt to extract payment of “the amount equivalent to the current market value” of the encumbered property (See: prayer 4 of the Notice of Motion), as initially claimed in the Notice of Motion. Prayer 4 of the Notice of Motion was during the hearing of the application abandoned by Counsel for the Applicants and therefore I will not deal with it further.

23.7 Lastly, the Applicants acquiesced to the judgment once payment of the excess amount was accepted. In *Schmidlin v Multisound (Pty) Ltd* 1991 (2) SA 151 (C) at 156A-D it was held that: Acquiescence in the execution of judgment must surely in logic normally bar success in an application to rescind...”. The delayed payment of the excess amount suggests that the Second Applicant, in her capacity as the administrator/representative of the deceased estate, neglected her fiduciaries duties to the deceased estate.

24. For reasons stated above, I find that the Applicants’ application for rescission of the default judgment is without merit and thus dismissed.

COSTS

[25] Costs should follow the successful party. There is no reason why the successful party should be “out of pocket.” At all material times the Applicants were aware of the defences raised by the First Respondent in opposing their rescission application, but irrespective thereof they persisted with their application for rescission.

[26] The First Respondent requested in its Answering affidavit that the application should be dismissed with costs on a scale as between attorney and client, which scale of costs is in line with the provisions of the mortgage bond. At the hearing of the current application Counsel for the First Respondent submitted that the First Respondent will only move for costs on a scale as between party and party.

THEREFORE the following order is made:

1. The rescission application is dismissed with costs on a scale as between party and party.

SIGNED ON THIS 12TH DAY OF FEBRUARY 2024.

BY ORDER

SM MARITZ AJ

APPEARANCE ON BEHALF OF THE PARTIES:

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