IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 6246/2008

In the matter between:

GARY IVAN HEUNIS **First Applicant**

MAGRIETA KRISTINA HEUNIS **Second Applicant**

and

ABSA BANK LIMITED **Respondent**

JUDGMENT DELIVERED ON 6 DECEMBER 2010

ALLIE, J

[1] This is an application to rescind and set aside the summary judgment, the order declaring the immovable property of applicants to be executable and the order that applicants pay the costs of the action instituted against them by the respondent.

[2] Applicants further seek leave to file further pleadings and a stay of the execution of the Writ of Execution against the Immovable Property as well as the costs of this application in the event of respondent opposing it.

[3] The applicants admit that they instructed their attorneys to file a notice of intention to defend the summons. They admit that they failed to pay 3 month's instalments on the mortgage bond.

[4] The applicants deny that they received a notice in terms of Section 129 of the National Credit Act 34 of 2005 prior to respondent instituting action against them.

[5] It appears that respondent first sent the Section 129 notices to an incorrect address, namely 16 Dorp Street Stellenbosch which is neither the domicilium nor the residential address of the applicants. The notices were subsequently sent to the address of the immovable property which was mortgaged to respondent but due to inefficient mail delivery, applicants allegedly did not receive it.

[6] The application for summary judgment was served on the service address of applicants' attorneys but the attorneys at the service address sent it by facsimile to the incorrect facsimile number ostensibly to the applicants' attorneys. The application for summary judgment was served 2 days after applicants' attorneys sent respondent's attorneys a letter stating that they intend to oppose any summary judgment that respondent should bring.

[7] Applicants' attorneys discovered that the summary judgment application had been brought only after the order for summary judgment had been sought

and obtained. Respondent refused to consent to the rescission of the summary judgment.

[8] Applicants alleged that they would have opposed the summary judgment on the basis that the *bona fide* defence is as follows. They paid all monthly instalments before and after the 3 month period in which they had fallen into arrear. They would like an opportunity to pay in the arrear amount and to bring the account up to date. This is a remedy afforded to them by the National Credit Act but because they did not receive the Section 129 notices, they did not avail themselves of that remedy. They have subsequently paid the arrear amount into the trust account of their attorneys and have tendered payment to the respondent.

[9] The applicants allege further that the particulars of claim are excipiable because the respondent did not allege that they sent applicants a notice of cancellation prior to claiming the full amount of the loan. In this regard applicants' counsel referred the court to paragraph 12 of the loan agreement which reads as follows:

> *"Die BANK sal geregtig wees om die FASILITEIT te kanselleer en onmiddellike betaling van alle uitstande bedrae ingevolge die FASILITEIT te eis indien ..."*

[10] On behalf of applicants it was argued further that paragraph 8 of the loan agreement provides for the full amount of the loan becoming immediately due

and payable in the event of a breach by the applicants and that the provision is in fact a *lex commissoria*. It was contended that a *lex commissoria* cannot be immediately enforced as Section 123 read with Sections 129 and 130 of the National Credit Act requires that a consumer be placed *in mora* and thereby be given an opportunity to remedy his failure to pay.

[11] On respondent's behalf it was argued that once mail is sent by registered post it is considered to have been received irrespective of whether it was actually received or not. On respondent's behalf it was argued further that the National Credit Act cannot amend the agreement between the parties and there was accordingly no need for the respondent to place the applicants *in mora*.

[12] Once the respondent produced proof that it had posted the Section 129(1) notices to the domicilium of the applicants on 22 December 2009, the applicants are considered to have received them. (See: **Munien v BMW Financial Service (SA) (Pty) Ltd and Another** (unreported decision of NPD: 16103/08 (3 April 2009) and Section 65 of the Act)). Unlike in the case of **Roussouw v First Rand Bank Limited**, the Supreme Court of Appeal case, No. 640/2009 the respondent *in casu* was able to produce as part of its papers proof of postage by means of a duly completed list of registered letters.

[13] In the **Roussouw case (supra) at paragraph 20**, Maya JJA, writing for a unanimous court concluded that the bank was entitled to enforce the entire loan

agreement, which includes a *lex commissoria* and the National Credit Act does not restrict it from doing that.

[14] The Act does not compel a credit provider to allow a consumer to reinstate the credit agreement by paying the overdue amounts after action has been instituted pursuant to sending out a Section 129(1) notice to which the consumer did not respond. Section 123(3) and (4) applies before a credit provider has cancelled the credit agreement. The issuing of the summons is clearly an act of cancellation of the credit agreement.

[15] Although the applicants did not attach an affidavit by the attorneys whose offices were used as their service address to confirm that they had sent the application for summary judgment to the incorrect facsimile number, I will accept that explanation for the absence of opposition to the application for summary judgment.

[16] I am not convinced however that the applicants have a *bona fide* defence to the merits of the claim of the respondent as they admit that they were in default with their payment obligations. They also failed to avail themselves of the remedies afforded to them by the Act timeously.

[17] The application is accordingly dismissed with costs.

ALLIE, J