REPUBLIC OF SOUTH AFRICA

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

CASE NO: 28687/2010

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

25 FEBRUARY 2015 **FHD VAN OOSTEN**

In the matter between

NNYANE JOSEPHINE MEKGOE	**APPLICANT**
And	
FIRSTRAND BANK LTD	**FIRST RESPONDENT**
THE SHERIFF OF THE HIGH COURT RANDBURG	**SECOND RESPONDENT**
VISION POINT PROPERTIES CC	**THIRD RESPONDENT**
REGISTRAR OF DEEDS	**FOURTH RESPONDENT**

Judgment – Execution - immovable property - pursuant to sale in execution following upon judgment by default - application for rescission of default judgment - requirements - reasonable and acceptable explanation for the default in appearance - no explanation for default - bona fide defence carrying some prospect of success - none shown to exist - application dismissed

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J U D G M E N T

VAN OOSTEN J:

[1] This is an application for firstly, declaring a sale in execution of an immovable property pursuant to a warrant of execution issued in consequence of a judgment by default, unlawful; secondly, rescission of the default judgment, thirdly, re-registration of the property sold in execution to the third respondent into the name of the

applicant, and fourthly, an interdict against the third respondent from evicting the applicant from the property. The first respondent (the bank) and the third respondent oppose the application.

[2] It is at the outset necessary to comment on the ineptness and lack of preparation by the applicant's legal representatives in presenting this case to this court. The notice of their appointment as attorneys of record on behalf of the applicant is dated 16 January 2015. The notice of set-down by the bank's attorneys of this application, for hearing on 23 February 2015, was served by the sheriff on the applicant's son, on 5 January 2015. The papers in this matter, I was informed, were paginated by the bank's attorneys. The applicant's attorneys did absolutely nothing to ensure that the practice directives applicable to opposed applications were complied with. The court bundle of documents was still incomplete and had not been properly paginated and indexed when the matter was heard. Counsel for the applicant failed to file either a practice note or heads of argument, as is required by the practice directive of this court. When the matter was called on the date allocated for hearing (Monday 23 February) counsel for the applicant was due to some misunderstanding, not present in court and in his absence the application was dismissed with costs. The matter was again called later that day but could not be heard as counsel for the third respondent was not available. The next day the matter was called out of turn and in the absence of any objection I recalled the order I had made the previous day. By then counsel for the applicant had still not made any attempt to file either a practice note or heads of argument. A notice of amendment of prayers 1 and 2 of the notice of motion was simply handed up. No amended pages reflecting the amendment had been prepared. Both counsel for the respondents raised no objection to the proposed amendment and in order to waste no further time I granted the amendment.

[3] Counsel for the applicant then sought a postponement of the application in order to, as I understood his argument, file further affidavits. Counsel was unable to and seemingly failed to enlighten me as to the aspects that required to be dealt with in the further affidavits. No grounds for a postponement of the application were advanced and counsel for the respondents, in my view, correctly submitted that a postponement would, apart from delaying the adjudication of the application, not serve any useful purpose. The ensuing argument presented on behalf of the parties

fully dealt with the merits of the application. At the conclusion thereof I made the order appearing at the end of this judgment and indicated that my reasons for the order would be delivered later. What follows are those reasons.

[4] Some background facts. In 2007 the applicant was granted a loan facility by the bank in the amount of R1 026 000-00 for the purchase of a residential property described as Erf 388, Kensington B Township, in the province of Gauteng (the property) and a bond securing the loan was registered over the property in favour of the bank. The applicant is alleged to and indeed admits having defaulted as early as in 2008, in making the required payments due under the bond. Pursuant to the bank's notice in terms of s 129(1) of the National Credit Act, 34 of 2005, the applicant applied for debt review and debt review proceedings followed but were terminated by the bank on 9 July 2010. The bank instituted action against the applicant on 23 July 2010 in which it claimed payment of the full amount due under the bond, interest thereon, costs of suit and addition thereto an order declaring the property specially executable. Service of the summons was effected by the sheriff on 25 August 2010 by way of affixing a copy of the summons to the principal gate at the address of the property, which was the applicant's chosen *domicilium citandi et executandi*. No appearance to defend was entered and judgment by default in favour of the bank against the applicant for payment of the sum of R1 334 947.53, interest thereon, costs as well as an order declaring the property specially executable was granted by the Registrar of this Court, on 12 November 2010. On 12 November 2010 a writ of attachment was authorised and issued. The warrant of execution and writ of attachment were served by the sheriff on the applicant personally, on 13 December 2010.

[5] Three sales in execution followed. The first on 11 July 2011. It was however, cancelled by order of this court (Meyer J) and leave granted for the property to again be sold in execution. The second on 10 April 2012, but it was likewise cancelled by order of this court (Francis J) and leave granted for the re-sale thereof. Lastly, on 28 November 2013. On 13 November 2013 a notice of the sale in execution on 28 November 2013, was served by the sheriff, by way of affixing a copy of the notice to the principal door of the house at the property. The third respondent was the

successful bidder at the sale in execution for the purchase price of R610 000-00 and the property was subsequently, on 11 April 2014, transferred into its name.

[6] In June 2014 the third respondent launched an application for the eviction of the applicant from the property, in the Magistrate's Court, Randburg. The application was served on the applicant on 5 June 2014. The applicant filed an answering affidavit in that application, which is still pending I assume pending the outcome of this application.

[7] The notice of motion in the present application is dated 17 June 2014, some two weeks after service of the eviction application on the applicant. The applicant states in the founding affidavit in this application that she had been informed of the sale in execution of the property, but she makes no mention of the date thereof. She further states that she received a telephone call from the bank 'during the course of 2014 June' advising her that the property had been sold and that she should make new arrangements for payment of the shortfall.

[8] The requirements for obtaining rescission of a default judgment are well-established: first, the existence of a reasonable and acceptable explanation for the default in appearance and second that a *bona fide* defence, carrying some prospect of success, exists (see *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A); *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A)353). I turn now to consider whether the applicant has satisfied these requirements.

[9] As for the first requirement the applicant has failed to advance any explanation for her default. The applicant does not state that she did not receive a copy of the summons. However, in order to deal with the real issue between the parties, I shall assume (without deciding) that the applicant did not receive a copy of the summons which, as I have alluded to, was affixed to the principal door of the house where she was living.

[10] This brings me to the defence relied on by the applicant. Firstly, reliance is placed on a Quick Sale Plan agreement (the agreement) she had concluded with the bank on 25 March 2011, some 4 months after the granting of the default judgment. A copy of the agreement is attached to the papers. In summary it provides for the bank, on behalf of the applicant, to sell the property within a marketing period of 90

days from the date of signature, and to deduct the proceeds of a successful sale from the amount owing by the applicant under the bond and further that the applicant would remain liable to the bank for payment of any shortfall. In regard to the agreement the applicant states 'that the agreement was not honoured' by the bank. The relevance of the agreement is not dealt with by the applicant at all. Nor can it have any relevance to a possible defence. The marketing period obviously has expired a long time ago and the property was not sold. The agreement, in any event, fully reserves the rights of the bank under the bond and specifically provides that the 'foreclosure action', should the property not be sold in the marketing period, 'shall continue'.

[11] Finally, the defence was raised that the default judgment was granted 'unlawfully' by which is meant that it was granted by the Registrar of this court without judicial oversight, which was held to be unconstitutional by the Constitutional Court, in *Gundwana v Steko Development and others* 2011 (3) SA 608 (CC). The default judgment in the present matter was obtained prior to the declaration of unconstitutionality. As to the retrospectivity of the order in *Gundwana*, Froneman J held:

'[57] But what about retrospectivity? In *Jaftha*, this Court placed no limit on the retrospectivity of its order. The declaration of invalidity of the legislative provisions in that matter did not entail, however, that all transfers made subsequent to invalid execution sales were automatically invalid. Individual persons affected by the ruling still needed to approach the courts to have the sales and transfers set aside if granted by default. This was made clear in *Menqa and Another v Markom and Others*.[1] A similar approach should be followed here.

[58] There may be a fear that the decision in this matter will lead to large-scale legal uncertainty about its effects on past matters where homes were declared specially executable by the registrar and sales in execution and transfers followed. The experience following *Jaftha* may be an indication that this fear is overstated. It must be remembered that these orders were issued only where default judgments were granted by the registrar. In order to turn the clock back in these cases aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule under which the property was declared executable is not sufficient to undo

[1] 2008 (2) SA 120 (SCA). See also *Campbell v Botha and Others* 2009 (1) SA 238 (SCA).

everything that followed.[2] In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier and they will have to set out a defence to the claim for judgment against them.[3] It may be that in many cases those aggrieved may find these requirements difficult to fulfil.'

[12] Save for relying on the alleged unconstitutionality of the default judgment, the applicant has failed to make out any defence. The property was sold to the third respondent and transferred into its name before this application was launched. The third respondent was clearly a *bona fide* purchaser (see *Knox NO v Mofokeng and others* 2013 (4) SA 46 (GSJ) para [5]). This court should carefully consider the consequences of rescission of the default judgment (cf *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) 217B, quoted with approval in *Abraham v City of Cape Town* 1995 (2) SA 319 (C) 322), which include the nullifying of the default judgment and the re-registration of the property into the name of the applicant, who has since 2008 not shown either a financial ability to pay the bond instalments or any defence to the bank's claim. Finally, the financial loss the third respondent will suffer cannot be justified on any basis. I am accordingly satisfied that no good reason exists for interfering with the status quo.

[13] In the result the following order is made:

1. The application is dismissed.
2. The applicant is ordered to pay the first and third respondents' costs of the application.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT ***ADV MS SEBOLA***

[2] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paras 27-38 and *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; Case No CCT 39/10, 13 November 2010, as yet unreported at paras 81-5.

[3] *Grant v Plumbers (Pty), Ltd* 1949 (2) SA 470 (O); *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I-765D; and *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042.

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THIRD RESPONDENT'S ATTORNEYS	*BRUNO SIMAO ATTORNEYS*
DATE OF HEARING	*24 FEBRUARY 2015*
DATE OF ORDER	*24 FEBRUARY 2015*
DATE OF REASONS	*25 FEBRUARY 2015*