

SOUTH AFRICA / JUDGMENT

Simelane v Land and Agricultural Development Bank of South Africa t/a Landbank; In re: Land and Agricultural Development Bank of South Africa t/a Landbank v Simelane (50247/09) [2017] ZAGPPHC 409 (9 June 2017) [2017] ZAGPPHC 409

COURT

North Gauteng High Court, Pretoria

BEFORE

Hughes

CASE / FILE NUMBER

50247/09

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 50247/09

Date:

9/6/2017

In

the matter between:

SIMELANE: SOLOMON
EMMANUEL APPLICANT
and
LAND
AND AGRICULTURAL DEVELOPMENT BANK
RESPONDENT
OF
SOUTH AFRICA t/a LANDBANK
In
re
LAND
AND AGRICULTURAL DEVELOPMENT BANK
PLAINTIFF

SIMELANE: SOLOMON
EMMANUEL DEFENDANT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] In this application the applicant seeks the following relief as set out in his notice of motion:

"1. That the Court condone the late filing of his application for rescission, in so far as is necessary.

2. That the Judgment taken by the Respondent on or about 22 June 2010 be rescinded.

3. That the applicant be ordered to file an appearance to defend [in] ten (10) [days from the] [of] date of rescission.

4 That the costs of this application be ordered against the respondent only in the event of same being opposed".

[2] The application for condonation and rescission was opposed by the respondent. The condonation application and the rescission, is some five years late, as such I intend to commence with the issue of condonation and deal with the issue of such a lengthy delay.

[3] A background Is relevant to the granting of the order that is sought to be rescinded. It is common cause that sometime in 2006 the applicant contracted with the respondent for two loan facilities. The applicant states that around 2008/2009 he fell into arrears with his payments on these loan facilities. Thus, on 28 August 2009, the respondent issued and served summons by affixing it to the door of the residential mortgaged property of the applicant.

[4] The applicant denies having received the summons at all, though the return of service states that the summons was affixed to the main entrance of the applicant's domicilium citandi et executandi.

[5] Fast forward, the applicant states that he was not aware that the respondent had pursued legal action against him for his default on the loans. On 22 June 2010

default judgment was granted against the applicant which included an order declaring the mortgaged specially executable. However, no writ of execution was served on the applicant in respect of the default judgment duly granted.

[6] During 2011, the applicant alleges that he sought the services of debt review and whilst doing so, around February 2011, he happened upon the fact that there was a default judgment against him instituted by the respondent in respect of one of the loan

facilities.

[7] In the papers before me the applicant makes reference of the debt review application that ensued in the magistrate's court of Alberton. On 8 June 2011, at the conclusion of that debt review application, the presiding officer handed down a judgment. The order that emerged from that judgment encompassed both loan facilities, namely account [....] and [....], which the applicant had with the respondent.

[8] The loan facility account for which the respondent had obtained default judgment related to account [....]. As at 8 December 2009, the situation pertaining to account [....], was that the respondent had only got so far as to issue the letter of demand in terms of section 129 of the National Credit Act 34 of 2005. The aforesaid information was elicited from the judgment handed down by the presiding officer in Alberton magistrate's court. It also came to light, in this judgment, that the applicant had advised the presiding officer that judgment had already been granted in the High Court Pretoria for the loan facility account [....].

[9] The following is an extract from the judgment of the presiding officer in respect of the applicant's debt review application;

"The uncontested evidence placed before this court shows the following:

7.1

7.2 ...

7.3 ...

7.4 ...

7.5 The consumer [applicant in the current case] states that it was due to the section 129 letter, inviting him to refer his obligations to a debt counsellor for debt restructuring purposes that let [led] to the debt rearrangement process now the subject matter before this court.

....

The debt review process started by the Applicant and the 1st Respondent [consumer] can therefore not stop the enforcement process that let [led] to the current High Court action by the 6th Respondent [respondent in the current case] against the 1st

Respondent. "

[10] The applicant states in his founding affidavit that in March 2011 he was introduced to his erstwhile attorneys by the debt councillor assisting him with the debt

review application. This is of significance and I will return to this aspect later in the judgment.

[11] On 23 February 2011, the summons issued, the second loan facility account [...] was issued and applicant's attorney entered an appearance to defend on 28 February 2011. This action was thus defended by the applicant. However, a notice of bar was served on the applicant's corresponding attorney as the applicant had failed to file his plea. The applicant's complaint now is that his attorney of record did not receive the notice of bar from their correspondent attorney.

[12] The eventuality being, on 4 May 2012 the respondent then proceeded with an application for default judgment. The applicant submits that when the application for default judgment came to his attorney's attention, discussions and correspondences followed between the parties in an attempt to resolve the matter.

[13] Notwithstanding the fact that, the parties were engaged in discussions and the respondent had given an undertaking not to proceed with the default application, the applicant avers that the respondent went ahead without informing them and obtained default

judgment.

[14] The applicant's submission that the respondent had not informed him that they were pursuing the default judgment, is contradicted by a letter on file dated 3rd May 2012. This is a letter from the respondent's attorney to applicant, advising that the default

application was scheduled for 4 May 2012.

[15] The applicant gives an account of what transpired prior to the aforesaid letter and during the course of the discussions with the respondent's attorneys. He stated that he had made an offer to the respondent's attorney and the respondent's attorney undertook to seek instruction from the respondent in respect of that offer. In the interim the respondent undertook to hold the application in abeyance.

[16] This offer was rejected and the respondent awaited further steps to be taken by the applicant, however none were forthcoming. This resulted in the respondent proceeding with the default application.

- [17] The applicant contends that the respondent only rejected his offer on 1 June 2016 and as such there was no need to lodge any rescission application as the parties were attempting to resolve the issues. The applicant further contends, that up until the 1st June 2016, the respondent by its conduct, consented and extended the time frames necessary to file his application and notices.
- [18] The respondent submits that the default judgment on the second loan facility, account [...], was only granted on 6 June 2012. On the other hand you have the applicant contending that they were not aware whether default judgment was granted in respect of the second facility, as according to the applicant, the parties were still engaged with settlement discussions in respect of both default judgment applications. To this end, the respondent avers that the applicant was well aware of both default judgments, at best, when the first sale in execution was to take place In January 2015. The respondent contends that, this is so, as the applicant made arrangements to pay and thus the sale in execution was cancelled.
- [19] The applicant failed to adhere to the arrangements and a second sale in execution was arranged for 28 July 2015. The notice of the second sale in execution was served on 6 July 2015. The applicant then responded by moving an urgent application in the absence of the respondent, which culminated in the sale in execution being stayed yet again.
- [20] A further attempt was initiated by the respondent to proceed with the sale in execution and the notification thereof was served in April
2016. This sale in execution was scheduled for 14 June 2016. The respondent attempted yet again to proceed with the sale in execution and this was again cancelled by an urgent application instituted by the applicant. However, the order of this court of Tutchén J, of the latter urgent application, placed stringent timelines that the applicant needed to adhere to launch his rescission application.
- [21] The applicant argues that the rescission is not late as he acted within the prescribed period set out in order of Tutchén J. He had to file his application for rescission within seven days from the date of the order and the order was made on 13 June 2016. According to the applicant he filed his rescission application on 20 June 2016, thus he contends, that it was within the stipulated seven day time period.
- [22] The applicant argues that, it is clear, that when Tutchén J considered his application to stay the execution, he must have

concluded that the applicant had a bona fide defence and did not consider it necessary for the applicant to deal with the fact that the rescission was out of time, once he granted the applicant an opportunity to file his rescission application.

[23] On the other hand, the respondent argues that the applicant is a habitual defaulter as is illustrated by the background facts set out above to this application. It is argued that the applicant would give undertakings from time to time and would fail to comply with same. It was further argued, that the debt review procedure in the magistrate's court of Alberton was merely a delaying tactic on the part of the applicant.

[24] Unfortunately, this did not work in favour of the applicant, with regards to the respondent's default judgment order, as the

magistrate's court order allowing debt review did not cover the default judgment already granted by this court. The respondent

contends that at the least, the sale in execution notifications scheduled for 28 July 2015, January 2016 and 14 June 2016, were

sufficient notification of the existence of the default judgment granted against the applicant.

[25] The respondent places emphasis on the fact that the applicant has at no stage, in any way whatsoever, instituted or attempted to institute proceedings to rescind the default judgment granted for the second loan facility.

[26] It is trite, that condonation is not just there for the asking and the applicant who seeks an indulgence from the court for

non-compliance with the rules must 'on good cause shown' demonstrate there is a valid and justifiable reason to grant the applicant

condonation. See *Nedbank Investment Bank Ltd v Visser* NO 2002 (4) SA 588 (T) at 591:

"Rule 27 (3) requires 'good cause shown' to be shown by the plaintiff...The requirements are, first, that the plaintiff should at least tender an explanation for its default to enable the Court to understand how it occurred. (*Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A) Secondly, it is for the plaintiff to satisfy the Court that its explanation is bona fide and not patently unfounded."

[27] I find that the dicta in the latter case mentioned in *Nedbank supra* instructive. Schreiner JA in *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352G and 353A had the following to say in a rescission and condonation application:

"352G

It seems clear that by introducing the words 'and good cause shown' the regulating authority was imposing upon the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for rescission, such good cause including but not being limited to the existence of a substantial defence (cf. *du Plessis v Tager*, 1953 (2) SA 275 at p.278 (0))

353A

It is sufficient for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives."

[28] The pertinent enquiry in the circumstances of this case, is whether the applicant has tendered an explanation that was bona fide for his default, and whether the inordinately long delay was not a reluctance on the part of the applicant to achieve an expeditious

hearing and conclusion matter at hand.

[29] In casu, I am of the view that the applicant did not provide a bona fide explanation at all for the non-compliance that resulted in the granting of the default judgment concerned, when he did become aware. He does not prefer a bona fide explanation why he did not bring the rescission application then. In these proceeding, he argues instead, that it was not of necessity to seek condonation for the non-compliance with the rules as he had a 'strong case on the merits'.

[30] From the case law mentioned supra, the approach adopted by the applicant is clearly not tenable when one considers the test to be applied in condonation and rescission applications. For his 'strong case on the merits' to be considered he has to first satisfy this court that he has provided an explanation and that the said explanation is bona fide for his non-compliance with the rules.

[31] In my examination of the facts before me and the argument of both counsel for the applicant and the respondent, it is my view, that the first default judgment, in respect of the first loan facility account, was authorised on the 22 June 2010; the applicant had a judgment from the magistrates court Alberton for his debt review application on 8 July 2011, the applicant cannot deny that at the least by 8 July 2011 he knew of the first default judgment against him.

[32] This is so because in the judgment for the application for debt review the presiding officer makes mention of the default judgment

granted in this court and even goes so far as to exclude the respondent from the debt review process because of the aforesaid default judgment. Thus the applicant was not being bona fide when he stated that he was not even aware of the first default judgment. At the very least, by 8 July 2011 he was aware. I must add that in the review judgment the presiding officer even sets out the consequences of the default judgment of this court in relation to the debt review order granted. Ironically, at that stage the applicant was represented by his erstwhile attorney.

[33] It further emerges from the debt review judgment that the applicant admitted that it was through the section 129 letter transmitted to him by the respondent that he sought the assistance of debt review. This is an admission on his part that he knew by way of the section 129 notification dated 8 December 2009, in respect of the second loan facility [...], that the respondent intended proceeding with an action against him.

[34] It was further pointed out to the applicant in the debt review judgment that the debt review process could not deter the enforcement

of processes in terms of the law with regards to the existing legal predicament the he was in. Further, that the debt review process

could not be of assistance to the applicant as regards both default judgments granted by this court. This is set out in the extract from the magistrate's court judgment which appears earlier on in this judgment, paragraph [9].

[35] What is of major concern to me is that the applicant was, as I stated above, represented by his erstwhile attorney when the debt review application and judgment was issued. According to his founding affidavit he had instructed an attorney as far back as March 2011, whilst the debt review judgment is dated 8 July 2011. A further interesting fact is that the applicant even makes mention in his founding affidavit that he was advised by the debt councillor to instruct his current attorney and what is also clear is that that attorney was to assist with the first default judgment already granted and the pending second default application.

[36] The applicant, having been represent would through his attorney appreciate the seriousness of the default judgment already granted and that pending. At best the debt review judgment was sounding warning bells for the applicant loud and clear. It is evident from the judgment that the magistrate did advise the applicant about his predicament with respect to the default judgment granted and second one pending.

[37] The facts set out above are indicators that the applicant was wilfully and flagrantly defying the default judgment granted and that which was pending. If this was not so he would have acted positively arid proceeded with a rescission application at that stage.

[38] Of further importance, is the fact that the applicant does not advance any explanation for the delay in instituting the rescission

proceedings, during that period when he should have been aware it was necessary, after the debt review judgment. The pertinent question to be asked is, 'why did he not proceed then with the rescission application?' The only plausible answer is that he was delaying in bring the matter between him and the respondent to finality.

[39] Further to the aforesaid, discussions were held between the parties and it becomes evident that the parties were not reaching consensus. With the situation as it was, why does he not proceed to at least launch the application for rescission for the default

judgment

already granted? In addition, it must be noted that he has done nothing, as yet, in respect of the second default judgment.

[40] Giving the applicant the benefit of the doubt, at best, after the debt review judgment, which sets out the predicament he was in as regards the default judgment and the pending default application, the applicant being represented at that time, was thus in a good position to appreciate the seriousness of the predicament he was in and proceeded with haste to launch the rescission application.

[41] The delay is one that can be characterised as a substantial delay, being a period of 5 to 6 years, from the granting of the order sought to be rescinded. In addition, there is still no rescission application launched against the second default judgment.

[42] I find that it is appropriate to quote a passage from *Uitenhage Transitional Local Council v South African Revenue Services* 2004

(1) SA 292 (SCA) at paragraph 6:

"One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge amongst practitioners who are entrusted with the preparation of appeals of this Court: condonation is not to be heard merely for the asking; a full detailed

and accurate account of the cause of the delay and their effects must be furnished so as to enable the

Court to understand clearly the reason and to assess the responsibility. It must be obvious that, if the

non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is

placed must be spelled out." [My underlining]

[43] In my view and in the circumstances mentioned above the applicant advanced many excuses for having not received the notices, the summons and the notice of bar in regards to this application. He was also reactive and not proactive in initiating these rescission

proceeding, which clearly is indicative of holding the respondent at bay and keeping the status quo. He was not prepared to bring to finality the impasse between the parties.

[44] It is absurd that the applicant submitted as a defence that due to the settlement negotiations, he took the high road and decided not to proceed with the rescission application, the proceedings were thus held in abeyance, and only when he was ordered by this court to proceed with the rescission, did the proceedings then resume.

[45] What is evident to me, in casu, is that at no stage did the respondent let up with its proceeding against the applicant, even though It was in settlement negotiations with the applicant. The applicant, having been represented by an attorney was a fool not to take heed that the default judgment, pending default application and warnings raised in the debt review judgment, were not serious and life changing for him.

[46] In the circumstances I make the following order:

[a] The application for condonation is dismissed, with costs on a party and party scale.

[b] In the result the rescission application is dismissed with costs on a party and party scale.

W. Hughes

Judge of the High Court Gauteng,

Pretoria

Appearances

For the Applicant: Mr R Zunneman

Instructed by: VZLR INC

For the Defendant: Advocate R J Groenewalt

Instructed by: Taitz & skikne Attorneys

Date delivered: 09 June 2017

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Prepared on 11 October 2026 · Esheria