IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 48319/2018

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

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SIGNATURE DATE

In the matter between:

FLORENCE LILLIAN KOLOKO **APPLICANT**

And

NEDBANK LIMITED **RESPONDENT**

JUDGMENT

PHAHLAMOHLAKA AJ

INTRODUCTION

[1] According to the amended notice of motion the Applicant is seeking an order in the following terms:

1.1 It is declared that the Court did not have jurisdiction to entertain the action instituted by the Respondent through the combined summons issued on 11 July 2018.

1.2 The Court Order granted on 17 September 2020, in the matter between Nedbank Limited and Florence Lillian Koloko under Case Number 48319/2018, is null and void, and is hereby set aside.

ALTERNATIVE TO 1 AND 2 ABOVE

1.3 The Court Order granted on 17 September 2020, in the matter between Nedbank Limited and Florence Lillian Koloko under Case Number 48319/2018, is null and void, and is hereby rescinded and set aside.

1.4 Costs of this application on attorney and client scale.

1.5 Further and/or alternative relief.

BACKROUND FACTS

[2] The Respondent obtained an order by default against the Applicant on 17 September 2020 in the following terms:

2.1 *That the Applicant must pay the Respondent an amount of R1 329 890.52;*

2.2 That the Applicant's property is declared specially executable and a warrant of execution was authorised;

2.3 That a reverse price of R800 000 was set for the sale of the property; and

2.4 That the Applicant pays the costs on attorney and client scale."

BASIS FOR THE RELIEF SOUGHT

[3] The Applicant lists the following as a summary of the basis for the relief sought:

3.1 By *what principle of law is the Respondent entitled to obtain the court order by default against me when a plea and a notice of intention to defend are, at the time of making the order, in the court file?*

3.2 There is no provision either in rule 31(2)(a) or Rule 31(5)(a) of the Uniform Rules of the Court for the Respondent to bring an application for default judgment in such circumstances.

3.3 bringing an application for default judgment without complying with the Uniform Rules of the Court simply means that a condition precedent for presenting such an application was not complied with;

3.4 The jurisdiction facts – namely the absence of a Notice of Intention to Defend and absence of plea – did not present themselves in this matter. Thus, the court had no jurisdiction.

3.5 A court that has no jurisdiction is incompetent to give a valid Court Order. Any court order that it makes is void. This is such in matter.

3.6 Moreover, bringing an application for default judgment where there is no compliance with the Uniform Rules of Court is obtaining a judgment by committing fraud (i.e. misleading the court). This should never be tolerated. This court order is therefore liable to be rescinded and set aside on the basis of common law.

3.7 The court order is further liable to be rescinded on the basis of Rule 42(1) (a) of the Uniform Rules of Court on the basis that it was erroneously sought or granted by the court. A court simply cannot make an order for default where there is in fact no such default.

3.8 *The claim for acceleration of the debt is unlawful*."

APPLICABLE LAW

[4] In terms of common law, a court has a discretion to grant rescission of judgment where sufficient or good cause has been shown that there is a reasonable explanation for the default, that the application was *bona fide* and that the applicant has a bona fide defence which prima facie has reasonable prospects of success.

[5] In terms of Rules 42(1) (a) 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:

1. An order or judgment enormously sought or erroneously granted in the absence of any party affected thereby;"

EVALUATION

[6] According to the opposing affidavit of the Respondent[1], On 30 July 2018 the summons was served on the Applicant by way of affixing. The Applicant did not file a Notice of Intention to Defend and the Respondent proceeded to issue and file an application for default judgment. The matter was initially set down for hearing on 02 September 2019 when the Applicant's Counsel appeared at court to file opposing papers. No opposing papers were filed and the matter was again set down for default judgment on 30 January 2020. The Applicant appointed SM Attorneys on 29 January 2020 which resulted in a postponement of the application for default judgment. SM Attorneys served Notice of Intention to oppose the application for default judgment on behalf of the Applicant on 29 January 2020.On 30 July 2020 the Respondent's counsel appeared at court (open) and requested a postponement.The Applicant filed a plea after she was barred and the court proceeded with the Application for default judgment in the presence of the Applicant's counsel.

[7] In her replying affidavit[2] the applicant says the following:

"Ad paragraph 4 – 16

6. *I reiterate that the Respondent was not entitled to proceed with the application for default judgment upon receipt of any plea in this matter. It was simply not in the interests of justice to do so in the light of how important the issue at hand was.*

7. *The fact that the plea was declared when I was barred from doing so can only mean that the filing of that plea constituted an irregular step. To lose my property because of a rule procedure is unconstitutional."*

[8] It is clear that the Applicant is not denying the fact that she filed a plea when she was under bar and she did not make an application to lift the bar before the plea was filed. Unfortunately the applicant is unable to refer this court to the application for the lifting of the bar or any authority which directs the court to accept the plea that was filed out of time. It is clear from the applicant's founding affidavit that she claims entitlement to file a plea out of time without any repercussions.

[9] From both the Applicant and the Respondent affidavits it is clear that when the court granted the Default Judgment against the Applicant all the facts were placed before it.

[10] I agree with counsel for the Respondent that the argument that the Respondent has nothing to lose if rescission or the declaratory order is granted should be ignored. This is so because the criteria for granting the relief sought is not whether the Respondent has something to lose or not.

CONCLUSION

[1] Caselines page 006-3(page paragraph 6 of the affidavit)

[2] Caselines page 008-2 paragraph 6

[11]I am of the view that the Applicant has followed a wrong procedure. The applicant was supposed to follow the procedure of appealing the decision of my brother Avvakoumides AJ instead of approaching this court for rescission of judgment or for declaratory.

[12] The Applicant has not made out a case for rescission of the judgment either in terms of common law or in terms of the Uniform Rules of Court.

[13] The applicant is asking me to declare the order of my brother invalid and unconstitutional. What the applicant is seeking is so confusing. As I said earlier the applicant has followed a wrong route in respect of the relief for declaratory order. Insofar as the application for rescission, I am of the view that the applicant has not met the requirements for the relief sought, either in terms of common law or in terms of the rules of court.

[14] I now turn to the aspect of costs. In this case it is abundantly clear that the applicant has abused the court process by bringing the meritless and frivolous application. I am alive to the fact that the courts should not award punitive costs lightly but this is a classical case where costs on attorney and client scale are deserving.

[15] Consequently I made the following order:

(a) The Application is dismissed;

(b) The Applicant is ordered to pay costs on attorney and client scale

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KGANKI PHAHLAMOHLAKA
ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of his matter on Caselines. The date for handing down is deemed to be 30 May 2022.

FOR THE APPLICANT : **ADV. PUMZO MBANA**
FOR THE RESPONDENT : **ADV. I OSCHMAN**
DATE OF JUDGMENT : **30 May 2022**