CASE NO: 3196/19

In the matter between

VUYISEKA FEBRUARIE	1st APPLICANT
RONALD FEBRUARIE	2nd APPLICANT

AND

ESKOM FINANCE COMPANY	1st RESPONDENT
NQABA GUARANTEE SPV LTD	2st RESPONDENT

JUDGMENT

THULARE AJ

[1] The applicants sought three orders to wit, declaring that the respondents are in breach of the mortgage loan agreement for number […] street, Erf […], Parow North, Cape Town; that applicants are still entitled to the respondents' performance in accordance with the mortgage agreement and that the 2nd respondent violated and infringed their privacy rights.

[2] The respondents raised two points in limine. The first is that the applicants served the notice in a manner which is not allowed by the Rules of Court. The second is that the applicants are in essence asking the court to consider a decision that has already been made by the Bellville Regional Court in respect of the Default Judgment and the section 66 application instead of continuing with an appeal process.

[3] In respect of the alleged breach of the agreement, the respondents raised two aspects. The first is that the first applicant was employed by Eskom Holdings SOC Ltd and as part of her employment benefits enjoyed a subsidized interest rate on her home loan, which ceased when her employment terminated. The second is that the interest rate applicable to the outstanding bond amount is regulated by clause 5 of the mortgage loan agreement, which provides for a variable interest rate in accordance with the Johannesburg Interbank Average Rate, which is a percentage calculated as an average of the cost at which South African Banks buy and sell money. The system allows for regular adjustments and is calculated by the Johannesburg Stock Exchange and that the first respondent used the system to adjust the interest rate charged to the applicants. The first respondent was also entitled at its own discretion in the event of a breach to increase the rate of interest under the agreement to the maximum allowable rate of interest permitted by the National Credit Act.

[4] It is not in dispute that the application was served by the first applicant personally and not through the sheriff of the court, on the offices of the correspondent attorney (Van Niekerk Groenewoud & Van Zyl Inc) for the respondents' attorney of record (Mohohlo Attorneys Inc) in various other proceedings in Bellville and arising from that an

appeal to this court between the same parties. Mohohlo Attorneys Inc in Cape Town is also the attorneys of record for the respondents in this matter.

[5] The background litigation between the parties includes default judgment being granted against the applicants in the Regional Court in Bellville; a successful application to declare the property executable; a successful urgent interdict to stay a sale in execution of the immovable property, an unsuccessful application for rescission of the judgment in the Regional Court in Bellville, a notice of appeal against the judgment dismissing the rescission application and this application.

[6] Rule 4(1)(a) of the Uniform Rules of Court provides as follows:

> "4 Service
>
> (1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraphs (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:"

[7] Rule 4(1)(aA) provides as follows:

> "(aA) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings."

[8] The correspondent attorneys did not refuse to accept service of process on them which were meant for the respondents. The attorneys of record were free to advise the applicants that they held no further instructions in the matter and that they were not mandated to accept service of any further legal processes in the matter [*ABM Motors v Minister of Minerals and Energy* 2018 (5) SA 540 (KZP) at para 22 and 23]. In the

opposing affidavit, it is not alleged that the attorneys were not duly authorised by the respondents to represent them and did not have the power to act on behalf of the respondents in respect of this application at the time of service. Their attitude is simply that the service was not in terms of the Rules. The service effected has the result that I am satisfied that the notice and affidavits came to the notice of the respondents [Kriel v Kriel 1970 (4) SA 707 (O) at 710A].

[9] The issues determined at the Bellville Regional Court, the appeal to the High Court and this application all relate to the same mortgage agreement and the same parties. They are intimately linked. Mohohlo Attorneys Inc are attorneys of record in respect of the whole matter [*Finishing Touch 163 v BHP Billiton Energy Coal SA* 2013 (2) SA 204 (SCA) para 28]. The purpose of all the proceedings, looked at against the history of the matter, was to determine the same matter to wit the rights and obligations of the parties in respect of the mortgage bond agreement.

[10] Mhantla JA said in the closing sentences of the paragraph in *Finishing Touch supra*:

> "The litigation was continuous and one has to have regard to its history over time. The same parties were involved on broadly the same issues. And, as I have mentioned, the remedy may have differed from one case to the next but the subject-matter was the same."

[11] Rule 4(1)(aA) was introduced in part with the idea of reducing costs [*Wlillies v Willies* 1973 (3) SA 257 (D) at 260B-C]. In my view, this Rule also introduced a factual,

effective, context-sensitive and purposive framework for simple and expeditious notice within the structure of a strict Rule 4(1)(a). The respondents suffered no prejudice. It is in the interests of justice that in the result the service of process by hand under the circumstances not be faulted and I find it to be in order.

[12] On the second point in limine, my starting point is what Navsa J said in *ABSA Bank v De Villiers and Another* [2010] 2 All SA 99 (SCA) at para 26:

> "[26] As a rule, where the complaint is against the result of proceedings rather than the method, the proper remedy is by way of appeal rather than review. Put differently, if the motivation for having a judgment of an inferior court set aside is that it came to the wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal."

[13] On the papers before me, the true issue between the parties is the rate of interest, the variables of that rate and the point of reference in the event of it being varied. The applicants' case is that the rate is a variable one fixed to the Johannesburg Interbank Average Rate (JIBAR). JIBAR is a percentage calculated at an average of the cost at which the South African Banks buy and sell their money. It is a system which allows regular adjustments and is calculated by the Johannesburg Stock Exchange. The agreement was that the interest may be varied in accordance with changes to that rate.

[14] According to the applicants, between 22 May 2008 and 4 November 2014, thirteen changes were made to the applicable rate. The respondents amended the rate of interest on the agreement between the parties based on the increase or decrease of the rate. The applicants allege that two such amendments did not conform to the agreement. The first was the increase which occurred immediately after the parties

signed the agreement, which was an increase of 0.50% and the second was the increase on 4.25% on 4 November 2014. Both, according to the plaintiffs, were not triggered by the variable rate fixed to JIBAR. The applicants allege that this impacted and crippled their lives.

[15] The respondents' case is that they used the JIBAR system to adjust the interest rate charged to the Applicants. They further indicate that they were in any event entitled, at their own discretion in the event of the breach, to increase the rate of interest under the mortgage loan agreement to the maximum allowable rate of interest permitted by the National Credit Act in terms of an applicable clause in the agreement.

[16] It is further the respondents case that the issue raised by the applicants had already been considered by the Regional Court in Bellville in the rescission application. The proper approach would be for the applicants to appeal the decision and not to ask this court to reconsider the issue.

[17] I was not favoured with the papers which the applicants placed before the Regional Court setting out their case in the rescission application. What I have before me is its judgment which does not provide an answer to the applicants' complaint that the interest rate was adjusted twice, which adjustments were not in accordance with the agreement between the parties and which was the cause of the applicants "crippled" position.

[18] From my reading of the judgment the question of the respondents' breach of the agreement was in the papers before it in the rescission application. I say this because paragraph 24 of the judgment reads as follows:

> "The applicants expect that the court should hold or find that Eskom breached the mortgage loan agreement, yet they did not place Eskom *in mora* in relation to this alleged breach."

[19] Whether or not from these comments amongst others in the judgment, one is able to establish whether or not inherent in this is a conclusion that there was good cause or good reason to rescind the judgment, but that the Regional Court was of the view that the applicants ought to have done something more, to wit, placed Eskom *in mora* first for them to succeed in the rescission, was not the subject-matter under the judicial spotlight in this proceedings before me. Based on the established authority in *ABSA Bank Ltd supra,* the application before me was not the proper remedy available to the applicants. The appropriate procedure was by way of appeal.

[20] The last issue for this court to determine is the public listing of the applicants' personal details in a Government Gazette at the instance of the respondents which the applicants allege had brought about great public humiliation, degradation and tarnished and destroyed their reputations and embarrassed them. The applicants allege that this compromised their constitutional right to privacy.

[21] The applicants took issue with the publication of their personal information when the notice of sale was published, as provided for in terms of the Magistrates' Courts Rules of Court (Rules Regulating the Conduct of Proceedings of the Magistrates' Courts

of South Africa) (the MC Rules). The personal information related to their full names, identity numbers and cell phone numbers.

[22] The respondents' answer was that they arranged for a sale in execution and that in terms of the MC Rules that relate to sales in execution of immovable property an auction must be advertised in the Government Gazette and a local newspaper. Further, the MC Rules also prescribe that the notices of sale be affixed at the Sheriff's Office and the local court and further that such information was first placed in the public domain when the information became part of the court record. Should there be any form of infringement, such infringement was duly justified and lawful.

[23] Rule 5(4)(a) of the MC Rules provides:

> "5 Summons
>
> (4) Every summons shall set forth-
>
> (a) the surname and first names or initials of the defendant by which the defendant is known by the plaintiff, the defendant's residence or place of business and, where known, the defendant's occupation and employment address and, if the defendant is sued in any representative capacity, such capacity;"

[24] The names and surnames of the applicants and their residence are part of the details which are sufficient to enable their identification as parties who can be sued [*SA Cooling Services (Pty) Ltd v Church Council* 1955(3) SA 541 (N) at 543C]. The court, its seat, the case number and the names and surname of natural persons as parties are generally the identification features of notices issued in relation to litigation, execution

and their ancillary processes, which includes a sale in execution. In my view, the applicants' complaint as regards the use of their full names is without merit.

[25] Rule 43(7)(b) of the MC Rules of Court provide as follows:

> "43 Execution against immovable property
>
> (7)(b)(i) The execution creditor shall, after consultation with the sheriff conducting the sale, prepare a notice of sale containing a short description of the attached immovable property, its improvements, magisterial district and physical address, the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the sheriff conducting the sale.
>
> (ii) The execution creditor must furnish the sheriff with as many copies of the notice of sale as the sheriff may require."

[26] The substantive details required by the Rule read with Rule 43(5)(a) and form 34 of the MC Rules were primarily intended for the identification of the property and the particulars of the sale. The identity numbers of the applicants were appropriate in the context of their more accurate identification on processes and notices in relation to the litigation, execution and ancillary matters.

[27] In my view, the provision of identity numbers of the judgment debtors in relation to a process of execution following a judgment cannot be said to be misplaced. A lot of activities with financial health implications and participation in the economic life happen outside the courthouse following a judgment, which activities depend on the proper identification of debtors in respect of the orders that the courts make. A classic example is the endorsements on the health profiles of debtors on credit bureaux. The applicants'

complaint is simply technical. In my view justice, fairness, reasonableness and good faith demands that I pronounce the complaint as unsound.

[28] The use of cellphones has become part of the incremental changes which are necessary to keep social and economic life dynamic and evolving within the fabric of our society. The use of the power of the Judiciary within our constitutional democracy should reflect its confinement and appreciation of the changing social and moral foundations. The furnishing of details in relation to the steps in the determination of the value of the property to be sold in execution would assist in the setting of an appropriate price for the sale. This is part of the managing of the indebtedness of the judgment debtor.

[29] Simple and expedited contact with the debtor can only be in the best interests of the debtor. The debtor is entitled to remedy any default by paying the arrear amounts, default charges and reasonable costs of enforcements, which right endures until the proceeds from the sale have been realized. I am unable to find that the provision of the applicants' cellphone details was wrongful.

For these reasons the application is dismissed with costs.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT

Dates of hearing: Set down 9 April 2019 with Judge Boqwana.

Postponed to 27 August 2019.
Hearing on the 27 August 2019 with Acting Judge Thulare.
Judgment handed down on 28 October 2019, Acting Judge Thulare.

For the 1st and 2nd Applicants	:	representing in person
Attorneys for the applicants	:	None
Counsel for the 1st & 2nd respondents:		Adv S Hendricks
Attorneys for 1st and 2nd respondents:		B Viljoen & Moholo Attorneys Instructing attorney Mr B Viljoen