REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **A3019/18**

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

7/2/2019

Date: **M. MATSEMELA**

In the matter between:

FIRST NATIONAL BANK A DIVISION OF FIRSTRAND BANK LIMITED	Appellant
And	
NICOLA BRIGITEE DA SILVA	First Respondent
CHANTELLE HEATHER PAPPAS	Second Respondent
NEDBANK LIMITED	Third & Fourth Respondent
OLD MUTUAL	Fifth Respondent
EDCON (PTY) LTD	Sixth & Eleventh Respondent
WOOLWORTHS	Seventh, Tenth and Fourteenth Respondent

MTN	Eighth Respondent
KULULA A DIVISION OF FIRSTRAND BANK LIMITED	Ninth Respondent
TRUWORTHS C/O CONSUMER FRIEND	Twelfth Respondent
DREAM VACATIONS	Thirteenth Respondent

JUDGMENT

MATSEMELA AJ

[1] This is an appeal against the judgment of the Magistrate for the district of Randburg (the Magistrate) dismissing the appellant's application for condonation for the late filing of its application of rescission of a default judgment and order granted against the appellant on 12 August 2011.

BACKROUND

[2] The default judgment emanated from an application, in terms of **Section 86(8) (b) of the National Credit Act, Act No. 34 of 2005** ("the NCA") ("the Debt Review Application") that was brought by the debt counsellor Nicola Brigitee Da Silva.

[3] The debt counsellor sought the following orders in the notice of motion (Debt Review Application):

> *"1. That the Second Respondent be declared over indebted as set out in Section 79 of the National Credit Act 34 of 2005;*

2. that the draft Debt Re-arrangement Order attached to the Applicant's Founding Affidavit as Annexure be made an order of court;"

[4] Pursuant to the said application, the Magistrate on 12 August 2011 granted an order in terms of the said notice of motion.

COMMON CAUSE

[5] It is common cause that the condonation and rescission applications were filed during 28 August 2017, which is six years after the judgement was granted.

[6] The debt counsellor made a payment proposal in terms of which the Second Respondent was to repay its indebtedness to the appellant by way of 256 instalments at a rate of 11.50% and was made an order of court in the court a qou.

[7] The appellant's reasons for its failure to oppose the debt review application and the delay in bringing the rescission application is attributed to the application being launched during a difficult economic period. The appellant was, at the time, inundated with debt review applications. As a result, there were applications that did not come to the appellant`s attention timeously and the matters therefore proceeded unopposed.

[8] The consumer under mortgage agreement with the appellant in respect of bank account 3-000-010-290-936 is Cordyk Investments (Pty) Ltd, a juristic person. The second respondent signed as a surety and co-principal debtor.

HEADS OF ARGUMENTS

[9] It was submitted on behalf of the appellant that the re-arrangement order by the magistrate was ultra vires the **National Credit Act 34 of 2005.**

[10] It was argued on behalf of the appellant that the Magistrate erred by not taking into account the merits of the rescission application when he dismissed the condonation application.

[11] The further grounds of contention by the appellant relate to the prejudice that the appellant stands to suffer if the respondent is allowed to pay the monthly amount as mentioned in the annexure which is less and did not even cover the interests accruing in the account.

REASONS FOR THE JUDGEMENT

[12] The dispute before us is that the re-arrangement order by the magistrate was ultra vires the National Credit Act 34 of 2005.

Chapter 4, part D of the said Act provides as follows:

Part D

Over-indebtedness and reckless credit

"78 (1) This part does not apply to credit agreement in respect of which the consumer is a juristic person"

[13] In the case of **Hira and Another V Booysen and Another SCA 1992 112** the following was stated**;**

"*[11] Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature;*

[12] it is a right inherent in the Court, which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal. The non-performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of the Court. And it will, when necessary, summarily correct or set aside proceedings which come under the above category."

[14] It is clear that the order of the magistrate is ultra vires the **National Credit Act 34 of 2005**. I am satisfied that the order of the magistrate is irregular and illegal and it is hereby set aside.

[15] The other dispute before us was whether in refusing the application for condonation, the Magistrate erred by failing to consider the merits of the rescission application. The court a quo was urged to condone the late filing of the rescission application and was referred the court to the case of First Rand Bank Limited v Brand NO and Another [2017] ZAGPPHC 438 where it was held that, where a delay is unreasonable the interest of justice may demand that condonation is granted. It was further held that the interest of justice is established by considering the merits and prejudice to the other party.

[16] Further more in **South African National Roads Agency v Cape Town 2017 (1) SA 468 (SCA)** at paragraph 84 and 85 it was stated:

"Even where a delay is unreasonable, interest of justice may demand that condonation be granted. The only way to establish the existence of interest of justice is to undertake an enquiry, which involve a consideration of the merits and prejudice to the other party".

[17] Having perused the record I found that the magistrate only considered prejudice which respondent might suffer if his judgement is rescinded. Looking at the circumstances of this case, I am of the view that the magistrate should have in the interest of justice made an inquiry into the merits of this case and rescind his judgement.

[18] The other dispute before us is that, the debt review order by

the magistrate was invalid and unlawful because the restructured payments were far less than the interests accruing on a monthly basis, and as such they will not lead to the eventual satisfaction of the debt.

[19] In the case of **Nedbank v Norris and Others 2016 (3) SA 568 (ECP).** It was held:

> *"41. The difficulty with the order, however, does not end there. As indicated hereinabove the magistrate re-arranged the first respondent's affairs in such manner as to require payment of a monthly amount of R289. 15 over a 260 month period and ordered that interest would be reduced to 0%.*
> *42. It is obvious from these figures that the re-arranged payments will not satisfy the amount outstanding to the applicant as at the date of restructuring. The clear effect of the re-arrangement order is that the first respondent, as consumer, will not meet all of his obligations to the applicant in terms of the credit agreement. Not only will the first respondent not be obliged to make payment of the f full outstanding loan, the monthly payments do not even meet the requirement to reimburse the applicant for the monthly payment it is obliged to make on behalf of the first respondent in respect of credit insurance cover. The order plainly does not meet the essential purposes of the NCA as set out in s 3 (g) and (i) (cf. BM W Financial Services SA (Pty) Ltd v Mudaly*

2010 (5) SA6 18 (KZD); FirstRand Bank Ltd v Adams and Another 2012 (4) SA 14 (WCC)).

43. Apart from this, the magistrate also ordered that the first respondent's contractual obligations to pay interest on the outstanding balance of the loan be reduced from the fixed 17.5% to 0%.

44. Section 86(7) (c) (ii) confers no such power upon the Magistrates Court. A debt re-arrangement order has as its purpose the rescheduling or re-arrangement of the obligations of the consumer in such a manner as to enable the consumer to meet his/ her/ its obligations to the credit provider. It serves to mitigate the effect of over-indebtedness by making provision for payments within the existing means of the consumer and over an extended period. A re-arrangement order, does not, and cannot, extinguish the underlying contractual obligations. This much is plain from the wording of section 86 (7). The order reducing the first respondent's contractual obligation to pay interest on the outstanding balance of the loan is therefore ultra vires the NCA (FirstRand Bank v Adams (supra) at par 28; SA Taxi Securitisation (Pty) Ltd v Lennard 2012 (21 SA 456 (ECG) at paragraph 10).

45. A magistrate's court is a creature of statute. It only has the jurisdiction that is conferred upon it by statute. It exercises no inherent jurisdiction and can accordingly not adjudicate matters which fall outside of its expressly conferred jurisdiction and cannot grant orders, other than those it is expressly

authorised to grant (Ndamase v Functions 4 All 2004 (5} SA 602 (SCA)).

46. In purporting to make the order the magistrate acted without jurisdiction. At common law such an order is null and void (Master of the High Court (North Gauteng High Court, Pretoria) v Motola NO and Others 2012 (3) 3 to 5 (SCA) at paragraph 12). Although the applicant seeks an order to the effect that orders made without jurisdiction are void ab initio and may be ignored, I do not consider that such an order is necessary in the present matter or that it is appropriate given the reach of f the declaratory relief sought."

[20] The Magistrate clearly misdirected himself by emphasizing the interest of justice and prejudice in as far as it pertains to the respondents. It appears from a reading of the judgment that the Magistrate, even when advised about the Norris-judgment, did not consider its effect on the proceedings before him. It is clear that he did not consider the invalidity of the debt review order, not just on the basis of the Norris judgment, but as part of the grounds for rescission as clearly stated in the founding affidavit. It is apparent that the respondent re-structured payment proposal that was made an order of court as indicated above falls foul of all the issues raised in the judgment of Goosen J and has to be set aside.

[21] Accordingly, and in view of the above, I propose the following order:

A. The appeal is upheld

B. The judgment and order of the Magistrate under case number 29801/2010 is set aside and replaced with the following:

1. Condonation for the late filing of the rescission application is granted.

2. The judgment and order dated 12 August 2011 is partially rescinded and set aside to the extent that it incorporates the banking account known as FNB Home loan Account 3-000-010-290-936.

M. MATSEMELA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree and it so ordered.

M. TWALA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	**15 October 2019**
Date of Judgment:	**07 February 2019**
On behalf of Appellant:	**Adv. M De Oliviera**
Instructed by:	**M Incorporated Attorneys**
Tel:	**021 815 - 2000**
On behalf of Respondents:	**None**