REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 8921/2013

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between

ABSA BANK **APPLICANT**

And

NKUMANE, CHARLES SIPHO **1ST RESPONDENT**

NKUMANE, TSWANE IDA **2NDRESPONDENT**

J U D G M E N T

VICTOR J:

[1] The applicants seek to rescind the default judgment granted against them on 9 April 2013 as well as the writ in execution. The judgment debt was for an amount of R523 406.46 and their property Erf […] Risiville Township held by Deed of Transfer t148752 was declared executable.

Applicants' Version

[2] A number of defences were proffered in order to justify the recession of the judgment debt. These included the lack of a Certificate of Registration as well as the contention that the deponent to the first respondent's papers is not an employee, no resolution was attached to the founding application and that the deponent Ms Naidoo has no personal knowledge of the facts. The applicants also dispute the domicilium address used for service. The applicants concede that they received the document which was appended to their front gate. On or about 2 April 2013 they telephoned the respondent's attorney, of record Hammond Pole and spoke to one Walter. They and offered to pay the arrears in the amount of R10 000 per month which offer according to the applicants was accepted.

[3] When the writ of execution was received, on 7 May 2013 the

applicants spoke to Walter of Attorney Hammond Pole who promised to draw the file and investigate and that he confirmed that he recalled the earlier agreement.

[4] The applicants contend therefore that there was a breach of the agreement. They now contend that wanted a higher amount viz a payment of R31 000 in May and R10 000 per month towards the arrears.

[5] The first applicant advised Walter that as far as he was concerned there was a valid and binding agreement and that he would continue to comply with the agreement as he understood it and pay R10 000.00 per month. He also stated that the first respondent had to abandon the judgment taken against them. This is the applicant's version. Walter would not commit himself either way and undertook to come back to him, which he failed to do.

[6] On 8 July 2013 he received a call from an agent who informed him that the house was going to be auctioned and that this agent wanted to look at the house.

[7] On 13 July he spoke to a certain Deon at the Department of Home loans at ABSA, the respondent. He had previous dealings with him. They met on 16 July and then Deon told him that he must pay the R44 000.00 before the date of sale. Deon did not deny that an

agreement had been reached on 2 April 2013. Obviously the agreement was not with him so Deon could not explain why the judgment had not been proceeded with. As far as the applicants were concerned, they proceeded paying the monthly amount of R10 000.00 as they understood the agreement to be.

[8] The first applicant averred that they also intended launching a counter application in due course for a statement and debatement of account and he would prove that the first respondent's entire calculation of the quantum is in dispute.

[9] The first applicant asserts that they never received notice in terms of section 129 of the National Credit Act and that the section 129 notice was not dealt with properly. If regard be had to the delivery of the papers at Three Rivers on 14 February 2013, there is a material discrepancy as to when that notice was indeed sent.

[10] There is a substantial dispute between the parties as to the alleged oral agreement itself and as to whether the applicants received proper notice. The degree of acrimony then escalated and the applicants accused the first respondent of being fraudulent. Mistakenly the first respondent did indicate that the property had been sold at the sale in execution to one Mazibuko when in fact, it had been on-sold on 25 July 2013 to Ms Phebane and the transfer of the property has taken place into the name of Ms Phebane.

[11] In order for the applicants to succeed they would have to have the judgment set aside as well as the sale in execution.

[12] Of importance in this matter is that Ms Phebane has not been joined in these proceedings. Unfortunately, a Mazibuko was joined and that particular error lies at the door of the first respondent. I am now faced with the situation where Ms Phebane, who is a bona fide purchaser of the immovable property, is not joined in these proceedings.

[13] The appropriate order would be to postpone the application or allow the applicants to join Ms Phebane to these proceedings. The applicants do not want that relief. They simply wish to have the judgment rescinded on the basis of Rule 42 of the Uniform Rules of Court. Alternative, the applicants contend that good cause has been shown and also in the alternative wish it to be set aside in terms of rule 31.

[14] The first respondent in very extensive heads of argument deals with the error in regard to Mr Mazibuko and says the following:

> "The property was not sold to Phebane but rather to Mr Mazibuko and it was Mr Mazibuko who had on-sold the property to Phebane."

[15] Unfortunately it is in relation to the onward sale to Mr Phebane that the first respondent did not appraise the applicants of that further onward sale.

[16] The point of non-joinder is taken by the first respondent and the submission is that it is fatal to the applicant's application by virtue of the fact that Ms Phebane has not been joined to these proceedings. It is clear that the new owner Ms Phebane will be prejudicially affected if a rescission were to be granted . See *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) Brand JA dealt with the question of non-joinder in the following terms:

> 'It has now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) par 21).'

[17] The question of non-joinder, the blame is partly apportioned to the first respondent who did not tell the applicants about the onward sale. However, well before this matter was argued the applicants knew about the onward sale to Ms Phebane and that she would have a material interest in the outcome of this rescission application.

[18] As regards the defence of lack of personal knowledge of the deponent Ms Naidoo who deposed to the affidavit on behalf of the

bank, I accept that Ms Naidoo has access to the books of account relating to this matter. She has familiarised herself with them. The applicants do not dispute that a credit agreement was concluded and the terms of the credit agreement. The terms and conditions pertaining to the credit agreement are not in dispute. It is common cause that the applicants were in arrears and thus in breach of the terms and conditions.

[19] The first respondent also deals with the merits of the points in limine taken by the applicants and the first respondent avers that a certificate of registration is not fatally defective if not attached to the particulars of claim. The certificate was attached to the answering affidavit. The above defences in limine are insufficient to grant the rescission application.

[20] The first respondent therefore contends that the rescission was not erroneously sought in terms of rule 42 and it was not erroneously granted because there were no irregularities in the proceedings before the Court and therefore that judgment does not stand to be set aside on that basis.

[21] The agreement in relation to the variation of the agreement in respect of the payment of R10 000 per month is in dispute. The applicants contended that their agreement of R10 000.00 would be sufficient to stay the sale in execution and that this would solve the

problem indefinitely. The applicants have attached an email where the following is stated:

> "We are therefore committing that people able to afford R10 000.00 by the beginning paying it in May 2013. We hope that our plea will be favourably considered and remained."

[22] In my view, the import of this particular email demonstrates that the applicants were making an offer. They say in particular, we hope that our plea will be favourably considered. Therefore, it is not possible on the disputed facts to accept the first applicant's version. It is implausible for the applicants to contend that there an agreement in place if they are still hoping that their plea would be favourably considered.

[23] The first respondent contends that the applicants have been less than candid in the disclosure of the true facts and that the said contention is a fabrication and a falsehood. It is also of note that even well after the alleged agreement with Walter, the representative of first respondent at Meyerton, did not have any knowledge of the alleged agreement nor would it have appeared, I presume, in a file or on the computer network. In my view, therefore, the applicants have not shown that I must not apply the *Plascon-Evans* rule to the allegation by first respondent that no agreement was reached in respect of a payment of R10 000.00 per month.

[24 In the alternative, the applicants rely on the common law to rescind the judgment in default of an appearance, provided sufficient cause is shown. Having regard to the facts set out above, I am of the view that the applicants had not shown sufficient cause. The quantum claimed is by virtue of the certificate, there is nothing submitted by the applicants to impugn the amount owing. The non-receipt of the section 129 notice is not decisive of the matter in the sense that that issue cannot be decided without the input of the parties who have not been joined.

[25] It was submitted on behalf of the applicants that it was insufficient simply to obtain a return from the Halfway House Post Office, much more was required as set out in the case of *Sebola & Another v Standard Bank of South Africa Ltd & Another* 2012 (5) SA 142 (CC). The above principle also must also be considered against the facts in this matter where there was receipt of the summons and the applicants reacted to it.

[26] In my view, the application by the applicants is fatally flawed in a number of respects, the most important of which, is the non-joinder of the third party Ms Phebane.

[26] In the result and in the absence of a prayer by the applicants to postpone this matter to enable them to join Ms Phebane, the application must fail.

The order that I make is the following:

The application is dismissed with costs.

_____

M. VICTOR

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Attorneys for the applicants:
Larry Marks Attorneys
Alberton North
087 351 6532
N46

Attorney for First Respondent
Vermaak and Partners
011 874 1800
Ref MAT 134549