
SOUTH AFRICA / JUDGMENT

Moshoeshoe and Another v Firststrand Bank Ltd and Others (40290/12) [2018] ZAGPJHC 8; [2018] 2 All SA 236 (GJ) (25 January 2018) [2018] ZAGPJHC 8

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vally

CASE / FILE NUMBER

40290/12

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

number: 40290/12

REPORTABLE

OF

INTEREST TO OTHER JUDGES

In

the matter between: Moshoeshoe
GT First
Applicant
Moshoeshoe
E
M Second
Applicant
and
Firststrand
Bank
Ltd First
Respondent
Seponono
A
M Second
Respondent
Mathapelo
J
S Third
Respondent
Ngcobo
J Fourth
Respondent
The
Sheriff of the High Court,
Benoni Fifth
Respondent

JUDGMENT

Introduction

- [1] The applicants, a married couple, seek condonation for the late filing of their application for rescission of an order of this Court obtained against them by default of their appearance in Court when their case was called. In addition, they seek to have the order rescinded. The order concerns a loss of their primary residence. This Court entertains numerous rescission applications in any one court term. Almost all of them arise from a failure of the applicant to comply with the time periods prescribed in the Uniform Rules of Court concerning pleadings, or a failure on their part to attend Court on the date of the hearing to present their cases. Invariably the explanation given for their failure is that they were ignorant of the fact that a case was launched against them by the party that succeeded in obtaining a judgment by default, or they were ignorant of the date of the hearing. This case, however, is unusual. Here the applicants want to rescind an order dismissing their application for rescission of a previous order. The basic facts are these: an order was granted against them by the Registrar of this Court as a result of their failure to answer to a summons issued against them; they brought an application for rescission of the order issued by the Registrar;

their application was opposed by the first to fourth respondents; they failed to make an appearance when the matter was called in the Opposed Motion Court and so it was dismissed; they now bring an application to rescind that order. The case has a long and tortuous history, which has to be reflected upon if any sense is to be made of the applicants' claim to relief.

History

- [2] Some seven years ago, on 27 September 2010, the Registrar issued an order requiring the applicants to jointly and severally pay the first respondent (the bank) the sum of R482 145.90 as well as interest on this amount at the rate of 9.2% p.a. from 1 June 2010, plus costs in the amount of R650.00. The Registrar went a step further and declared the home of the applicants, which is described in the order as Erf 81, D. H. Township (the property), and which was mortgaged to the bank, executable. The more commonly used address of the property is 26 R. Street, D. Park, Benoni. The order, no doubt, caused significant harm to the applicants. Two years and one month later, the applicants approached this Court to have the order of the Registrar rescinded. The application was founded on the provisions of rule 42(1) (a), alternatively rule 31(2)(b), alternatively on the principles of the common law. In explaining why they allowed a default judgment to be obtained from the Registrar, they claimed that the summons commencing action against them was never served upon them, as a result of which they were at all material times ignorant of the fact that they had a case to answer to.
- [3] The issue originates with the fact that in 2006 they concluded a contract of loan with the bank in order to purchase the property. They agreed to pledge the property as security for the loan. They elected to use the address of the property – 26 R. Street, D. Park, Benoni – as their domicilium citandi et executandi, but unfortunately this got incorrectly recorded in the contract as 36 R. Street, D. Park, Benoni. They alerted the conveyancing attorney from Austin Jordon Attorneys, who was appointed by the bank, of this error, but he advised them that the error should cause them no anxiety. He noted that it was of no consequence since the property was correctly described on the register of deeds at the office of the Registrar of Deeds and on the title deed issued by the Registrar, and it is those descriptions that were important. The description on the register and on the title deed was Erf 81, D. Township. Being uneducated in these matters, they accepted the advice. In the meantime, they wrote to the bank directly and informed it that the address on the contract was incorrectly reflected as 36 R. St instead of 26 R. St. The bank made sure that its records had the correct address, thus ensuring that all statements reflecting the payments by the applicants towards liquidating the debt were sent to 26 R. St and not 36 R. St.
- [4] Despite the conveyancing attorney's assurance that the error was of no material importance, it actually had a serious practical consequence for the applicants – one that was the source of immense heartache for them and which turned out to be financially ruinous for them. The consequence took effect when the applicants failed to honour all their obligations in terms of the loan agreement. Aware of the problems they faced, the applicants drew on the

offer contained in s 86(1) of the National Credit Act, 34 of 2005 (the NCA) to apply to a debt counsellor to have themselves declared over indebted. Their application met with success. On 1 June 2010 the bank's attorney, Lowndes Dlamini Attorneys (Lowndes Dlamini), issued notice in terms of s 129 of the NCA, which notice came to the attention of the first applicant. He contacted an employee of this firm of attorneys and told her that he was under Debt Review and supplied her with the details of the appointed Debt Counsellor. This did not deter the bank from issuing a summons against the applicants. The summons, issued on 1 July 2010, identified 36 R. Street and not 26 R. Street as their place of residence and was accordingly served at 36 R. Street. Crucially, (the importance of which will be clear in a moment) the summons was issued by Lowndes Dlamini. According to the return filed by the Sheriff he went to 36 R. Street on 8 July 2010 and found the property fenced, the gates locked and "nobody at home", thus leaving him with an option to either "fix a copy (of the summons) to the entrance", or to leave without serving the documents. He chose the former option. As to what occurred with the summons is explained below in [8]. For the moment the important undisputed fact is that the summons did not come to the attention of the applicants. In consequence, they failed to note their opposition to the action and the bank drew the advantage of securing an order by default from the Registrar and, as we know, it did not let the advantage slip away. It took the order on 27 September 2010.

- [5] It is not to be forgotten that the notice prescribed by s 86(10) of the NCA (the s 86(10) notice) was, too, sent per registered post to 36 R. St. It, too, did not come to the attention of the applicants.
- [6] On or about 22 October 2010 the first applicant was informed, per telephone call, by an employee of the bank that the order was secured from the Registrar and that the bank would soon be issuing a writ of execution. While the Debt Counsellor appointed to attend to their over indebtedness was trying to resolve the matter with Lowndes Dlamini, the bank nevertheless instructed Lowndes Dlamini to issue and serve the writ of execution. The writ of execution, unlike the summons and the s 86(10) notice, was correctly served on the applicants at 26 R. Street. This was on 18 November 2010. By the terms of the writ they were informed that a sale of execution of their property situated at 26 R. Street would be held. The applicants were served with two copies of the writ. Both copies reflected, per typeset, the address of the property as 36 R. Street. But, one of the copies had a line drawn in manuscript over the typeset number 36 and the number 26 written, again in manuscript, above it. In essence, the mis-description of the address continued, at least on one copy of the writs. The notice advertising the sale in execution was placed in The Times newspaper of 19 November 2010. It described the property as being situated at 36 R. Street, but it clearly identified the two applicants as the debtors against whom judgment was secured. Thus, according to the advert the property that was to be sold was not the one that was mortgaged to the bank.
- [7] On 11 November 2010 the applicants sought to have the order issued by the Registrar rescinded. They appointed a Mr Gideon Desemond Phalatse (Mr Phalatse) of Phalatse Attorneys to attend to the rescission application. On 16 January 2011 he informed the first

applicant that the said application was launched and that it would automatically stay the execution process. Mr Phalatse operates from Pretoria and had told the first applicant that he had appointed Manungeni Attorneys as his correspondent attorneys. The last time the first applicant saw or heard from Mr Phalatse was on 16 January 2011. The applicants were never furnished with a full copy of the application for rescission by Mr Phalatse. However, the first page of the notice of motion was annexed to his present papers and it indicates that a rescission application was filed on 11 January 2011 (but according to the first applicant it was served on the bank on 15 December 2010). The case number is 25265/10. Nevertheless, the bank continued with the process of executing on the order of the Registrar, which means that if this application was actually brought it failed to deter the bank from proceeding. If this is true then the bank cannot be said to have acted bona fide. In this regard, it is important to bear in mind the dictum of the Constitutional Court that:

“An agreement to put one’s property at risk as security in a mortgage bond does not equate to a licence for the mortgagee to

enforce execution in bad faith.”[1]

- [8] The applicants as we know were served with two copies of the writ. Upon being served with these copies the first applicant investigated the issue of the service of the summons. He made contact with a Ms Gangat who owns the property situated at 36 R. Street. She informed him that in July of that year she found the summons affixed to her gate. She noticed that it was not addressed to her even though the address contained therein reflected her address. She immediately made contact with Lowndes Dlamini and informed them of this fact. She was told that she should ignore the summons. Lowndes Dlamini was, therefore, made aware of the fact that the summons did not come to the attention of the applicants. By virtue of this knowledge, they also must have known that they sent the s 86 notice to the incorrect address. Yet they persisted with securing a default judgment against the applicants. This particular conduct of the attorneys, I must say, is disconcerting. At the very least they were under a legal duty to bring to the attention of the Registrar that neither the summons nor the s 86 notice were brought to the attention of the applicants.[2] Instead they remained silent and took the order from the Registrar.
- [9] The sale in execution took place. This occurred despite the fact that a rescission application was supposedly pending. The property was sold to the fourth respondent, but he was unable to secure a loan from any financial institution as he was declared to be an unworthy credit risk. The sale was cancelled. A new sale was held. The property was then sold to the second, third and fourth respondents on 15 February
2011. The second and third respondents are related to the fourth respondent. On 18 August 2011 the property was registered in the name of the fourth respondent.

- [10] In the meantime, the first applicant contacted a Mr Malatjie of the bank and informed him that while judgment was taken against him and the second applicant no summons was ever served upon them. On 7 March 2011 the first applicant received a call from an employee of the bank, a Ms Jacqueline Jacobs (Ms Jacobs). She said that she was informed by the manager of her department, a Mr Desmond Scheepers (Mr Scheepers), that the sale in execution was set aside. He asked her to confirm this in writing. On 23 March 2011 he received an email from Ms Jacobs containing an attachment which was a letter from Mr Scheepers addressed to him. She indicated to him that the letter constituted the bank's formal response to his complaint (presumably this refers to his contention that the summons was never served upon him or the second applicant). Contrary to what Ms Jacobs said orally, the letter of Mr Scheepers essentially iterated that the bank had no intention of cancelling the sale of their property as it was of the view that it was within its rights to sell the property in order to recover the monies lent to the applicants.
- [11] The applicants applied to the Legal Aid Board for assistance with legal representation. They were refused legal aid. They appealed against the decision. On 30 June 2011 they were informed by the Regional Operations Executive of the Legal Aid Board that their appeal was unsuccessful because "there are no prospects of success (merits) in proceeding with the matter."
- [12] On or about 14 September 2011 the first applicant approached a Mrs Selamolela of T S Selamolela Attorneys to assist him in bringing the rescission application. Mrs Selamolela passed his case on to Manungeni Attorneys, which informed him that they would only be able to assist if he were to pay part of their fees upfront. He was unable to do so. Manungeni Attorneys were the same attorneys that were appointed by Mr Phalatse to act as correspondent attorneys on his behalf. The first applicant asked them about the application that Mr Phalatse was supposed to have launched in November 2010, and was informed that as their fees for acting as correspondent attorneys were not paid by Mr Phalatse they did not do anything with the application. He was now alerted to the fact that Mr Phalatse was no longer practising as an attorney. He contacted the Law Society of the Northern Provinces who informed him that it had suspended Mr Phalatse from practice on 20 July 2010, and that the Court had struck him from the roll of attorneys on 8 November 2011. It is crucial to note that while the applicants only learnt of this on 30 June 2011 they had actually engaged Mr Phalatse on or about 11 November 2010, and at that time he was legally unable to proffer any services to them, but did not tell them so.
- [13] Thereafter the second, third and fourth respondents brought an application in the Magistrates Court for the District of Benoni for the eviction of the applicants from the property. The applicants were represented by a Mr Sefatsa, of Sefatsa Attorneys.
- [14] During the proceedings for the eviction order the presiding magistrate advised them that the way to halt the eviction was to have the foreclosure order of the Registrar rescinded in this Court. It seems the learned magistrate was not informed that the rescission

application had already been launched. The application for their eviction was granted on 2 February 2012. In early May 2012 the fourth respondent sent the Sheriff to evict the applicants from the property. The applicants immediately approached this Court on an urgent basis seeking an interdict halting the eviction process. On 9 May 2012 they secured an interim interdict from this Court, per Spilg J. The order of Spilg J reads:

“...

2. That pending the final determination of Appeal and Recession. Applications pending before the above Honourable Court under case

number 438/2011 and 25265/2010 respectively [It is not clear on the papers which Court is being referred to here].

2.1 That the Respondents to be interdicted and restrained from evicting the Applicants at the property situated at Stand No. 26 R. Street, D. H. Park, Benoni

2.2 That the 1st Respondent [fourth respondent in our case] be interdicted and restrained from intimidating the Applicants directly and indirectly.

3. That the Applicants will continue in paying the Municipality services upon the receipt of the Rates and Taxes, Water and Lights and Refuse account as applicable and that the Municipality cannot be instructed by the 1st Respondent [fourth respondent in our case] to terminate the services to the Applicants. While the Applicant so pays those account directly to the 4th Respondents [the Municipality]. The Applicants obligation to so pay as a condition not to have services terminated depending on receipt by them of account for such payment whether directly from the [Municipality] or via the [present fourth respondent], if the Applicant are no longer identified by the [Municipality] as the relevant party to be billed.” (The quotation is verbatim.)

[15] Then, on 24 October 2012, almost two years after the foreclosure order was granted by the Registrar, the applicants brought another application to have the order rescinded, as well as to have the order of the sale of their home in execution set aside. The applicants are aware that their application was outside the time periods allowed for the launching of a rescission application and therefore asked that its late-filing be condoned. Important to note though is that this time the applicants were represented by attorneys from J Galananzhele Inc. Mr Galananzhele, the attorney dealing with them merely re-filed the same rescission application that was filed by Mr Phalatse, except he obtained a different case number. That is the present case number: 2010/40290. The application was served on all the present respondents. The application was resisted by the first to fourth respondents presently cited here. All these respondents filed opposing papers.

- [16] The answering affidavit of the bank was filed by a Ms Amelia Buisson who is the bank's foreclosure manager. Her affidavit was filed on or about 8 March 2013, some five months after the application was served on the bank. There is no application by the bank for condonation for the late filing of its answering affidavit.
- [17] Ms Amelia Buisson does not challenge any of the factual averments, which are relayed above in [2] – [14]. This is worrying given that the first applicant has averred that the bank proceeded to issue the writ fully cognisant of the fact that by that stage the rescission application was brought, and that it was based on a common cause fact that the order was obtained without the summons being served on the applicants. Instead of placing its factual version before Court the bank elected to rely solely on a number of legal contentions, which according to it should be determined on the basis of the facts averred to by the applicants. These contentions are:
- a. The application for rescission was well out of time, thus making it incompetent;
 - b. The applicants were personally present during the sale in execution and had therefore "acquiesced to the validity of the sale in execution";
 - c. According to the abstract system of transfer of immovable property the property had been transferred to the fourth respondent;
 - d. Even if the order of the Registrar was rescinded, the property cannot be vindicated from the second to fourth respondents because "the sale in execution cannot be set aside".
- [18] The answering affidavit of the second to fourth respondents was deposed to by the fourth respondent. It was filed on 14 February 2013 four months after they received the application. The fourth respondent does apologise for the late filing of the answering affidavit, but does not apply for it to be condoned. These respondents, too, do not challenge any of the factual averments of the applicants relayed above in [2] – [14]. Their main ground of challenge is that they had legitimately purchased the property during the sale in execution and that the applicants had had numerous opportunities to bring their application for rescission of the order of the Registrar but failed to do so. Simultaneously with their opposition they brought a counter-application wherein they sought, inter alia, an order "enforcing the eviction order granted on 7 December 2011 in the Magistrates Court for the District of Benoni."
- [19] The applicants did not file a replying affidavit, nor did they answer to the counter application of the second to fourth respondents.[3]
- [20] On 27 January 2014 the matter was called in the Opposed Motion Court before Dodson AJ. The applicants failed to make an appearance. Dodson AJ issued a default judgment which dismissed the rescission application of the applicants with costs, postponed the counter-application of the second to fourth respondent and reserved the costs of the counter-application.

- [21] In early September 2014 the Sheriff of the Benoni District evicted the applicants and their family at the instance of the fourth respondent. The Sheriff removed the possessions of the applicants, placed them on the street and locked the applicants and their children out of the property. The applicants with the assistance of members of the community removed the locks and re-took possession of the property. On 11 September 2014 the first applicant was arrested. On 13 September 2014 the fourth respondent and his friends evicted the applicants and their family and locked the property. The applicants unlocked it and re-took possession. On 19 September 2014 while the first applicant was at work the second applicant was arrested. On the same day the fourth respondent came to the property with some friends and demanded that the children vacate the property. The first applicant was called. He arrived. Upon seeing him the fourth respondent and his friends fled. A few minutes later the first applicant was arrested. He was released on bail. The second applicant, too, was released on bail. They were both charged and a criminal case against them is now pending. They are being represented by Mrs Selamolela. On their return to the property they found the fourth respondent and his friends removing their furniture. The applicants sought the assistance of the police, but to no avail. They have since vacated the property.
- [22] The first applicant has since attended this Court to enquire about the default judgment and order of Dodson AJ. He found the case file to be empty. He was informed by the office that types and records the Court Orders of the order of Dodson AJ. He was furnished with a copy of the order. He claims that he was surprised to learn that the judgment and order were taken in their absence. He claims that he was always under the impression that Mr Galanzhele was attending to the opposed application to rescind the order of the Registrar. He took the copy of the Dodson AJ order to Mrs Selamolela and asked her to launch an application for its rescission. She failed to do so. When it became clear to him that she was not pursuing the matter on their behalf they dispensed with her services. This was in April 2015. They appointed the attorneys Luis Teixeira Inc to represent them. In August 2015 these attorneys informed them that they were not able to assist them. They sent the applicants an email, the contents of which read:

“We regret to inform you that we are no longer able to continue as your attorneys in your matter.

In the interim, we have furnished your details to Richard of RMB Wands Attorneys who are highly recommended by Advocate Shaw and who will be in contact with you shortly.

If you have any queries, you are welcome to contact Advocate Shaw or Lesley.

Thank you for your instructions to date.”

- [23] The first applicant claims that he only received the email on 22 March

2016. However, in the meantime on 11 December 2015 he engaged the services of Advocate Viquelin Kim Johnson, who informed the applicants that she would bring an urgent application in the Gauteng

High Court, Provincial Division to rescind the order of Dodson AJ. It bears mentioning that Dodson AJ sat in the Gauteng High Court, Local Division. She charged him a fee of R54 000.00, of which he paid R23 000.00. As he was not able to pay the rest she was not able to continue servicing him. He terminated her services in August 2016, when he appointed his present attorney Mr Hadebe of T Hadebe Attorneys. Mr Hadebe had great difficulty in locating all the papers in the matter, which he required in order to launch a properly considered application for rescission. The application was brought on or about 20 November 2016. While identifying Rule 42(1)(a) as a ground for the rescission, it is really brought in terms of the common law. It was served on all the respondents. Only the bank opposed it.

[24] The bank did not file an opposing affidavit. Instead it filed a notice in terms of rule 6(5)(d) (iii) wherein it stated that it intended to raise two mutually exclusive points of law, which were argued in the alternative. They were:

- a. The matter has been finalised in this Court, i.e. *res judicata*;
- b. The matter is still pending i.e. a plea of *lis pendens*

Res Judicata

[25] The argument that the matter had been finalised in this Court goes like this: The order of Dodson AJ may have been given because the applicants were in default, but it has to borne in mind that when the matter was called in Court all the papers of the applicants, as well as those of the bank, were placed before Dodson AJ; therefore, Dodson AJ was fully apprised of the case made out by the applicants as well as the basis of the bank's opposition; in these circumstances, the order is equivalent to a judgment as it is a decision on the merits of the application for rescission. Taken to its logical conclusion this contention leaves the applicants with one option only, to apply for leave to appeal the order of Dodson AJ to a higher court. The application would have to be brought before Dodson AJ and if unsuccessful it would have to be on petition to the Supreme Court of Appeal.

[26] It bears reminding that my colleague Dodson AJ did not give any reasons for his decision. He merely issued an order, which is customary in this Court when a default judgment is given. In these circumstances, it cannot be correct to say that Dodson AJ had taken all the facts into account and heard full argument, even if only from one side, before granting the order. Default judgment in this Court is not only obtained when the Court is entertaining unopposed applications, it is also granted when the Court is entertaining opposed applications, but where one of the parties is in default of its duty to appear at the hearing. When this occurs the Court deals with the matter as if it is unopposed and, after being satisfied that all procedural requirements for the matter to have been properly placed on the roll are complied with, grants the order. The Court does not scrutinise the application. If it were to do that and found that the party that is in default has a good case, it would postpone the matter, but never grant an order in favour of that party. It would do so simply because that party has failed in its duty to make an appearance when the matter was called. When the matter is next called, that party would have to explain its default and could find itself

mulcted with costs

of its opponent at the previous hearing.

[27] In my view, the order of Dodson AJ is not equivalent to a judgment where the main issue in dispute between the applicants and the bank (which secured the order from the Registrar) was solemnly and with certainty determined in favour of the bank. Dodson AJ has certainly issued an order which dismissed the application of the applicants but the learned Acting-Judge did so without going into the merits of the dispute and without making any findings on these merits. Hence, the absence of reasons for the order granted by him on 27 January 2014.

[28] Another factor that demonstrates the folly of the view that the matter is *res judicata* leaving open an appeal as the only avenue forward (assuming that the application for leave to appeal succeeded), is the impossible

position the appellate court would find itself in given the absence of any reasons from Dodson AJ. Dodson AJ cannot be asked to furnish any reasons for he merely granted the order as per the usual practice in this Court. There was no misdirection on the part of Dodson AJ. Hence, the appeal would have to fail even though the applicants' case would not have been heard (in both the court *a quo* and the appellate court). All the facts referred to above, which incidentally are not disputed, would remain ignored in toto, although they are of crucial importance for a fair and just determination of the dispute between the applicants and the respondents.

[29] It is clear then that the order of Dodson AJ was granted without the merits of the dispute between the applicants and the respondents being considered and without the applicants being heard. Accordingly, in my view, it is not complete and is susceptible to being revisited by this Court. In fact, the only available remedy to the applicants, who remain aggrieved by an order which has far reaching implications for them, is to ask this Court to revisit the order. Once that process is complete they would then be able to approach the appellate court. In other words, the only avenue open to them is to have the order of Dodson AJ rescinded. Should they fail either because they have failed to make out a case for rescission or for whatever other reason, they would be entitled to approach an appellate court for further relief. Until then the only avenue open to them is to call on this Court to exercise its powers to rescind the order of Dodson AJ,[4] which is exactly what they have done.

[30] For the reasons stated above, it is my judgment that the *res judicata* point taken by the bank has no merit and stands to be dismissed.

Lis Pendens

[31] The bank contended that since the applicants have brought more than one rescission application this particular one is *lis pendens*. The three applications referred to concern the rescission of the order of 27 September 2010 issued by the Registrar. But none of those applications prevail here. The case here is that the order of Dodson AJ is susceptible to being rescinded as it was, *inter alia*, erroneously granted in the absence of the applicants. It is

therefore incorrect to suggest that the case that presently prevails here is pending in this Court under a different case number. There is no pending litigation that bears on the outcome of this case.

[32] Accordingly, the *lis pendens* contention, too, must fail.

Should Dodson AJ's order be rescinded?

[33] The bank failed to challenge any of the factual material that forms the basis of this application. In fact, it was conceded during argument that if the two legal points it raised failed, the rescission application should succeed. However, as the applicants rely on the common law, it is necessary to examine whether they have shown good cause for the rescission.

[34] To succeed on this basis, the applicants must at least (a) provide a reasonable explanation of their default, (b) show that the

application is made bona fide, and (c) show that they have a bona fide case which *prima facie* would succeed in setting aside the order of the Registrar.[5]

[35] The applicants have provided a detailed account of facts that led to their default. The default is really caused by the fact that they, no doubt, have not had a pleasant experience with attorneys and in one case an advocate. In their short experience they have encountered:

- a. A conveyancing attorney, Austin Jordan Attorneys, who refused to correct the error on the contract of loan agreement;
- b. The present attorneys of the bank, Lowndes Dlamini, who when alerted by the recipient that the summons was sent to the incorrect address, informed the recipient to ignore it. It bears mentioning in this regard that Lowndes Dlamini was also made aware of the fact that the s 86(10) notice was sent to the incorrect address and did nothing to remedy the problem. Instead it proceeded to secure a default judgment from the Registrar;
- c. The Legal Aid Board who refused to take their case because "there was no merit" in it;
- d. Mr Phalatse of Phalatse Attorneys who while not being allowed to practice as an attorney promised to launch the rescission application

and see it through to finality but then failed to honour his promise;

- e. Mr Galananzhele of Galananzhele Attorneys who failed to prosecute their rescission application to finality;
- f. Ms Selamolela of T S Selamolela Attorneys whose only way of assisting them was to pass the case on to Manungeni Attorneys;

- g. Manungeni Attorneys who were firstly appointed as correspondent attorneys by Phalatse Attorneys but who, without the knowledge of the applicants, failed to perform because of non-payment by Phalatse Attorneys. They were later asked by Ms Selamolela to take on the case, but refused to do so without receiving payment upfront; and,
- h. Advocate Viquelin Kim Johnson who charged the first applicant R54 000.00, was paid R23 000.00 but did not see the matter through.

[36] There is no debate that the application is made bona fide. The applicants have suffered greatly as a result of the order of the Registrar and they have done everything that could be expected of anyone caught in their position to seek the protection of the law. Unfortunately, it has not been an easy road for them, but they have persisted nevertheless.

[37] The order granted by the Registrar had been issued without them ever being given an opportunity to present their case as they were never served with the summons. Moreover, the execution process took place without any judicial oversight. The Constitutional Court has pronounced that the Registrar does not have to power to issue an order declaring a person's home to be executable.[6]

[38] The applicants have lost their primary residence, which prima facie appears to have occurred through unlawful means or to have occurred in unfair and unjust circumstances. There is no doubt that prima facie they enjoy a significant prospect of succeeding in overturning the order of the Registrar.

[39] For these reasons the order below is made.

Order

[40] The following order is made:

1. The non-compliance with rules of this Court is condoned.
2. The judgment and order of Dodson AJ issued on 27 January 2014 is rescinded and set aside.
3. The first respondent is to pay the costs of this application.

VALLY J

Representatives for the applicant: Thamsanqa Hadebe from T Hadebe Attorneys

Representative for the first respondent: Leander VR Van Tonder

Instructed by: Lowndes Dlamini Attorneys

Date of hearing: 25 October 2017

Date of judgment: 25 January 2018

[1] Gundwana v Steko Development and others 2011 (3) SA 608 (CC) at [48]

- [2] I must mention that until recently the banks which granted loans to persons for them to purchase residential properties had brought a phenomenally large amount of foreclosure applications on an unopposed basis in this Court. Lowndes Dlamini has acted for the banks in a substantially large number of these applications. The applications only subsided when the Deputy Judge President issued specific practice directives that were addressed to stem the tide of abuse that had developed in this area of law. These directives have received full judicial approval, in one case by a full court, see *Absa Bank Ltd v Lekuku* [2014] ZAGPJHC 274.
- [3] In its heads of argument, the bank claims that the applicants had filed a replying affidavit in June 2014. No page reference was supplied in the heads of argument filed on its behalf, and I searched for this replying affidavit in the papers but could not find it. In any event, if the bank is correct then the replying affidavit was filed after the order of Dodson AJ was obtained. The order of Dodson AJ was obtained on 27 January 2014.
- [4] See: *Pitelli v Everton Gardens Projects CC* 2010 (5) SA 171 (SCA) at [31]
- [5] See: *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at [11]
- [6] *Gundwana*, n1, at [49]

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