**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE, PORT ELIZABETH**

**Case no: 1523/2012**
**Date heard: 14.9.2012**
**Order given:14.9.2012**

**In the matter between:**

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| **VUYANI MAKAULA** | **First applicant** |
| **SISANDA NDLUNGWANE** | **Second applicant** |
| **vs** | |
| **NEDBANK LIMITED** | **Respondent** |

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**REASONS FOR JUDGMENT**

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**TSHIKI J:**

[1] Applicants herein have instituted the present application on an urgent basis. However, on perusal of the papers only the first applicant has instituted the proceedings and I say so for the reason that he is the only applicant who has deposed to the founding affidavit. In any event, having regard to the respondent's answering affidavit which contends that the second applicant was present in Court when the application for judgment and for declaring executable the immovable property of the applicants, there can be no sense in second applicant's institution of the present proceedings.

[2] Having read the certificate of urgency by applicants' counsel on 13th September 2012, I ordered that the matter could be heard by way of urgency.

[3] Respondent has opposed the application and has filed its answering affidavit. No replying affidavit was filed by applicant.

[4] After the case was argued, I dismissed the application with costs and indicated that my reasons for judgment would follow. What next follows are my reasons.

[5] During argument Mr Ahmed appeared for the applicants and Mr Marais represented the respondent.

[6] The loan amount in issue originates from a home loan mortgage bond granted in favour the respondent for an amount of R486 000.00 together with finance charges thereon in respect of immovable property being erf no 5960 Motherwell, Uitenhage within the jurisdiction of this Court. First applicant had chosen as his primary place of residence the immovable property which is situate at no 56 Zingela Street, Kwanobuhle, Uitenhage. Therefore, it follows that the mortgaged property cannot be the first applicant's primary residence.

[7] It is common cause that applicant had both failed to pay the monthly instalments in terms of the agreement an omission which necessitated respondent to take legal action against them. Respondent had in fact obtained judgment against applicants which includes an order declaring executable the immovable property in issue. When the present proceedings were issued the property in question was to be sold by public auction at 15h30 on 14th September 2012. The present proceedings are the first applicant's attempt to save the property from being sold in

execution.

[8] In his application before me first applicant raises two issues which are:

[8.1] That the respondent has not complied with the provisions of section 129 (1) of the National Credit Act 34 of 2005 (the Act) in that first applicant never received the required notification letter in terms of section 129 (1) of the Act.

[8.2] That when respondent instituted the legal proceedings against the applicants it had no *locus standi* to sue because it had ceded its rights to do so to another entity which has since settled the debt. For that reason, respondent has lost all rights, titles and obligations in respect of the property.

[8.3] Thirdly, first applicant contends further that respondent has illegally tempered with the contents of their contract with applicants in that the available copy of the contract does not correctly reflect the original terms of the agreement and that it is a defective generated copy of the original.

[9] In response to the above allegations respondent has contended as follows.

[9.1] It has attached a letter "LP1" written by Advocate Zietsman confirming that second applicant who did not oppose the application for default judgment was present in Court on the date when default judgment was granted.

[9.2] It has annexed "LP2" and "track and trace" reports in respect of all the four sections 129 (1) notices despatched to both applicants. The notices were despatched to both the Kwanobuhle and Motherwell residential hubs of the applicants.

[9.3] That the Sheriff had served both applicants personally with the notices in terms of Rule 31(5) read with Rule 46(1) A (11) relating to the immovable property in question and this was on the 9th June 2012 at 20h12 at 56 Zingela Street, Kwanobuhle, Uitenhage as it is proved by the copies of the returns of service of the notices.

[10] I may mention that in his founding affidavit applicant avers that he did not receive the notice of application to declare the property executable because during that period he was in Mthatha from March 2012 up to until he came back on 23rd August 2012.

REASONS FOR JUDGMENT

[11] In terms of the rule in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 620 (A), I have no reason to accept the bare denial of the first applicant that he was never served with the Court papers in this case prior to 23rd August 2012. There is no merit in his averments that all along he has not been aware that there is Court action against him which threatens to either recover the amount due and/or to have the property sold in execution for the recovery of the amount owed by him to respondent.

[12] In the first place, first applicant alleges that the respondent has ceded the debt to another entity but this bald allegation is not proved by facts. It is a bare assertion which respondent has refuted outright. There is no such proof by first applicant and neither does he mention the name of the party or entity that has paid the debt on behalf of the applicants. There are no details of this unsubstantiated cession of debt. In my view, first applicant's allegations in this regard have not meaningful substance.

[13] Secondly, a personal service to the first applicant of the notice in terms of Rule 31 (5) read with Rule 46 (1)(A)(ii) informs him that respondent will apply for an order declaring executable the immovable property which is specially hypothecated and being the property in issue herein. No steps were taken by the first applicant since 9 June 2012 when the service was effected. The returns of service in this regard have not been challenged by applicants. The service of such writ was sufficient to inform first applicant that the property in issue was under threat of being sold in execution. First applicant, however, did not take action since then and only now does he pretend to have been ignorant of the intended sale of his property until he met his current legal representative. This, in my view, cannot be so because the nature of the contents of the served documents was explained to him by the Sheriff. In such circumstances first applicant was expected to have considered seeking legal advice or at least approaching the respondent or its attorneys. In any event, the return of service refutes his allegation that he had been ignorant of the Court proceedings until 23rd August 2012. In any event, even if he only became aware of the legal proceedings on 23rd August 2012, for him to only approach this Court on 14th September 2012, does not help him either because he only took action 23 days after he became aware of the Court proceedings.

[14] With regard to the notice in terms of section 129 (1) of the National Credit Act 34 of 2005 (the Act), the requirement necessary for its compliance is that the credit provider "may draw the default to the notice of the consumer in writing and make some proposals to the consumer." In this case, the respondent informed first applicant of the provisions of section 129 (1) of the Act by sending letters to both

addresses of the first applicant, the one in Uitenhage at no 56 Zingela Crescent, Kwanobuhle, Uitenhage 6242, as well as to the alternative address at no 2 Chalumna Street, NU 5 Motherwell 6211. The first address was specifically chosen by the first applicant and it is where the letter in terms of section 129 (1) of the Act was sent by registered post. Annexures "LP2a-d" containing the track and trace reports prove that all four section 129 (1) notices were dispatched to the first and second applicants. The letters reached both the Kwanobuhle and Motherwell places to which they were posted by registered mail. In my view, respondent has sufficiently complied with section 129 (1) of the Act. Nothing more is required of it by the Act. In the present case there appears to be no prospects that first applicant has the ability to repay the debt owed which is the amount of R544 255.52. As at 31st March 2012, applicants were in arrears of over 14 months amounting to R60 029.63 which in my view was not a negligible amount. According to the first applicant he cannot even pay fees for an attorney let alone an amount in excess of R60 029.63 by which he was in arrears as at March 2012. The property in issue is the one in terms of which the bond was taken by the applicants herein. It does not appear to me that the first applicant's rights to adequate housing would be infringed by the refusal of the orders sought in the form of staying the sale in execution. I say so because both applicants have not demonstrated an ability to pay the debt they owe in respect of the property and for that reason respondent herein would suffer irreparable harm if the order is granted. This is also demonstrated by the second applicant's attitude in not defending the application for default judgment. (***Standard Bank of South Africa Ltd v Saunderson and Others*** 2006 (2) SA 264 (SCA)).

[15] For the above reasons I could not be persuaded to grant the orders sought by first applicant herein, hence I dismissed the application with costs. However, in view

of the evidence contained in the papers that second applicant does not appear to be involved in the institution of the present proceedings only the first applicant should pay the costs of this application.

**P.W TSHIKI**
**JUDGE OF THE HIGH COURT**

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| Counsel for the first applicant | : | Mr M.S. Ahmed |
| Instructed by | : | MSA Attorneys<br>36 North Road<br>North End<br>PORT ELIZABETH<br><br>(Ref: Mr Ahmed) |
| Counsel for the respondent | : | Adv P Marais |
| Instructed by | : | Pagdens Attorneys<br>Pagdens Court<br>18 Castle Hill<br>Central<br>PORT ELIZABETH<br><br>(Ref: Mr Vienings/hd/N0569/4421) |