

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

TOUGH TIMES AND HANGING IN THERE

Kratshi v Absa Bank Limited and Others (39859/2015) [2016] ZAGPPHC 221 (15 April 2016)

The judgment teaches a valuable lesson for debtors who fall behind with bond repayments in difficult times. What is notable is that the court assisted the debtor, at least temporarily, where she could show that, during the hard times, she regularly maintained instalments on the loan account, although in a lesser amount; kept in contact with the bank; and could provide an alternative mechanism with which to bring the account back up to date.

The Judgment can be viewed [here](#).

FACTS

Ms Kratshi is a single mother of four children (two at university, one at high school and another at primary school), 55 years of age and declared medically unfit.

In November 2007, before she was declared medically unfit, she obtained a loan of R700,000.00 from ABSA which was secured by the registration of a mortgage bond over her property. The loan agreement required her to make a monthly repayment of approximately R6,000.00.

In 2013 she fell into arrears. She contacted the bank through her account manager and made arrangements regarding the management of her account. She continued to make monthly payments of R 3000,00. Her financial situation however worsened - mainly due to illness that was diagnosed in 2004 and as a result of which she was eventually declared unfit for work in January 2015. From then on she commenced receiving ill-health retirement benefits.

Due to the ongoing short payment on the loan, ABSA instituted proceedings against her.

In a letter (dated 19 June 2013) to ABSA, Kratshi acknowledged receipt of the summons and asked the bank whether it could grant her some indulgence: she offered to make a substantial payment on her account with the proceeds of the sale of another property she owned and/or pay-out of her ill health retirement benefits.

ABSA however proceeded with the summons and obtained default judgment in August 2013, Mrs Kratshi not having entered appearance to defend.

On 15 August 2013, after the judgment was taken against her, Kratshi reviewed her monthly payments with ABSA and commenced paying R8,000.00 per month, whilst

awaiting a capital payment she was due to receive. The monthly instalments, albeit in an increased amount, were not made regularly.

In November 2014, she received a communication from the Sheriff indicating that the property would be sold on 4 December 2014. Her attempts to avoid the sale in execution came to naught.

She then approached the court in terms of the common law and/or the Uniform Rules of Court for an order rescinding the default judgment and setting aside the warrant of execution and the subsequent sale in execution of her property. She argued that at all material times, before judgment was taken, she had a standing arrangement with the bank to pay into the account as much as she could, to cater for monthly interest, and that the arrangement stood to be reviewed on 15 August 2013. (The bank denied this although no proof was furnished by way of affidavit from the account manager.) She argued further that, had the court been appraised of these facts when the action was heard initially, it would not have granted default judgment and that the judgment was therefore granted in error.

The issue in this application was thus whether the court would have decided differently, had all relevant facts been placed before it.

HELD:

- Judgment obtained by default can, under common law, be rescinded by a court if the applicant has shown sufficient cause for rescission. Otherwise, an applicant can rely on Rule 31(2)(b). However, as the latter Rule requires the application to be brought within 20 days after the applicant obtained knowledge thereof, this was not open to Ms Kratshi as she was outside the 20 day period and could not fully explain the reason for the delay in approaching the court.
- Rule 42(1)(a) is also available in the present circumstances. This Rule provides that a "court may ... *mero motu* or upon the application of any party affected, rescind or vary ... an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."
- The factors to be considered when the court is called upon to exercise judicial oversight in matters dealing with the sale of residential property for recovery of outstanding bond repayments, include the following:
 - (i) the amount of the outstanding arrears on the date of application for default judgment;

- (ii) whether the hypothecated property was acquired with a State subsidy or not;
 - (iii) whether, as far as the debtor is aware, the property is occupied or not;
 - (iv) whether the property is utilised for commercial or for residential purposes;
 - (v) whether the debt sought to be enforced was incurred to acquire the property or not;
 - (vi) in addition, any matter in which the amount claimed falls within the jurisdiction of the magistrates' court must be referred to the court if the hypothecated property is to be declared especially executable;
 - (vii) the debtor's attention must be specifically drawn, in the warrant issued for the purposes of execution of the registrar's order, to the fact that he may apply for rescission of the judgment enforced against the hypothecated immovable property.
- Instances where a judgment debtor, facing execution and subsequent eviction, would be a victim of an abuse of process would be rare, in matters in which a specially hypothecated immovable property is the object of the execution process. This is because of the specific content: that both parties concluded voluntarily, to enable the debtor to acquire immovable property, or capital as the case may be, against the security of the bond registered over the property. Absent any extraordinary circumstances, the judgment creditor would normally be entitled to enforce his judgment by executing against the immovable property that is bonded as security. The special hypothec registered in favour of the creditor, as security for the moneys advanced for the purchase of the home and capital loans, is entered into between the parties consciously, deliberately and for mutual benefit.
- What would constitute extraordinary circumstances, depends on the facts of each case. Creditors' conduct however need not be wilfully dishonest or vexatious to constitute an abuse: the consequences of intended writs against hypothecated properties, although *bona fide*, may be iniquitous because the debtor will lose his home, while alternative modes of satisfying the creditor's demands may exist that would not cause any significant prejudice to the creditor. These factors should be considered by a court:
 - o whether the mortgaged property is the debtor's primary residence;
 - o the circumstances under which the debt was incurred;
 - o the arrears outstanding under the bond when the latter was called up;
 - o the arrears on the date default judgment is sought;
 - o the total amount owing in respect of which execution is sought;
 - o the debtor's payment history;
 - o the relative financial strengths of the creditor and the debtor;

- o whether any possibilities exist, that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence;
 - o the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;
 - o whether any notice in terms of section 129 of the National Credit Act was sent to the debtor prior to the institution of action (this was sent in the present matter);
 - o the debtor's reaction to such notice, if any;
 - o the period of time that elapsed between delivery of such notice and the institution of action;
 - o whether the property sought to be declared executable was acquired by means of, or with the aid of, a State subsidy;
 - o whether the property is occupied or not;
 - o whether the property is in fact occupied by the debtor;
 - o whether the immovable property was acquired with moneys advanced by the creditor or not;
 - o whether the debtor will lose access to housing as a result of Execution being levied against his home;
 - o whether there is any indication that the creditor has instituted action with an ulterior motive or not;
 - o the position of the debtor's dependants and other occupants of the house.
- Not all of these will be relevant in every matter; the facts in each case will dictate what would be relevant in that particular case.
- In the present matter the facts showed that:
 - o the agreement was entered into in 2007 and that during August 2012 Ms Kratshi started to make payments that were short of the required monthly instalment, but on a regular basis;
 - o that her circumstances and financial position changed;
 - o that she was in contact with the bank, which culminated in a meeting for a further review of the account on 15 August 2013;
 - o that on 19 June 2013 she reduced her request to be afforded time to settle her arrears into writing. She proposed alternative means for payment with the proceeds of the sale of another property she owned and she was also making an application for ill-health retirement. The bank also did not indicate if it ever responded to her letter setting out alternative means of paying the debt.

- On the other hand, the bank:
 - o disputed that Ms Kratshi had an arrangement with the account manager, without providing an affidavit from their employee to that effect;
 - o in the default application, it further alleged that Kratshi made sporadic payments, but did not attach the actual record of payments. Kratshi attached these to the present application which shows, and what the other court thus did not see, that she made regular payments rather than sporadic ones, although admittedly not each month;
 - o it also did not mention in the initial application that Ms Kratshi had communicated to it her health problems that put a strain on her finances, leading to her applying for ill-health retirement;
 - o it stated in the present matter that "there are no alternative methods for the plaintiff to recover the debt", which was in direct contrast of the letter the bank sent to her in which it made suggestions of alternative methods to pay the debt.
- The court *a quo*, had it been appraised of all the relevant facts as listed above, would not have exercised its judicial oversight in a manner that lead to the conclusion that it was just and equitable to order the sale in execution of the property.
- Accordingly, it is certain that the court would have come to a different conclusion. The judgment was therefore erroneously granted in the sense referred to in Rule 42(i)(a) and as argued by Ms Kratshi.

The warrant of execution and subsequent sale in execution was accordingly set aside.

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