REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

23/2/16

CASE NO: 77025/2009

Not reportable

Not of interest to other judges

In the matter between:

KATHLEEN MAPULA KEKANA **Applicant**

and

CHANGING TIDES 17 (PROPRIETARY) LIMITED N.O. **Respondent**

JUDGMENT

PETERSEN AJ:

Introduction

[1] This is an application for rescission, enrolled by the respondent, after the applicant failed to file a replying affidavit. At issue is an order granted by default by Jordaan J on 9 January 2017 for the sum of R484 822.68 with interest thereon at the rate of 10.80% per annum from 1 September 2016 to date of payment; together with an order declaring the property, being Erf 6821 Atteridgeville Township, Registration Division J.R., Gauteng Province, in extent 569 (Five Hundred and Sixty Nine) Square Metres, held by Deed of Transfer T77662/2011, specially executable.

[2] The application for rescission was brought on the 7 July 2017, six (6) months after the granting of default judgment. The applicant states in her founding affidavit as one of the grounds for rescission that she first learnt of the judgment against her during March 2017 when she received a telephone call from her friend informing her that the said property has been advertised in the Government Gazette for sale in execution. The return of service from the Sheriff of the Court, however, indicates that the Writ of Attachment was served on the applicant personally at her place of residence on 8 February 2017 at 10h54. This casts serious doubt on the credibility of the applicant. No condonation has been sought by the applicant for the late filing of the application. The applicant has failed to comply with rule 31(2)(b) of the Uniform Rules of Court.[1]

Point in limine

[3] The property was sold in execution on 16 May 2017 by the Sheriff of the Court to Monosi Ingrid Mapeleng ("Ms Mapeleng"). The respondent raises a *point in limine* that the property having been sold on 16 May 2017, the purchaser Ms Mapeleng and the Sheriff of the High Court have a direct and substantial interest in the matter and should have been joined to the proceedings. The respondent accordingly seeks a dismissal of the application as a result of the non-joinder. The relief sought by the respondent in this regard is fully justified. On this basis alone the application stands to be dismissed. However, I consider it appropriate that the grounds for rescission raised by the applicant be considered, to bring finality to the matter.

The grounds for rescission

[4] The applicant relies on the following grounds in support of the application for rescission:

(1) the affidavit deposed to in the default judgment by a certain Alricka Jeneveve Philander constitutes hearsay evidence in that the deponent cannot testify to the applicants' relationship with the respondent which exceeds eight (8) years.[2]

(2) the applicant never received the section 129 notice;[3]

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[1] Rule 31(2)(b): "A defendant may within 20 days after he has knowledge of such judgment apply to the court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it seems meet."

[2] Paras 7.1 to 7.3 of the Founding Affidavit

[3] Para 7.6 and 10 of the Founding Affidavit

(3) the respondent has securitized the bond and therefore lacks the necessary *locus standi* to foreclose on the property;[4]

(4) the applicant never attended the respondents' place of business to sign or complete any documents to assess affordability and as such no pre-assessment of affordability was done by the respondent constituting reckless credit in terms of section 80(1)(a) of the National Credit Act 34 of 2005.

[5] The application for rescission, premised on the grounds relied upon, is essentially sought in terms of Uniform Rule 42(1)(a) and (b), which provides that:

"42(1) 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;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission; ..."

[6] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) Jones AJA held as follows at paragraphs 5 and 6:

'5 It is against this common-law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The Rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the Courts a discretion to order it, which must be exercised judicially...

6 Not every mistake or irregularity may be corrected in terms of the Rule...Because it is a Rule of Court its ambit is entirely procedural.'

<u>The first ground</u>

[7] The applicant contends that the affidavit utilized in seeking default judgment was deposed to by a certain Alricka Jeneve Philander. It is not clear from the papers where and under which circumstances the applicant came on the aforementioned name, as the affidavit relied on in the application for default judgment was in fact deposed to by a certain Fatima Adam. This ground for rescission is therefore fatally flawed.

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[4] Para 8 of the Founding Affidavit

The second ground

[8] The applicant contends that the respondent did not comply with the provisions of section 129 as nothing more than an inference is made regarding the delivery of the section 129 notice. The decision in *Kubyana* v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC) at paragraph 54 is apposite in respect of section 129 notices:

'54 The Act prescribes obligations that credit providers must discharge in order to bring s129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that —
(a) the s129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;
(b) the Post Office issued a notification to the consumer that a registered item was available for her collection;
(c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and
(d) a reasonable consumer would have collected the s129 notice and engaged with its contents. This may be inferred if the credit provider has proven *(a)* – *(c)*, which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.'

[9] In the present application the bank has discharged its obligations set out in section 129. It is common cause that the applicant resided at 11 Shilote Street, Atteridgeville. The section 129 notice was sent to the said address on 13 September 2016 via registered mail, with a first notification for collection being issued by the correct Post Office on 15 September 2016, according to the track and trace report. There is no evidence to rebut this. It can therefore safely be inferred that the notice came to the attention of the applicant, notwithstanding her averment that she had not personally received such notice. The applicant concedes that she is indebted to the respondent albeit that she denies that she owes any of the amounts claimed.[5] She could reasonably only be aware of this state of affairs through the section 129 notice sent to her by the respondent via registered mail.

[5] Para 10 of the Founding Affidavit

The third ground

[10] The applicant fails to substantiate the bald allegation with documentary proof. The respondents' bond documents which were brought to the attention of the applicant as an annexure to the particulars of claim is a true copy of the original with no indication of same having been ceded or endorsed in favour of a different entity.

The fourth ground

[11] The applicant as an alternative to the merits of her defence alleges that she had not attended the respondent's place of business to sign or complete any documents to assess affordability and therefore denies that the respondent did a proper and adequate enquiry into the applicant's ability to service and repay the debt. The applicant further denies that the respondent took any steps to assess her understanding of the risks and costs of the proposed credit and her rights and obligations under a proposed credit agreement. The respondent through annexures to its answering affidavit disproves all these allegations by the applicant. The said annexures include the application form for the home loan, an income and expenditure statement compiled by the applicant, an asset and liability statement completed by the applicant, bank statements supplied by the applicant in respect of her bank account held at ABSA and an acceptance letter addressed to the applicant.

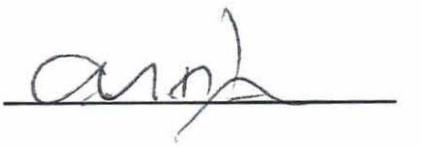
Conclusion

[12] The applicant has not shown that the judgment was erroneously sought or erroneously granted or that it contains any ambiguity, patent error or omission as required by uniform rule 42(1)(a) and (b). In respect of costs, I do not propose to mulch the applicant with a further punitive cost order. I have considered the fact that the applicant is a lay person who has clearly been misled by an institution referred to as Legal Smart, purporting to be her attorneys of record whilst making no appearance in this court. It is further clear that the applicant has been misled to depose to an affidavit making no reference to their involvement in the drafting of the affidavit and portraying the affidavit to have been drafted on advice provided to her by "friends", which she tested against research on the internet and general research

by herself. The applicant herself states that she is a layman, with no legal qualification. The very purport of the drafting of the founding affidavit speaks to the involvement of a person or persons who are legally qualified.

Order

[13] In the result the application for rescission of judgment is dismissed with costs.



AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

For the Applicant: No appearance

For the Respondent: Adv. P.I. Oosthuizen

Instructed by: Velile Tinto and Associates

Date heard: 19 February 2018

Date of judgment: 23 February 2018