IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 906/2015

2/12/2016

In the matter between:

KASHAN RAMOKOKA MABANDO Applicant

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

2/12/16 ..... Frawley .....

DATE SIGNATURE

And

STANDARD BANK OD SOUTH AFRICA LIMITED Respondent

JUDGMENT

MAIER-FRAWLEY AJ,

[1]. This application is for the rescission of a default judgment granted against the applicant on 17 March 2015 (the judgment). It appears to have been brought under Rule 32(1)(b) of the Uniform Rules of Court (the Rules).

[2] The applicant, Mr. Mabando appeared in person at the hearing of the matter. At the outset of the hearing, the Court was informed by both the applicant and counsel appearing for the respondent, of the recent death of the applicant's attorney of record, Mr. Maseka, of Jake Maseka Attorneys (the deceased). The respondent filed an affidavit in which it was indicated that the Law society appointed Mabuse Attorneys to take over the deceased's files. However, Mabuse Attorneys claimed that they did not receive instructions or the deceased's files. According to the applicant, he was given telephonic and written notice via email that the matter had been enrolled for hearing in court. Effectively, he was afforded less than 10 days' notice of the date of hearing. This was not disputed on behalf of the respondent. Notwithstanding, the applicant bravely decided to conduct his case in person. This then explains why the applicant failed to file a practise note and written heads of argument in compliance with the Practise Manual of this division.

[3] The background to the granting of this judgment is as follows. The applicant and the respondent concluded a written home loan agreement in terms of which the respondent loaned and advanced monies to the applicant, which loan was secured by a covering mortgage bond in favour of the respondent. In terms of the mortgage bond agreement, the applicant assumed responsibility for payment of the monthly insurance premiums as well as certain assurance premiums in respect of the property. The amount loaned was R321 720.80 and was repayable in 240 monthly instalments, each in the amount of R1,917.98.

[4] After the applicant fell into arrears with his monthly instalments and on 26 October 2014, the respondent sent a notice in terms of Section 129 read together with Section 130 of the National Credit Act, No 34 of 2005 (NCA) to the applicant for payment of the arrears (s129 notice). The s129 notice was delivered by a courier to the applicant's chosen domicilium address, being Erf 1491, The Orchards Extension 11, also known as 88 Hulton Street, The Orchards, Pretoria (the property), where the applicant still resides. In terms of the courier's delivery report, a copy of which was annexed to the respondent's answering affidavit, a person by the name of 'Makhaya' accepted delivery of the notice.

[5] On 3 January 2015 summons was issued on account of the applicant's breach of the terms of the loan agreement in not adhering to the monthly repayments. The plaintiff claimed *inter alia* payment of the full balance outstanding in the sum of R50,409.11 and an order declaring the property executable. As at 4 December 2014, the arrears amounted to only R21, 899.52.

[6] On 8 January 2015, the summons was served by the Sheriff of Court at the property by affixing a copy of the combined summons to the principal gate of the property. According to the Sheriff's return of service, 'after diligent search and enquiry no other manner of service was possible at given address.' The applicant failed to enter an appearance to defend and on 17 March 2015, the respondent obtained default judgment against the applicant for payment of the outstanding balance owing, an order declaring the property executable and further relief. On 10 April 2015 this court issued a Writ of Execution in respect of the immovable property. On 20 April 2015, the Writ was served on the applicant at the property, again by affixing it to the principal gate. The Sheriff's return of service does not state whether any other manner of service was possible at the address.

[7] According to the applicant, he became aware of the judgment on 31 March 2015 when he discovered an envelope at his gate which contained a letter notifying him of the judgment granted against him.

[8] The applicant states that he did not receive the s129 letter, which was served on Makhaya, the applicant's nine year old son, on Sunday the 26th October 2015, being a date on which the applicant was away from home. According to the applicant, Makhaya might have misplaced the letter or might have forgotten to bring it to the applicant's attention. Had he received this notice, he would have reacted thereto by contacting the respondent to make arrangements for settlement of the amount due. According to the applicant, he also did not receive the summons, which was served by affixing a copy thereof to his main gate. However, his residential premises are accessible to anyone in that the gate is 'not locked'. The Sheriff's return does not say why the summons was left at the gate or that there was no other

method of serving the summons or that there was no one at the premises to serve the summons upon.

[9] Mr Mabando submitted during oral argument that it was unclear from the Sheriff's return how such a thick document was 'affixed' to the main gate. The combined summons together with annexures, comprise some 42 pages, copies of which were attached to the answering affidavit of the respondent in the present proceedings. Had the summons been properly affixed to the gate, he would undoubtedly have seen it. Furthermore, and considering that the property is situated in a busy street, which school children frequent, it is entirely possible that any one of the school children might have picked up the summons. Had the summons been dropped inside the property, then 'chances are one would have found it.' He stressed that he did not wilfully ignore the summons, as stated in his founding affidavit, and explained that he could not have reacted to something which he did not receive and had no knowledge of. Had he received the summons, he would have reacted to it.

[10] The applicant admits being indebted to the respondent but states that he fell into arrears with his bond repayments due to the fact that he became unemployed. According to the applicant, he stands to acquire funds from a retirement annuity with which he intends to settle the debt, either wholly or in part. These funds are not yet available although the applicant expects them to become available once he has resolved his 'tax issue' with the receiver of Revenue. In addition, the assurance policy in respect of the property was cancelled in October 2011 and therefore the outstanding balance falls to be reduced by the amount of assurance premiums charged to the applicant's bond account after that date.

[11] According to the applicant, the value of the property is approximately R700 000.00 whilst the total amount due on the mortgage as at date of issue of summons, was R56 181.93. As indicated earlier, the amount in arrear at the time of

issue of summons was only R21 899.52. An order declaring the property specially executable would cause him great prejudice by virtue of the fact that that he would lose his primary residence, where his family, including young children, reside.

[12] In the answering affidavit, the respondent indicated that the last payment received from the applicant was an amount of R1500.00 on 22 November 2014. In reply, the applicant produced payment deposit slips evidencing further payments of R3000.00 and R2000.00 that were made by him on 27 August 2015 and 11 September 2015 respectively, which evidenced his intention to settle the debt.

[13] An application under Rule 31(2)(b) must be brought within 20 days after a litigant became aware that judgment has been granted against him. It is clear that the application was brought timeously. As indicated, the applicant stated that he first became aware of this judgment on 31st March 2015. The application for rescission was served on 9th April 2015.

[14] The pre-requisites for the grant of rescission in terms of rule 31(2)(b) are set out in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) (2003) 2 ALL SA 113, at para 11[1]:

> "*The applicant must show cause why the remedy should be granted. That entails (a) giving a reasonable explanation of the default; (b) showing that the application is made bona fide; and (c) showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospectus success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgement*".

[1] Albeit that *Colyn's* case dealt with the requirements for rescission under the common law, the requirements under Rule 32(1)(b) are the same.

[15] It is trite that a notice in terms of section 129(1)(a) of the National Credit Act 34 of 2005 (NCA) is a mandatory, statutory procedure before launching litigation proceedings as set out in *Nedbank Ltd & Others v National Credit Regulator* 2011 (3) SA 581 (SCA).[2] The requirement that a credit provider provide notice in terms of section 129(1)(a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice. A credit provider seeking to enforce a credit agreement must aver and prove that the notice was delivered to the consumer.[3]

[16] Incidentally, the NCA has been amended in terms of the National Credit Amendment Act 19 of 2014, by the introduction of section 129(5) therein. The amendment took effect on 13 March 2015. Section 129(5) now deals with the manner in which notice must be delivered to a consumer, namely, by registered mail or delivery to an adult person at the location specified by the consumer (own emphasis). As at date of service of summons in this matter, the amendment had not yet come into operation. The NCA, in its pre-amended form, did not deal with the manner in which notice must be delivered to the consumer. However, it is inconceivable that delivery to a nine year old child could ever suffice. Even Rule 4 of the Uniform Rules of court requires service of documents upon persons who are apparently over the age of 16 years.

[17] In *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) at paras 74-75 (Sebola judgment), the constitutional court held that for a section 129(1) notice to be effective, the credit provider should take reasonable measures to bring the notice to the attention of the consumer. He must therefore present proof on a balance of probability that the notice reached the consumer.'(own emphasis)

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[2] See too *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 CC at paras [55], [57] , [72] and [87]

[3] See Sebola *supra* at paras [74] and [75]

[18] Simply put, since the Sebola judgment, there is a heavier burden on a credit provider to ensure that the notice is sent and delivered to the defaulting debtor. The credit provider has to prove on a balance of probabilities that the notice was delivered and came to the attention of the defaulting consumer. (own emphasis)

[19] The respondent asserts that the s129 notice was delivered to the applicant's residence via courier. The respondent however disputes that the applicant did not receive notice thereof without providing any gainsaying evidence to refute the applicant's allegation that the notice was served on a nine year old child who either misplaced it or forgot to give it to him – either way, the notice never came to the applicant's attention, as is required for purposes of 'delivery' thereof. In the light of the authorities quoted above and by virtue of the facts of this matter, I am of the view that the respondent has failed to prove on a balance of probabilities that the s129 notice came to the attention of the applicant.

[20] I am persuaded that the applicant has furnished a satisfactory explanation for his default. The applicant has also established that the respondent failed to give him proper notice under the NCA. He has therefore set out a bona fide defence. [4] Accordingly the application for rescission of judgment must succeed.

[22] In the result, the following order is granted:

i) Default judgment granted against the applicant on 12 September 2013 is hereby rescinded and set aside;

ii The proceedings instituted under case number 906/2015 are suspended pending compliance by the applicant/plaintiff with the provisions of section 129 read with section 130 of the National Credit Act 34 of 2005;

[4] See *Nkata v FirstRand Bank Limited and Others* [2016] ZACC 12 at para 18

iii) The costs of the application will be costs in the cause.

A. MAIER-FRAWLEY

ACTING JUDGE OF THE HIGH COURT

Date of hearing	29 November 2016
Date of judgment:	1 December 2016
Date judgment delivered:	2 December 2016
For the Applicant:	Mr. Mabando (in person)
For the Respondent:	Adv JF Winnertz
Instructed by:	Haasbroek & Boezaart Inc, Ref: Mr. C. Gerber