

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 19765/2011

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. ✓
<u>2021/12</u> DATE	
<u>[Signature]</u> SIGNATURE	

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

JWARA, PETROS DUMISANI

First Respondent

JWILI, VICTOR MPHO

Second Respondent

JWILI, ETHEL FEZEKA

Third Respondent

MOKGOSANI, RASHEKI LANDRO

Fourth Respondent

MOKGOSANI, MANSEBTSE HILDA

Fifth Respondent

VAN DEN HEEVER, THEODOR WILHELM N.O.

Sixth Respondent

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Seventh Respondent

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

Eighth Respondent

**THE REGISTRAR OF DEEDS,
JOHANNESBURG**

Ninth Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Tenth Respondent

J U D G M E N T

WEPENER, J:

[1] The applicant, a bank, seeks an order declaring certain immovable properties executable. The first to fifth respondents are all registered owners of the properties ('the immovable properties') either alone or as co-owners.

[2] The applicant bases its claim on the terms of the agreements of loan between the parties, the respondents being the borrowers. The terms include the following:

'4. Default and termination

4.1 *Without prejudice to the Bank's other rights under the loan agreement, the Bank will not be obliged to make any advance or re-advance on the loan and/or the Bank may convert the loan to one repayable on demand and/or the Bank may revise any of the terms and conditions and/or increase the interest rate charged and/or remove any interest rate concession granted to the Borrower if any of the following events occur:*

...

4.1.5 *a provisional or final order is passed placing the Borrower or any surety:*

4.1.5.1 *under sequestration or any other legal disability; or*

4.1.5.2 *in liquidation or under judicial management;*

....

4.2 *In any of the events envisaged in clause 4.1 above, the Bank shall have the right, without prejudice to any other rights or remedies available to the Bank, to terminate the loan agreement and claim immediate repayment of the outstanding balance by giving written notice. It may be effective immediately or from a date stated in the notice. If the loan agreement is cancelled any amounts owing to the Bank become payable:*

4.2.1 *immediately, if stated in the notice; or*

4.2.2 *on the date stated in the notice'.*

(Own emphasis)

[3] On 15 February 2010 an order was issued by this Court provisionally restraining the respondents from dealing in any manner with any of their property, including the immovable properties, which order was issued pursuant to s 26 of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). Pursuant to s 28(1)(a) of POCA, a curator bonis was appointed who was to take the immovable properties into his possession and control and take care of it and administer it with powers, duties and authority as provided for in POCA and such further powers as are set out in the court order.

[4] The applicant avers that the effect of this order is that an event as envisaged in clause 4.1.5.1 of the agreement of loan occurred ie the respondents are under legal disability to deal with their property resulting in a default by them under the agreements, which entitles the applicant to cancel the agreements.

[5] Legal disability is the English for the Afrikaans 'regsonbevoeg'. Persons are under legal disability when, by law, their capacity or ability to relate, as legal subjects, to the legal system, is curtailed. Examples are minors and insolvents that are not permitted ('regsonbevoeg') to perform certain juristic acts. In our law, 'legal disability' relates to situations where there is an impediment in law (impedimentum iuris) without narrowing or limiting it to specific circumstances. See *Nokoyo v AA Mutual Insurance Association Limited* 1976 (2) SA 153 (E) at 154H; *Hippo Quarries (Tvl) (Pty) Limited v Eardley* 1992 (1) SA 867 (A) 876B-C; *Commissioner for Inland Revenue v Friedman and Others NNO* 1993 (1) SA 353 (A) 372E-373H; *ABSA Bank Limited v Blumberg and Wilkinson* 1995 (4) SA 403 (W) 410F-H and *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC) 11-12 [21].

[6] Boberg, *Law of Persons and the Family* 2nd Edition states at pages 68 and following:

'The etymology of the word "status", they say is a good indication of its meaning. Derived from the Latin stare (to stand) it is used in jurisprudence to connate a person's overall legal position (regsposisie) or standing in law. An important aspect of a person's status is his or her ability or capacity to relate to the legal system. This ability which varies from one person to another, embraces three specific capacities or "kompetensies" (also called "bevoegdhede"). They are:

- (a) *legal capacity, that is, the capacity to be the bearer of (i.e. to have) rights and duties (regsbevoegdheid);*
- (b) *capacity to act, that is, the capacity to perform juristic acts (handelingsbevoegdheid); and*
- (c) *capacity to litigate, that is, the capacity to appear in court as a party to a law suit (verskyningsbevoegdheid)'.*

I leave aside the capacity to incur delictual or criminal responsibility from wrongful acts ('toerekeningsvatbaarheid').

[7] *Du Bois et al* in Wille's Principles of South African Law (9th Ed) at p 146 – 147 set out the status or capacities of persons and the absence of capacity or the limitation thereof as follows:

'The law of persons, stated briefly, is that part of private law that comprises the rules dealing with the legal status of various classes of persons. A person's status may be described as his or her legal position or 'standing' in relation to his or her fellow-person and the wider community: "the aggregate of his or her various rights, duties and capacities". The status of a person determines to what extent he or she has the ability to participate as a legal subject in the life of the law. This ability (legal capacity in the broad sense) embraces four main constituent capacities or competencies: the capacity to have rights and duties (passive legal capacity or legal capacity in its narrow sense, in Afrikaans "regsbevoegdheid"); the capacity to perform juristic acts, ie voluntary human acts to which the law attaches at least some of the legal consequences willed by the party or parties performing the act (active legal capacity, in Afrikaans "handelingsbevoegdheid"); the capacity to bring and defend an action at law (locus standi in judicio or capacity to litigate, in Afrikaans "verskyningsbevoegdheid"); and the capacity to incur delictual or criminal responsibility for wrongful acts (in Afrikaans "toerekeningsvatbaarheid").

The only capacity common to all persons is legal capacity in its narrow sense: every legal subject, irrespective of his or her personal attributes, has the capacity to have rights and duties, although the extent of this capacity and the particular rights and duties possessed at a certain time by virtue of this capacity may vary from one person to another. On the other hand, not all persons have any or all of the other capacities. So, for example, infants (children below the age of 7 years) and insane persons have no capacity to perform juristic acts or to litigate, while these capacities are subject to certain limitations in the case of minors above the age of 7 years.

As stated above, a person's status determines what capacities he or she has, and the extent of these capacities. A person's status is in turn determined by certain factors, the most important of which include domicile, sex, age, marital status legitimacy or illegitimacy, mental disability, insolvency and criminal conviction. All of these factors have, of course, to be considered against the backdrop of the constitutional rights to equality and dignity.

An outstanding feature of status is that the state alone can confer, revoke, or alter the status of any person. This it does either by giving effect to certain facts over which the persons whose status is in question have little or no control, such as birth, age, or insanity, or by requiring state co-operation for entry to a particular class of persons. For example, two persons cannot by mere agreement acquire the status of married persons; they require the authority of the state in the form of an official marriage ceremony. Similarly, a married couple cannot by their own act alter or terminate their status; this can be effected only by the death of one spouse or by the state in the form of a divorce order.

It follows that the law of persons is primarily the law relating to the legal status and capacity of various classes of persons, namely, unborn persons, female minors, married persons, illegitimate persons, mentally disordered persons, insolvent persons, and convicted persons'.

[8] In *Van Staden v Venter* 1992 (1) SA 552 (A) at 560C Harms AJA (as he then was) said:

"n Minderjarige wat onder voogdy staan of 'n persoon onder kuratele is streng gesproke nie regsonbevoeg nie omdat daar wel deur of namens hulle gelitigeer kan word'.

The learned judge, however, did not distinguish between the four different capacities that such a minor or person under the curatorship may possess and in my view that the passage is no more than a general statement regarding a minor's capacity to litigate.

[9] A correct approach would be that which is referred to by *Boberg and Du Bois*. If regard is had to the various capacities in which persons may relate to the legal system, I am of the view that the respondents are restricted as far as their dealings with the properties are concerned and that their capacity to act ('*handelingsbevoegdheid*') with the properties has been curtailed by the operation of law. Stroud's *Judicial Dictionary of Words and Phrases* (7th ed)

defines legal disability as follows: '*A forfeiture if a donee be "under any legal disability in consequence whereof he would be hindered from taking for his own personal and exclusive benefit" means some disability imposed on the donee by law, e.g. bona fide bankruptcy, or (per Lindley and Lopes L.JJ) attainder for treason,...*' I would add that such legal disability would follow if a person's estate is surrendered because of a court order thus preventing such a person from dealing with his or her property.

[10] By virtue of the restraint order granted by the court, the respondents' capacity to deal with their property has been curtailed. That, in my view, alters the status of the respondents by placing the respondents under a legal disability to deal with their property. Ms Kolbe argued that the respondents are not under legal disability but that their property is under restraint. I do not agree. The restraint order reads in clause 1.4 that the respondents are '*prohibited from dealing in any manner with the property ...*' Ms Kolbe's argument that there is no change in the status of the respondents, cannot be upheld. The examples cited by Ms Kolbe of court orders against parties that do not affect their status and consequently their legal ability to perform juristic acts, do not detract from the effect of the restraint order which does curtail the respondents' ability or capacity to perform juristic acts with their property.

[11] The applicant is accordingly entitled to rely on this legal disability of the respondents as constituting a default in terms of the agreement, which in turn entitles the applicant to terminate the loan agreements.

[12] The relevance of the default in this matter as far as the first respondent is concerned is that the first respondent, unlike the other respondents, is not in arrears with payments, which in itself would constitute a default allowing for the cancellation of the loan agreements. However, the reliance by the applicant on the second to fifth respondents' arrear payments in order to claim a default and cancellation of the loan agreements cannot be countenanced. After the second to fifth respondents pointed out in the answering affidavits that the applicant failed to comply with s 129 of the National Credit Act 34 of 2005 ('NCA') as far as this default is concerned, the applicant attached documents in reply to show that it indeed complied with the section insofar as the second to fifth respondents are concerned in that notices regarding the arrears were sent to them. A party cannot make a case in reply and that the applicant's case should have been made in the founding affidavit. The reliance on notices regarding the arrears contained in the replying affidavit must consequently be disregarded. See *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T). The matter is to be approached on the basis that the cause of action disclosed in the founding papers is the default of the respondents by virtue of their legal disability and not any alleged arrear payments, a matter which the respondents were not alerted to react to in a notice nor dealt with in their answering affidavits.

[13] Pursuant to the default of the respondents as a result of their legal disability the applicant cancelled the agreements of loan. The respondents dispute that a valid cancellation was effected. They aver that the applicant

failed to comply with s 129 of the NCA (which Act it is common cause covers the relationship between the parties). S 129(1)(a) of the NCA provides:

'If the consumer is in default under a credit agreement, the credit provider –

- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the party resolves any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date;...'*

A credit provider may not commence legal proceedings to enforce a claim without complying with the provisions of s 129 (1)(a) – see JM Otto: *The National Credit Act Explained* at p 87, *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA) para 8 and *Rossouw v First Rand Bank Ltd* [2011] 2 All SA 56 (SCA) para 22.

[14] The respondents argue that the default to which their notice should have been drawn is the reliance by the applicant on their legal disability. Having regard to the purpose and objects of the NCA, I am of the view that the applicant was obliged to draw the respondents' attention to the fact that it regarded the legal disability as a default in order to allow the respondents to act pursuant to the provisions of s 129(1)(a) of the NCA to resolve the dispute, which may have included a plan to bring the arrears under the agreements up to date or to apply for a variation of the restraint order pursuant to s 26(10) of POCA. The restraint order may also lapse upon the completion of the criminal trial instituted against the respondents. It is common cause that the notice

pursuant to s 129 of the NCA was sent to the second to fifth respondents only in respect of arrear payments.

[15] No notices were sent regarding the legal disability default as the applicant was of the view that no notices pursuant to the NCA were necessary in regard to that default. Mr Van Nieuwenhuizen, who appeared on behalf of the applicant, argued that no notice pursuant to s 129 was required because s 129 finds no application as the specific default cannot be remedied nor is there a dispute which could be resolved pursuant to the provisions of s 129(1)(a) of the NCA. I do not agree with the argument and I have already stated that the respondents could have brought their payments up to date as is envisaged in s 129(1)(a) of the NCA or applied for a variation of the restraint order or the criminal trial may be completed with a possible resultant release of the properties. S 129 foresees other avenues, which the respondents could have investigated or followed such as approaching an ombud. S 129(1)(a) is applicable and the applicant failed to give the required notice to the respondents rendering the application defective for want of compliance with s 129(1)(a), which is a necessary precondition before legal proceedings may be commenced – *Nedbank v National Credit Regulator*, at 590 F. I respectfully agree with what was said in *Scott v Moir NO (A27/2011)* [2011] ZAWCHC 369 (19 September 2011) at para [26]:

'Ms Reilly's contention misconstrues the object and purpose of the section 129(1) (a) notice. Delivery of the section 129 (1) (a) notice is a step devised by the legislature in an attempt to encourage parties to iron out their differences before seeking Court intervention and its purpose is to give effect to the object of the NCA as set out in section 3(h) (First Rand Bank Ltd v Olivier 2009 (3) SA 353 (SE) paragraph 18)

by encouraging a consistent and accessible system of consensual resolution of disputes arising from credit agreements. (Nedbank Ltd v National credit Regulator 2011 (3) SA 582 (SCA)).

[16] I do not decide whether a court will indeed grant execution in this matter, as the court hearing this application, after the applicant's compliance with s 129 of the NCA, will be obliged to judicially oversee the matter as is provided for in s 26(3) of the Constitution. I respectfully agree with what Peter AJ said in *Nedbank Ltd v Fraser and Another and Four other Cases* 2011 (4) SA 337 (GSJ) at paras 23-25:

'[23] The context of the judicial oversight provided in section 26(3) of the Constitution is a matrix of factors. These are: the existence of the social need for housing; the constitutional right to access to adequate housing embodied in section 26(1); the need for people to honour their debts; the need for debts to be enforced by a court process, and the need for execution, all of which serve the housing need; as well as the drastic nature and far reaching consequences of executing against a person's home and the scope for the abuse of the process of execution.

[24] Seen in this context, the purpose of the judicial function required in section 26(3) is to act as a filter or check on execution that does not serve the social interests and which is an abuse. Expressed simply, the function of the court is to safeguard against abuse of the execution process. It is with the consideration of this context and purpose that a determination is made whether or not to declare a person's home executable.

[25] As mentioned earlier, there is no definition in either the Constitution or the rules of court as to what are "all the relevant circumstances". Some guidance is given in Jaftha; paras 56 to 60, which in my view is the most valuable and authoritative starting point. Although Saunderson and Mortinson have been overturned on the question of the registrar's competence to declare specially executable property constituting a person's home, the guidance that those judgments give and their practical directions nevertheless remain intact - Gundwana para 52. In my view this guidance should be applied having regard to the context and purpose referred to above. Above all each case should be decided on its facts; flexibility should be retained in what is required to satisfy the threshold rather than demanding adherence to an inflexible procedure or list of prescripts before an order of execution is made'.

The relevant circumstances, including the question whether the immovable properties are the primary residences of the respondents, will be considered by the court hearing the application in due course.

[17] The applicant has requested relief pursuant to s 130(4)(b) of the NCA in the event of my finding that it failed to comply with s 129 of the NCA. Having so found, the provisions of s 130(4) of the NCA prescribe the further conduct of the proceedings:

'In any proceedings contemplated in this section, if the court determines that –


- (a) ...*
- (b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c) the court must –*
 - (i) adjourn the matter before it and*
 - (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;...'*

It is common cause that the reference to subsec (3)(a) is a reference to proceedings in which, inter alia, s 129 applies. The provision is couched in peremptory terms and the court is obliged to adjourn the matter before it and make any order pursuant to the application launched by the applicant.

[18] In open court Ms Kolbe, who appeared on behalf of the respondents, tendered that the second to fifth respondents will pay all arrear amounts

owing by them to the applicant. Having regard thereto I make the following order:

1. The proceedings, pertaining to the legal disability (*'the default'*) of the respondents as a result of the restraint order against them in Case No. 2012/5153, are stayed in terms of s 130(4) of the National Credit Act 34 of 2005 and the applicant is ordered to deliver a notice to the respondents in terms of s 129(1)(a) drawing the default of the respondents to their attention, if the applicant so wishes, before the matter may be resumed and further subject to 3 below.
2. The second to fifth respondents are granted an opportunity to pay all arrear amounts owing by them respectively, to the applicant within a period of 30 days from date of this order.
3. The notice referred to in 1 above may only be delivered after expiry of the time period referred to in 2 above if the applicant wishes to pursue the matter.
4. The applicant is ordered to pay the respondents' costs of the motion week of 31 January 2012.



W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING: 2 February 2012

DATE OF JUDGMENT: 8 February 2012