THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 10909/09
Case No: 15797/12

In the matter between:

JOHN JOHANNES BUYS	Applicant
and	
CHANGING TIDES 17 (PTY) LIMITED N.O.	1st Respondent
THE SHERIFF, MALMESBURY	2nd Respondent
THE REGISTRAR OF DEEDS,	3rd Responden
CAPE TOWN	
MARILYN VAN WYK	4th Respondent

JUDGMENT delivered this 23rd day of May 2013

NDITA; J

[1] This matter involves two applications arising from an action in which the first respondent, based on the applicant's default on terms of a loan agreement, obtained on 7 September 2009,

judgment against the applicant and an order declaring the relevant property executable. It is common cause in these papers that in pursuance of the judgment, the property was sold in execution on 13 June 2012 and was bought by the fourth respondent. In the first application, the applicant seeks an order in terms of Uniform Rule 42 (1) (a) for the rescission of the judgment on the basis that the order was granted erroneously. In the second application, the applicant seeks the confirmation of an interim order granted by this court on 20 August 2012 directing the first respondent not to lodge for the transfer of the property to the fourth respondent, pending the determination of the application for the rescission of the default judgment. The two applications were heard simultaneously and I consider it prudent to first deal with the rescission application as the second one is ancillary to the outcome of the first one.

[2] The applicant is an adult male person and a consumer in terms of section 1 of the National Credit Act 34 of 2005 ("NCA"), whilst the first respondent, a company duly incorporated in terms of the Laws of the Republic of South Africa, and a Trustee of the South African Home Loans Guarantee Trust, is a credit provider. The parties entered into a loan agreement for an amount of R2 300 000,00 on or about 22 April 2008 and 8 May 2008, in terms of

which the applicant bound the property situate at Atlantic Beach Road, 1E, Atlantic Road, Melkbosstrand, Western Cape, as security for his obligations. The applicant breached the terms of the agreement as a result of which, the first respondent, as earlier pointed out, obtained judgment by default against him. The property was sold in execution on 13 June 2012. On 14 August 2012, the applicant successfully launched an application to prevent the transfer of the property, pending the present application for rescission of the default judgment which was moved on 8 October 2012 and heard on 23 February 2013.

[3] The basis upon which the applicant relies for the contention that the default judgment was erroneously granted is that the notice in terms of section 129 of the NCA was not served on him prior to the launching of the application for default judgment, and that had the court been aware of that fact, it would have been precluded from granting it as it was not competent to do so. Counsel for the first respondent argued that the applicant's reliance upon Rule 42 (1)(a) is misguided and misplaced as the correct recourse is, in terms of Uniform Rule 31(2)(b). I propose to deal with this contention from the outset.

[4] Rule 42 (1) (a) provides that:

"The Court may, in addition to any other powers it may have, mero motu or upon the application by any party affected, rescind or vary;

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

The Supreme Court of Appeal in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed* [2003] 2 All SA 113 (SCA) at paragraph 5 examined the Rule against its common law background which imparts finality to judgments in the interests of certainty, and explained that rescission or variation does not follow upon proof of a mistake. It can be accepted that once the court is satisfied that the requirements of Rule 42(1)(a) have been satisfied, it has a discretion to grant rescission application and the applicant need not show good cause. (See *Van der Merwe v Bonaero Park (EDMS) BPK* 1998 (1) SA 697 (T). Similarly in *Erasmus, Superior Court Practice* at B1-308 A, commenting on the sub-rule, the authors *Van Loggerenberg and Farlarm* state that:

"Once a court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause for the sub-rule to apply. An order or judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the court to have made such an order."

In determining whether what happened in this case amounted to an error in terms of the Rule 42(1)(a), I think the proper context is to be found in the relevant legislation and the dicta relevant thereto.

[5] The credit facility provided by the first respondent to the applicant falls squarely within the ambit and meaning of the NCA. For this reason, the first respondent was under an obligation to draw the default to the applicant before commencing with legal proceedings as envisaged in s 129 of the NCA. The section provides 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 and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with 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(1), as the case may be; and

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

Section 130 deals with debt procedures and provides that:

"(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under the 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 120(1), as the case maybe;

(b) In the case of notice contemplated in section 129(1), the consumer_

(i) has not responded to that notice; or

(ii) has responded to the notice by rejecting the credit provider's proposal; and

(c) in the case of instalment agreement secured a loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

(2) In addition to the circumstances contemplated in section (1), in the case of an instalment agreement, secured a loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if _

(a) all relevant property has been sold pursuant to_

(i) an attachment order; or

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

(b) the net proceeds of the sale were insufficient to discharge all the consumer's financial obligations under the agreement.

(3) Despite any provisions 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-

(a) In the case of proceedings to which section 127, 129 or 131 apply, the procedure required in those sections have been complied with;

(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court__

(i) during the time that the matter was before a debt counsellor, or 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 section 129 (1) (a); or

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

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

[6] The first respondent averred that the requisite notice was despatched to the applicant's chosen *domicilium* by registered mail on 18 May 2009. The applicant denies receipt of the notice. But

the denial is inconsequential if the first respondent can on these papers prove that the notice reached the post office in the area of the applicant's *domicilium*. To this end, a copy of proof of its despatch by register is attached to the papers. However, there is no report indicating that the notice was received at the stipulated address or post office. This report is now commonly referred to as a "*track and trace"* report. Nonetheless, according to the first respondent, even if there had been no compliance with s 129, such failure does not constitute a sufficient ground for holding that the order was granted erroneously, particularly when regard is had to the fact that the applicant admits proper service of summons, to which a further copy of the notice was attached. In addition, so stated the first respondent, the applicant has not shown in these papers how failure to deliver the notice prejudiced his rights and what recourse he would have taken had he received it. First, with regard to the attachment of the s 129 notice to the summons, I must immediately state that there is no merit in this submission. The very purpose of the notice is to enable a debtor to consider the avenues listed in the Act before any commencement of legal proceedings for the recovery of the debt. The Act is in this regard, clear and unambiguous.

[7] The Constitutional Court in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) considered and outlined the weight to be attached to the provision of s 129, and at paragraph 45 stated thus:

"Section 129 (1)(a) requires a credit provider, before commencing with any legal proceedings to enforce a credit agreement, to draw the default to the notice of the consumer in writing. It has been described as a "gateway" provision, or "a new pre-litigation layer to the enforcement process". Although section 129 (1)(a) says a credit provider "may" draw the consumer's default to his or her notice, section 129 (1)(b)(i) precludes the commencement of legal proceedings unless the notice is first given. So, in effect, the notice is compulsory."

[8] The question whether in the circumstances of this case, the judgment was erroneously sought or erroneously granted must be examined in the context of the applicable legislation, the NCA, as well as the dicta pertinent thereto. In *Sebola*, Cameron J set out the requirements for a credit provider to comply with s129 (1) (a);

"[74] These considerations drive me to conclude that the meaning of "deliver" in section 130 cannot be extracted by parsing the words of the statute. It must be found in a broader approach – by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that the section 129 notice in fact reached the

consumer. As pointed out earlier, the statute does not demand that the credit provider prove that the notice actually came to the attention of the consumer, since that would be ordinarily impossible. Nor does it demand proof of delivery to an actual address. But given the high significance of the section 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer.

[75] Hence, where the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential. Even though registered letter may go astray, at least there is a “a high degree of probability that most of them are delivered”. But the mishap that afflicete the Sebola’s notice shows me that proof of registered despatch 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.

[76] In practical terms, this means that the credit provider must obtain a post-despatch “track and trace” printout from the website of the South African Post Office. . . .

[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 post office, it may reasonably assumed that in the absence of contrary indication, and 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."

The court concluded thus:

"[81] I agree with the Supreme Court of Appeal in *Rossouw* that, "to be effective, the notice would have to comply both with the contract and with the Act." So the Bank was obliged not only to send the notice to their address at the North Riding post office, which it did in fulfilment of its agreement with Sebolas; the statute also obliged it to show that the notice actually reached the correct post office. That did not happen. The Sebolas were therefore entitled to rescission of the judgment granted against them."

[9] In the matter at hand, it is not in dispute that the papers reflect only that the written notice in terms of 129 (1)(a) was sent by registered mail to the lender and as pointed out earlier, there is no indication that same reached the post office. Clearly, the notice does not comply with both the contract and the Act.

[10] Relying on the judgment of the Constitutional Court in *Gundwana v Steko Development CC & 3 Others* 2011 (3) SA 608 CC, Counsel for the first respondent contended that non-compliance with s 129 does not, per se, render the judgment erroneous. The relevant passage in the judgment reads as follows:

"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. The experience following *Jaftha* may be an indication that this fear is overstated. It must be remembered that these orders were issued only where default judgments were granted by the registrar. 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."

[11] It is well to recall that the issue in *Gundwana* was the constitutional validity of a default judgment and a warrant of execution issued pursuant there by the Registrar of the High Court.

There is a stark difference between the two matters. In *casu*, the credit provider is under an obligation to comply with both the contract and the Act. This has not happened in the instant matter. I therefore have difficulty with this contention because it seeks to underscore the significance and importance of the notice. Besides, the crisp question is whether the judgment was erroneously sought or erroneously granted. The default and reasons thereof do not come into play and will only do so in the circumstances of this case if it is found that the first respondent in fact complied with the s 129 notice provisions. That then would be the second leg of the enquiry.

[12] Counsel for the first respondent further contended that even if the judgment was not lawfully granted, that by itself and without more, does not offer good cause for it to be set aside. In support thereof, extensive reference was made to the judgment of Binns-Ward J in *ABSA Bank Ltd v Petersen* 2013 (1) SA 481 (WCC).

"[29] In the circumstances it does not appear probable that the defendant would have be [*sic*] 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."

[13] In my view, the reliance on this judgment is misplaced for two reasons. First, the facts of the *Petersen* judgment are distinguishable from the present matter. In the former, the application for the rescission of the judgment obtained against *Petersen* was dismissed on the basis that he had not shown good cause for the relief sought. In addition, the track and trace post office records showed that the registered s 129 notice was at least delivered at the Milnerton post office, which appeared to serve the area in which the defendant's *domicilium i*s located. The records further showed that after being held there for only a few days, the item was returned to the post office from which it had originally been dispatched. The risk of non-receipt had therefore been minimized. In this matter, no track and trace report was filed at all. I do not understand the Petersen judgment to suggest that there must be good cause shown where the credit provider failed to comply with a statutory obligation. The converse is true because the judgment unequivocally acknowledges that:

"[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. If it is not satisfied, the

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

The manner and method of compliance is clearly set out in the *Sebola* judgment as alluded to earlier in this judgment. Second, in *Sebola,* Cameron J had due regard to the fact that debt resolution procedures are available to the consumer from the outset of the credit relationship and stated thus:

"[60] . . . Indeed, as the Bank pointed out, the Regulations require that most credit agreements include, from their inception, a statement of the consumer's right to apply for alternative dispute resolution and for debt counseling. But access to debt counseling and extra-judicial resolution will undoubtedly have their most important impact when the guillotine is about to fall. And, it is at this point, before the credit provider resorts to court processes, that legislation insists the consumer should have the benefit of a notice. This plain statutory objective must significantly influence the meaning we give to "deliver" in section 130."

[14] Similarly, in *Nedbank Ltd v Binneman* 2012 (5) SA 569 (WCC) Griesel J, was satisfied that the available evidence showed that the letter in terms of s 129 was sent by registered post to the mortgaged property and that it actually reached the

appropriate post office, namely Kraaifontein and accordingly held that the plaintiff had duly provided notice to the consumer as required by s 129(1) of the Act and therefore the risk of non-receipt therefore rested squarely with the defendant.

[15] It follows from the above reasoning that failure to produce the requisite track and trace report indicating that the s 129 notice was dispatched to the relevant post office leads to the inescapable conclusion that the judgment was erroneously sought and erroneously granted. In the circumstances, it is my judgment that the default judgment granted on 7 September 2009 ought to be rescinded. On this basis, it stands to reason that the provisional order prohibiting the first respondent from lodging for transfer of the property must be confirmed.

[16] In conclusion for all these reasons, the order that I issue is the following:

1. The default judgment granted on 7 September 2009 under case no: 10909/2009 is hereby rescinded. The first respondent is ordered to comply with s 129 of the NCA.

2. The order issued on 20 August 2012 under case no: 15797/2012 prohibiting transfer of Erf 4022 Melkbosstrand, Cape Town is confirmed.

3. The first respondent is ordered to pay the costs of both applications.

T. C NDITA

JUDGE: WESTERN CAPE HIGH COURT

FOR THE APPLICANT :Adv N de Wet
Instructed by : Randall Titus and Associates

FOR THE 1st RESPONDENT : Adv R Randall
Instructed by : Velile Tinto and Associates
:

FOR THE 2nd – 4th RESPONDENT: no appearance

DATE OF HEARING : 25 February 2013

DATE OF JUDGMENT : 23 May 2013