REPUBLIC OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Delete whichever is not applicable

(1) Reportable ~~Yes~~ / No
(2) Of interest to other Judges ~~Yes~~ / No
(3) Revised.

Signature..... Date: 14 March 2016.

17/3/2016

CASE NO: A798/14

In the matter between:

LEAVIT TSHIKETANI MKHANSI	First Appellant
BOMBELANI ANNEGRATH MAKAMU	Second Appellant

and

FIRSTRAND BANK LIMITED	Respondent

J U D G M E N T

Ismail J:

[1] This is an appeal against the dismissal of a rescission of judgment, which was handed down by J W Louw J in this court against the appellants on the 3 April 2014.

[2] Leave to appeal was granted to the full court of this division on the 14 May 2014.

[3] The respondents aver that the appeal has lapsed in view of the appellants having failed to :

3.1 file the required Notice of appeal within fifteen (15) days as provided for in Rule 49 (2);

3.2 bring a condonation application to explain the delay in prosecuting the appeal

[4] At the outset of the arguments presented, appellants' representative, addressed the court on the aspect of condonation. He submitted that the appellants had a good case on the merits and for that reason condonation should to be granted.

[5] The Appellate Division, in *Melane v Santam Insurance Co, Ltd* 1962 (4) SA 531 at 532 B-E stated the following regarding condonation:

" In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any Attempt to formulate a rule of thumb would only serve to harden the arteries of what would be a flexible discretion. What is needed is a flexible conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

See also : *United Plant Hire (Pty) Ltd v Hill* 1976 (1) SA 717 (A) at 720 E-G; *Ferris and Another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) at par [10]-[12] and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) AT 477E.

[6] The appellant submitted that this was a matter which concerned the right to housing in terms of section 26 of the Constitution. As such it concerned an important issue which needed to be ventilated, notwith-

standing the delay, in prosecuting the appeal.

[7] Arguments were advanced by both protagonist, in respect of their cases.

Background to the dispute:

[8] The appellants entered into a home loan agreement with the respondent. The appellants experienced financial difficulties and they approached a debt counselor, who arranged a debt review process for them. The debt was restructured and made an order of court. The monthly instalments to the respondent in terms of the debt restructured scheme was substantially reduced, almost by half the original payments in terms of the loan.

[9] The appellants in terms of the magistrates' court order were to pay an amount of R24 580,00 per month to the payment agent, referred to as the PDA, for distribution to various creditors.
For several months the appellants paid over an amount which was less than the amount they ought to have paid to the PDA, in terms of the magistrates' court order.

[10] The respondent issued summons against the appellants for their breach of payments in terms of the agreement. Default judgment was granted against the appellants. The summons was served at the agreed *domicilium* of the appellants. It was common cause that the appellants did not receive the summons and *a fortiori* they were not in willful default.

[11] It came to the appellants' attention that judgment was taken against them and consequently they brought an application for rescission of the judgment taken against them. This application was heard by Louw J, which is referred to in par [1], *supra.*

The legal position:

[12] Mr Tshishonga on behalf of the appellants submitted that the court *a quo* erred in finding that the PDA was the appellants' agent. As the PDA failed to pay over the reduced amount to the respondent, in terms of the restructured payment, the appellants were liable for the omission of their agent. He submitted that the PDA is not an agent of the debtor but rather a person who is appointed in terms of the Act and is an agent of the system.

[13] In this regard he relied upon the decision of *Nedbank v Thompson* 2014 (5) SA 392 (GJ) and specifically to paras [14], [16] and [19] of the judgment, where the court found that there was no relationship of agency between the PDA and the consumer.

In response Adv du Plessis SC, acting for respondent, submitted that the *Thompson* decision was wrongly decided and that this court should follow the approach set out in *Kneen and Roper v ABSA Bank Limited* (Eastern Cape, Port Elizabeth Division, Case no 1358/2013, and at para's 18-40 of the judgment)

[14] The question whether the PDA was the consumer's agent was dealt with by Mavundla J in *FirstRand Bank Limited v Barrett and Another* (unreported matter in this division under case number 81205/2014 dated 19 June 2015). At para [13] the learned Judge relied upon *Thompson's* matter where it was held that the Payment Distribution Agency [PDA) is a payment distribution agency approved by the National Credit Regulator (the NCR) and is not the agent of the consumer but of the counsellor.

[15] Appellants counsel submitted that Louw J found that the consumers, the appellants, paid the full amount and their agent failed to pay over the re-arranged amount to the respondent. He relied upon the following extract from the judgment of Justice Louw:

" It is unfortunate for the applicants that this is the situation in that it appears that they may have made all payments required of them, but that the PDA did not, on their part, pay what they were supposed to pay to FNB. The PDA is not FNB'S agent and acts on behalf of the applicant."

[16] My understanding of the passage is that Louw J does not make a conclusive finding that the monies were paid over to the PDA. The operative words being *' it appears that they may have'.* The gist of the remarks pertains not as much as to how much was paid but rather to the issue of whether the PDA was FNB's agent or the consumers agent.

[17] For the purpose of this appeal it is not necessary for us to comment upon the issue whether the PDA is the agent of the consumer or not. We are to pronounce upon the correctness or otherwise of the judgment handed down by Louw J in the court *a quo,* dismissing the rescission application.

[18] In this regard the pivotal issue to be determined is whether the appellants paid over the amount which was ordered by the court in terms of the restructured debt. This issue raised some debate before us. On behalf of the appellants it was submitted that the full amount was paid to the PDA, whereas respondents counsel argued to the contrary.
Respondents relied on exhibit LT1 (pages 180-191 of the record) to show that less than the amount due was paid to the PDA.

[19] From the uncontroverted evidence before us it is clear that the full amount was not paid to the respondent in terms of the re-arranged scheme, and the issue to be determined was whether the respondent was entitled to take judgment as it did.

[20] Mr Du Plessis submitted that once the re-arranged scheme of payment is breached, in that any amount in terms of the re-arranged scheme is not paid, the credit provider need not give notice again. He submitted that support for his submission could be found in *Ferris'* matter, *supra*, as well as *Jili v Firstrand Bank Limited* 2015 (3) SA 586 SCA.

[21] In *Ferris,* Moseneke ACJ at para [17] stated:

"It follows that Mr and Mrs Ferris' breach of the debt-restructuring order entitled FirstRand to enforce the loan without further notice. However, even if further notice were required, its absence is a purely dilatory defence-a defence that suspends proceedings rather than precluded a cause of action- and is not an irregularity that establishes that a judgment has been 'erroneously granted', justifying a rescission under rule 42(1)(a)."

[22] In the light of the Constitutional Court's finding referred to above, it is abundantly clear that the issue of giving notice to the appellants was not

necessary and it concomitantly follows that the appellants failed to show a *bona fide* defence.

[23] Even if Louw J's erred in finding that the PDA was the agent of the consumer, the appeal should nevertheless be dismissed as the appellants breached the debt restructure agreement and they failed to put forward a *bona fide* defence.

Costs

[24] The question of costs was not argued before us, aside from the argument that the party who succeeds should be awarded with costs. More specifically the question of costs for two advocates on behalf of the respondent was not canvassed at all.

[25] The question of costs is within the discretion of the court. It is trite that the costs would generally follow the result. The question which needs to be answered is whether the matter required the services of two counsel on the part of the respondent.

[26] The law on this aspect was sufficiently crystallized and I am of the view that this matter could have been handled by a single advocate, as

opposed to engaging the services of two advocates.

[27] According, the following order is made:

(i) The appeal is dismissed;

(ii) The appellant is ordered to pay the costs of the appeal on a party and party scale, such costs to include the costs of a one advocate.

Ismail J

I agree

Mavundla J

I agree

and it is so ordered

Rabie J

APPEARANCES :

For the Appellants:	Mr V Tshlshonga instructed by Khoranbi Mabuli Attorneys Hatfield, Pretoria.
For the Respondent:	Adv D T v du Plessis SC assisted by Adv M Reineke instructed by Bezuidenhout van Zyl & Associates
Date of Appeal:	2 March 2016.
Judgment delivered on:	17 March 2016