

SOUTH AFRICA / JUDGMENT

Khanyile and Another v Firststrand Bank Limited and Another (66225/2014) [2017] ZAGPPHC 1002 (10 November 2017) [2017] ZAGPPHC 1002

COURT

North Gauteng High Court, Pretoria

BEFORE

T P Mudau

CASE / FILE NUMBER

66225/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 66225/2014

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

10

November 2017

In

the matter between: NTENHLE
LUNGELO
KHANYILE 1st
APPLICANT
PATRICIA
LYNETTE SITHOKOZISILE MTHIMKULU 2nd
APPLICANT
and
FIRSTRAND
BANK
LIMITED 1st
RESPONDENT
THE
SHERIFF OF THE HIGH COURT,
BOKSBURG 2nd
RESPONDENT

JUDGMENT

MUDAU, J

- [1] This is an opposed application for rescission of the judgment granted by this Court on 25 August 2015 . The Applicants further seek that the sale in execution of the immovable property (with property description Erf 1090, Vosloorus Extension 5 Township, Registration Division IR, Province of Gauteng situated at 1090 Umnquma Crescent, Eastfiled, Vosloorus) (the property), which was consequential to the granting of the default judgment be set aside together with any transfer of the property.
- [2] In addition, the Applicants seek an interdict whereby the Respondents are interdicted from evicting the Applicants from the property. The First Respondent opposes the application on the grounds that no defence is disclosed, no acceptable explanation is given for default that the Applicants do not make out a case for condonation and that, in general, and the Applicants fail to make out a case for the relief sought.
- [3] The salient facts are that the First Respondent and the Applicants concluded a loan agreement during December 2005, in terms of which, and as security for the amounts advanced therein, a mortgage bond was registered over the property in favour of the First Respondent. The mortgage bond made provision that should any instalment or obligation towards the first respondent not to be met, the whole outstanding amount becomes immediately due and payable to the First Respondent, that the First Respondent shall be entitled to institute proceedings for the recovery of all such amounts and for a court to declare the property executable and that a certificate signed by a manager of the First Respondent would constitute prima facie proof of the amount owed.
- [4] The Applicants defaulted on their obligations in terms of the loan agreement with the First Respondent. Consequently, the requisite steps as envisioned in the National

Credit Act 34 of 2005 (the NCA) were taken to draw default to their attention. On 26 September 2014 the summons was duly served on the applicants. No appearance to defend was entered. During July 2015 the amount owed by the applicants to the first respondent had escalated to R32 439. 05. Consequently, a default judgment as stated above was granted coupled with an order declaring the property specially executable. On 12 February 2016, pursuant to the writ and judgment, the property was sold at a sale in execution to a third party.

- [5] In their affidavit supporting their application, the first applicant contended that in 2014 he had financial problems which he reported to the First Respondent. He was alerted to his arrears by way of a letter in 2015 subsequent to which he made arrangements of payment. Subsequently, he attended to the Sheriff's offices where he discovered that he was R47 000 in arrears. He immediately paid R10 000. and made further arrangements to pay R1 000 which he paid. Furthermore he made an undertaking to pay all arrears owing.
- [6] The First Respondent denies that any such an agreement was reached. Furthermore that, the information provided by the Applicants in this respect is so vague that it cannot serve as a bona fide defence. It is trite that the onus to prove that diligent payment has been effected rests upon the Applicant. The First Respondent submitted correctly so, in my view that, the mere bold allegation that payments have been affected is insufficient.
- [7] The applicants admit to having fallen into arrears; they admit to having made a lump sum payment of (R10 000) which is insufficient to cover the arrear amount. The abovementioned implies that the payments allegedly made by the Applicants, on their own version, would never have been sufficient to reinstate the agreement as contemplated in terms of Section 129(3) prior to the granting of the default judgment or prior to conducting the sale in execution.
- [8] There have traditionally been requirements which an applicant is generally expected to establish to succeed in a rescission application, as intended in Rule 31(2)(b), viz a reasonable explanation by the applicant for the default; an absence of wilfulness; a bona fide defence which has some prospects of success and that the application is bona fide and not made with the intention to delay the respondent (plaintiff)'s claim (see *Grant v Plumbers (Pty) Ltd*).^[1] Importantly, the application must be made within 20 (twenty) days after the defendant had obtained knowledge of the judgment.
- [9] The Applicants instituted the present application during July 2016, approximately a year after the granting of the order and four months after the sale in execution was conducted. The Applicants however, do not indicate to this Court when they became aware of the action instituted against them or the judgment granted, save to state that during 2015 they received a letter from the First Respondent informing them that they are in arrears. Moreover, the application is not accompanied by a request for condonation from this Court.

[10] The Applicants do not set out a defence to the First Respondent's claim. On the applicants' own version, the applicants were and presently still are in default of their obligations to the First Respondent. The Applicants further fail to provide any basis for the reinstatement of the agreement, which might serve as a basis for a bona fide defence. Essentially the Applicants do not indicate any basis upon which it can be considered that the default judgment was erroneously sought or granted.

[11] In my judgment the Applicants have failed to make out a case for the rescission of the judgment and/or the order authorising execution of the property either in terms of Rule 31(2)(b) or in terms of Rule 42. The Applicants have further failed to make out any case for the setting aside of the sale in execution and consequential transfer of the property. A cost order on an attorney and client scale is provided for in the agreement concluded between the parties. The proceedings in issue merely relate to a furtherance of litigation which had to be undertaken in the recovery process for the full outstanding balance due, owing and payable to the first respondent.

[12] The application is dismissed with costs, on a scale as between attorney and client.

T P MUDAU

Judge of the High Court

Gauteng Division

Pretoria

Date of Hearing: 30 October 2017

Date of Judgment: 10 November 2017

APPEARANCES

For the Applicant: No Appearances

Instructed by: Segoale Attorneys Clo Ledwaba Incorporated

For the First Respondent: Adv Jaco Van Heerden

Instructed by: Vezi & De Beer Incorporated

[1] 1949

(2) SA 470 (O) at 476.

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