IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No.: 6910 /2009

In the matter between:

LORRAINE MAUD MARRIOTT **FIRST APPLICANT**

VINCENT PAUL MARRIOTT **SECOND APPLICANT**

and

ABSA BANK LIMITED **FIRST RESPONDENT**

SHERIFF OF THE HIGH COURT
DURBAN SOUTH **SECOND RESPONDENT**

JUDGMENT

Delivered on: 24 August 2010

SISHI J

[1] The applicants brought an urgent application on 18 November 2009 wherein they sought the following relief:

1.1 That the Sale in Execution scheduled to take place on 20 November 2009 at 10h00 on the steps of the High Court,

(Dullah Omar), Masonic Grove, Durban, be and is hereby stayed:

1.2 That the judgment obtained against the applicants by the first respondent in this court, on 24 June 2009 be and is hereby rescinded.

[2] The first respondent consented to the stay of the Sale in Execution.

[3] The issue before this court is an application for rescission of a default judgment granted by this Court against the applicants on 24 June 2009.

[4] The application for rescission has been brought in terms of common law and the applicants must show good cause for the rescission application to be granted. The applicants have to satisfy this Court that the three requirements have been met, namely:

4.1 Giving reasonable explanation for the default;

4.2 Showing that the application is a *bona fide,* and

4.3 Showing that they have a *bona fide* defence to the first respondent's claim which *prima facie* has some prospects of success.

See: ***Colyn v Tiger Food Industries Ltd trading as Meadow Feed Mills (Cape) 2003(6) SA 1 (SCA).***

Reasonable explanation for default

[5] The following facts are either common cause or not disputed by the parties.

5.1 Summons was issued on or about 14 May 2009.

5.2 The applicants had failed to enter an appearance to defend the action.

5.3 Default judgment was obtained against the applicants on 24 June 2009.

[6] The applicants alleged that their reason for failure to enter an appearance to defend was due to the fact that summons never came to their attention.

[7] In opposition to the applicants' version, the first respondent has put up a Sheriff's return of service evidencing service on only the second applicant. The service took place by affixing the process to the outer or principal door of the chosen *domicilium citandi et executandi.* In addition, the first respondent alleges that the applicants must have received the summons as Betsie van Zyl, an employee of the applicants's debt counsellor, acknowledged receipt of such summons on 25 May 2009, during a telephone conversation with Mrs Govender. These allegations have been denied by Betsie Van Zyl in the replying affidavit and should this dispute of fact prove to be definitive in the application for rescission, the applicants request that it be referred to oral evidence for adjudication. The applicants submit that they have furnished a reasonable explanation for their default.

[8] The first respondent alleges that the service on the applicants was effected on 20 May 2009 in their chosen *domicilium citandi et executandi* in terms of the loan agreement and mortgage bond.

[9] On 25 May 2009, Betsie Van Zyl telephoned the first respondent's attorney of record and spoke about the applicants having received

the summons and forwarded a copy of the applicants' application for debt review.

[10] Annexure *"ZE2"* to the answering affidavit specifically records the following: *"Account Number: Summons on Marriot V P and L M",* and *"Date: 25 May 2009"*. It was submitted on behalf of the first respondent that there can be no dispute of fact as alleged by the applicants that the summons was received by the applicants as five days after the Sheriff had served summons on the *domicilium*, Betsie Van Zyl contacted the first respondent's Attorney of record and made reference to the summons.

[11] Counsel for the first respondent referred to the case in ***Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 354 (A) at 353 A***, where the Court held 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 motive".

[12] It is clear from the Sheriff's return of service that the summons was served on the *domicilium* chosen by the applicants on 20 May 2009. Document *"ZE2"* was faxed through by Betsie and it refers

to the summons. This occurred on 25 May 2009, it is therefore highly probable that the only conclusion that can be drawn is that the applicants were aware of the summons on or before 25 May 2009, because clearly Betsie Van Zyl, who is the employee of the debt counsellor, had knowledged receipt of the summons.

[13] Furthermore these allegations are dealt with, as follows in the answering affidavit:

Paragraph 8.2: "On 25 May 2009, Betsie Van Zyl, an employee of J Walter Legal Forum and Associates, telephoned the first respondent Attorney of record and spoke to Mrs Govender an employee of the first respondent's Attorney of record. She advised Mrs Govender that the applicants had received the summons but they were currently under debt review".

Paragraph 8.3: "Mrs Govender requested that Betsie forwards a copy of the application for debt review"

Paragraph 8.4: "The first respondent's annexes marked *"ZE2"* a copy of the document forwarded to Mrs Govender".

Paragraph 8.5: "Upon receipt of annexures *"ZE2",* Mrs Govender telephoned Betsie and advised her that the aforesaid documents did not support their claim that the applicants were under debt review".

[14] In paragraph 8 of the replying affidavits in and in response to paragraph 8.2 of answering affidavit, the following is stated:

"I admit the contents hereof save to deny that Betsie informed Mrs Govender that the applicants had received summons".

[15] In paragraph 9 of the replying affidavit and in response to paragraph 8.3 and 8.4 of the answering affidavit, the following is stated:

"I admit these paragraphs".

[16] In paragraph 10 of the replying affidavit and in response to paragraph 8.5 of the answering affidavit the following is stated:

"I deny the contents hereof and submit that Mrs Govender did not call Betsie back".

[17] It was submitted correctly, in my view, on behalf of the first respondent that the applicants did not want to take the Court to

their confidence and attempt to explain away why there is reference to the summons in annexure *"ZE2"*.

[18] What is important in this respect is the fact that the summons were served by the Sheriff on 20 May 2009 and the telephonic conversation between Mrs Govender and Betsie indicates that summons was mentioned, because clearly on the fax cover sheet it makes mention of the summons, so Betsie not being the applicant but being a representative of the debt counsellor, would have been aware of the summons and the only way she would have become aware of the summons was if the applicants had given her a copy of it or had advised her of it.

[19] The applicants are required to give a reasonable explanation for their default. In the light of the above, I am satisfied that the applicants have failed to give reasonable explanation for their default.

BONA FIDES OF THE APPLICATION

[20] The Applicants allege that the first time they became aware of the default judgment obtained against them was during or about

September 2009. The applicants launched this application for rescission on 18 November 2009.

[21] The applicants alleged that there is a two months delay from the time that they became aware of the judgment until the time they made this application for rescission.

[22] The applicants also alleged that despite the first respondent's intentions being made clear in a letter dated 17 September 2009, Mr Van Zyl was of the opinion that the first respondent would be reasonable upon receipt of the Magistrate's Court restructuring application being forwarded to the first respondent. The second paragraph of the letter of 17 September 2009, reads as follows:

"The documents provided in our opinion appear to be irregular and no proper debt review applications are pending when the action was instituted by ABSA Bank". The explanation given by the applicants is that the debt counsellor did not take this letter seriously. This explanation is not sufficient. The applicants did not say what steps they and why they considered the debt counsellor's attitude towards this letter as reasonable.

[23] The following allegations are made in paragraph 29,31,35 and 36 of the founding affidavit:

- On 28 May 2009, Betsie had a telephone conversation with Mrs Govender and advised her that the applicants were under debt review;

- On 4 August 2009, Mr Rob Meyer called Mr Van Zyl's offices and advised that the applicants were not under debt review;

- On 13 August 2009, Riaan called Mr Van Zyl's Office and also indicated that the applicants were not under debt review;

- On 23 September 2009, all documentation pertaining to the debt review applications were sent to the offices of the first respondent's Attorneys;

- All documentation was once again forwarded on 14 October 2009;

- On 21 October 2009 a letter to Mr Van Zyl's offices attaching a copy of the sale notice pertaining to the sale in execution was forwarded;

- On 28 October 2009, the applicants' Attorney's of record were instructed;

- On 11 October 2009, a letter was forwarded to the first respondent's Attorneys of record.

[24] It was submitted correctly, in my view, on behalf of the first respondent, that the applicants had not shown that this application is *bona fide* for the following reasons:

(1) Annexure "ZE2" clearly reflects that the applicants were aware of the summons at the very latest, by 25 May 2009. Despite the aforesaid, the applicants alleged that they were not aware of the summons.

(2) The applicants have failed to take this Honourable Court to their confidence as they have failed to bring to the Court's attention that

the first respondent had terminated the debt review process on 6 October 2009.

(3) The Sheriff's return of service of the Notice of Attachment in Execution to the applicants was forwarded by registered post on 21 July 2009 to the chosen *domicilium* of the applicants.

(4) The applicants have merely denied receipt of the notice, however, it is noteworthy that the applicants had contacted the first respondent's Attorneys of record shortly thereafter and forwarded documentation to the first respondent's attorneys of record.

[25] Considering all the circumstances set out above, I am satisfied that the applicants are not *bona fide* in this rescission application.

<u>*BONA FIDE* DEFENCE</u>

[26] The applicants allege that their defence is based on the rights afforded to them in terms of section 88(3) of the National Credit Act 34 of 2005 ("The Act").

[27] In terms of the aforesaid section, a credit provider cannot institute legal proceedings against a consumer in circumstances where such

consumer has applied for debt review in terms of section 86 of the Act, without first terminating such debt review process in terms of section 86(10) of the Act.

[28] It is common cause between the parties that the applicants applied for debt review on 14 December 2007. On or about 14 December, Mr Van Zyl addressed notification to all credit providers of the applicants' application for debt review. On or about 31 January 2008, the applicants' application for debt review was successful. On 5 October 2009 the application for debt restructuring was withdrawn.

[29] It was submitted on behalf of the first respondent that it was entitled to execute the action against the applicants because the application for debt restructuring was terminated in terms of section 86 (10) on 6 October 2008. The aforesaid notice was sent to:

- J Walter Van Zyl, fax number 031 301 8824;

- National Credit Regulator, ***mthekiso@ncr.org.za***; and

- Mrs M L Marriot, 42 Zulweni Gardens, Coral Road, Amanzimtoti, 4126"

It was submitted on behalf of the applicants that the Act requires that a section 86 (10) termination notice be addressed to:

"(a) The consumer;

(b) The debt counsellor; and

(c) The National Credit Regulator, at any time at least sixty (60) business days after the date in which the consumer applied for the debt review".

It was submitted on behalf of the applicants that it is common cause that such notification was addressed to the applicants' debt counsellor, however, the first respondent failed to place any evidence before the Court, proving that the notice was sent to the consumer and National Credit Regulator. The first respondents purported termination in terms of section 86 (10) was therefore irregular and invalid.

[30] It was submitted on behalf of the first respondent that, it is common cause between the parties that the first respondent had

terminated the debt review process in terms of section 86 (10) of the Act. If the applicants had specifically raised in the replying affidavit that they dispute that notice was valid, then the first respondent would have asked for leave of the court to file a supplementary affidavit to respond to that dispute and put proof of service. It was further submitted that the applicants had never raised on the papers that they disputed that the first respondent had terminated the debt review process in terms of section 86 (10). That was not the issue between the parties. They therefore cannot raise for the first time in argument from the bar, new issues that are not on the Court papers.

[31] Annexure *"LMM2"* to the founding affidavit, is a letter from the Debt Counsellor to the Credit Provider, which is in terms of the Act and the regulations. In terms of the Act and the regulations, where an application has been made for a debt review, the Debt Counsellor then needs to make a determination as to whether or not the applicant or consumer is over indebted. That letter is dated 31 January 2008, but part of the documentation that was forwarded by the debt Counsellor to the first respondent's Attorneys of record, contains the exact same letter but dated 13 June 2008. It is the exact same letter, their references are the same, it is only the date

that is different. The substantive information that this letter is conveying is the notice to advise:

(a) Whether the consumer's application for debt review was rejected, or

(b) Whether the consumer's application for debt review was successful or

(c) Whether the consumer's debt application had been restructured.

[32] The Court cannot determine when the Debt Counsellor made the determination that the applicants were over indebted because they have two documents from the same Debt Counsellor, with different dates, one is dated 31 January 2009 and the other is dated 13 June 2008.

[33] In terms of regulation 24, of the regulations promulgated in terms of the Act, the determination must be made within 30 business days, and regulation 24.6 provides as follows:

"Within thirty (30) business days after receiving an application in terms of section 86(1) of the Act, a Debt Counsellor must make a determination in terms of section 86(6)."

[34] The first respondent has raised specifically that this whole application is irregular and in fact there is no application that is pending. But what is most important and it is also common cause between the parties is that on 5 October 2009, the application for debt restructuring before the Magistrate was withdrawn.

[35] It is therefore clear that one cannot ascertain when the determination was made, whether it was made on 31 January 2009 or on the 13 June 2008. There is also no explanation why there was non-compliance with the Regulations and the Act.

[36] When the Court asked Counsel for the applicants, when was the application launched in the Magistrate's Court, reference was made to the affidavit which was deposed to on 28 August 2008. It is clear from the papers that, that application had not been made by 7 October 2008 because if one refers to page 127 of the papers, the response to the section 86(10) notice by the first respondent, the Debt Counsellor said in the first paragraph thereof:

"I am in the process of making an application to the Court and as soon as I am allotted a case number, and the court date, I will notify you".

This is from a letter dated 7 October 2008, from the Debt Counsellor to the manager of ABSA Bank. It is, however, common cause between the parties that the application was withdrawn on 5 October 2008. When the letter terminating the debt review, which is dated 6 October 2008 was written, there was no application for debt restructuring.

[37] Considering all the above, I am satisfied that the first respondent had validly terminated the debt review process. Even if this finding is wrong, it is common cause between the parties that the application for debt restructuring was withdrawn on 5 October 2008, the letter terminating the debt review is dated 6 October 2008. There was therefore no proper and valid application for debt review pending in the Magistrate's Court.

[38] In the premises, I am satisfied that the applicants have failed to show good cause for the rescission of the judgment sought to be rescinded.

[39] In the circumstances, the application for rescission must fail.

[40] In the result, I make the following order:

(1) The applicants' application for rescission of the default judgment granted by this Court against the applicants on 24 June 2009 is dismissed with costs.

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SISHI J

JUDGE OF THE KWAZULU-NATAL HIGH COURT - DURBAN

Date of Hearing	:	15 March 2010
Date of Judgment	:	24 August 2010
Applicant's Counsel	:	S HOAR
Instructed by	:	McKenzie Dixon Attorneys 14 Acacia Avenue Westville Ref : D J Stilwell/vs/M018-0001
Respondent's Counsel	:	M. G. DE KLERK
Instructed by	:	Pearce du Toit & Moodie 8th Floor, Mercury House 320 Anton Lembede (Smith) Street DURBAN Ref: JDT/ng/11/A135/493