REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 25964/2013

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

_____ _____
DATE SIGNATURE

In the matter between:

CRANSTON RANDY JULIE First Applicant

ANGELA ROZANNE JULIE Second Applicant

And

FIRSTRAND BANK LIMITED First Respondent

THE SHERIFF OF THE COURT, JOHANNESBURG SOUTH Second Respondent

Summary:

Rescission application in terms of Rule 42 of Uniform Rules of Court – based solely on first respondent's alleged failure to send notice in terms of section 129 of National Credit Act, 34 of 2005 to applicants – allegation disproved – first respondent proved that notice was sent and received – application dismissed with costs.

JUDGMENT

MAENETJE AJ:

Introduction

1. This is a rescission application that the applicants brought in terms of Rule 42 of the Uniform Rules of Court. They seek the following order:

    "1. Rescission of the Court Order granted by the above Honourable Court on the 12th of December 2013 under case number: 13/25964;

    2. Costs of the application.

2. The Court order against the applicants, sought to be rescinded, is in the following terms:

    "1. Payment of the sum of R1, 131, 971.65

    2. Interest on the above amount at the rate of 8.50% per annum from the 1 June 2013 to date of payment."

    3. The following property is declared executable:
    Erf 1280 Mondeor Township, Registration Division I.R, Province of Gauteng (70 Ormonde Street, Mondeor)

    4. An order authorising the Registrar to issue a Warrant of Execution for the attachment of the Respondents' Property."

3. Under the heading, "AD RESCISSION APPLICATION" in their founding affidavit, the applicants set out the grounds upon which the rescission is sought. The applicants allege that the order was erroneously and/or fraudulently sought by the first

respondent and was consequently erroneously granted by the Court. The grounds upon which this allegation is made can be summarised as follows:

a. The first respondent failed to deliver to the applicants a notice in terms of section 129 of the National Credit Act, 34 of 2005 ("the Act").

b. The first respondent deliberately misled the Court that there was proof that the notice in terms of section 129 of the Act was sent to the applicants. In this regard, the applicants contend that the first respondent bore the evidentiary burden to prove not only that the notice was sent, but that it had been received by the applicants.

c. The first respondent failed to discharge its obligations in terms of section 129 of the Act.

d. The applicants did not receive the section 129 notice that the first respondent alleges it sent to them. As a result, the applicants contend that they have a *bona fide* defence to the first respondent's claim because they were unaware that any legal proceedings were instituted against them. They say that section 129 of the Act specifically requires that prior to any formal legal action being taken against a debtor, the notice in terms of section 129 of the Act must have been delivered and received by the debtor. Failure to show that the section 129 notice has in fact been delivered and received by the debtor must lead to a failure of the action, which then constitutes a valid defence in law.

The case pleaded lacks merit

4. The primary difficulty for the applicants is that not only was the first respondent able to show in its answering affidavit that it had sent a notice in terms of section 129 of the Act to the applicants as required, but also that the second applicant signed acknowledgement of receipt of the notice. The first respondent states the following in its answering affidavit in this regard:

> "20.10 On 25 April 2013 the second applicant personally signed an acknowledgement of receipt in respect of the initial notice in terms of section 129(1)(a) of the National Credit Act 34 of 2005 ("the Act").

> The second applicant undertook to "*respond to the letter*". A copy of the section 129 notice (which duly reflects the confirmation of receipt by the second applicant herself on the last page thereof) is attached hereto and marked as annexure "**F**"."

5. Annexure "F" to the first respondent's answering affidavit is a notice from the first respondent in terms of section 129 of the Act to the applicants. It is dated 19 April 2013. It contains the acknowledgement that the first respondent alleges in its answering affidavit.

6. The applicants did not file a replying affidavit. Whereas counsel for the applicants sought to suggest that a replying affidavit might have been filed – a fact that he was unsure of, none was produced even after the applicants' counsel was afforded an opportunity to contact his attorneys to verify whether indeed a replying affidavit had been filed. All indications are that no replying affidavit was filed. As a result, allegations by the first respondent, including as regards the notice dated 19 April 2013, as well as other evidence in support of the contention that a notice in terms of section 129 of the Act had been sent to the applicants in line with the requirements of section 129 of the Act, remain uncontradicted. For his part, the applicants' counsel opened his submissions to the Court with a concession that indeed the first respondent had sent the applicants a notice in terms of section 129 of the Act as alleged in its answering affidavit.

7. When it was raised with the applicants' counsel that in light of the uncontradicted facts, as well as his concession, which was correct on the facts, the applicants' case should fail, he sought to persuade the Court that if regard is had to the notice in terms of section 129 of the Act that the first respondent relies upon, it would be manifestly clear that the first respondent still failed to comply with its obligations in terms of section 129 of the Act. There are two problems with this submission. First, it was never the applicants' case that the first respondent had sent a notice in terms of section 129 of the Act, which they had received, but that the first respondent failed to comply with its other obligations in terms of section 129 of the Act. Had this been the case, the first respondent would have had an opportunity to deal with it in its answering affidavit. Secondly, the notice in terms of section 129 of the Act that bears the second applicant's signature, is manifestly in compliance with section 129 of the Act.

8. In the circumstances, there is no basis – as pleaded – upon which this Court can find for the applicants. The applicants have admitted in their founding affidavit that they had fallen into arrears with their payments to the first respondent. Save for the question of compliance with section 129 of the Act, the first respondent was entitled to institute action and obtain judgment. It cannot be said that judgment was erroenously and/or fraudulently sought and obtained in those circumstances.

Order

9. Accordingly, I make the following order:

   a. The rescission application is dismissed with costs.

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MAENETJE AJ

Appearances:

Counsel for applicants:	XE Mazibuko
Attorneys for applicants:	Pule Pule Attorneys
Counsel for first respondent:	D van Niekerk
Attorneys for respondents:	Hammond Pole Attorneys
Date of hearing:	19 November 2014
Date of judgment:	28 November 2014