REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
NORTH GAUTENG DIVISION, PRETORIA

CASE NO: 52592/2014

DATE: 12/8/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

MAHLAKENG JANUARY MOHLAHLO	First Applicant
MMASHOTO EMILY MOHLAHLO	Second Applicant
and	
THE STANDARD BANK OF SOUTH AFRICA	Respondent

J U D G M E N T

MSIMEKI J,

INTRODUCTION

[1] The applicants, in this application, seek an order rescinding a default judgment which the respondent obtained against them on 11 September 2014. The application is opposed.

BACKGROUND

[2] The applicants and the respondent concluded loan agreements which were secured by mortgage bond numbers [8.../1994], [8…/2006] and [8…/2007]. The total amount due, owing and payable by the applicants, to the respondent, at the time of the default judgment application, according to the papers, amounted to R985 647 21. The arrears at the time amounted to R85 011 56. Default judgment was granted on 11 September 2014. The respondent obtained a writ of execution to have the applicants immovable property, namely Erf [2..] Raceview Township Registration Division IR, The Province of Gauteng also known as[4.. Glen Albyn Street, Raceview], sold on 26 November 2014 at Alberton. The applicants were served with the Warrant of Execution and Notice of Attachment on 11 October 2014. The applicants launched an urgent application seeking an order stopping the sale. On

25 November 2014 the parties agreed that the sale in execution be stayed. The applicants were ordered to launch an application for the rescission of the default judgment "within 20 (twenty) days of the date of this order for failing which, the sale in execution shall proceed". The costs of the application were reserved. Letters were exchanged between the parties relating to the rescission application. There are disputes

relating to the launching of the rescission application, the **Section 129** Notice and whether the application should succeed or not.

[3] The applicants' case, in a nutshell, is that it is, indeed, correct that they concluded agreements with the respondent in respect of loans that the respondent advanced to the applicants. The loans were secured by the mortgage bonds that were registered over the applicants property referred to above. It is also their case that the respondent, when they defaulted with their payments, sent them a Notice in terms of **Section 129** read with **Section 130 of the National Credit Act 34 of 2005 (the NCA).** They also concede that following the **Section 129** Notice, summons was also served on them. Their argument is that upon receipt of the **Section 129** Notice, same was taken to Mr Jaco Joubert (Jaco) of the respondent's attorneys and that they had a discussion with regard to the Notice. Again, upon receipt of the summons, Jaco was again approached. The promise he made to them was that he would attend to the matter and revert to them. This, according to them, created a legitimate expectation that the respondent would not proceed with the matter before reverting to them. This is denied by the respondent.

[4] The first applicant telephoned Jaco when he heard nothing from him. An undertaking, according to him, was again given that they would be contacted as soon as the matter was discussed with the respondent. To their surprise, they were, this time, served with a Warrant of Execution and Notice of Attachment of their property on 11 October 2014. They then contacted their attorneys.

[5] Mr S Laka (Mr Laka), the applicants' attorney, submitted that the respondents had disregarded the provisions of **Section 9 of the Constitution Act 108 of 1996** as well as **Sections 129, 130 and 61 and 66 of the NCA** in that the action was brought prematurely. It appears that the applicants' case is based on what they call a "legitimate expectation" -that the respondent would not proceed with the matter until Jaco reverted to them. The respondent contends that the applicants

were assisted by Mr Jaco Posthumus, an employee and administrative clerk at the respondent's attorney's office and not Jaco Joubert.

[6] The respondent contends that the application for rescission of judgment was brought out of time. In other words, it was not launched as the Urgent Court ordered on 25 November 2014.

[7] The respondent contends that no legitimate expectation was ever created by it or anyone on its behalf. The respondent concedes that, a meeting was held but states that the first applicant was advised that the matter would be proceeded with until an agreement had been reached. The first applicant, according to Posthumus, was requested to furnish documents which would enable him to obtain instructions from the respondent. A list of the required documents, according to Posthumus, was given to the first applicant who had to furnish them to enable the respondent to instruct its attorneys. The documents, up to the time the answering affidavit was deposed to, had not been given as requested. Posthumus states that it was made abundantly clear to the first applicant that the respondent would proceed with the legal action unless the applicants participated as they were required to. The applicants, according to Posthumus, did nothing and never defended the matter which was proceeded with until judgment by default was obtained.

[8] The respondent contends that:

1. the applicants failed to make out a case for the relief they seek on their papers.

2. they have failed to sufficiently explain why they disregarded the advice of the respondent's attorney, namely that the legal process instituted would proceed until an acceptable solution was found.

3. they have failed to sufficiently explain their failure to defend the action.

4. they have failed to show a good cause for the rescission of the judgment.

5. they have failed to set up a *bona fide* defence.

6. they have failed to comply with the requirements for any application for rescission of judgment set out in the **Uniform Rules of Court** or as required by the common law.

[9] It is noteworthy that:

1. the applicants acknowledge their obligations and debt in terms of the loan agreements.

2. the applicants concede that they were in arrears with their payments in terms of the loan agreements. This clearly comes out in paragraph 19 of annexure LA1 to the founding affidavit. Annexure LA1 is a letter from the applicants' attorneys to the respondent's attorneys.

3. In the third last paragraph of their letter to the respondent's attorneys dated 31 October 2014 appearing on page 37 of the papers, the applicants' attorneys state:
"We are of the view that <u>while our clients may not have</u> a defence <u>to the arrears amount due as at date of ju</u>dgment, they do have a *valid reason to rescind the Default Judgment based <u>on the procedural aspects</u> mentioned in our letter of 31st ultimo."* (my emphasis).

4. the applicants received the Section 129 Notice.

5. they concede that the summons was duly served on them although they state that it was prematurely issued.

6. they were served with a Warrant of Attachment issued on 29 September 2014. The property was attached on 13 October 2014.

7. the applicants were supposed to have launched the rescission application within 20 (twenty) days from the date of the order.

[10] The applicants contend that the rescission application was launched within the time period stipulated by the Court on 25 November 2014 while the respondent, disagrees.

[11] Mr Laka submitted that while the applicants may not have a defence to the arrears, the application is nevertheless based on the procedure which the respondent did not observe up to the time of the default judgment. It is the applicants' contention that upon receipt thereof they took the **Section 129** Notice to the respondent's attorneys. The respondent's attorneys, told them to wait. "Without any feedback", according to them, they were served with the summons. Further the respondent, according to them, disregarded the representations and applied for default judgment.

[12] It is submitted on behalf of the applicants that the summons was issued while the applicants were waiting for a feedback regarding the **Section 129** Notice. This, according to the submission, was in contravention of **Sections 66** and, **130 of the NCA** and **Section 9 of the Constitution Act 108 of 1996 ("the Constitution").** It is their submission that the rights mentioned in **Section 9** of the Constitution are protected by these sections of the **NCA.** Mr Laka, for the applicants, submitted that the respondent failed to observe the provisions of **Section 66(1) (d)** in that it took an action which accelerated and enforced the credit agreement.

[13] Mr Richard, for the respondent, submitted that the respondent's case is simple and clear. The applicants, according to him, were in arrears with

their payments. A Section 129 Notice was sent to the applicants. The applicants, because they wanted the matter resolved were required to produce documents which would assist the respondent to consider the matter. It is denied that the applicants would not proceed with the matter before the applicants heard from the respondent. Nothing worthwhile was done by the applicants who had not been paying as they were expected to for a while. Summons was issued and served on the applicants who again took the summons to the respondent's attorneys. Mr Richard specifically submitted that no undertaking or legitimate expectation was created by the respondent or its attorneys. However, according to him, what the applicants were informed was that the respondent would proceed with the action until same was satisfactorily resolved. After obtaining default judgment, the respondent instructed the Sheriff of the High Court to attach and sell the property in execution.

[14] The sale in execution as explained above was stayed and the applicants had to comply with the Court order of 25 November 2014 regarding the launching of the rescission application. The applicants and their legal representatives hold the view that the application was properly launched while Mr Richard, the respondent's attorney holds a different view.

[15] The respondent contends that although the applicants had to comply with the payment of the monthly instalments of RB 584 26, throughout the period from 2011 up until 2013 certain debit orders were returned. The respondent contends that the applicants' payment history reveals that only two payments of R1000 00 and R500 00 were received during 2014. The end result was that arrears amounted to R85 011 56 when the respondent took action against the applicants.

[16] Mr Richard submitted that the **Section 129** Notice preceded the summons which was procedurally correctly issued and served. Reference was made to **Nedbank Ltd and Others v The National**

Credit Regulator 2011 (3) SA 581 (SCA) in which the purpose of the **Section 129** Notice was spelt out. The purpose is to enable the parties to resolve the dispute under the agreement or to develop or agree on a plan to bring the agreement up to date prior to the enforcement of the credit agreement and to avoid enforcement once the matter is amicably resolved.

[17] Mr Laka, for the applicants, submitted that the enforcement of the agreement was hastily made in that the matter was prematurely brought before the Court.

[18] It must be borne in mind that the applicants were given the **Section 129** Notice. This was after the applicants had not been paying properly for a long time. They received the Notice which called on them to have the matter resolved. They were aware they were not complying with the agreements they had concluded. Considering the dates of the agreements the matter is indeed old. It, indeed, should have been incumbent upon the applicants to have the matter resolved as speedily as possible. They received the summons which again informed them of the significance of the matter. They appear to have done nothing save to say that they were waiting for a feedback. I do not think that this constitutes sufficient explanation for their default. It is in any event not convincing.

[19] The particulars of claim alert the applicants to the provisions of **Section 26(1) and 26(3) of the Constitution (the Bill of Rights)** dealing with access to adequate housing, execution and eviction from one's home.

[20] What is very important is whether the applicants are entitled to the relief that they seek.

[21] The applicants had been in arrears for a long time. They received the **Section 129** Notice. It was submitted that they may not have a defence relating to the arrears. Indeed, no defence has been shown.

In **Absa Bank v Peterson 2013 (1) SA 481 (WCC) 25** the application for rescission where the applicant had not received the **Section 129 (1) (a)** Notice was refused. The applicants in this matter received the **Section 129** Notice. The applicants themselves clearly did not furnish a reason demonstrating that they have a valid defence in the action. The applicants up until the matter was argued did nothing to show their willingness and ability to bring the monthly payments up to date.

[22] Mr Laka, submitted that the respondent could not in terms of **Section 129 (1) (b) of the NCA** commence any legal proceedings to enforce the agreement before giving the applicants the required notice and complying with the other requirements set out in **Section 130.** The applicants, as I pointed out above, received the notice and, according to them, proceeded to the offices of the respondent's attorneys. They duly received the summons but say nothing about paying the respondent the money that was due owing and payable.

[23] Regarding delivery of the application as directed by the Court, Mr Laka submitted that no condonation was required as the application was served via fax on 20 December 2014. What transpired in the matter, according to respondent's attorneys, is as follows:

1. On 1O December 2014, by way of a letter addressed to the respondents attorneys, the applicants attorneys requested an extension of time within which to launch the application. The extension was refused.

2. on 18 December 2014, the respondents attorneys of record reminded the applicants attorneys that 24 December 2014 was the last day on which they could launch their application. However, they informed the applicants attorneys that they could serve the application by e-mail.

3. On Saturday 20 December 2014 at 10:13am the applicants attorneys through an e-mail requested another extension of the

time period. At 15:13pm which was five hours later, the request was refused by the respondent's attorneys. At 11:30am the same day, according to Mr Richard, the applicants' attorneys "ostensibly" faxed the application to the respondent. The application appears not to have been received by the respondent's attorneys who, instead, received a Notice of Set Down of the application which was served on the respondent's correspondent attorneys in Pretoria. The respondent's correspondent attorneys immediately informed the respondent's attorneys who immediately enquired about the status of the application from the applicants attorneys.

4. The parties on 18 December 2014 and 20 December 2014 communicated via e-mail. The respondent's attorney's e-mail of 18 December 2014, to assist the applicants' attorneys, confirmed that they would receive the applicants' application for rescission on or before 24 December 2014 via e-mail. The e-mail addresses were furnished.

5. Despite the confirmation that service of the application would be via e-mail, same, according to the applicants' attorneys was faxed to the respondent's attorneys. The respondent's attorneys do not seem to have received the faxed application. Instead, it is said that the first document which they received from the applicants' attorneys was the Notice of Set Down. Secondly, why would they at 15:13pm on 20 December 2014 refuse the extension if the application by then had been received by them? The applicants' attorneys, if indeed they faxed the application, must have done that 47 minutes after their request without even waiting for the reply to their request. What transpired on 20 December 2014 appears strange. The application, according to the respondent's attorneys, was furnished on 18 February 2015.

6. Mr Richard submitted that the Registrar's date stamp on the application shows that the Notice of Motion was only issued on 9 January 2015 and that the application could not have been launched within the time period stated in the Court order granted on 25 November 2014. Condonation, according to Mr Richard was not set out and sought in the founding affidavit. Only a cursory reference to condonation, which is sought, according to him, appears in the replying affidavit while this ought to have been properly done in the founding affidavit. (See: **Bayat and Others v Hansa and Others 1955 (3) SA 547 (N)** and **Herbstein and Van Winese:** 'Civil Practice of the High Court of South Africa'. Volume 1. 5th Edition at 429).

[24] Mr Richard submitted that the application was fatally defective because it was brought out of time with no proper application for condonation to rectify the defect. Mr Laka's submission, in any event, is that condonation was not necessary. The application, at any rate, was according to him, delivered within the ordered time limit.

[25] Even if condonation was granted there still would be the problem pertaining to the applicants defence to the respondents action. It has been conceded that the applicants may not have a defence to the arrears that have accumulated. The applicants received the **Section 129** Notice and the summons was properly served on them. The legitimate expectation that the applicants refer to is denied by the respondents. One may ask: why would the respondent create such an expectation if it had been waiting for payment for a long time? The respondent's version on this aspect is much more probable. The respondent's version is also supported by **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD) at 634E-1** and **Stellenbosch Farmers Winery (Pty) Ltd v Stellenbosch Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E-G** where the court said:

"...*where there is* a *dispute as to the facts* a *final interdict should only be granted in notice of motion proceedings if the facts as stated by the*

respondents together with the admitted facts in the applicant's affidavits justify such an order...Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

Granting the relief that the applicants seek, in my view, will serve no purpose.

[26] The application is based on **Rule 42 of the Uniform Rules of Court.** This appears from paragraph 57 of the founding affidavit on page 15 of the papers. Mr Richard submitted that the applicants made no attempt to rely on **Rule 31(2)(b)** or the common law. This is in fact correct. **Rule 42** provides:

"42 Variation and rescission of orders

(1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any part y affected thereby:

(b) An order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) An order or judgment granted as the result of a mistake common to the parties." (my emphasis).

[27] Mr Richard submitted that **Rule 42 is** designed to correct expeditiously an obviously wrong judgment or order. (See: **Bakoven Ltd v G J Howes (Pty) Ltd 1992 (2) SA 466** (E) at 471 E-F and **Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others 1996 (4) SA 411** (C) **at 417 B-1).** In the absence of the jurisdictional facts contained in **Rule 42 (1)(a)-(c),** the Court has no discretion to set aside an order in terms of this Rule. (See: **Van der Merwe v Bonaero Park (Edms) Bpk**

1998 (1) SA 697 (T) at 702H and **Swart v Absa Bank Ltd 2009 (5) SA 219 (C) at 222B-C).**

Mr Richard submitted further that the trend by the Courts over the years, has been to interpret the Rule in such a way that it did not include "a*ll kinds of mistakes or irregularities"* (See: **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 7D).**

[28] Mr Richard's interpretation of **Rule 42** is that **Rule 42 (b) and (c)** are excluded in this application which then, according to him, means that only **Rule 42 (a)** remains applicable.

[29] For **Rule 42 (a)** then to apply, the applicant must demonstrate that the order of 11 September 2014 was erroneously sought or erroneously granted. An order or judgment, according to Mr Richard, is erroneously granted if there is an irregularity in the proceedings or if the Court was not legally competent to grant the order. (See: **Athmaram v Singh 1989 (3) SA 953 (D) at 956D, Primedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C) at 417G-H** and **First National Bank of Southern Africa Ltd v Jurgens and others 1993 (1) SA 245 (W) at 247 D). In Lodhi 2 Properties Investment CC and Another v Bender Developments (Pty) Ltd 2007 (6) SA 87 (SCA), Streicher JA at (27]** said:

" *Similarly, in* a *case where* a *plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of* a *subsequently disclosed defence. A Court which grants* a *judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have* a *defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff s claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff s in terms of the Rules*

entitled to the order sought. The existence or non-existence of a *defence on the merits is an irrelevant consideration and, is subsequently disclosed, cannot transform* a *validly obtained judgment into an erroneous judgment."*

[30] Mr Richard submitted that the applicants received the **Section 129** Notice and that the summons was duly served on the applicants. The applicants, according to the respondent, were duly warned that the action would not be stopped for as long as the matter remained unresolved. This, according to Mr Richard, precluded the applicants from employing **Rule 42 (1) (a).** The further submission was that the respondent was procedurally entitled to the judgment obtained by default. The order according to the submission, was neither erroneously sought nor erroneously granted. The applicants, in my view, aware of the **Section 129** Notice and the summons, failed to persist in getting the matter properly resolved or pay the money which became due owing and payable to the respondent by them. Nothing, as correctly submitted by Mr Richard, has been demonstrated to show that the judgment ought to be rescinded.

[31] The respondent is honest enough to admit that the applicants attended at the offices of its attorneys to discuss the matter and to consider a solution to the outstanding arrears. However, the applicants, according to Mr Richard, did not want to take the Court into their confidence by disclosing that they were supposed to have furnished the respondent's attorneys with documents which would have enabled it to consider the matter. These documents to date, still have not been furnished. From the time the matter was argued to date nothing has been said regarding payment of the arrears. Had the matter been resolved, this, no doubt, would have been communicated to the Court. This simply explains the absence of a valid defence to the respondent's action and payment of the arrears.

[32] It is Mr Richard's submission that the applicants demonstrated a wanton disregard of the respondent's request that required documents be furnished. This, once more, demonstrates the absence of any defence on the part of the applicants. The submission, in my view, seems to have merit. Indeed, the respondent, for a number of years now, has been waiting for payment which has not been forthcoming. The applicants' explanations, in my view, reveal no good cause of their wilful default.

[33] **Section 66 (1) of the NCA,** according to Mr Richard, is not there for the credit consumers to frustrate the legal process of credit suppliers. **I** agree. Further, according to Mr Richard, **Section 129** Notice is there to invoke equal participation by the parties to achieve a speedy resolution of a matter. This is also true.

[34] That the applicants were not given sufficient time to amicably settle the matter, according to Mr Richard, appears to be ill-founded and without basis. I agree. The application in my view, should fail and be dismissed with costs.

[35] **The following order is made:**

The application is dismissed with costs.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION OF THE HIGH COURT,

PRETORIA