IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: Yes / ~~No~~
(2)	OF INTEREST TO OTHER JUDGES: Yes / ~~No~~
(3)	REVISED.

06-05-2016 P.A. Meyer

DATE SIGNATURE

6/5/2016

Appeal Case No. A882/2014

Case No. 25071/2012

In the matter between:

MARTHINUS JOHANNES DE BEER Appellant

and

ABSA BANK LIMITED Respondent

Case Summary: Practice – Judgment and orders – Summary judgment – Rescission of a summary judgment cannot be claimed under Rule 42(1)(a) of the Uniform Rules of Court when neither a defendant nor his legal representative appeared at the hearing but had submitted an affidavit opposing summary judgment.

JUDGMENT

MEYER J (PRINSLOO and JW LOUW JJ concurring)

[1] This is an appeal against an order of the North Gauteng High Court (Bertelsmann J) on 26 November 2013, dismissing the appellant's application for the rescission of a summary judgment that was granted against him in favour of the respondent, Absa Bank Limited (the bank). The appeal is with leave of the court a quo.

[2] As at 17 April 2012 the appellant was indebted to the bank in an amount of R461 544.03 and interest thereon at the rate of 9% per annum. The indebtedness arose as a result of monies lent and advanced by the bank to the appellant pursuant the conclusion of a home loan agreement (the home loan agreement). The indebtedness is secured by a mortgage bond which the bank holds over an immovable property owned by the appellant (the immovable property). The appellant was further indebted to the bank for the repayment of other amounts that the bank had lent and advanced to the appellant pursuant to the conclusion of three other loan agreements (the other loan agreements). He was also indebted to other creditors arising from the conclusion of credit agreements.

[3] On 2 February 2010, the appellant applied to a debt counsellor, Ms Adri Botha of New Life Debt Counselling (the debt counsellor), in terms of s 86(1) of the National Credit Act 34 of 2005 (the Act) to have himself declared over-indebted. The debt counsellor inter alia notified the bank and her review and assessment culminated in an order being made in the Magistrate's Court, Pretoria-North on 9 February 2011

declaring the appellant to be over-indebted and re-arranging his obligations arising from the credit agreements listed in the order, including the other loan agreements (the re-arrangement order). However, the home loan agreement was - for some or other reason which is not presently relevant – not included in the re-arrangement order.

[4] The appellant was in default under the home loan agreement. By letters dated 18 April 2012 the bank's attorneys gave notice of termination of the review proceedings in respect of the home loan agreement in terms of s 86(10) of the Act, which subsection provides that-

'[i]f a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to –

(a) The consumer;

(b) The debt counsellor; and

(c) The National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.'

[5] The bank then commenced legal proceedings for the enforcement of the home loan agreement. During May 2012 it instituted an action in the North Gauteng High Court, Pretoria under case number 25071/12 against the appellant. Therein it claimed payment of the amount of R461 544.03, interest thereon at the rate of 9% per annum from 18 April 2012, for the immovable property to be declared specially executable and costs (the action). After the appellant had given notice of his intention to defend the action the bank filed an application for summary judgment. The appellant filed an affidavit in opposition to the application for summary judgment on 18 July 2012 in which various defences were raised. The application for summary judgment was heard in the North Gauteng High Court (Phatudi J) on 15 February 2013. Neither the

appellant nor his legal representative appeared in court. Summary judgment was granted against him as claimed in the action.

[6] On 8 April 2013 the appellant filed an application for rescission of the summary judgment in terms of rule 42 of the Uniform Rules of Court. Sub-rule 42(1)(a) provides that the court may-

'. . . *mero motu* or upon the application of any party affected, rescind or vary . . . [an] order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby . . .'.

The application for the rescission of the summary judgment was opposed by the bank and the filing of an answering affidavit and a replying affidavit followed in due course. The application was heard in the Gauteng Division of the High Court (Bertelsmann J) on 26 November 2013. Neither the appellant nor his legal representative appeared when the matter was heard in court. Bertelsmann J dismissed the application for the rescission of the summary judgment with costs.

[7] The appellant then made application for leave to appeal against the order of Bertelsmann J on the sole ground that the 'default judgment' granted by Phatudi J on 15 April 2013 against him was granted 'erroneously' and should have been rescinded by Bertelsmann J since, so the appellant contends, the home loan agreement was not subject to the debt review and the bank's notice of termination of the debt review proceedings in respect of the home loan agreement in terms of s 86(10) was therefore a nullity and the bank ought to have delivered a notice as contemplated in s 129(1) of the Act before it was entitled to approach the court for the enforcement of the home loan agreement.

[8] Section 129 sets out the required procedures before debt enforcement. Subsection 129(1) reads as follows:

'(1) If a 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 parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

[9] Section 130 sets out the debt procedures in court. Subsection 130(1)(a) reads thus:

'(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce the credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be; . . . '

[10] The bank, on the other hand, contends that in acting in terms of s 86(10) of the Act it acknowledged the debt review and it therefore did not need to comply with the provisions of s 129 of the Act. Before us it placed strong reliance on the decision of the Supreme Court of Appeal in *Firstrand Bank Ltd v Owens* (16/2012) [2012] ZASCA 167. Therein, Lewis JA said the following:

'[10] A reading of subsections (1) of each of s 129 and s 130 shows that where it is the credit provider that wishes to enforce the debt, a notice must be given by it to the consumer

in terms of s 129(1)(a). That subsection also makes it clear that the credit provider must draw to the consumer's attention the possible methods of resolving the debt default. Section 86(10), on the other hand, assumes knowledge on the part of the consumer of these methods: it applies only where the consumer has already applied for debt review. A notice under s 129(1)(a) is thus redundant where the consumer has already taken steps to rearrange her debts. That is why s 129(1)(b)(i) states that in order to commence legal proceedings, a credit provider must give notice either under s 129(1)(a) or s 86(10). The former applies where there has been no debt review. The latter applies where there has been. The requirement of two notices to the consumer where these are meant to serve different purposes, and in different contexts, is absurd.

[11] I accordingly agree with the decision of Murphy J in *Changing Tides* that a notice in terms of s 129(1)(a) is not required where a notice under s 86(10) has been given. I also agree that the reference in s 130(1)(a) to a notice under s 86(9) must be a reference to s 86(10). It is an obvious error. Section 86(9) does not deal with notices at all. And s 130(1)(a) must be read with s 129(1)(b)(i), which refers to s 86(10): they both refer to the requisite notice to be given to the consumer.'

(Footnotes omitted.)

[11] On 4 August 2014, Bertelsmann J granted the appellant leave to appeal to this Full Court. The view I take of the matter makes it unnecessary for us to decide whether the above quoted principles laid down by the Supreme Court of Appeal in *Owens* apply to a case such as the present one where a notice in terms of s 86(10) was given after a re-arrangement order had been made and in respect of a credit agreement that had not been included in the order.

[12] There was no default and the summary judgment was not granted 'in the absence of the appellant' within the meaning of rule 42 even though the appellant and

his legal representatives failed to appear when the application for summary judgment was heard. Rule 34(3) of the Uniform Rules of Court provides that-

'[u]pon the hearing of an application for summary judgment the defendant may- (a) give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given, or (b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the de3fence and the material facts relied upon therefor.'

And sub-rule (5) provides that-

'[i]f the defendant does not find security or satisfy the court as provided in paragraph (b) of sub-rule (3), the court may enter summary judgment for the plaintiff.

The appellant submitted his affidavit in opposition to the bank's application for summary judgment and the court was enjoined to consider the affidavit in deciding whether or not to grant summary judgment. (See *Verrijdt v Honeydew Tractors and Implements (Pty) Ltd* 1981 (1) SA 787 (T) at 789E; *Slabbert v Volkskas Bpk* 1985 (1) SA 141 (T), at 145-146.)

[13] In *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 (W), at p 400, Le Roux J said the following:

'It seems to me that a summary judgment application falls to be considered on a different footing to that of the trial action or even an application for provisional sentence. Summary judgment is an extraordinary remedy, as pointed out by MELAMET J in *Slabbert's* case. What is more, a Court is not entitled, on the authorities quoted, to ignore an affidavit submitted by a defendant in opposition to an application for summary judgment. Because of this fact it cannot, in my view, be said that a defendant is in default when he submitted an affidavit opposing summary judgment even though ideally he would have wished to have been represented by

counsel. It may be that counsel could have swayed the Judge to make a different order had he appeared on behalf of the defendant, but this is not the test. This is no "default" in the sense in which the word is used in the *Katritsis* case. The matter differs *toto caelo* from that of a trial action.

I therefore hold that there was no default and that the application brought for a rescission of the judgment is the wrong procedure.'

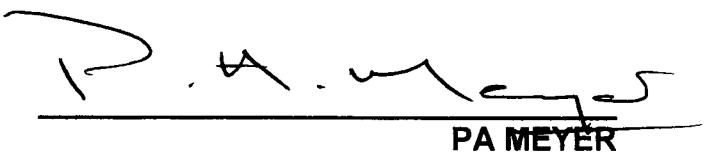
[14] It can also, in my view, not be said that summary judgment was granted 'in the absence of' a defendant when he submitted an affidavit opposing summary judgment. In this instance the appellant opposed the summary judgment application by way of an affidavit submitted to the court on the merits of the matter. The summary judgment granted against the defendant is consequently final and *res judicata*. The application brought for the rescission of the summary judgment is, therefore, the wrong procedure. My conclusion would have been different had the appellant not filed an affidavit opposing the summary judgment application. In that event he could have applied for the rescission of the summary judgment under rule 42, but he would have been limited to the grounds stated in sub-rule (1). (See *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T), at 454H-455A.)

[15] The appellant's application for a rescission of the summary judgment in its present form also does not meet the requirement of sub-rule 42(1)(a) that the order or judgment must be 'erroneously sought or erroneously granted'. Even if Phatudi J should have concluded that a s 129(1) notice ought to have been given before the bank was entitled to enforce the home loan agreement and wrongly disregarded the fact that it had not been given the order would not be 'erroneously sought' or 'erroneously granted' within the meaning of sub-rule 42(1)(a). That renders the order appealable. The rule does not cover orders wrongly granted. (See *Seale v Van*

Rooyen and others; Provincial Government, North West Province v Van Rooyen NO and others 2008 (4) SA 43 (SCA), para18.)

[16] In the result the following order is made:

The appeal is dismissed with costs.

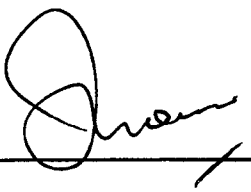


PA MEYER
JUDGE OF THE HIGH COURT

I agree.

WRC PRINSLOO
JUDGE OF THE HIGH COURT

I agree.



JW LOUW
JUDGE OF THE HIGH COURT

Date of hearing:	20 April 2016
Date of judgment:	6 May 2016
Appellant's counsel:	AA Botha
Instructed by:	Van Heerden & Krugel Attorneys, Montana, Pretoria
Respondent's counsel:	J Eastes
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