

SOUTH AFRICA / JUDGMENT

Somlal v Nedbank Limited and Others (57426/2018) [2024]

ZAGPPHC 1363 (31 December 2024)

[2024] ZAGPPHC 1363

COURT

North Gauteng High Court, Pretoria

BEFORE

N P Mali

CASE / FILE NUMBER

57426/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION PRETORIA

CASE

NO: 57426/2018

DOH:

04 September 2024

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

SIGNATURE

DATE:

31/12/2024

In

the matter between:

PRENASH
SOMLAL
APPLICANT
and
NEDBANK
LIMITED
FIRST
RESPONDENT
CITY
OF TSHWANE MUNICIPALITY
SECOND RESPONDENT
REGISTRAR
OF DEEDS, PRETORIA
THIRD RESPONDENT
SHERRIF
OF NORTH WEST, PRETORIA
FOURTH RESPONDENT
HAWA
BIBI OSMAN
FIFTH RESPONDENT

This

Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be

uploaded on caselines. The date for hand down is deemed to be on 31 December 2024.

JUDGMENT

Summary: Rescission of default judgment - The impact of the incorrect amount of municipal account in setting the reserve price- rescission granted.

Mali J

- [1] This application pertains to the application for the rescission of default judgment granted by this honourable court on 23 January 2020, for the amount of R124 323.80, as well as warrant of execution against immovable property. The value of the immovable property was R1 400 000.00, and the court set a reserve price of R700 000.00. The applicant is Mr Somlal a self-employed accountant. The first respondent Nedbank Limited is a banking institution and a financial service provider which had financed the applicant to buy immovable property (the property). A mortgage bond over the property was registered in favour of the first respondent.
- [2] The second respondent is the City of Tshwane Metropolitan Municipality, a local municipality duly established in terms of the law of the Republic of South Africa. The third respondent is the Registrar of Deeds, which deals with the registration of all properties. The fourth respondent is the Sheriff of the Court, North-West Pretoria.

- [3] The immovable property was later sold in auction for the amount of R700 000.00 through the fourth respondent and is currently registered in the name of the fifth respondent, Mr Hawai Bibi Osman (Mr Osman). The applicant and his elderly parents were still residing in the immovable property at the time of the hearing of this application. The applicant appeared in person. Only the first respondent opposed the application. The order sought by the applicant in the notice of motion is couched in the following terms:

“1) That the condonation be granted for the late filing of this application for rescission of the default Judgement granted on 23

January 2020 against the applicant in favour of the first respondent

- 2) That the default judgement granted in favour of the First Respondent on 23 January 2020 be rescinded and set aside in respect of the Applicant.
- 3) Anyone opposing this application -----
- 4).....”

- [4] The applicant asserts in paragraph 4 of the founding affidavit that the purpose of the application is also to “set aside the warrant of execution issued on 1 July 2020 and also to set aside the deed of transfer regarding the transfer of Erf 9[...], Laudium Township, Registration Division IT, Province of Gauteng in favour of the first respondent.

- [5] There is no averment as to the rule employed by the applicant for the rescission application however the application was argued under both under Rule 42 (1) of the and Rule 31 (2) (b) of the Uniform Rules of the Court. Judgment obtained by default under common law can be rescinded by court if the applicant has shown, sufficient cause for rescission. Where a judgment is to be set aside on the basis of Justus error under common law in *De Wet v Western Bank Ltd*[1] it was held that the discretion of the courts in setting aside a default judgment under common law extends beyond, and is not limited

to, the grounds provided for in rules 31 and 42(1) of the Rules.

- [6] Rule 31 2(b) provides;

"a defendant may within twenty days after he/she has knowledge of such judgment 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 deems fit."

Rule 42 (1) (a) provides;

“the court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary”

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

- [7] It is common cause that the applicant filed the rescission application out of time. In the notice of motion, the applicant referred to condonation for the late filing of the rescission application, however not much was ventilated in the founding affidavit. The first respondent did not seriously take up the issue of the late filing of the application. Taking into account that the applicant is a lay person and that there is no prejudice visited upon the first respondent the condonation is granted as prayed for in the notice of motion.
- [8] It is not in dispute that the applicant obtained a loan from the first respondent (Nedbank) and during 2003 a bond in the sum of R220 000.00 was registered over the immovable property (the property). It is common cause that the applicant was not in court on 23 January 2020 although he knew about the application.

Absence or otherwise of the applicant

- [9] In the case of *Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*[2], the Constitutional Court had to decide and determine whether or not Mr. Zuma the applicant had met and satisfied the requirements for rescission of judgment either in terms of rule 42 (1) (a) or the common law. The court summarized the legal position and correct

approach as follows:

“It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that the court “may”, not “must”, rescind or vary its order – the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially.

- [10] In *Zuma* (supra) the court drew a distinction between two litigants: In the first place, there is a litigant who was physically absent because he or she was not present in court on the day the judgment was granted. In the second place there is a litigant whose absence she or he chose or elected. Accepting this approach, the court held that on the facts, Mr. Zuma was given notice of the case against him and also, sufficient opportunity to participate in the matter by opposing same if he wanted to. He deliberately chose not to participate. The court therefore found that a litigant who elects not to participate in despite knowledge of legal proceedings against him or her is not absent within the meaning of Rule 42 (1)(a). In other words, the court emphasized that the word “absence” in the rule, “...exists to protect litigants whose presence was precluded, not those whose absence was elected.”

- [11] In summarising this requirement, the constitutional court put the position as follows:

“Our jurisprudence is clear: where a litigant, given sufficient opportunities to participate, elects to be absent, this absence does

not fall within the scope of the requirement of rule 42 (1)(a). And it certainly cannot have the effect of having an order granted in absentia, into one erroneously granted.”

- [12] There is a protracted history of litigation between the applicant and the first respondent. In particular 2011 was the beginning of various applications for default judgments against the applicant. Since 2018 the applicant has raised the defence of in duplum rule[3] with the first respondent.
- [13] Sometime in 2018 the applicant learnt through email correspondence from the first respondent's officials that the application for default judgment would be heard on 2 May 2019. On that day, the matter was stood down for the applicant and the first respondent's counsel to have a discussion. Subsequent to the discussions the matter was postponed sine die. It is common cause that the applicant kept on contacting the first respondent's officials as he was trying to reason with them that he had paid the debt in full. Also, the applicant was approaching other regulatory bodies including the National Credit Regulator Authority for assistance in establishing his case on the basis of in duplum rule.
- [14] In explaining his absence, the applicant submitted that on 14 January 2020 he sent an email to the Chief Executive Officer of the first respondent informing him of his intentions to refer the matter to the Banking Ombudsman. On the same day he received email correspondence from the first respondent's attorneys informing him about the date of the hearing of the application for default judgment, which is 23 January 2020. He later had was telephonic engagement Ms Robin Van Niekerk, the employee of the first respondent. She informed him that the first respondent was not going to proceed with the application for default judgment. She was going to investigate the matter and revert.
- [15] As a result of the above engagement, he did not attend the court proceedings as he was made to believe there were none. He further submitted that he was in the vicinity of the court as he attended to the Legal Practice Council (formerly Law Society) to obtain advice about the same matter.
- [16] The first respondent denied that the applicant was advised by its official that it would not proceed with the application for default judgment. The first respondent's version is unsubstantiated. There is no rebuttal of the version about Ms Robin Van Niekerk. The first respondent would have been in a better position to obtain the affidavit from its employee. The first respondent's version is a bare denial and cannot be accepted. The presence of the applicant was precluded, his absence was not elected.

Erroneously sought or granted orders.

- [17] In order to satisfy this requirement an applicant has to show on a balance of probabilities that at the time the orders were granted, there were material facts that the court was unaware of, and that had these facts been known to the court, the court would not have granted the order. In other words, the applicant has to show and demonstrate that there was a deliberate and intentional non-disclosure and or withholding of crucial and material facts and information to the court, which induced the court to grant the order. This simply means that the court must have been misled, into granting the order.

[18] In *Bakoven Ltd v GJ Howes (Pty) Ltd* [4] the court explained the position as follows:

“An order or judgment is ‘erroneously granted’ when the court commits an ‘error’ in the sense of ‘a mistake in a matter of law appearing on the proceedings of a Court of record’. It follows that in deciding whether a judgment was ‘erroneously granted’ is, like a Court of Appeal, confined to the record of proceedings.”

In *Naidoo v Matlala No* [5] Southwood J said the following:

“In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment.”

[19] The issue in this application is whether the court would have decided differently, had all relevant facts been placed before it. According to the applicant the reserve price was set on an incorrect figure taking into consideration the amount of the municipality account disclosed to the court.

[20] The first respondent’s averment in the application for default judgment is “the amount owed by the Respondent/Defendant regarding levies is R61 076. 083 a copy of the Municipal Statement is attached hereto as Annexure NED 6”. It is common cause that the NED 6 Annexure is a certificate of balance and Annexure NED 5 attached in the application is the municipal account reflecting the amount owed to the municipality as being R1276. 63. The explanation proffered on behalf of the of the first respondent is that the above is all an unfortunate oversight and typing error.

[21] Indeed, it is unfortunate and above all so material in all respects. In *FirstRand Bank Limited v Folscher and Another* and similar matters 2011

(4) SA 314 GNP, the full court had an occasion to list factors to be considered when the court is called upon to exercise judicial oversight in matters dealing with sale of residential property for recovery of outstanding bond repayments. In paragraph 19 the court held that a creditor, applying for default judgment in those circumstances must simultaneously with the application file an affidavit setting out:

(i) The amount of the arrears outstanding on the date of application for default judgment;

(ii) whether the hypothecated property was acquired with a state subsidy or not;

(iii) whether, as far as the debtor is aware, the property is occupied or not;

(iv) whether the property is utilised for commercial or for residential purposes;

(v) whether the debt sought to be enforced was incurred to acquire the property or not;

(vi) in addition, any matter in which the amount claimed falls within the jurisdiction of the magistrate’s court must be referred to the court if the hypothecated property is to be declared especially executable;

(vii) the debtor's attention must be specifically draw, in the warrant issued for the purposes of execution of the registrar's order, to the fact that he may apply for rescission of the judgment enforced against the hypothecated immovable property.

[22] Furthermore, the Courts in the exercise judicial oversight over the sale of residential properties have a discretion to set the reserve price. In this division it is well accepted practice, that the amount owed to the municipality as well as the market values of the immovable property and other variants, are taken into account in order to arrive at a reserve price. The applicant's submission is that the reserve price would have been set at a different amount had the correct figures been disclosed to the court. He is therefore prejudiced because he had suffered loss.

[23] Subsequent to the first respondent obtaining the default judgment of the amount of R124 333.80, the first respondent issued the applicant with a statement of account in the sum of R94 488.17. This happened without the applicant making payment towards reducing the sum of R124 333.80. This glaring contradiction can be nothing more than miscarriage of justice. One is left non- the wiser as to the amount of debt owed by the applicant to the first respondent when the judgment was granted. These issues should be ventilated in the appropriate forum.

[24] Having regard to the above the judgment was granted erroneously. With regards to the warrant of execution, it follows that it ought to be set aside. There is also another issue pertaining to the registration of the immovable property in the name of the fifth respondent, the purchaser. He did not oppose the application. Regardless of whatever consideration this court would have given to his circumstances, the sale would not be able to stand when the judgment and the warrant of execution have been set aside. The sale is accordingly set aside. In the result I grant the following order:

ORDER

1. It is hereby ordered that the judgment granted by this court on 23 January 2020 be and is hereby rescinded and set aside.
2. The warrant of execution issued on 1 July 2020 and the sale in execution held on 12 November 2020 of erf 9[...] Laudium Township, Registration Division J.R.; Province of Gauteng, Local Authority: City of Tshwane Metropolitan Municipality; Measuring 441 (Four Hundred and Forty-One) Square Meters is hereby set aside.
3. The costs are hereby reserved for the main action.

N P MALI

JUDGE OF THE HIGH COURT

Appearances

For the applicant: Applicant acts in person Prenash Solmal prenash@sugarrealty.co.za For the first respondent: Adv. WJ Roos Email: wroos@rsabar.com Instructed by: VHI Attorneys Ms. Yolande Steyn/Mr. H Buitendag Email: law2@vhilaw.co.za law3@vhilaw.co.za For further respondents: No representation

[1] 1979 (2) SA 1031(A)

[2] 2021 (11) BCLR 1263 (CC)

[3] Interest stops running when the unpaid interest equals the amount of the outstanding capital claim. This principle is referred to as the in duplum rule, arises from English Law.

[4] 1992 (2) SA 446 (ECD)

[5] 2012

(1) SA 143 (GNP)

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Prepared on 11 October 2026 · Esheria