REPORTABLE

Republic of South Africa

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

Case No: 934/2011

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

ABSA BANK LIMITED Plaintiff

and

GARY EDGAR PETERSEN Defendant

JUDGMENT DELIVERED: 20 SEPTEMBER 2012

BINNS-WARD J:

[1] Two applications arising out of an action in which the plaintiff bank obtained default judgment against the defendant mortgagor as long ago as 6 May 2011 were heard together. One of them was an application by the bank for an order directing that the judgment could be executed against the hypothecated immovable property. The other was brought by the defendant, in terms of uniform rule 31(2)(b), for the rescission of the judgment.. Both applications were opposed. It is appropriate to determine the defendant's application first because if it is successful the bank's application will be rendered redundant.

[2] The requirements that an applicant for rescission of judgment in terms of rule 31(2)(b) must satisfy are well established; see e.g. *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA); [2003] 2 All SA 113, at para. 11, and the other authority cited there.[1] The applicant must show good cause why the remedy should be granted. That entails (a) giving a reasonable explanation of the default; (b) showing that the application is made *bona fide*; and (c) showing that there is a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgment.

[3] In the current case the application for rescission was made by the defendant outside the 20 day period prescribed in terms of the sub-rule. He became aware of the judgment on 8 February 2012. The application was instituted several months later on 29 June 2012, and quite some time after he had already delivered his opposing papers in the bank's application for an order of executability. (The defendant gave notice of his intention to oppose the application for an order of executability on 30 April 2012 and deposed to his opposing affidavit on 30 May 2012.) Consequently, he was also required to show good cause why the period within he could bring the rescission application should be extended; see uniform rule 27(1) and (2).

[4] It seems appropriate to approach the application having regard to the requirements of rule 27 and rule 31(2)(b) in an integrated manner. The exercise

[1] It is of no moment that the court in *Colyn* was concerned with an application for rescission in terms of 42(1)(a). The applicable approach is the same.

entails the exercise by the court of a wide discretion upon a proper consideration of all the relevant circumstances.[2]

[5] The reason for a limited period being afforded to a person who becomes aware of a default judgment to make application to have it set aside is manifest. It is in the public interest that there be finality in litigation. Any approach that would tolerate tardy challenges to judgments of the courts determining litigation in too accommodating a manner would thus be inimical to the public interest. The effect of the time limitation is that a judgment debtor who fails to take steps timeously to have a default judgment set aside may be required to suffer the consequences of the judgment notwithstanding that he or she might have had a defence to the claim on which it is premised.

[6] The bank's claim against the defendant was for payment of an amount due to it by him in terms of a credit facility agreement. The defendant's property had been mortgaged to provide security for the payment of the debt. The credit facility agreement was a 'credit agreement' within the meaning of the National Credit Act 34 of 2005 ('the NCA'). Hence the bank had been obliged to give the defendant notice in terms of s 129(1) of the Act[3] before the institution of recovery proceedings.[4]

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[2] Cf. *Cairns' Executors v Gaarn* 1912 AD 181, at 186 and *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A), at 352-3.

[3] Section 129(1) of the NCA provides:

> *(1) If the consumer is in default under a credit agreement, the credit provider-*
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> *(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*
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> *(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-*
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> *(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and*

[7] The object of the prescribed statutory notice is to afford the credit consumer the opportunity of taking advice and seeking to make arrangements to bring the arrears up to date, or failing that, to purge the default. The notice is also intended to serve the purpose of drawing the consumer's attention to the right to refer any dispute under the agreement to a consumer court, or to an 'ombud' with jurisdiction. A credit provider is required to react in a constructive and *bona fide* manner to any approach made to it by a consumer who has received a notice in terms of s 129. The notice has been described as a pivotal characteristic of the NCA's 'cost-avoidant and settlement-friendly processes'. It is directed at alerting debtors to 'restructure their debts, or find other relief before the guillotine of cancellation or judicial enforcement falls'; see *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) 142 (CC), at para.s 72 and 59, respectively.

[8] A court may not give judgment in a matter in which the claim is subject to notice in terms of s 129 unless, amongst other matters, it is satisfied that the notice requirements have been complied with.[5] If it is not so satisfied, the court is obliged to

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

[4] The exceptions to the requirements of s 129(1), provided for in terms of s 129(2), did not obtain in the current case.

[5] Section 130(3)(c) of the NCA provides:

Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

(c) that the credit provider has not approached the court-

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having-

(aa) surrendered property to the credit provider, and before that property has been sold;

(bb) agreed to a proposal made in terms of section 129 (1) (a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129 (1) (a); or

(dd) brought the payments under the credit agreement up to date, as contemplated in section 129 (1) (a).

give appropriate directions to enable the objects of s 129 to be satisfied; and judgment may thereafter be given only once compliance has been made with those directions.

[9] The bank sent a notice to the defendant in terms of s 129 of the NCA. It was sent by registered post to his chosen *domicilium citandi*, which happened to be at the physical address of the mortgaged property. The defendant avers that he did not receive the notice; he also says on affidavit that he does not recall ever having received notification from the post office during the period in question that there was a registered item for him to collect. The so-called 'track and trace' records obtainable from the post office in respect of registered postal items certainly appear to bear out that defendant did not receive the notice. The relevant record shows that the registered item was delivered to the Milnerton post office, which would appear to serve the area in which the defendant's *domicilium* is located. It also shows that after being held there for only a few days the item was returned to the post office from which it had originally been despatched.

[10] Postal 'track and trace' reports are something with which courts of first instance dealing with the enforcement of credit agreements under the NCA have recently become acquainted, after the judgment of the Constitutional Court in *Sebola* supra, which was delivered on 7 June 2012. The judgment added to the growing volume of jurisprudence that has been produced in the course of the courts' grapples with the inept draftmanship of many provisions of the NCA, which have taken up an extraordinary amount of space in the law reports in the last few years and given rise to what one might have hoped the National Credit Regulator and the Department of

Trade and Industry would by now acknowledge to be an embarrassment of conflicting judicial interpretations of a number of important provisions of the statute.[6]

[11] *Sebola* also concerned an application for the rescission of a default judgment in a case subject to the provisions of the NCA. The practical issue before the Constitutional Court in *Sebola* was what form of delivery by post was sufficient to fulfil the requirement of the delivery of notice in terms of s 129 of the NCA. The Supreme Court of Appeal ('SCA') had previously held in *Rossouw and Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) that s 129 of the NCA was satisfied if the credit provider despatched the required notice by registered mail to the consumer's chosen address. Following *Rossouw*, a court approached to grant judgment for the enforcement of a credit agreement might be satisfied as to compliance with s 129 if the credit provider proved the despatch of the notice by registered mail. If notice had been given by that mode of delivery, the relevant allegation was required to be included in the summons. The risk of non-receipt of notice duly despatched by registered mail was on the consumer.[7] The applicants in *Sebola* challenged the

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[6] Cf. e.g. *Sebola* supra, at para. 66; and *Nedbank Ltd and Others v National Credit* Regulator 2011 (3) SA 581 (SCA), at para. 2. The National Credit Provider (NCR), as the organ of state immediately responsible for the administration of the statute, has even had to approach the courts for declaratory relief in respect of the meaning of a number of the Act's provisions; see *National Credit Regulator v Nedbank Ltd and Others* 2009 (6) SA 295 (GNP) – the SCA judgment just cited was in respect of the appeal against the GNP judgment. Ironically, the Act, somewhat unusually, provides for one of the functions of the NCR to be '*providing guidance to the credit market and industry by- applying to a court for a declaratory order on the interpretation or application of any provision of th[e] Act*'; see s 16(1)(b)(ii). Notwithstanding the courts' repeated deprecation of the demonstrated shortcomings in the wording of many of the Act's provisions, there is regrettably no evidence that NCR's mandate to review the legislation (s 16(1)(g)) is being carried out in a manner to bring about the obviously desired improvements. Even obvious errors in the statute have been left unattended. The flawed drafting of the statute does not conform comfortably with the requirements of the rule of law which, to be properly effective, requires statutory law to be clearly worded and readily understandable to those who are expected to comply with it; cf. *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC); 2006 (2) SACR 319, at para. 62 (per O'Regan J) '*Law should be certain and accessible.*'

[7] See also *Munien* v *BMW Financial Services* 2010 (1) SA 549 (KZD) and *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA), at para. 19.

correctness of the SCA's interpretation of the Act. They contended that the NCA required that actual delivery of the s 129 notice to the consumer had to be effected before enforcement proceedings could ensue and judgment thereon could be obtained.

[12] The Constitutional Court was divided on the answer. The majority held (at para.s 74-76) that upon a proper construction of s 129 read with s 130 of the NCA it is not required of a credit provider seeking judicial enforcement of a credit agreement to prove that the s 129 notice had actually come to the attention of the consumer, nor is it required of the credit provider to prove delivery to an actual address. What is required is –

> 'averments [by the credit provider] that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer ... proof of registered despatch by itself is not enough. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by section 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office. In practical terms, this means the credit provider must obtain a post-despatch "track and trace" print-out from the website of the South African Post Office. As BASA's[8] submission explained, the "track and trace" service enables a despatcher who has sent a notice by registered mail to identify the post office at which it arrives from the Post Office website. This can be done quickly and easily. The registered item's number is entered, the location of the item appears, and it can be printed'.

[13] Cameron J, writing for the majority, summed up this part of the judgment as follows (at para. 77):

> The credit provider's summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence of contrary indication, and

[8] The Banking Association of South Africa.

> the credit provider may credibly aver, that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office.

[14] The majority judgment in *Sebola* proceeded to deal, *ex hypothesi*, with what the approach of a court should be when, in contested proceedings, it is denied by the consumer that the notice has been received. The guidance furnished in this regard is, with respect, ambiguous. On the one hand it could be read to the effect that if the consumer alleges that he or she has not received the notice, the credit provider must prove that this is not so, failing which the court must adjourn the proceedings in terms of s 130(4)(b) of the NCA; on the other hand it could also be read to suggest that an adjournment of the proceedings would be required only if the consumer was able to demonstrate that the registered item which (according to the pertinent 'track and trace' report) had arrived at the relevant post office had not been reasonably available for collection, in other words that he or she as a reasonable consumer could not have ensured its retrieval from the post office. The authoritative answer will no doubt eventually be provided in yet another culmination of the burgeoning litigation to which the unsatisfactory drafting of the NCA has given rise on a number of fronts.

[15] I would venture that, in practice, the recent experience of first instance courts is that a high percentage of s 129 notices sent by registered notice are not retrieved from the post offices. Certainly my own observation in the unopposed motion court in the post-*Sebola* era, when 'track and trace' reports have become the latest addition to the seemingly ever-increasing volume of paper with which judicial officers dealing with NCA matters have to contend, is that more often than not the registered item is indicated in the report as having arrived at the local post office, having been held

there for a period of about four weeks, and thereafter, having not been collected by the addressee, having been returned to the sender.[9]

[16] The question that has arisen is how the majority judgment in *Sebola* falls to be implemented in the face of that reality. Answering it has shifted the debate from one about the proper construction of the badly drafted statute to one about the intended import of the judgment. The new debate has been reflected in the delivery, within a month of *Sebola*, of conflicting interpretations of the Constitutional Court's majority judgment: firstly, in a judgment of this court (*Nedbank Ltd v Binneman and 12 similar cases* [2012] ZAWCHC 141 (21 June 2012)), and thereafter by the KwaZulu-Natal High Court (*Absa Bank Ltd v Mkhize; Absa Bank Ltd v Chetty; Absa Bank Ltd v Mlipha* [2012] ZAKZDHC 38 (6 July 2012)).

[17] In *Binneman*, the court concluded that the majority judgment in *Sebola* did not overrule the risk of receipt principle confirmed in *Rossouw*. Hence it fell to be read as adding only the requirement that the plaintiff should allege, and demonstrate by means of a 'track and trace' report, that the registered item had become available for collection at the addressee's post office. The judgment in *Binneman* found that it was unnecessary in the context of a default judgment application in which the relevant credit agreement contained a provision recording '. . *any notice or other document or legal process to be given, sent or delivered under this bond shall be regarded as sufficiently given, sent or delivered to the Mortgagor if delivered at that mortgaged property or sent by prepaid registered post to that mortgaged property, in which latter case it shall be presumed to have been received on the third day following the*

[9] Cf. *Nedbank Ltd v Binneman and 12 similar cases* [2012] ZAWCHC 141 (21 June 2012) at para. 2 and *Absa Bank Ltd v Mkhize; Absa Bank Ltd v Chetty; Absa Bank Ltd v Mlipha* [2012] ZAKZDHC 38 (6 July 2012), at para.s 2 and 25-29.

date of posting unless the contrary is proved' to speculate as to the intended meaning of the qualification '*in the absence of contrary indication*' in para. 77 of *Sebola*.[10]

[18] To the best of my knowledge *Binneman* has been followed without exception in this court. It has also been applied in cases in which the credit agreement did not have a presumption of receipt clause. I think that the reasoning for doing so in those cases has been that it seems to follow from the majority judgment in *Sebola* as interpreted in *Binneman* (i) that it may be presumed when a registered item arrives at the addressee's local post office that notification of its arrival will probably have been given by the post office to the consumer and that a reasonable consumer would ensure its retrieval; (ii) *ergo* that non-collection of the item in the circumstances is on the face of it an indication of unreasonable indifference by the addressee; (iii) the risk of non-receipt in the circumstances of the credit provider having taken '*reasonable measures to bring the notice to the attention of the consumer*' is on the consumer; and (iv) in any event, a presumption of receipt clause could not trump the requirements of s 129.

[19] In the *Mkhize* judgment, by contrast, it was held (at para 53) that the majority judgment in *Sebola* established 'that actual notice to the consumer is indeed the standard set by section 129(1) of the Act' and that by necessary implication the very foundation of the risk of non-receipt principle applied in *Rossouw* had therefore been demolished. Olsen AJ found support for his conclusion in a number of sentences picked out from various paragraphs of the majority judgment; see *Mkhize* at para.s 52-58. He stressed the repeated use of the phrase 'in the absence of contrary indication'. The learned judge's reasoning is not without persuasive quality, but the conclusion to

[10] See also para. 87 of *Sebola*.

which it drove him falls to be contrasted in turn with the minority's apprehension of the effect of the majority judgment (see *Sebola* at para.s 100-102), which seems to me to be more consistent with Griesel J's interpretation in *Binneman*. There is nothing in the majority judgment to suggest that the minority's expressly stated understanding of its import was misplaced, as might have been expected if that were the case.

[20] The *Sebola* judgment was allegedly the inspiration for the belated application for rescission of judgment in the current matter. Its delivery, in early June of this year, is the reason given by the defendant for the launching of the rescission application only on 29 June 2012, almost five months after he had became aware of the default judgment against him. The defendant explained the lateness of his rescission application as follows: In the course of drawing papers in opposition to the bank's application to execute the judgment against the hypothecated property the possibility of bringing a rescission application on the basis of the non-receipt of a notice in terms of s 129 and summons had been discussed. He was advised by counsel (presumably on the basis of the SCA's judgments in *Rossouw*) that '*receipt of that notice was not required*'. He continued '*After the judgment of the Constitutional Court in Sebola v Standard Bank of South Africa (handed down on 7 June 2012) my legal representatives considered that judgment and formed the view that this defence did exist to the Respondent's claim and that a rescission application was possible. I then instructed them to launch this application.*' He attributed the '*any delays in bringing* [the] *application* [to his] *desire to resolve matters and the change in the legal position regarding the delivery of section 129 notices*'. The supporting affidavit was made more than a week after the delivery of this court's judgment in *Binneman*, but before the judgment in *Mkhize*. The defendant made no reference to the judgment

in *Binneman* in his affidavit. In argument on his behalf, however, it was submitted that this court should find that the judgment in *Binneman* was clearly wrong, and that the judgment in *Mkhize* should be followed. For the reasons that follow I consider that it is unnecessary to take up that invitation.

[21] The defendant's defences were not limited to the non-receipt of the s 129 notice. He also relied on an alleged agreement with the bank to accommodate his allegedly temporary cash flow difficulties. The alleged agreement would appear to have the effect of a *pactum de non petendo*. The institution of proceedings by the bank was alleged to have been in conflict with the agreement. Thus, by his own account, the defendant had been in a position from the very moment he obtained knowledge of the default judgment to have taken steps to apply, on that ground, for the rescission of the judgment. He chose instead, in a markedly leisurely fashion, merely to oppose the bank's application for an order permitting execution against the mortgaged property.

[22] Not only did he not proceed timeously with an application for rescission that would have been feasible even on his understanding of the law pre-*Sebola*, he also consciously confirmed his election against that course when consulting with his legal representatives for the purposes of drafting his opposing affidavit in the execution application. It is evident from what he said about those consultations that an application for rescission must have been considered. In the circumstances considerations of the need for finality weigh heavily against the defendant. But that is not all. The defendant's case for rescission is also not improved when one examines the materiality of his reliance on the alleged non-compliance with s 129 of the NCA.

[23] That the judgment against him arguably might not have been lawfully granted does not, by itself and without more, afford good cause for it to be set aside. Compare, for example, the consequences of the Constitutional Court's judgment in *Gundwana v Steko Development CC and others* 2011 (3) SA 608 (CC); 2011 (8) BCLR 792, in which it was held that it was not competent for court registrars to grant execution orders in cases in which a court's consideration of the circumstances of the cases was required by virtue of s 26 of the Constitution. The Court addressed the concern that the consequence of its judgment would automatically render uncertain the status and efficacy of orders which had been granted by registrars that had been carried out, or were in the course of execution, observing (at para. 58) '*There may be a fear that the decision in this matter will lead to large-scale legal uncertainty about its effects on past matters where homes were declared specially executable by the registrar and sales in execution and transfers followed.... In order to turn the clock back in these cases aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule under which the property was declared executable is not sufficient to undo everything that followed. In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier and they will have to set out a defence to the claim for judgment against them. It may be that in many cases those aggrieved may find these requirements difficult to fulfil.*'

[24] Significantly, the Constitutional Court illustrated these remarks with reference to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA), [2004] 3 All SA 1, at para.s 27-38. As is well-known, *Oudekraal* was a case about unlawful administrative action. The judgment confirmed that even unlawful

acts are effective until and unless they are set aside on review. The court observed that the role of the court's discretionary power to set aside, or to decline to set aside unlawful administrative action, having regard to the peculiar circumstances of each case, '*accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide*'.[11] Certainty and finality are one and the same concept in the given context. In my view, the act of a registrar purporting to grant a judgment in terms of the rules of court is more accurately characterised as judicial than administrative in nature. But even if I am wrong in this respect, the approach in analogous circumstances by the Constitutional Court in *Gundwana* – an approach plainly formulated with the requirements of rule 31(2)(b) in mind - seems to me to be apposite in the consideration of the defendant's rescission application.

[25] In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC), 2011 (3) BCLR 229, at para. 85, the Constitutional Court, consistently with long established principle, mentioned the materiality of the consequences of the illegality as one of the factors weighing importantly in the balance in any decision to put certainty before legality when determining upon a just and equitable remedy in the face of a demonstrably unlawful administrative act. The averments made by the defendant in his supporting affidavit indicate that he was aware of s 129 of the NCA and had thought about relying on the non-receipt by him of notice in terms of the provision as a basis for obtaining a rescission of the judgment. What is strikingly absent from his affidavit, however, is any indication as to what effect he could have used his rights in terms of the provision

[11] *Oudekraal*, at para. 36.

had he received the notice, or as to how he could use them now if the court were to set aside the judgment and give directions in terms of s 130(4)(b) of the NCA[12] of the sort given in *Mkhize*. It is equally noteworthy that his affidavit does not contain any indication of his having taken any of the steps of which a s 129 notice would have advised him were available after obtaining knowledge of the judgment, save perhaps for communicating ineffectually with the bank in the manner to be described below. He did not need to have a notice in terms of s 129 in his hand to be able to refer the credit agreement to a debt counsellor or alternate dispute resolution agent, consumer court or 'ombud with jurisdiction'.

[26] The history of the matter shows that the defendant had been in breach of his contractual obligations for some considerable time and that the bank had been accommodating of his requests for time to get his affairs in order and bring his payments up to date. On his own version of the facts the defendant had not complied with his undertakings in respect of reduced periodic payments. It is evident that he was in no position to bring his arrears up to date. The deponent to the bank's opposing affidavit averred that the defendant had contacted the bank's attorneys on 8 February 2012 to indicate that he wished to make a payment arrangement. In response, and on the same day, the attorneys had emailed a request to the defendant to furnish them with an income and expenditure statement, together with a written payment proposal. The defendant replied immediately, undertaking to comply with

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[12] Section 130(4)(b) of the NCA provides:

In any proceedings contemplated in this section, if the court determines that-

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (a), or has approached the court in circumstances contemplated in subsection (3) (c) the court must-

(i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

the request by 9 February. He failed to do so. More than two months later, on 18 April 2012 (approximately two weeks after service of the execution application on him), the defendant emailed the bank's attorneys admitting his failure to keep to his undertaking and advising that he would 'endeavour' to make monthly payments of R14 500 with effect from 27 April.

[27] Previous arrangements made in this regard had not been kept by the defendant. Payment records attached to the bank's opposing affidavit show that the defendant's payments had been erratic. Thus, during the six months between July and December 2011, when the defendant should have paid the sum of R87000 to the bank in terms of the reduced monthly payments arrangement, payments actually made totalled only R49 393,79.

[28] It is also relevant that in the execution application the defendant had sought an order postponing the matter for three to four months, subject to an undertaking by him to pay the bank R14 500 per month (that is in instalments less than his contractual obligation) so that he could arrange the transfer of his accounts to another bank against settlement by that bank of his indebtedness to the plaintiff. It was common cause at the hearing that notwithstanding the passage of more than three months he had not succeeded in transferring the accounts. He also had not succeeded in borrowing funds from his 'business entities' to settle his indebtedness, a prospect which had been offered in the alternative to transferring his accounts. This tends to indicate that the defendant's ability to purge his arrears and maintain future payments has not been demonstrated to be sufficient to persuade alternative funders to step into the shoes of the plaintiff as his creditor.

[29] In the circumstances it does not appear probable that the defendant would have be in a position to avail effectively of the options in terms of s 129 of the NCA, even had notice been received by him. Any infringement of his rights which might have followed on an application of the interpretation in *Mkhize* of the majority judgment in *Sebola* thus has not been established to have been material.

[30] It is not necessary to say much about the defendant's second alleged defence, which was the alleged *pactum de non petendo*. As mentioned, it is evident that he was fully aware of this defence on 8 February 2012 when he first learned of the judgment, yet he did nothing on account of it to apply for rescission within the period allowed by the sub-rule. He has offered no explanation for this omission. On the contrary, as contended by the bank, his behaviour between 8 February and 29 June 2012 was outwardly consistent with acquiescence in the judgment. I am not persuaded as to his *bona fides* in attempting to invoke the defence at this stage.

[31] In the circumstances the defendant has failed to show good cause why the period within he could bring an application in terms of rule 31(2)(b) should be extended, and, even were an extension to have been given, why his application for rescission of the judgment should be granted. I shall reflect these conclusions in an order simply dismissing the application for rescission with costs.

[32] The bank's application for an order permitting execution of the judgment to be levied against the defendant's immovable property therefore has to be addressed. The housing unit erected on the mortgaged property (section 240 in the sectional title scheme known as Woodbridge Island) has been consolidated with that on an adjoining section registered in the name of the defendant's wife. The consolidated housing

units constitute the primary residence of the defendant and his family. The court is accordingly required to consider all the relevant circumstances before making the order; see the proviso to rule 46(1)(a)(ii) and the judgment of the Constitutional Court in *Gundwana* supra. Before dealing with the circumstances upon which the defendant relies to oppose the application, I feel constrained to pause to consider why it was necessary for the bank to have brought a separate application to obtain the order in the current case; special execution orders are ordinarily sought and granted in mortgage bond cases contemporaneously with, and ancillary to, the order granting judgment sounding in money.[13]

[33] The defendant had agreed in terms of the mortgage agreement that the bank would be entitled, in the event of his falling into default of his contractual obligations, to institute proceedings against him for payment and 'for a court order declaring the mortgaged property executable'. Equivalent provisions are standard in all mortgage contracts. That is the basis for the usual practice for an order of special executability to be sought ancillary to any judgment sounding in money in matters in which fixed property has been hypothecated as security for the payment of the judgment debt. In the current case, however, the acting judge who granted the default judgment declined to make the usual ancillary order. His reasons for doing so are not apparent. They do not appear to have been requested by the plaintiff.[14] It may be that, perceiving that the mortgaged property was probably the defendant's home, he thought that the bank should first excuss the defendant's moveable property. If that was his approach, it was wrong, with respect.

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[13] Cf. e.g. *First National Bank of SA Ltd v Ngcobo* 1993 (3) SA 490 (D) at 492D; *Entabeni Hospital Ltd v Van der Linde; First National Bank of SA v Puckriah* 1994 (2) SA 422 (N) at 424G-H.

[14] See Western Cape Consolidated Practice Notes PN 22 and compare *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) at para.s 10 and 11.

[34] The proper approach would have been to give effect to the provisions of the mortgage bond unless something about the case, whether based on information apparent on the summons, or provided by the defendant, made it appear inappropriate to do so. The right to housing is not an absolute right; and it is a right to adequate housing, not to housing that a mortgagor is unable to afford.[15] In the context of hypothecation, the defendant-mortgagor's right to ownership of his or her home must, in general, yield to the mortgagee's right to realise its security.[16] It is only when the exercise of the mortgagee's right is in bad faith that effect should not be given to the right. An indication of bad faith would be provided if the mortgagee seeks to proceed with execution against the defendant's home when it is evident that the judgment debt can probably be satisfied in a reasonable manner, without involving the drastic consequences of the loss of the mortgaged home.[17] This much has been acknowledged in various ways in a number of cases; see *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78; at para. 58; *Gundwana* supra, at para.s 47, 53 and 54; *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA), 2006 (9) BCLR 1022, [2006] 2 All SA 382, at para. 19-20 (which was unaffected in this respect by the judgment in *Gundwana*) and *Standard Bank of SA Ltd v Bekker & Four Similar Cases* 2011 (6)

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[15] Cf. *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA), 2006 (9) BCLR 1022, [2006] 2 All SA 382, at para. 17 and *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)* 2010 (1) SA 634 (WCC) at para 30.

[16] The constitutional significance of the principle that contractual obligations voluntarily undertaken should be respected and enforced (*pacta sunt servanda*) subject to considerations of public policy was confirmed in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691, at para.s 57 and 87. See also *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA) at para.s 15-16. In *Colonial Mutual Life Assurance Society Ltd v Tilsim Investments (Pty) Ltd* 1952 (4) SA 134 (C) at 135C, it was held '*It has been the general practice of our Courts, unless some sound reason is advanced, to declare property which is specially mortgaged to be executable for the mortgage debt.*' See also *Ledlie v Erf 2235 Somerset West (Pty) Ltd* 1992 (4) SA 600 (C) at 601F-G to the same effect.

[17] *Absa Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T) affords an example of such a case.

SA 111 (WCC) at para.s 16-26. The recognition of the important role played by the provision of mortgage finance in assisting towards the realisation of the right of adequate housing that is evident in all of these judgments is significant. It confirms that public policy supports the enforcement of home-related mortgage contracts, except where it is apparent that their enforcement is sought in bad faith.

[35] In the current case the claim was for payment of a capital sum of more than R1,5 million. The summons included a notice to the defendant about his s 26 constitutional rights in the manner required at that stage in terms of the practice direction given in *Saunderson* supra. No facts had been placed before the court as to why execution against the property should not follow in the ordinary course, and there was no material before the court which could have led the judge reasonably to believe that the defendant would have sufficient movable property available for sale in execution to satisfy the judgment debt.[18] There was nothing before the court to support an inference of bad faith, or abuse of court procedure by the plaintiff. The refusal of the ancillary relief sought by the bank was therefore unwarranted in principle. It has achieved nothing but purposeless delay, an unreasonable and unjustifiable impingement on the mortgagor's contractual rights, increased litigation costs (for the account of the defendant), and an unnecessary additional imposition on the court's time and resources. These results underscore the undesirable consequences that are bound to follow if judges do not discharge their duty in terms of the proviso to rule 46(1)(a)(ii) with appropriate regard to the principles acknowledged in the authorities referred to in the preceding paragraph. I have digressed on this aspect at some length because it is apparent from the number of separate applications

[18] In the event the defendant pointed out to the Sheriff movable property of an estimated value of only R5000 as available for sale in execution.

for leave to execute against hypothecated property coming before the unopposed motion court that the ancillary relief to which mortgagees are ordinarily entitled is too often being withheld, apparently for no principled reason, when default judgments are granted. It would be conducive to adherence to principle, I think, if a court which refuses to grant the usual ancillary relief were to briefly state its reasons. The Constitutional Court has confirmed on a number occasions that the furnishing by courts of reasons for their decisions fulfils an important role in the rule of law; reasons explain '*to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions*'.[19]

[36] The defendant has raised a number of points in answer to the bank's application for leave to execute against the hypothecated property. These are (1) the property is his family home; (2) a sale in execution will realise far less than the property is worth and he will prejudiced in consequence; (3) the consolidation of the building unit on the mortgaged section with that on the adjoining section owned by his wife will make the property difficult to sell practically; (4) he was in the process of raising funds to pay off his indebtedness to the bank in full 'in a few weeks'; and (5) the bank had been unreasonable in seeking leave to execute against the property 'when alternative means exist to obtain payment of the amount owing to [it]'. I shall consider each of these points in turn.

[37] The fact that the mortgaged property is the defendant's family home is, in itself, not a reason to deny the mortgagee's contractual right to realise its security.

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[19] *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC), 1999 (3) BCLR 253, at para 12; quoted with approval in *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC), 2009 (10) BCLR 1046, at para 17 and *Stuttafords Stores (Pty) Ltd* supra n. 14, loc cit.

Indeed, by giving the property in security the defendant voluntarily derogated from the extent of his full dominium over the property in favour of the bank. He did so for his own benefit and upon an undertaking in favour of the bank that if he defaulted in his payment obligations to the bank the full amount owed by him would become immediately due and payable, and the property given as security could be sold to realise the funds to settle the debt. The result is that on the application of the principles referred to in paragraph [34], above, there is nothing in the first point raised by the defendant, save to the extent that substance might be found in his fourth and fifth points - to which I shall come – as indications of bad faith by the bank. There is in any event no evidence to suggest that the defendant and his family will be unable to afford alternative accommodation.[20] All the indications are to the contrary. (Even had the defendant been able to assert that the sale of the property in execution and his subsequent eviction would render his family homeless, the resultant considerations the court would be called upon to address would go rather towards fixing conditions as to the timing of the sale and the subsequent vacation of the property than to the question of its executabilty in terms of the mortgage contract *per se*; cf. *The City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (The Socio-Economic Rights Institute intervening)* [2012] ZASCA 116 (14 September 2012), at para.s 16-20 – the case was concerned with the application of s 4 of the PIE Act,[21] but the considerations discussed at the passage cited would be germane in any determination of an application for the sale in execution of immovable property that is the judgment debtor's primary residence when it is apparent that the debtor will be rendered homeless as a result.)

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[20] Cf. the authorities cited in n. 15, above.
[21] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[38] The defendant's second point also hangs in the air. I think it can be accepted that forced sales frequently realise prices lower than those achieved in sales by private treaty. But if that consideration were sufficient to defeat a mortgagee's right to realise its security, the security would be illusory for all practical purposes. The position might have been different if the defendant had averred that he had put his property on the market and had been able to give an indication of a reasonably short time period within which it might be expected to be sold to common advantage in the prevailing market conditions. There has been no such averment or indication by the defendant; on the contrary, it is evident that his desire is to continue in ownership and occupation of the property, notwithstanding the bank's rights as mortgagee.

[39] The fact that the property might be difficult to sell because of building alterations effected by the mortgagor is a wholly irrelevant consideration when the enforcement of the mortgage contract is sought. There is no merit in the defendant's third point.

[40] As described earlier, the history of the matter shows that the bank has been reasonably accommodating of the defendant's financial problems. Arrangements previously entered into in this regard have not been adhered to by the defendant. Furthermore, despite the passage of more than three months between the deposition of the defendant's opposing affidavit and the hearing, the defendant has not made good on his promise to settle the debt. His fourth point is thus also demonstrably without substance.

[41] There is nothing in the defendant's fifth point. It is a weak attempt to suggest that the bank is acting in bad faith in seeking to exercise its right as mortgagee. It will

be apparent from what has been described earlier in this judgment that all the indications are to the contrary effect. The defendant has provided no evidence of alternative reasonable or effective means of obtaining settlement of the debt.

[42] In the result the bank's application for leave to execute against the hypothecated property must be upheld, as indeed it should have been when default judgment was granted on the money claim.

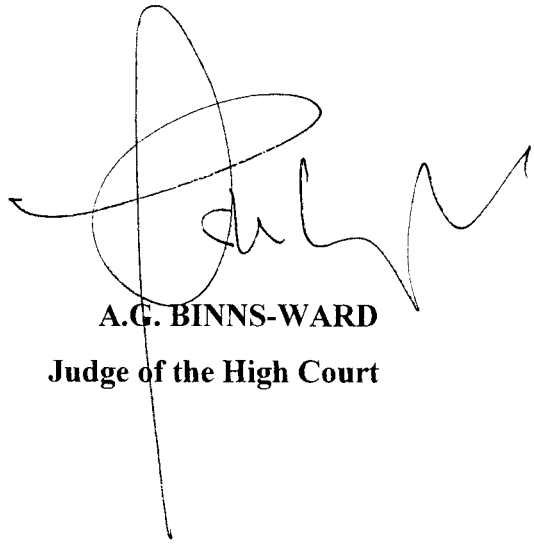
[43] The following orders are made:

1. The defendant's application for rescission of the judgment granted against him by default on 6 May 2011 is dismissed with costs.

2. Sections 240 and 229 (Sectional Plan SS.206/1988) in the scheme known as WOODBRIDGE ISLAND at MILNERTON are declared executable in satisfaction of the judgment granted against the defendant on 6 May 2011.

3. The defendant is ordered to pay the plaintiff's costs of suit in the application for the order granted in terms of paragraph 2, above.

4. The costs awarded in terms of paragraphs 1 and 3, above, shall be taxable on the scale as between attorney and client (as agreed in terms of clause 12 of the mortgage bond).



A.G. BINNS-WARD
Judge of the High Court

JUDGMENT	:	Binns-Ward J
FOR THE PLAINTIFF	:	Adv. D. Van Reenen
INSTRUCTED BY	:	Sandenbergh Nel Haggard
	:	Bellville
FOR THE DEFENDANT	:	Adv. D. Rabie
INSTRUCTED BY	:	Abrahams & Gross Inc.
	:	Cape Town
DATE OF HEARING	:	13 SEPTEMBER 2012
DATE OF JUDGMENT	:	20 SEPTEMBER 2012