

REPUBLIC OF SOUTH AFRICA



THE GAUTENG DIVISION, PRETORIA

Case no: 44749/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

23 JAN 2023

Date



Signature

In the matter between:

BOYCE VUYOKAZI

APPLICANT

and

STANDARD BANK OF SOUTH AFRICA

1ST RESPONDENT

**SHERIFF OF THE HIGH COURT FOR THE
DISTRICT OF CARLTONVILLE**

2ND RESPONDENT

JUDGMENT

MALUNGANA AJ

Introduction

1. On 26 November 2020, the first respondent ('hereinafter referred to as 'the bank'), successfully launched an application for default judgment against the applicant for payment of the sum of R1 160 888.66, interest thereon plus costs.
2. The action which resulted in the aforesaid default judgment was predicated upon a home loan agreement which the applicant and her former husband ('Christopher') concluded with the bank. The said loan was secured by means of a continuing covering mortgage bond¹ which was registered over the parties' immovable property situated at Celtisdal Extension 20, Section No.23 of Sectional Title Scheme known as Robinson within the City of Tshwane ('the property').
3. In terms of the loan agreement, the principal debt together with interest at an applicable rate was payable by the applicant and her former husband over a period of 240 months. In breach of the terms of the loan agreement the applicant and Christopher fell into arrear with their loan repayment to the bank, prompting the latter to institute legal proceedings for the recovery of the outstanding debt.
4. It appears from the papers that the applicant was alerted to the existence of the default judgment when the sheriff of the court turned up at her door steps, armed with the writ of execution issued by the registrar on 15 March 2021.²
5. The applicant now seeks to have the default judgment obtained against her rescinded, and in this regard has brought this application before me which is being opposed by the bank. Immediately I turn to the legal principles governing applications for rescission of judgments.
6. There are three dispensations under which an application for rescission of judgment can be brought, namely:

¹ Sectional Continuing Covering Mortgage Bond, Case-lines 004-14

² Warrant of Execution, Case lines 006-77

- (a) Rule 31(2)(a) – where there is no appearance to defend or where the defendant has filed an appearance to defend but failed to file a plea and was barred from doing so;
- (b) Rule 42.1 – where (i) the judgment sought to be rescinded was erroneously granted in the absence of the affected party;(ii) there is a patent error or omission or ambiguity in such judgment, but only to the extent of such error or omission or ambiguity; or (iii) was granted as a result of mistake common to the parties. This application does not pivot on this rule as it would become clear herein below.
- (c) Common law – where the applicant has to demonstrate sufficient or good cause for the court to exercise discretion in his/her/its favour. That would entail a situation where the party presents reasonable and acceptable explanation for her/his or its default; and that party also has to show on merits that it/she/he has a *bona fide* defence, which *prima facie* carries some prospect of success.³

7. At this stage it is necessary to set out the relevant background facts.

Factual Background

8. On 08 September 2020 the bank issued summons against the applicant out of this division for the outstanding amount of R1 160 888.66 and ancillary relief.

9. According to the sheriff's return of service, the summons was served upon the applicant on 16 September 2020, at her chosen *domicilium et executandi* being 10 Fish Eagle Charles De Gaulle Crescent, Centurion by affixing a copy thereof to the principal door after a diligent search, in terms of Rule 4(1)(a)(iv) of the Uniform Rules.⁴

³ *Promedia Drukkers & Uitgewers (EDMS) Bpk v Kaimowitz and Others* 1996 (4) SA 411 at page 417; *Chetty v The Law Society of Transvaal* 1985 (2) SA 756 at 765B-C. Millar JA said: "But it is clear that in principle and in the long -standing practice of our courts two essential elements of 'sufficient cause' for rescission of judgment by default are (i) that the party seeking relief must present aa reasonable and acceptable explanation for his default and (ii) that on the merits such party has bona fide defence which, *prima facie*, carries some prospect of success."

⁴ Return of Service by Deputy Sheriff Dhlamini. Case lines 005-1

10. The application for default judgment was launched by the bank on 23 October 2020, and was granted on 26 November 2020.

11. The application before me was instituted by the applicant during the month of May 2021, and served upon the first respondent on 12 May 2021.⁵

12. It is alleged in the particulars of claim that in terms of the loan agreement, if one instalment is not paid on the due date the whole outstanding balance would become due and payable.⁶ In that event the first respondent would be entitled to institute proceedings for the recovery of all such amounts and for a court order declaring the hypothecated property executable. The certificate signed by a manager of the first respondent would become a *prima facie* proof of the amount owed by the applicant and her former husband.⁷

13. It is alleged in paragraph 8.1 of the particulars of claim that the applicant's former husband, Christopher Boyce, was placed under final sequestration on 14 September 2009, and Trustees were appointed in his estate. The bank contends that the trustees were unable to settle the first respondent's claim. As a result the property in question was realized and the proceeds were utilized to partially settle the first respondent's claim against the estate.⁸ The current balance owing by the applicant is shown in the certificate of balance attached to the particulars of claim marked Annexure "C"⁹.

Merits of the Application

14. The applicant states in her founding affidavit that during her marriage to her former husband they had two immovable properties including the property in Celtisdal

⁵ Notice of Motion dated 11 May 2021. Case lines 006-53

⁶ Para. 7.1 of the Particulars of Claim. Case lines 004-7

⁷ Paras 7.2-7.4, of the Particulars of Claim. Case lines 004-7

⁸ Para 8.2 of the Particulars of Claim. Case lines 004-8

⁹ Para 9.2 of the Particulars of Claim. Case lines 004-9. "*The current balance due and payable to the Plaintiff in terms of the loan agreement is R1 160 888.66 (One Million One Hundred Sixty Thousand Eight Eight Rand and Sixty Six Cents) together with interest on the said sum at the rate of 17% per annum from 14th of OCTOBER 2020, to date of payment (see certificate of balance attached hereto marked as Annexure "C").*"

Centurion. After her divorce the former husband took responsibility of both properties, while she moved out in 2006. At all relevant times she was under the impression that he would be able to take care of the financial obligations in terms of the loan agreements.¹⁰

15. During the sequestration of her erstwhile husband's estate in September 2009, she was requested by his attorneys to give consent for the sale of the immovable properties which were under his custody. The applicant states under paragraph 13 of the founding affidavit that she has no details of how the said properties were disposed of by the liquidators of her husband's estate. She was taken by surprise when the sheriff of the court served her with the writ of execution. She laboured under the impression that the issue of the properties had been resolved.

16. The applicant further alleges in paragraphs 17 to 22 of the founding affidavit, that they only applied for a loan amount of R689 900.00 from the bank, and she does not know how the first respondent arrived at the amount R1 160 888.66, given the fact that the immovable property was sold for R950 000.00.¹¹

17. In answer to the application, the bank has filed its opposing affidavit resisting the relief sought by the applicant. According to the bank, the trustees in the insolvent estate of Christopher were unable to settle the bank's claim against the estate. As a result they resolved to realize the property in collaboration with the applicant for the sum of R640 000.00¹² The proceeds of the sale were utilized to partially satisfy the bank's claim against Christopher's estate.

18. The bank further contends that the proceeds of the sale of the property could not extinguish the debt owed by the applicant, and in light thereof it seeks to recover the amount reflected in the certificate of balance marked "H", attached to its answering affidavit. Furthermore, the applicant and Christopher have consented under the loan

¹⁰ Paras 8-9 of the Founding Affidavit. Case lines 006-9

¹¹ Para 22 of the Founding Affidavit. *"The respondent seems to be in pursuit of me as the only debtor in the circumstances. There is no transparency regarding the sale of the property."*

¹² Para 6.1 of the Answering Affidavit. Case lines 008-7

agreement that the certificate of balance signed by the manager of the bank will constitute a *prima facie* proof that the duo are indebted to the bank.¹³

Assessment

19. Counsel on both sides dealt extensively with what was contended to be, on the one hand, probabilities favouring the contentions of the applicant, and conversely, probabilities favouring the bank, that the certificate of balance serves as *prima facie* evidence. For purposes of my judgment I do not have to embark on the details of the argument. The matter can be resolved on the paragraphs that follow.

20. The starting point is that, it is not in dispute that the applicant consented to the sale of the property in order to settle the debt owed to the bank. The property was first sold to Sancrontron Close Corporation for the amount of R640 000.00, and thereafter sold for the amount of R950 000.00. Three issues arises from the sale of the applicant's property. *Firstly*, it is not clear from the papers as to how much was the outstanding debt when the property was sold by the trustees. *Secondly*, I could not discern from the papers as to how the proceeds of the sale were appropriated by the trustees, and. *Thirdly*, how the mortgage bond was cancelled notwithstanding the shortfall in respect of the principal debt. This, in my view, raises some questions around the amount reflected in the certificate of balance relied upon by the bank.

21. In the *Bank of Lisbon International Limited v Venter en 'n Ander* 1990 (4) SA 463 (A), the court held that the reliance on a certificate of balance becomes problematic when other evidence emerges which casts doubt on the correctness of the certificate. Evidently the property in question was purchased for R689 900.00, and sold for R640 000.00 less than the value of the loan, and subsequently sold by another entity for R950 000.00. Having regard to the *duplum rule* there might be questions to be answered regarding the manner in which interest on the debt were calculated in view of the substantial amount claimed by the bank. In any event the certificate of

¹³ Para 23.2 of the Answering Affidavit. Case lines 008-15

balance relied on by the bank is not an absolute proof of indebtedness in every circumstance.¹⁴

Conclusion

22. As in *Bank of Lisbon, supra* I weighed all the aspects I have referred to in the scale against the all other evidence. It is my view that there are outstanding issues which constitute good cause raised by the applicant against the bank's claim. These issues, in my view, casts into doubt into the correctness of the certificate relied upon by the bank. A clarity has to provided as how the quantum of its claim has been calculated taking into account the proceeds of the sale of the property. The burden on the applicant for purposes of obtaining rescission was not to show substantial defence with probability of success. It is enough to show the existence of an issue which is for trial.

23. Given my view that there are issues pertaining to the quantum of the bank's claim which needs to be answered at the trial, it is not necessary for me to consider whether the other probable defences are bona fide and have reasonable prospects of success. I am satisfied that the applicant has made out a proper case, and rescission ought to be granted.

24. In the premises, therefore, the rescission is granted. The following order is made:

1. Th applicant is granted leave to defend the action;
2. Costs will be costs in the cause of the action.



P H MALUNGANA

Acting Judge of the High Court

¹⁴ *Trupp Investments Holdings (Pty) v Goldrick* 2008 (2) SA 253 (W) at [6]

APPEARANCES:

For the Applicant	: Adv BL Pilusa
Instructed by	: Sukwana Motshabi Inc
For the Respondent	: Adv B Kubeka-Manyelo
Instructed by	: Findlay & Niemeyer Inc.