REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 39859/2015

15/4/16

Reportable

Of interest to other judges

Revised.

In the matter between:

XOLISWA MARTHA KRATSHI	
(ID NR: […])	Applicant
And	
ABSA BANK LIMITED	First Respondent
REGISTRAR OF DEEDS, PRETORIA	Second Respondent
SHERIFF OF THE HIGH COURT, PRETORIA WEST	Third Respondent
DELPORT M.D.	Fourth Respondent

JUDGMENT

MAJIKI J

[1] The applicant described herself as a retired (declared medically unfit) 55 year old single mother of four children, two at university, one at high school and another at primary school. She approached this court in terms of Common Law, and/or Rule 31(2)

(b) and/or Rule 42(1) (a) of the Uniform Rules of Court ("the Rules") for the rescission of the default judgment granted against her in favour of the first respondent on 12 August 2013. She also seeks orders for the condonation of the late filing of her application for rescission, the setting aside of the warrant of execution and the subsequent sale in execution of the immovable described as portion 4, Erf 176 Claremont (PTA) Township ("the property"), which is the subject matter herein. Furthermore, she seeks an order in terms of which the further execution of the above default judgment and all other further processes emanating therefrom are stayed. The application is opposed by the first respondent.

[2] It is common cause that in November 2007 she obtained a loan of a sum of R700 000.00 and an additional amount of R140 000.00 secured with a mortgage bond registered over the property, which is her primary residence, in favour of the first respondent. She was obliged to pay an amount of R6 236.18 monthly over a period of 250 months towards repayment of the said loan. In 2013 she fell into arrears with her monthly payments. She would contact the bank through the manager of her account, one Ms Kgopotso and make arrangements regarding the management of her account. She however made monthly payments, *albeit* short payments of about R3000.00 towards the settlement of her account. Her financial situation worsened mainly due to illness that was diagnosed in 2004. Eventually she was declared unfit for work in January 2015 and has duly received her ill-health retirement benefits. Her medical condition put a heavy strain on her finances and it became difficult to balance the medical bills, educational costs of the children and other household obligations.

[3] It is also common cause that a notice in terms of Section 129 of the National Credit Act 34 of 2005 was sent to her and summons was issued against her on 30 April and 16 May 2013 respectively. These processes led to the granting of default judgment on 12 August 2013, which is the subject matter of these proceedings.

[4] In a letter dated 19 June 2013 to the first respondent, the applicant acknowledged that she had knowledge of the summons issued against her. She sought an indulgence from the first respondent. She attempted to make an offer to make substantial payment on the account with the proceeds of the sale of her other immovable property and or pay-out of her ill health retirement benefits. The said letter is annexed to the first

respondent's answering affidavit.

[5] On 15 August 2013, she had an opportunity to review her monthly payments with the first respondent. From that date she paid a sum of R8000.00 per month, whilst awaiting her payment, even though this was not so regular. In November 2014 she received some communication from the office of the sheriff indicating that the property would be sold on 4 December 2014. All her attempts not to have her property sold in execution thereafter came to a naught.

[6] According to the applicant, she at all material times, before the judgment was taken, had a standing arrangement with the first respondent to pay into the account, as much as she could, to cater for monthly interest. That arrangement would be reviewed on 15 August 2013. This is denied by the first respondent. She goes on to submit that had the court been appraised of this arrangement, it would not have granted the default judgment. Essentially, the judgment was granted in error.

[7] The issue in this application is whether the court would have decided differently, had all relevant facts been placed before it. Furthermore, whether the applicant has satisfied the requirements for the granting of rescission judgment.

[8] The first respondent raised points of law, which go to the core of the very issues that are relevant for the determination of the whole application. I will deal with such issues as part of the determination of the application in its entirety.

[9] 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 1979 (2) SA 1031(A)*** it was held that the discretion of the courts in setting aside a default judgment under common law extend beyond, and is not limited to, the grounds provided for in rules 31 and 42(1) of the Rules. Rule 31 2(b) provides;

> *"a defendant may within twenty days after 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 such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it*

seems meet."

[10] Rule 42(1) (a) of the rules provide;

"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.

[11] Ms Lottering, counsel for the respondents, submitted that Rule 31(2)(b) is not available to the applicant. She argued furthermore that if the applicant wanted to rely on that rule, she is required to file her application within twenty days after she had knowledge of the judgment. She also had to show good cause to the court to set aside the default judgment. This requires that she gives a reasonable explanation for the delay. The application must not merely be made in order to delay the plaintiff's claim and she must show that she has a *bona fide* defence. Furthermore, the applicant had been to the respondent on 15 August 2013, three days after judgment was granted; in November 2013 the applicant heard from the office of the sheriff that the property will be sold in execution and therefore she ought to have known at these instances about the judgment.

[12] I agree with the submission that the applicant's submission cannot be acceptable. The submission that she only had requisite knowledge that the judgment was erroneous in March 2015 at the time she was able to fully instruct her attorney. The section refers to knowledge of judgment and nothing more. She had been to consult the applicant in November 2014 and sent the email confirming her retirement benefits on 21 November 2014. On 05 December 2014 she consulted with an attorney about available options regarding the rescission of judgment. Even if I am to accept in the applicant's favour that during the discussions between the parties three days after the judgment, both she and Ms Kgopotso possibly were not aware of the judgment, the applicant cannot succeeded in her application, if she seeks to rely on Rule 31(2) (b). She was aware of the summons when she addressed a letter to the first respondent on 19 June 2013. She was aware of the judgment at least in November 2014. She has not fully explained the reason for the delay in approaching court for rescission of judgment.

[13] If the applicant relies on common law in her application, she has to show sufficient cause for rescission of the judgment. This legal dispensation too, requires that she presents reasonable and acceptable explanation for the default and that on the merits she has a *bona fide* defence which *prima facie,* carries some prospect or probability of success. The enquiry as to sufficient cause both under Rule 31(2) (b) or common law has been held to be linked to whether the applicant acted in wilful disregard of the court rules, processes and time limits.

[14] This leaves the applicant with the determination of whether she has satisfied the requirements of Rule 42(1) (a). The consideration of the issue of the existence of an error in the sense referred to in Rule 42(1) (a) has been a subject of interrogation in the past by the courts. According to the decision in ***Topal v L S Group Management Services (Pty) Ltd 1988 (1) SA 639 (W)*** **at** ***650 D-J*** no good cause need be established for rescission application brought in terms of Rule 42(1) (a).

[15] Similarly I do not deem it necessary to deal with the aspect of existence of *bona fide* defence. In ***Lodhi 2 Properties Investment CC v Border Developments 2007 (6) SA 87*** **at** ***95F*** it was held that the existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.

[16] 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 magistrates' 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 drawn, 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.

[17] At paragraphs 37, 38, 39 the court cautioned that, instances where a judgment debtor, facing execution and subsequent eviction, would be a victim of an abuse of process would be rare, in matters in which a specially hypothecated immovable property is the object of the execution process. The context in which the creditor entered into the agreement in those circumstances had to be taken into account; that both parties concluded voluntarily, to enable the debtor to acquire immovable property, or capital as the case may be, against the security of the bond registered over the property. Absent any extra-ordinary circumstances, the judgment creditor will normally be entitled to enforce his judgment by executing against the immovable property that is bonded as security. The special hypothec registered in favour of the creditor, as security for the moneys advanced for the purchase of the home and capital loans, is entered into between the parties consciously, deliberately and for mutual benefit.

[18] At paragraphs 40 and 41 the court stated that it was not possible to anticipate every potential circumstance that may be regarded as extraordinary, which would persuade the court to decline a writ of execution. The court referred to ***Hudson v Hudson and Another 1927 AD 259; Beinash v Wigley 1997 (3) SA 721 SCA*** **at** ***734 F Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 CC*** and ***Absa Bank ltd v Ntsane and Another*** **2007** ***(3) SA 554 T.*** From the examples in those cases they concluded that *the "Creditors' conduct need not be wilfully dishonest or vexatious to constitute an abuse. The consequences of intended writs against hypothecated properties, although bona fide, may be iniquitous because the debtor will lose his home, <u>while alternative modes of satisfying the creditor's demands might exist</u> (my emphasis) that would not cause any significant prejudice to the creditor."* The court then listed the following factors as some that might need to be taken into consideration:-

- Whether the mortgaged property is the debtor's primary residence;
- the circumstances under which the debt was incurred;
- the arrears outstanding under the bond when the latter was called up;
- the arrears on the date default judgment is sought;
- the total amount owing in respect of which execution is sought;
- the debtor's payment history;
- the relative financial strengths of the creditor and the debtor;
- whether any possibilities exist, that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence;
- the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;
- whether any notice in terms of s 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action;
- the debtor's reaction to such notice, if any;
- the period of time that elapsed between delivery of such notice and the institution of action;
- whether the property sought to be declared executable was acquired by means of, or with the aid of, a State subsidy;
- whether the property is occupied or not;
- whether the property is in fact occupied by the debtor;
- whether the immovable property was acquired with moneys advanced by the creditor or not;
- whether the debtor will lose access to housing as a result of Execution being levied against his home;
- whether there is any indication that the creditor has instituted action with an ulterior motive or not;
- the position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant.

Not all of those will be relevant in every matter. The facts in each case will dictate what would be relevant in that particular case.

[19] At paragraph 43, the court recorded that there will always be problems when the debtor remains in default. Taking into consideration everything else, for example, that court should ordinarily not be expected to take proactive step to establish whether the debtor is the victim of abuse litigation, in ordinary course of events the creditor will be able to fully inform the court of the history of the creation of the debt, the repayment thereof, the debtor's ability to effect payment on any arrears other than allowing execution against her home. (My emphasis) In default proceedings the creditor, like applicant in unopposed motion proceedings, as any litigant in that role, is in duty bound to make full disclosure to the court of all known relevant facts that might influence the court in coming to a conclusion.

[20] The facts that were placed before the court appear in paragraph 8 of the affidavit filed in support of the application for default judgment. The paragraphs that set out the relevant aspects I will deal with in this judgment are:-

> "8.1 The courts attention is drawn to the fact that the plaintiff implements various steps to rehabilitate an arrear account, which steps are taken prior to an account to be handed over for legal action. Several telephone calls are made to the defendant to all available telephone numbers from the plaintiffs Call-Centre before the matter is handed over to the Pre-Legal department of the plaintiff, where again, attempts are made telephonically to make an arrangement with the defendant. The account stays in Pre-Legal for six months during which a field-agent is also required to visit the property in question with the purpose of negotiating with the defendant a repayment plan to rehabilitate the account.
> 8.2 The courts' attention is further drawn to the fact that, during the procedures referred to in paragraph 8.1 above, the defendant has been repeatedly informed that their failure to rehabilitate the account will result in judgment against them, attachment of their immovable property, a sale in execution and ultimate eviction from the property. It is therefore my submission that the defendant is aware of the consequences of his/her failure to make arrangements and that further notice of this application would be redundant and will only result in unnecessary cost for the defendant's account.
> 8.3 The defendant has made sporadic payments, towards his mortgage bond

over the immovable property.

8.4 The defendant having failed to make payments of the monthly instalments payable under the mortgage bond, has resulting in the full amount owing under the mortgage bond becoming due, owing and payable, and no possibility exist that the defendant's liabilities will be liquidated within a reasonable period of time and execution against the primary residence to be the only option left to the plaintiff.

8.15 In the light of the breaches by the defendant of his/her obligations to make payment of the monthly instalments under the mortgage bond, there are not alternative methods for the plaintiff to recover the debt in respect of the monies loaned and advanced by the plaintiff to the defendant."

[21] From the facts apparent in the present application it appears to be common cause :

that the agreement was entered into in 2007, it was around August 2012 that the applicant started to make payments that are short of her monthly instalment, but on regular basis;

that her circumstances and financial position changed;

that she was in contact with the respondent and those culminated to a meeting for a further review of the account on 15 August 2013;

that on 19 June 2013 she reduced her request to be afforded time to settle her arrears into writing. She proposed alternative means for payment with the proceeds of the sale of a property in Sunnyside and she was also making an application for ill-health retirement.

[22] The first respondent disputes that the applicant had an arrangement with her account handler, Ms Kgopotso and state that she did not attach a confirmatory affidavit from Ms Kgopotso. The applicant details her arrangement to have been that of paying reduced monthly instalments to cater for the interest, subject to a further review of the account.

[23] The first respondent has attached the copy of the letter dated 19 June 2013 from the applicant suggesting alternative means of paying the debt. It has neither stated what its response was to it nor did it deny that Ms Kgopotso was its employee who at all material times was managing and monitoring the applicant's account. In my view, the

first respondent would have been in a better position than the applicant to get a supporting affidavit from Ms Kgopotso in which she would have confirmed their assertion that there was no arrangement with the applicant.

[24] In paragraph 8.1 extracted from the first respondent's affidavit in support of the default judgment, the first respondent stated routine steps they take to rehabilitate an arrear account. In paragraph 8.7 the respondent referred to sporadic payments that were made by the applicant. The respondent did not attach the actual record of payments made by the applicant. The applicant attached same in this application. This would have shown, what in my view, are more of regular payments than sporadic ones. It is however, clear that they were short of monthly instalments. The first respondent made no mention of the fact that the applicant had communicated about her health problems that put a strain to her finances, leading to her applying for ill-health retirement.

[25] In paragraph 8.16, the first respondent states as a fact that "there are no alternative methods for the plaintiff to recover the debt." This is in direct contrast of the letter attached by the first respondent in this application dated 19 June 2013, making suggestions of alternate methods to pay the debt.

[26] The court concluded on the basis of the facts placed before him and those contained in the first respondent's affidavit that default judgment ought to be granted, in the absence of the applicant. I am of the view that had the judge been aware of the facts appearing from paragraph 22 above, he would not have exercised his judicial oversight in a manner that leads to the conclusion that it is just and equitable to order the execution of the property.

[27] Nepgen J in ***Stander*** (supra} at ***page 884 C-D*** after a considered reference to a number of decisions before coming to his conclusion, concluded that he was entitled to have regard to facts, which do not appear in the record. Facts of which the judge who granted judgment in the absence of the applicant was unaware, in considering whether the order that was made was erroneously granted in the sense referred to in Rule 42(a }. The learned judge in the final analysis concluded that the order was erroneously granted.

[28] Accordingly, after consideration of the facts that were within the knowledge of the respondent, which were not placed before Sithole AJ, I have already concluded that, had they been placed, he would have decided differently. I therefore find that the judgment was erroneously granted in the sense referred to in Rule 42 (l)(a).

[29] I do not wish to address the contents that relate to the facts after the time judgment was granted. They would not have served before Sithole AJ.

[30] With regard to the warrant of execution it follows that it ought to be set aside.

[31] During the argument of the application, it transpired that the purchaser, even though cited as a party in the proceedings was not properly served. He did not oppose the application. Regardless of whatever consideration the court would give 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 also set aside.

[32] The applicant asked for costs against the respondents, only in the event of the respondents opposing the application. Usually, the costs follow the result, but costs remain within the discretion of the court. I am not of the view that the opposition herein was unreasonable. Therefore, I am not inclined to make an order of costs against the first respondent that opposed the application, even though the opposition was unsuccessful.

In the result,

1. It is hereby ordered that the judgment granted by this court on 12 August 2013 be and is hereby rescinded and set aside.
2. The warrant of execution and the sale in execution held on 4 December 2014 of portion 4, erf 176 Claremont (PTA) Township, held by Deed of Transfer T147/2003 be and are hereby set aside.
3. The costs are hereby reserved for the main action.

_____

MAJIKI J

JUDGE OF THE HIGH COURT

ACTING IN GAUTENG DIVISION, PRETORIA

Appearances

Counsel for the applicant	:	Mr Msiza
Instructed by	:	Messrs Msiza & Associates 793 Merton Avenue Eastwood, Arcadia PRETORIA Tel. 082 737 2010
Counsel for the 1st respondent:		Ms Lottering
Instructed by:		Messrs Hack, Stupel & Ross 2nd Floor, Standard Bank Chambers Church Square PRETORIA Ref. C. Van Wyk/M-L/DA2292 Tel. No. 012 - 325 4185
Date of hearing:		01 March 2016
Date of Judgment:		15 April 2016