IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19767/2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGE: No
(3) REVISED:

In the matter between

KUBHEKA, ZUZILE CHARITY	**APPLICANT**
And	
NEDBANK LIMITED	**1st RESPONDENT**
THE SHERIFF RANDBURG SOITH WEST	**2nd RESPONDENT**
MIKOUHE SHARES MULAUDZI	**3rd RESPONDENT**

In re:

NEDBANK LIMITED	**APPLICANT**
And	
KUBHEKA, ZUZILE CHARITY	**RESPONDENT**

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is *deemed to be 14:00 on 26 April 2022.*

JUDGMENT

LENYAI AJ

[1] In this application, the applicant seeks the rescission of an order granted on the 1st August 2019 in terms of Rule 46A of the Uniform Rules of Court, wherein a default judgement was granted against her in the amount of R1 053 063.19 plus interest thereon and an immovable property registered in her name was declared especially executable.

[2] The applicant further seeks an order that she be afforded an opportunity to sell the property on the open market within a period of three months failing which the property may be re-auctioned, alternatively

[3] The issue of the reserve price of the property be referred back to the Court for the determination of another reserve price, following submissions to be made by the applicant within 10 days of the granting of the order.

[4] It is common cause between the parties in terms of the joint minutes, that the applicant fell in to arrears with her mortgage loan instalments. The first respondent (the bank) afforded her the opportunity to sell the property through the bank's assisted sales program but this did not materialise because the applicant did not fully cooperate. The bank and the applicant entered into an agreement in terms of which the applicant's repayment terms were restructured, however the applicant did not adhere to the terms of the

agreement. This resulted in the bank proceeding with legal action and eventually having the property being declared especially executable.

[5] The first respondent in its answering affidavit contends that the deponent to the applicant's founding affidavit does not have the authority to represent the applicant because the copy of the special power of attorney relied upon by the deponent was signed outside the country and has neither been authenticated nor has the original thereof been made available to the court.

[6] The applicant in her replying affidavit contends that if the first respondent hastaken a point that the deponent to the founding affidavit has no authority, then she is also taking a point that the she did not receive personal service of the summons or the warrant of execution as she was in the United Kingdom at the time of service of the documents.

[7] During the hearing of the matter and after extensive arguments by the Legal representatives of both parties, the first respondent abandoned its point in limine on the issue of the authority of the deponent to the founding affidavit as well as the authenticity of the special power of attorney and the applicant conceded that she was properly served and abandoned her point that she was not personally served.

[8] The applicant filed an application for leave to file a supplementary affidavit after the parties had filed the customary affidavits, heads of argument and practice notes which application is opposed by the first respondent. I will deal first with this application and shall return to the rescsission application afterwards.

[9] The applicant seeks firstly condonation for the late filing of the affidavit and avers that the power of attorney was sent to her in February 2020 and she could not have it signed before a notary public or the South African High

Commissioner in London as she received the document at the start of the lockdown in England which was caused by the Covid-19 pandemic.

[10] The applicant further avers that she was advised she had two options available to her. The one option was to withdraw this application and to bring an application to cancel the sale in excecution on the basis that she had not received the Summons or the Warrant of Excecution and on the basis that she was not aware that she was in arears at all as well as on the basis that the Reserve Price of the sale in Excecution was hopelessly understated. The other option "was to file this Application (with the permission of this Honourable Court, of course) and to include what I would have said in that Application, with what has already been said in this one."

[11] The applicant avers that she stands to lose her property and after the sale in execution she will still be indebted to the fisrt respondent until she settles the outstanding balance. She would also be indebted to the City Council of Johannesburg because in terms of the original papers filed by the first respondent, the third respondent only has to pay arrear rates and taxes in terms of Section 118(1) of the Local Municipal Systems No 32 of 2000 in respect of the last two years.

[12] The applicant further contends that the first respondent would benefit from the sale being cancelled as the property could be sold for its true value and it together with the municipality would be paid in full. The applicant also avers in her affidavit that she was not aware of the fact that summons had been issued and served. This point was however abandoned as she conceded during the hearing that she was infact served and I will not say anything further.

[13] The applicant further contends that the issue of the reserve price was not properly considered by the court as not all the relevant facts were placed before the court. The estimated market value of the property of the first respondent of R950 000,00 was very low and it was made by an employee of the first respondent and was therefore not independant. She wished to place

the valuation she obtained from an estate agent which puts the valuation at a higher amount of between R 1 560 000.00 and R1 750 000.00.

[14] The first respondent in opposing the application contends that the applicant has not alleged anything new in the founding affidavit. She is dealing with the main points of her rescission application and is actually trying to address the deficiencies in her main application, namely, her failure to deal with the authentification of the power of attorney which the deponent is relying upon, the issue that she was not personally served and that the reserve price is too low. The first respondent contends that the applicant has not furnished the court with any explanation as to why she failed to deal with the issues fully in her replying affidavit in the rescission application. The first respondent contends that the applicant is deliberately dragging her feet in finalizing the application so as to derive maximum benefit from the delay occasioned in the finalization of the transfer of the property pursuant to the sale in execution in terms of the judgement.

[15] It is a well established principle in our law that it is in the interests of the administration of justice to require adherence to well established rules and that those rules should in the ordinary course be observed. **James Brown & Hamer (Pty) Ltd v Simmons 1963 (4) SA 656 (A) at 660 E-G**.

[16] A party seeking to introduce further affidavits in proceedings is seeking the indulgence of the court. In the matter of **Bangtoo Bros and Othres v National Transport Commission and Others 1973 (4) SA 667 (N) at 680B**, the court held that where supplementary affidavits do not deal with new matters arising from the reply by an applicant or evidence which came to the attention of the parties subsequent to the filing of their affidavits, the party seeking the indulgence must provide an explanation which is sufficient to assuage any concern that the application is *mala fide* or that the failure to have introduced the evidence in question is not due to a culpable remissness of such party.

[17] In the matter of **Standard Bank of SA v Sewpersadth and Another 2005 (4) SA 148 (C)**, the court held that for a court to exercise its discretion in favour of a litigant who applies for leave to introduce an affidavit outside of the rules relating to the number of sets of affidavits and the sequence thereof, such litigant must put forward special circumstances explaining its failure to deal with the allegations therein within the parameters of the applicable rules.

[18] Turning to the matter before me, it is my view that the applicant has not given any explanation which is sufficient to allow the court to condone the departure from the normal rules of court for the filing of affidavits in motion proceedings as clearly stated in the matters of **Bangtoo** and **Sewpersadth** supra. The applicant in her affidavit does not deal with any new issues arising from the affidavits filed or any new evidence which came to the attention of the parties.

[19] The application for leave to file a supplementary affidavit is declined and the supplementary affidavit filed by the applicant will not be considered by the court in adjudicating the matter.

[20] Turning to the application for rescission, the issue that the court has to determinine is the reserve price. The applicant contends that the reserve price set by the court is hopelessly low because the information put at the court's disposal was inadequate with regard to the valuation of the property. The valuation was made by an employee of the first respondent which renders it questionable and biased. The applicant further contends that no person entered the property and examined it and consequently would not have been aware of any renovations, repairs and improvements made to the property.

[21] The applicant further contends that the municipal valuation placed by the first respondent at the disposal of the court was R950 000.00 which was ridiculously low and it resulted in the calculations of the reserve price coming to an amount of R400 000.00 which is unrealistic and unfair, unjust and unconstitutional. The applicant attached to the founding affidavit two municipal accounts one dated June 2015 which reflected the municipal value of the

property to be R1 070 000.00 and another dated August 2019 reflecting the municipal value at R1 485 000.00.

[22] The applicant in her heads of argument submits that the judge could not have been given the correct municipal valuation as alleged in the answering affidavit. She further submits that the applicant should have been required to be present to debate the issue of the reserve price.

[23] The applicant contends that the judgement must be rescinded and alternatively the reserve price should be set aside as it was erroneously granted in the absence of the applicant.

[24] The first respondent on the other hand avers that their answering affidavit was filed out of time and explained in their application for condonation that the delay was due to the national lockdown period which was imposed during March 2020. This resulted in the first respondent being unable to timeously sign and depose to the affidavit. The applicant indicated in the replying affidavit that the first respondent's application for condonation will not be opposed. After hearing the respondent's submission and reading the papers I am satisfied with the reasons submitted by the first respondent and the condonation requested is granted.

[26] The first respondent avers that the applicant has brought the rescission application in terms of Rule 42(1)(a) of the rules of the Superior Courts. This rule provides that a court may, *mero motu* or on application of a party affected thereby, rescind or vary a judgement which has been erroneously sought or erroneously granted in the absence of such party.

[27] Rule 42(1)(a) is a procedural step which has been designed to correct in an expeditious fashion, an obviously wrong judgement or order. This principle is clearly set out in the matter of **Promedia Drunkkers & Uitgewers (Edms) Bpk v Kaimowitz and others 1996 (4) SA 411 (C) at 417.**

[28] To give purpose to rule 42(1)(a) and the rule being a discretionary remedy, it is necessary for an application in terms thereof, to be brought within a reasonable time. What would be considered a reasonable time would depend on the circumstances of each case. Our courts have stated the following, the 20 day period stipulated in Rule 31(2)(b) provides guidance as to the reasonable time within which to bring the application for rescission in terms of Rule 42(1)(a). In the matter of **Nkata v Firstrand Bank Ltd and Others 2014 (2) SA 412 (WCC) at 420, para [27]**, the court held that the requirement of finality in litigation and the prejudice which can arise from an applicant for rescission not acting promptly, is the reason the requirement for a time limit exists.

[29] The first respondent avers that the judgement that is sought to be rescinded was granted on the 21st August 2019. It is not clear from the applicant's papers when she became aware of the judgement, however the court order and the writ of attachment were served on Mr M Shwala (applicant's brother) on the 14th September 2019. The application for rescission was served on the first respondent on the 13th February 2020 which is almost five months after the order was granted and the applicant has consistently failed to prosecute the application in accordance with the time limits in terms of the rules and practice directives of the court. The applicant's heads of argument were only delivered on 15 October 2020 after an application to compel had been brought by the first respondent. From the facts of the matter the applicant has not put forward any reasonable explantion for the delay in bringing the application for rescission before court in terms of Rule 42 of the Superior Courts Act.

[30] The applicant further alleges that the order was erroneously granted in her absence and she should have been given an opportunity to address the court on the issue of the reserve price. She avers that the reserve price of the property was wrongfully set and the matter should be referred back to court for a redetermination thereof, in the event the judgement is not rescinded.

[31] It is established law that where a judgement has been granted in a procedurally competent manner, it cannot be regarded to have been orrenously sought and granted because the court was unaware of facts which had a bearing on the outcome of the case. In the matter of **Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at para [27]**, the court held that:

"*Similarly, in a case where a plaintiff is procedurally entitled to judgement in the absence of the defendant the judgement if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgement by default like the judgement we are presently concerned with, does not grant the judgement on the basis that the defendant does not have a defence: it grants the judgement on the basis that the defendant has been notified of the plaintiff's claim as rquired by the Rules, that the defendant, not having given a notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgement into an erroneous judgement."*

[32] Turning to the matter before me the applicant in my view seeks to have a second bite at the cherry. The applicant wants to be given an opportunity to present evidence before the court which may have an impact of showing that the reserve price that was set is too low because not all relevant information was put before the court. The applicant wilfully chose not to participate in the litigation despite being aware of the matter and its legal consequences, she cannot now cry foul after judgement was granted against her. In accordance with the matter of **Lodhi** supra, even if the evidence provided by the applicant was admissible and her argument is cogent, this would not render the judgement susceptible to being declared an erroneous judgement.

[31] A judgement may also be rescinded in terms of common law, where a judgement was granted by default, in terms of Rule 31(2)(b). The applicant has chosen to to bring the application in terms of Rule 42, this does not

preclude a court from granting the rescission application on a different legal basis. This principle is clearly stated in the matter of **De Wet v Western Bank Ltd 1977 (4) SA 770 (T) at 780H-781A**.

[32] In the matter of **Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at 529, para [6],** the court held that in order for an applicant to succeed with an application in terms of the common law and rule 31(2)(b), one would have to satisfy the court that that there is sufficient or good cause . Sufficient cause is defined in our jurisprudence as the appellant having to show a reasonable and acceptable explanation of his or her default, and must also show a *bona fide* defence that has some prospect or probability of success. In order for the applicant to succeed in showing sufficient or good cause, it is necessary to show an absence of willful default. Willful default implies a deliberateness in the sense of knowledge of the action, its legal consequences and a concious and freely taken decision to refrain from giving notice of intention to oppose, whatever the motive of this decision might be.

[33] Turning to the matter before me, the applicant has conceded that she was properly served of the summons, and the deponent to the founding affidavit had stated that *" I gave up and did not oppose the Application. I felt that I had nothing to add to the facts before the court."* The applicant therefore did not oppose the application for the judgement and executability. It is my view that the applicant was aware of the application and that there was a real possibility that the property would be declared especially executable and despite this knowledge elected not to oppose the matter. From the facts the applicant knowingly elected not to oppose the matter, this in my view was deliberate and therefore willful.

[34] In the premises , the following order is made :

(a) The application is dismissed with costs.

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M.M.D LENYAI

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel/Attorney for the Applicant: Mr Brian C Clayton
Instructed by: Brian C Clayton & Co

Counsel for the 1st Respondent: Adv ER Venter
Instructed by: DRSM Attorneys

Date of hearing: 31 January 2022
Date of judgment: 26 April 2022