IN THE HGH COURT OF SOUTH AFRICA

(KWAZULU-NATAL DIVISION, PIETERMARITZBURG)

Case number: AR179/15

In the matter between:-

SHAUN KISTEN N.O.	**First Appellant**
MEENA KISTEN N.O	**Second Appellant**
SHAUN KISTEN	**Third Appellant**
MEENA KISTEN	**Fourth Appellant**

And

ABSA BANK LIMITED	**First Respondent**
SHERIFFF OF THE COURT, INANDA DISTRIC 2	**Second Respondent**
REGISTRAR OF DEEDS FOR THE PROVINCE OF KWAZULU-NATAL	**Third Respondent**
PURCHASER AT SALE IN EXECUTION	**Fourth Respondent**

JUDGMENT

MAHARAJ, A.J. (KOEN ET MNGUNI JJ concurring):-

[1] The Appellants in this matter appeal against the decision of Mokgohloa J where the learned Judge refused an application for rescission of a default judgment on 15 May 2013.

[2] The default judgment was granted by the Registrar of the High Court Durban on the 18 October 2007.

[3] The First and Second Appellants are trustees of the MSKC Family Trust which borrowed monies from the First Respondent using property owned by the Trust as collateral. The Third and Fourth Appellants signed as surety and co-principal debtors for the loan amounts taken by the Trust.

[4] The First Respondent in this matter who was the plaintiff in the court *a quo* sued the Appellants for the amounts owed in terms of the mortgage contracts signed by the First and Second Appellants.

[5] The certificate of balance reflected an amount of R791 463.00 which was the accelerated amount which remained owing by the Appellants. The certificate is dated 9 May 2007.

[6] The Registrar granted default judgment in terms of Rule 31(5) on the 17 October 2007 in favour of the First Respondent. The terms of the judgment were as follows:

(a) payment of R791 463.00;

(b) interest on the aforesaid sum at the rate of 12.5% per annum, calculated from 8 May 2007 to date of payment;

(c) Against the First and Second Defendant only, an order declaring executable the immovable property described as:

Erf 1……. U…….. R……. (Extension No. 2) registration Division FU, in the Durban Metropolitan Unicity municipality area, province of KwaZulu-Natal in extension 1….. square metres held under Deed of Transfer no. T2…….

(d) Costs of suit on an attorney/client scale (to be taxed).

[7] The Appellants then sought to have the said judgment rescinded on the following grounds:

(a) non-compliance with section 129 of the National Credit Act No. 34 of 2005; (NCA);

(b) the provisions of section 26 of the Constitution not being dealt with in the summons relating to the right to have access to housing and that no one may be evicted from their home.

[8] Section 129 of the NCA deals with the procedures prescribed to be followed before debt enforcement and provides in subsection (1) as follows:

"(1) If the consumer is in default under a credit agreement, the credit provider –

(a) may draw the default to the notice of the consumer in writing proposing that the consumer refer to the credit agreement to a debt counsellor, alternative dispute resolution agent consumer court or ombudsman with jurisdiction, with the intent that the parties resolve any dispute under the agreement or, develop or 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 requirement set out in section 130

(2) subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.

(3) subject to subsection (4), a consumer may:

(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying the credit provider all amounts that are overdue, together with the credit providers permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and

(b) after complying with paragraph (a), may resume possession of any property that has been reposed by the credit provider pursuant to an attachment order.

(4) A consumer may not re-instate a credit agreement after –

(a) the sale of any property pursuant to –

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any court order enforcing that agreement; or
(c) the termination thereof in accordance with section 123.

[Date of commencement of section 129: 1 June 2007]"

[9] It is apparent that the Appellants became aware that the property was put up for sale by the First Respondent. This is evidenced by the fact that an amount of R76 151.00 was paid to the First Respondent on 22 February 2008 to stay the sale of the property scheduled for 25 February 2008.

[10] It is also apparent from an email of one Tokkie de Kock that the Appellants were made aware that the First Respondent required the

amount of R669 812.84 in order to further stay the sale of the property scheduled for 4 June 2012.

[11] The court a quo found that the Appellants launching the application some four years later, for the rescission of the default judgment was not-

(a) reasonable in the circumstances;

(b) despite the fact that notice was not given in terms of section 129 of the NCA it was not in the interest of justice to grant rescission;

(c) that the interests of justice also favours that matters come to finality and the application for rescission ought to fail on this ground as well.

(d) the court a quo also found that a "Trust" is not protected under section 26 of the Constitution .

[12] The Fourth Appellant appeared in person to argue the appeal and confirmed she was the spokesperson for all the Appellants. She submitted that the delay of four years in bringing the application for rescission was reasonable for the following reasons:

(a) she was a lay person;

(b) the default judgment was erroneously granted;

(c) she was a victim of abuse by the First Respondent;

(d) the interests of justice dictated the judgment be rescinded.

[13] In *Nkata v Firstrand Bank Ltd and Others* 2014 (2) SA 412 (WCC) the court said that:

> "Rule 42(1) does not specify a time limit within which rescission must be sought. Rescission under rule 42(1) must be sought within a reasonable period of time. (see *First National Bank of Southern Africa Ltd v Van Rensburg N.O. and Others*: In re *First National Bank of Southern Africa Ltd v Jurgens and Others* 1994 (1) SA 677 (T) at 681B-G). The same applies to rescission at common law (see *Roopnarain v Kamalapathy and Another* 1971 (3) SA 387 (D) at 391 B-D). What is reasonable will depend on the circumstances of each case *(Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 421 F-H), but the twenty day period laid down in rule 31(2)(b) provides some guidance as a starting point. The reason for a time limit is that there must be finality in litigation and that the prejudice can be caused if rescission is not promptly sought. There is no reason in principle why a litigant should have more time when seeking rescission under rule 42(1) than under rule 31(2)(b)."

[14] The party seeking rescission must show 'good cause' for the rescission of the judgment. The court has a wide discretion in evaluating 'good cause' (see *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A) at 939). 'Good cause' means there is a reasonable explanation for the default (see *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C).

> "A judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the judge who granted the judgment (see *Lodhi2 Properties Investment and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) at para 17 and 25."

[15] The Appellants on no less than six occasions paid the First Respondent monies to have the sale of the property stayed. In my view this conduct amounts to pre-emption (see *Sparks v David Polliack & Co (Pty)* Ltd 1963 (2) SA 491 (t) at 496 D-F). The general position is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate'. In order to show that a person has acquiesced in a judgment, the court must be satisfied upon the evidence that an act has been done which is necessarily inconsistent with his continued intention to have the case reopened on appeal.

[16] The Appellants paid monies to the First Respondent as mentioned above to stay the sale of the property on the following dates:

(a) 22 February 2008;

(b) 15 August 2008;

(c) 23 February 2009;

(d) 20 July 2009;

(e) 09 October 2010;

(f) 19 November 2011.

The Appellants conduct in making these payments in my view is entirely inconsistent with an intention to have the case reopened by way of rescission.

[17] From what has been alluded to aforesaid, it is my view that the failure by the First Respondent to include the section 129 notice does not render the summons a nullity or the granting of the default judgment by the Registrar on 18 October 2007 erroneous on the basis that even if the notice was alluded to in the summons, the Appellants have not pointed to what effect remedy they might have resorted, and which they did not subsequently do, which would have warded off the default judgment.

[18] It is clear that the grounds of appeal as set out by the Appellants and the reasons advanced for the delay in bringing the application for rescission some four years later, in my view, suggests that the Appellants had acquiesced in the granting of the default judgment.

[19] I cannot find that the court *a quo* misdirected itself in exercising its discretion and in reaching the conclusion.

[20] Accordingly, I propose the following order:

The appeal is dismissed with costs.

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MAHARAJ, AJ.

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KOEN, J.

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MNGUNI, J.

JUDGMENT RESERVED:	**5 AUGUST 2016**
JUDGMENT HANDED DOWN:	**23 AUGUST 2016**
COUNSEL FOR APPELLANTS:	**IN PERSON**
	(Tel: 0786082589 & 0714018372)
COUNSEL FOR RESPONDENTS:	**L MILLS**
	(Instructed by: Sowell & Co Tel: 031 5369700 Ref A Ward/06A300630)