**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 2320/2014

DATE: 12 AUGUST 2015

In the matter between:

**Z GONGXEKA** Applicant

And

**STANDARD BANK OF SA LIMITED** Respondent

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**J U D G M E N T**

**DAVIS, J**:

This is an application for rescission of part of a default judgment granted against the applicant on 14 March 2014. In terms of an order granted by Rogers, J default judgment was ordered for the payment of R495 810.73 together with interest and costs, together with an order declaring the mortgage properties specially executable.

Of significance was a condition attached to the sale of execution which reads thus:

> "No sale of execution pursuant to this order shall

take place on the date earlier than 6 months from the date of this order. The respondent was notified that in terms of section 129(3) of the National Credit Act 34 of 2005 he may at any time prior to the sale of execution of the property reinstate the credit agreement by paying to the applicant all amounts that are overdue (i.e. in arrears) together with the applicant's permitted default charges and reasonable costs on enforcing the agreement up to the time of reinstatement, which amounts charges of costs the applicant must on enquiry from the respondent furnish to the respondent. If the credit agreement is reinstated by payment as aforesaid, the property may not be sold in execution."

It is common cause that a sale of execution was held on 14 August 2014. This took place prior to the end of the 6 month period provided fo r in the order of Rogers, J. Mr Jonker, who appeared on behalf of the first respondent, correctly conceded that the sale in execution must be set aside. It was a patently illegal act because it breached the clear conditions of the order granted by Rogers, J.

However, the applicant seeks a rescission of paragraph 4; that is the declaration that the movable property is specially executable together with the award of costs. In terms of Rule 31(2)(b) of the Uniform Rules of Court, a defendant may within 20 days after he or she has knowledge of such judgment apply to Court upon notice to the plaintiff to set aside such judgment and the Court may upon good cause shown set aside the default judgment in such terms as it seems meet.

It is well established law that in order for an applicant to establish good cause the applicant must:

(1) Present a reasonable and acceptable explanation for the default and;

(2) Must show a *bona fide* defence which *prima facie* carries some prospects of success. (See for example Vilvanathan Nathan and Another v Louw N.O. 2010 (5) SA 17 (WCC) at 27).

In this case the applicant provides the following explanation insofar as her default is concerned:

> "On or about May 2014 I received from my mother an index relating to this matter which index was served at my mother's house at No. 14 Bhunga

Avenue in Langa Township."

I should add that the index to which the applicant refers is a bundle of the papers which were issued in order to justify the grant of the default judgment, including all of the relevant supporting documentation. The applicant continues:

> "I never received the papers at my house in Kuilsriver. Upon receiving the papers I noticed that the papers indicated to a date for the hearing of this matter on 14 March 2014 and I asked my mother why she would take so long to inform me about the Court papers and she indicated that she feared for my stress levels as I already had too much on my head as a result of my father's health. I immediately called the number on the papers which appears to be the number of the correspondent of first respondent's attorneys ... no one knew anything about the matter and there was no other number available. Around about the same time I was already solely responsible for the care of my father who was very sick with cancer. I also worked shift work which meant I had little time to do anything besides caring for my father. I am the only child of my father and

> all other family members have deserted him. When I struggled to get hold of the applicant's attorneys my mind went off and all I could think of was my father coupled with the financial strain I was taking as a result of his condition. My father succumbed to his illness and passed away on 26 December 2014 and again as the only child I was faced with the responsibility of ensuring that he is buried with dignity. The funeral was held on 8 January 2015 ... around the same time I received another set of papers from third respondent for my eviction and it was then when it dawned on me. I ran around looking for a legal representative to assist me in resolving this matter."

Attached to these submissions are the papers upon which the order for eviction which was procured in the Magistrate's Court, Kuilsriver on 25 August 2014 was based. It appears that, while applicant provided a partial explanation for the very lengthy delay of some 9 months before this application was launched on 2 February 2015, the delay is a lengthy one and the explanation is a sketchy one.

Given the drastic consequences of the loss of a primary

residence, one could have expected a more expeditious response on the part of the applicant.

There is one aspect however which, in my view, needs to be taken into account. It is true that the first respondent served papers on the applicant's *domicilium citandi et executandi* which had been provided by the applicant when the initial contractual agreements were concluded between first respondent and the applicant. The applicant, however, says notwithstanding that the papers were sent to this address (that is her mother's address), she was under the impression that this was the address for the purposes of the initial correspondence. She was unaware of the meaning of the phrase *domicilium citandi et executandi*. Its meaning was never explained to her.

> "It was only explained as an address where I'm staying prior to staying in the house concerning the credit agreement."

She goes on to say:

> "I bought the house for residence and the most logic explanation would be that I receive all communication about my house at my house and

not someone else. Certainly had that happened it may have saved a lot of trouble."

I agree with this observation. It appears to me, and without setting out a general rule for these cases (because many who enter into agreements of this kind with banks are sophisticated people who doubtless understand the nature and significance of the concept of domicile), banks, such as first respondent, in dealing with a customer who may not be educated and whose first language is not English, owe some duty to explain the significance of this key term, including the point that all correspondence thereafter will be delivered to this address.

It is not acceptable to treat the entire population in this country as a single constituency living in a developed world where the citizenry can understand sophisticated contracts, phrased in a language which is often not the client's first language.

This case highlights this problem and, in my view, banks should undertake a duty of care to their clients in the appropriate case, I can only but agree with the applicant that, had this happened it may well, to use her words, have saved people "a lot of trouble".

Be that as it may, applicant contends that she never received the notice in terms of section 129 of the National Credit Act, even though it is not disputed that the notice was delivered in terms of the accepted legal position. See Kubyana v Standard Bank of South Africa Limited 2014 (3) SA 56 (CC) at para 54.

The question then arises as the *bona fide* defence. Applicant's answer is ambiguously set out.

On the one hand the applicant says:

> "Had I been present at the proceedings I would have argued that the amount of arrears sought by first respondent were not so high to justify dispensing with executing my property. I would have had means to secure the arrear amount or alienate my immovable's to satisfy the arrear amount, still I maintain I can do so."

Shortly thereafter she says:

> "Since his passing (that of her father) I have managed to receive some funds and now am in a position to settle all the arrears of the capital debt and continue with payment." (my emphasis)

There has to be some doubt as to whether these passages, on their own constitute a *bona fide* defence. After careful consideration, I do not consider that, on these papers, a sufficient case has been out for rescission of judgment.

That is not however the end of the matter. Not only did the applicant sell the property prior to the 6 month period which I have indicated, but there was no service of the relevant order on the applicant. In my view, non service defeats the very purpose of the annexure to the order, as set out in this judgment.

As Mr Jonker noted, often these clauses are inserted into an order, after an appearance from a respondent on the day in which default judgment is sought by the applicant. When the respondent does not appear in Court, as was the case with this applicant, it defeats the very purpose of the safeguard that a party such as the applicant does not receive notice thereof. What is the point of the order, one might ask rhetorically, unless there is service? If an order is granted, as was the case in the present dispute, service of the order must be effected upon the defendant.

Mr Jonker informs me that the practice is that service is

affected. This may well be the position. It must be a mandatory requirement and not one that is exercised in a discretionary fashion. In this case service did not take place. This has consequences for this case. In the first place the sale of execution must be set aside because there was non-compliance with the 6 month period. Secondly, the safeguards which were provided by Rogers, J for the applicant in this case served no purpose because of the absence of service.

The implications were made clear by Rogers, J in Nkata v First Rand Bank 2014 (2) SA 412 (WCC) at para 55 where the learned Judge says this:

> "My conclusion is thus that the mortgage loan agreements were reinstated by not later than 8 March 2011 when the arrears were cleared for the first time. As foreshadowed earlier, I consider it to be necessarily implicit in S 129(3) read with S 129(4) that, if a credit agreement is reinstated before the execution of a monetary judgment enforcing that agreement, the judgment can no longer be enforced. If the consumer again falls into arrears, the credit provider can only approach the court for an order enforcing the reinstated agreement after compliance with s13.

> The earlier judgment cannot on this ground be rescinded but by operation of law it seizes to have any further affect."

This respresents a luminous exposition of the law as I understand it. En passant Mr Jonker properly referred me to the judgment in First Rand Bank v Nkata [2015] ZASCA 44 in which Willis, JA on behalf of a unanimous Court which overturned the judgment of Rogers, J in Nkata, *supra.* However, whatever the broader implications of Willis JA's judgment, the paragraph that I have cited, which in my view reflects the law accurately, was left undisturbed and it must be followed.

This means that the proposed order that I will grant is designed to provide the applicant with a further period of time to repay the arrears, default charges and reasonable costs of enforcing the agreement so that the agreement may be reinstated. If this is the case, not only may the property not be sold in execution but, were there to be a failure of compliance in the future by the applicant, it would then rest upon the first respondent to approach the Court for a fresh order. This result balances the rights of both sides in the best possible way.

**(1) IN THE RESULT THE APPLICATION SUCCEEDS IN PART IN THAT THE SALE IN EXECUTION IS SET ASIDE AND THE DEEDS REGISTRAR IS PREVENTED AND INTERDICTED FROM TRANSFERRING ERF 21329, KUILSRIVER TO WESTERN CAPE PROPERTY ALLIANCE (PTY) LIMITED.**

**(2) THE AUCTION HELD ON 14 AUGUST 2014 AGAINST ERF 21329, KUILSRIVER BY THE KUILSRIVER SHERIFF IS SET ASIDE.**

**(3) THE IMMOVABLE PROPERTY WHICH HAS BEEN DESCRIBED IS DECLARED SPECIALLY EXECUTABLE AND TO THIS END A ROUTE OF EXECUTION MAY BE ISSUED AS ENVISAGED IN TERMS OF RULE 46(1)(A) OF THE UNIFORM RULES OF COURT, HOWEVER NO SALE IN EXECUTION PURSUANT TO THIS ORDER SHALL TAKE PLACE ON A DATE EARLIER THAN 4 MONTHS FROM THE DATE OF THIS ORDER.**

**(4) THE APPLICANT IS NOTIFIED THAT IN TERMS OF SECTION 129(3) OF THE NATIONAL CREDIT ACT 34 OF 2005 SHE MAY, AT ANY TIME PRIOR TO THE SALE IN EXECUTION OF THE PROPERTY, REINSTATE THE CREDIT AGREEMENT BY PAYING TO THE RESPONDENT ALL AMOUNTS THAT ARE OVERDUE (THAT IS THE ARREARS) TOGETHER**

**WITH THE APPLICANT'S PERMITTED DEFAULT CHARGES AND REASONABLE COSTS OF ENFORCING THE AGREEMENT UP TO THE TIME OF REINSTATEMENT, WHICH AMOUNTS, CHARGES AND COSTS THE RESPONDENT MUST FURNISH TO THE APPLICANT WITHIN 10 DAYS OF THIS ORDER HAVING BEEN SO GRANTED.**

**(5) IF THE CREDIT AGREEMENT IS REINSTATED BY PAYMENT AS SET OUT, THE PROPERTY MAY THEN NOT BE SOLD IN EXECUTION.**

**(6) THERE IS NO ORDER AS TO COSTS.**

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**DAVIS, J**