REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF JUSTICE

(GAUTENG DIVISION, PRETORIA)

CASE NO: 3101/2015

20/10/2017

(1) NOT REPORTABLE.

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

In the matter between:

UNITA MAPULENG NOCWAKA OLIPHANT

(ID: [….]) Applicant

And

FIRSTRAND BANK LIMITED Respondent

In re:

FIRSTRAND BANK LIMITED Plaintiff

and

UNITA MAPULENG NOCWAKA OLIPHANT

(ID: [….]) Defendant

JUDGMENT

MOTEPE AJ:

Introduction

[1] The applicant is an adult female representing herself in these proceedings. She brings an application for the recession of judgment granted against her on 10 March 2015 in favour of the respondent, a registered bank.

Background

[2] Between 17 August 2009 and 20 June 2013, the applicant concluded 3 loan agreements. As a securtiy, mortgage bonds were registered over the applicant's immovable property described as Erf 825 Bloubosrand Extension 2 Township, Registration Division I.Q, Province of Gauteng, measuring 830 (eight hundred and thirty) square metres, held by virtue of deed of transfer T18558/1994 and subject to the conditions therein contained and also known as: 15 Centaurus Street, Bloubosrand, Extension 2, Randburg *("the mortgaged property").*

[3] On 19 January 2015, the respondent issued summons against the plaintiff out of this court. Summons were served by the Sheriff at the applicant's chosen domicilium, being the mortgaged property, by affixing the summons to the outer or principal door. The summons demanded that the applicant pays an amount of R771 359. 44 to the respondent in accordance with the abovementioned covering mortgaged bonds.

[4] The applicant states in paragraph 9 of her founding affidavit that she received the aforementioned summons on 22 January 2015. They were not signed by the registrar. She states however that the summons demanded "payment of an amount of R39 825.49 being arrears" of 3 and a half months on her bond. This cannot be corrected though because as I have stated above, the summons demanded the full amount of R771 359. She qualified her statement from the bar and stated that what she was referring to in her affidavit was not the summons themselves but an

attachment thereto, being the certificate of compliance in terms of section 129(1) of the National credit Act, No 34 of 2005. I deal with this certificate below. Save to state at this juncture that nowhere did it state that only the arrears were being demanded.

[5] In the summons, the respondent also sought interest on the amount of R771,359.44 at the agreed rate of 8,75% per annum as from 1 January 2015 to date of payment. The summons also sought an order declaring the mortgaged property executable for the said sums and for the Registrar to issue a warrant of execution against immovable property in terms of Rule 46 of the Uniform Rules of Court. The summons further informed the applicant to file a notice of intention to defend failing which default judgment may be given against her without further notice.

[6] The applicant did not file a notice of intention to defend. She states that she decided to pay the arrears in the amount of R39 825.49 on 3 February 2015. She says as a lay person, she was under an impression that having paid her arrears, there was no need for her to defend the matter because *"as stated in the court application I was supposed to respond or pay the arrears by 5 February 2015'.*

[7] Having received no intention to defend, the respondent launched an application for default judgment in terms of Rule 31(2)(a) and 46(1)(a)(ii) of the Uniform Rules. In that application, the respondent sought an order for payment of aforesaid amount together with interest and an order declaring the mortgaged property specially executable. It further sought an order that the Registrar of this court be authorized to issue a warrant of attachment.

[8] The application came before Thobane AJ on 1O March 2015. It appears from the transcript of the proceedings that the matter had to stand down because the affidavit had not been properly commissioned. It was later recalled after commissioning. Thobane AJ granted an order in the following terms:

1. That judgment is granted against the respondent for:-

a. Payment of the sum of R771, 359.44;

b. Payment of interest thereon at the agreed rate of 8,75% per annum from 1 January 2015 to date of payment, aforementioned date inclusive;

2. An order declaring Erf 825 Bloubosrand Extension 2 Township Registration Division: I.Q. Province of Gauteng, measuring: eight hundred and thirty (830) square metres held by virtue of deed of transfer T18558/1994 subject to the conditions therein contained and also known as: 15 Centaurus Street, Bloubosrand, specially executable; Extension 2, Randburg

3. That the Registrar of the above Honourable Court is authorized to issue a warrant of attachment;

4. Costs on the scale as between attorney and client still to be taxed.

[9] The applicant states in her affidavit that during October 2015, a warrant of execution was served on her property as she was once more in arrears. She states that the warrant of attachment was not signed by the Registrar.

[10] On 20 August 2015, the respondent caused a warrant of attachment to be issued. This warrant was firstly served on the applicant on 25 August 2015 and later reserved on 3 and 5 September 2015.

[11] On 16 September 2015, the respondent's attorneys sent a letter to the applicant in which the following was *inter alia* stated:

> *"As you have failed to keep your bond account up to date, the Sheriff has been instructed with a sale in execution of your property which sale is scheduled to take place on Tuesday, 1O November 2015. As* a *matter of policy, the bank has decided that if all your arrear instalments plus costs are paid, to consider in its discretion, the cancellation of the sale in execution. It is* a *further condition in cases where it is applicable, that the amount owed be brought back to the*

original loan.

Unless payment is received, in cash or in bank guaranteed cheque, at least 48 hours prior to the sale, no offer of payment will be accepted and the sale will proceed unless full amount owing under the bond, together with all interest and legal costs calculated up to date and including the date of the sale are paid in cash before the sale."

[12] On 14 September 2015, the applicant sent an email to the respondent which read as follows:

"The full arrears will be paid on 30 September 2015 and the bond will be up to date."

[13] On 9 October 2015, the applicant was informed by way of an email that in order to stop the sale of execution, she had to pay an amount of R90,500.00.Further emails were exchanged on the same date with the applicant and one Emily Rankhumise described in the emails as the legal collector in the respondent's employ.

[14] On 20 October 2015, the respondent's attorneys emailed the applicant a copy of the summons and the return of service. The applicant responded to the respondent's attorneys by email of even date in which she questioned why the summons emailed to her differed to the summons delivered at *"her place"* on *"the page with the Registrar in the document'.*

[15] The applicant did not pay the R90 500. 00 in order to stop the sale. The mortgaged property was sold on auction on 10 November 2015.

[16] On 11 November 2015, the respondent's attorneys wrote an email to the applicant advising her that her property had been sold on 10 November 2015 and that the registration into the new owner's name will take place within the following 7 days unless she launched an urgent application to stay registration.

[17] The applicant states in her founding affidavit that she did receive a notice of sale of execution it had indicated that it was issued in September 2015

with no specific date. Upon receipt of that notice, she insisted on the bank providing her with proper legal documents for the process they followed to which they did not respond.

[18] She states that on 10 November 2015, 3 people from the offices of an estate agent came to her house and told her that they had bought her property from an auction. She told them that she was challenging the legal process followed. This is significant. On 11 November 2015, she sent an email to the Office of the Sheriff asking them to provide her with the judgment that they used to sell her property. She also sent an email to the respondent's attorneys on the same date requesting the judgment in terms of which her property was sold.

[19] After sending an email to the bank questioning the validity of the auction, the respondent wrote the applicant a detailed letter on 9 December 2015. In this letter, the respondent did not mention the payment made by the applicant on 3 February 2015. The applicant took issue with the respondent and questioned why her payment of 3 February 2015 was not mentioned in the detailed report.

[20] On 10 December 2015, the respondent wrote a further detailed response in which it now mentioned the payment made by the applicant on 3 February 2015. The applicant then conducted her investigations and obtained the affidavit used by the respondent to obtain the default judgment. She also secured the transcripts of the proceedings of 10 March 2015.

[21] The applicant lunched her application on 25 August 2016, more than a year after she had become aware of the judgment under challenge. I was however informed by the parties from the Bar that the issue of the delay in launching this application is not raised by the respondent. I deal with this delay further below.

[22] The primary question before me is whether the order of this court of 10 March 2015 should be rescinded. In her heads of arguments, the applicant places reliance on Rule 42 of the Uniform Rules and the common law for this application. No mention is made of Rule 31(5)(d) of the Uniform Rules,

presumably because this application was not launched within 20 days after the applicant had acquired knowledge of the judgment. It is in any event immaterial at this stage whether the rescission is brought in terms of the Uniform Rules or the common law.

[23] What the plaintiff has to establish in order to succeed is good cause. This entails the applicant furnishing a reasonable and acceptable explanation for her default and demonstrating that on the merits, she has a *bona fide* defence which, *prima facie,* carries some prospect of success.[1]

Was the applicant in willful default?

[24] The applicant accepts having received summons. She of course contends that the summons were defective in that they were unsigned. She nevertheless made payment in the amount of R39 852. 49 on 3 February 2015. She contends that this was within the timeframes specified in the document attached to the summons. After making this payment she received an SMS from the respondent acknowledging the payment.

[25] The applicant states that to her, as a lay person, this was the end of the dispute as she had paid the outstanding arrears. This is so because according to her it was stated in the summons that she was either supposed to defend the summons or pay the arrears by 5 February 2015. Because she paid the arrears on 3 February 2015, she was under an impression that there was no need to defend the summons.

[26] The simple summons served on the applicant demanded the full amount of R771,359.44 without any mention of arrears. It was demanded of the applicant to file notice of intention to defend within 10 days if she intended disputing the claim. She was informed further therein that if no intention to defend is filed, judgement as claimed may be given against her.

[27] The certificate of compliance which I am informed was attached to the summons does mention that the applicant was in arrears at an amount of

[1] Chetty v Law Society, Transvaal 1985(2) SA756(A) at 7641 to 765D

R39 825.49. Paragraph 5 thereof read as follows:

"The current balance is R771 359.44 including the arrears of R39,825.49."

[28] Nowhere in the summons or the certificate of compliance is it stated that if the applicant pays the arrears within 20 days, that she need not defend the claim. The only reference to 20 days in the summons, is in paragraph 6 which informs the reader that if judgement is granted, a rescission application may be brought within 20 days thereof.

[29] In paragraph 1 of the certificate of compliance the following is stated:

"The client has been in default for 20 (twenty) days or more in regards to his obligations under the agreement."

[30] I could find nothing that could have led the applicant to the belief that should she pay the arrears within 20 days, she need not defend the action. However, that does not mean that there was willful default from the applicant. Indeed, her actions point to the contrary. The fact that she did pay the arrears in full as reflected in the certificate of compliance shows a willingness to bring her account up to date. I emphasise that this is on the basis of the arrears mentioned in the certificate of compliance and not the summons.

[31] In my view, the applicant was mistaken but I find that she was *bona fide.* A litigant can be held not to be in willful default if he or she acted on a *bona fide* but mistaken belief.[2] In my view, her explanation for not filing an intention to defend is plausible. She was under an impression that payment of arrears will obviate the necessity of the matter proceeding.

Does the applicant possess a *bona fide* defense?

[32] It is common cause between the parties that when the order of 10 March 2015 was made, it was on the basis of the allegations made in the affidavit supporting the application for default judgment. This affidavit was deposed

[2] Koekemoer v Viljoen 1921 TPD 129

to on 2 March 2015. Paragraph 5.5 of that affidavit stated as follows:

> *"The Defendant is by virtue of the above, currently indebted to the Plaintiff in the amount of R771,359.44 together with interest thereon at a rate of 8,75% per annum with effect from 1 JANUARY 2015 to date of payment, both dates inclusive. At the time when the instructions were handed over to the Attorneys for collection, the* arrears *in the account were R39,825.49. As at date of this Affidavit, the* arrears *on the abovementioned account amounts to R39,825.49. We enclose herewith an interim statement dated 25 JANUARY 2013 - 31 DECEMBER 2014 marked ' "."*

[33] It is common cause between the parties that the above paragraph was incorrect. The arrears stated therein had been calculated only up to 31 December 2014 and not up to 28 February 2015. Those arrears (up to 31 December 2014) had already been paid by the applicant on 3 February 2015. The applicant contends in essence that the respondent obtained the court order fraudulently because it informed the court that as at the deposing of the affidavit on 2 March 2015, the applicant was in arrears in the amount of R39 825.49. This was not true.

[34] As indicated above, the applicant is correct that this statement was wrong and was misleading to the court. However, I cannot find that it was done fraudulently. Firstly, I cannot make credibility findings on affidavits.[3] Secondly, the deponent clearly mentions that she is relying on an interim statement for the period 25 January 2013 up to 3.1 December 2014. If she intended deliberately misleading the court, she would have added the arrears for the months of January and February 2015 which would have driven the arrears to more than R50 000. The fact that she did not do that demonstrates that the information that was used to compile the affidavit was as at 15 January 2015 when the certificate of compliance was compiled, the period around which attorneys would have been given

[3] **Prlnsloo NO and Others v Goldex 15 (Pty) Ltd and Another 2014 (5) SA 297 (SCA) at para**

instruction to institute an action against the applicant.

[35] To put it differently, if the affidavit had been factually accurate as at 2 March 2015 when it was deposed to, it would have stated that the applicant paid an amount of R39,825.42on 3 February 2015 but that· the said amount only covers her arrears until 31 December 2014. The affidavit would have proceeded further to state that the applicant is still in arrears for January and February 2015.

[36] I pause to mention though that a litigant approaching the court on an *ex parte* basis has a duty to the court to make a frank and full disclosure of all known facts that might influence the court in reaching a just conclusion.[4] The respondent was aware that the applicant had made a payment on 3 February 2015 and yet did not mention in its affidavit. This is wrong.

[37] It is possible on one hand that if the court had known of the true facts on 10 March 2015 it might not have granted the order sought by the respondent as she would have only been in arrears for 2 months (for January and February 2015). This is however speculative. I say so because the current practice in this division where only monetary orders are granted where a debtor is in arrears for less than 3 months was not yet applicable. What is clear however is that on the law and this court's practice as it existed at the time, and on the true facts, the court was within its rights to grant default judgment. Be that as it may, it was remiss of the respondent not to have placed the full facts before the court.

[38] I have great sympathy for the applicant for having lost her house. However, in my view, while she has shown that the respondent was remiss with regard to the true facts, she has not shown that as at 10 Match 2015 that she possessed a *bona fide* defence to the claim against her. I reiterate that this is because even taking into account the payment she made on 3 February 2015 (which covered arrears up to 31 December 2014), she would still have been in arrears for the months of January and

[4] Schlesinger v Schlesinger 1979 (4) SA 342 (W); Moila v Fitzgerald [2007] 4 ALL SA 909 (T) at 921 F - G

February 2015. The facts of this case are for this reason distinguishable from the facts in Nkata v Firstrand Bank[5] Section 129(3) of the National Credit Act was not triggered because the applicant was still in arrears when the judgment was granted, in spite of the payment she had made.

[39] In the premises, the application for summary judgment cannot succeed. This is further compounded by the fact that her property has already been sold to a third party who has not been cited in these proceedings. I agree with counsel for the respondent that this is a case where one cannot unscramble the egg, even if the applicant had shown a *bona fide* defence.

Signing of the summons by the Registrar

[40] The applicant contends that the Sheriff had not signed a copy of the summons that was served on her and therefore that the summons were defective. Rule 17(3) of the Uniform Rules provides in peremptory terms that the summons *"shall thereafter be signed and issued by the registrar and made returnable by the sheriff to the court through the registrar."*

[41] While it was held in Noord-Kaap Lewende Hawe Ko-Op Bpk v Lombard[6] that summons not signed by the Registrar constitutes a nullity, it was also held in other decisions including in this division that the copy of the summons that is served need not be signed personally by the Registrar; it sufficient that it bears his name.[7] I agree with the latter decisions. The fact that the applicant received summons not signed by the Registrar does not render the summons a nullity. It is sufficient that they bore his or her name. It is not the applicant's case that the summons did not bear the Registrar's name.

The commissioning of the affidavit

[42] The applicant complains that when the default judgment was granted, the

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[5] 2016 **(4) SA** 257 (CC)
[6] 1988 (4) SA 810 (O)
[7] Minister of Justice v Human 1970(2) SA765(E); Proteas Assurance CO Ltd v Vinger 1970(4) SA663(0); Wiehahn Konstruksie Toerusting Maatskappy (Edms) Bpk v Potgieter 1974(3)

affidavit had not been properly commissioned. This she finds from the transcript of the record of the proceedings. The applicant is indeed correct that the affidavit had not been properly commissioned. However, this factor was pointed out by counsel before the order could be granted. The court stood the matter own for the error to be corrected. In fact, the counsel informed the court that the commissioner of oath was outside the court and would be approached to commission the affidavit. The affidavit was then commissioned. An incorrect date was added by the Commissioner of Oaths. This appears to me to be a bona fide error as explained in the answering affidavit. The Commissioner's confirmatory affidavit is attached to the answering affidavit. The matter was recalled. Of importance is that the court granted the order fully aware that there had been difficulties with the affidavit.

[43] I agree with counsel for the respondent that the court having granted the necessary condonation, the applicant is not entitled to rescission on this ground.

Service of Section 129 Notice

[44] The further argument raised by the applicant is that notice in terms of Section 129 of the National Credit Act, No. 34 of 2005. This contention however lacks merit. The track and trace report show that the notice was indeed served at the applicants address at 14 Centaurus Street, Bloubosrand Ext2, Randburg, 2153. It seems that the applicant misread the tracking report in this regard.

Costs

[45] I reiterate that the applicant has failed to show *bona fide* defence. The rescission application must therefore fail. However, in the light of the respondent having failed to disclose to disclose accurate facts in its affidavit of 2 March 2015 on which it obtained default judgment, this court must show its displeasure by awarding costs against the respondent on a punitive scale.

[46] In the premises, I make the following order:

1. The application for rescission is dismissed.
2. The respondent is ordered to pay the costs of this application on an attorney and client scale.

JA Motepe

Acting Judge of the High Court

Matter heard on: 16 August 2017

Judgment reserved on: 16 August 2017

Applicant appearing in person

Counsel for the respondent: Adv M Riley

Attorneys for the respondent: Hack Stupel & Ross
Pretoria