IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: 2318/2017

Date heard: 29 August 2019

Date delivered: 25 September 2019

In the matter between:

MATSHEDISO DAPHNE MOTHLABANE **Applicant**

And

ABSA BANK LIMITED **Respondent**

JUDGMENT

Goosen J:

[1] The applicant seeks rescission of a judgment granted against her by default on 20 February 2018[1]. She also seeks rescission of an order declaring her hypothecated property specially executable on 19 June 2018.

[2] The respondent instituted action for payment of the accelerated capital sum due in terms of a loan agreement concluded with the applicant. The sum claimed was R450 032,48 together with interest and costs. The loan agreement, entered into on 14 May 2012, provided for registration of a first mortgage bond over Erf 3447, Korsten, Port Elizabeth (the property) as security for the loan. The applicant was required to repay the capital and interest on the loan by way of monthly instalments in the amount of R4 595,00. The loan agreement provided that in the event of default of payment of the monthly instalment the respondent would be entitled, *inter alia*, to claim payment of the full amount due in terms of the loan agreement.

[3] It is not in dispute that the applicant fell into arrears in the payment of her monthly instalment. As a consequence the respondent caused a Notice and letter of demand in terms of s 129 of the **National Credit Act**[2] (hereunder the **NCA**) to be delivered to the applicant. Delivery of this Notice, dated 20 June 2017, is not in dispute[3]. It is common cause that the applicant did not avail herself of any of the remedies available to her in terms of s 129 read with s 130 of the **NCA**.

[4] As already indicated the respondent issued summons seeking to enforce the credit agreement concluded between it and the applicant. Summons was served on

[1] The judgment is erroneously dated 20 February 2017. That this is an error is apparent from the court file which indicates that summons was issued and served on 11 July 2017 (this is also admitted by the applicant) and was thereafter referred to open court on 3 August 2017 and ultimately enrolled for hearing on 20 February 2018.
[2] Act No, 34 of 2005
[3] The Notice reflects the amount in arrears as at 8 June 2017 as being R31 650,26.

the applicant in person at the *domicilium* address of the property on 11 July 2017. The applicant did not enter an appearance to defend. It appears that the application for default judgment was set down for 3 October 2017. It is not apparent what, if anything, transpired on that day. There is no note on the file nor any court order dated 3 October 2017. Be that as it may, the application for default judgment was re-enrolled for 20 February 2018. The applicant is noted as being present and appearing in person. As indicated, judgment was granted by Beshe J for payment of the capital, plus interest and costs.

[5] On 3 May 2018 the respondent issued an application in terms of Rule 46A to declare Erf 3447 Korsten, Port Elizabeth to be specially executable. Personal service of the application was effected on the applicant on 8 May 2018. On 19 June 2018, Chetty J granted the order.

[6] The application for rescission of the aforementioned judgments is premised upon the common law, alternatively upon Rule 42(1)(a).

[7] The applicant's founding affidavit sets out three bases upon which rescission of the judgments is sought. The first of these that the procedure adopted by the respondent, viz. to obtain two separate judgments i.e. the first for the capital and interest and the second for authority to execute against the property is impermissible. In this regard reference is made (both in the founding affidavit and the heads of argument filed on behalf of the applicant) to ***Absa Bank Limited v Mokebe***[4]. Mr Lambrecht, who argued the matter on behalf of the applicant, wisely and properly abandoned the point. The ***Mokebe*** judgment was delivered on 12 September 2018 after both judgments in this matter had been handed down. The

[4] 2018 (6) SA 492 (GJ)

Mokebe judgment (leaving aside for the moment its precedential status) does not address the practice or procedure of this Division prior to its delivery. The applicant's reliance upon it is accordingly without merit.

[8] The primary basis upon which the applicant seeks rescission is the contention that the credit agreement was re-instated prior to judgment by reason of the plaintiff effecting payment of the then outstanding arrears. The applicant alleges that shortly after receiving the summons in the action she visited a branch office of the respondent. She does not state when this occurred. However, she states that she spoke to a bank official who made telephonic contact with an official in the Home Loans Department of the respondent at its head office in Gauteng. She spoke to this official, a Mr Madlabane. She states that he informed her that she should make payment of R45 000,00 in order to bring the account up to date. Should she do so no further legal steps would be taken.

[9] Following this conversation the applicant made payment of the R45 000,00 in two tranches, R30 000,00 on 2 September 2017 and a further R15 000,00 on 6 September 2017. According to the applicant she believed that the payment of the arrears would result in the legal proceedings being halted.

[10] The applicant states that she attended court on 20 February 2018 and explained to the court that she had made an arrangement with the bank official. She thereafter assumed that the matter was resolved and only came to a different understanding when she received notice of the application to permit execution against the property.

[11] The applicant then sought legal assistance from some unnamed attorneys. She was advised not to take the matter further. She was eventually referred to her present attorney. This was some time after the order was made by Chetty J. During the course of September 2018 counsel's opinion was obtained and on 3 October 2018 the present application was launched[5].

[12] In addition to the contention that the credit agreement was reinstated by payment of the arrears the applicant also asserts that she intends to challenge the enforceability of the credit agreement on the basis that the extension of credit to her was reckless. As I understand it this is founded on the allegation that the loan was approved at a stage when she was five years from retirement. She would, for this reason, therefore not have been in a position to repay the loan over the period of its terms.

[13] For reasons which will become apparent hereunder it is not necessary to canvas this latter issue to determine whether it constitutes a *bona fide* defence to the respondent's claim. I have my doubts but I need say no more.

[14] A party seeking rescission of judgment, in accordance with common law principles, is required to establish sufficient cause. This involves two elements viz. a reasonable and acceptable explanation for the default <u>and</u> a *bona fide* defence which carries some prospects of success[6]. Both elements must be established.

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[5] It is apparent that the conduct of the application itself was bedevilled by delays in the filing of papers. These delays do not bear upon the substantive question as to the applicant's explanation for the delay in commencing the application and can accordingly be ignored for present purposes.

[6] See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765A-D

[15] Mr Van Rooyen, for the respondent, argued that the applicant's application must fail on both accounts. He argued that the applicant had given no explanation for her default nor for the delay in bringing this application.

[16] I am unable to agree with these submissions. The applicant states that she did react to the summons. She contacted the bank and was told that she must pay the outstanding arrears on the account. If she did so no further action would be taken. She did, in fact, pay the amount indicated and therefore assumed that nothing further would occur. That was in September 2017 and it appears that nothing further was in fact done until the application for default judgment was "re-enrolled" for 20 February 2018. On that occasion she attended and, according to her uncontradicted statement, attempted to explain her position.

[17] In my view this explanation is reasonable. It adequately explains why she was in default of entering an appearance to defend. The explanation is also closely intertwined with the substantive defence raised on the papers, viz. that the credit agreement upon which the cause of action had been founded had been reinstated.

[18] In its answering affidavit the respondent suggests that the applicant's averments regarding the arrangement to pay the outstanding arrears are "*conveniently vague, bald and sketchy*". This characterization of the applicant's averments is patently wrong. While it is so that the applicant does not specify a date when she spoke to the bank official, she names the official and identifies the department in which he works. She also provides specific detail in regard to the amount of the arrears communicated to her.

[19] Apart from the inaccurate characterization of the averment there is no attempt by the respondent to address these factual averments. The respondent does not go on oath to state that no such person as a Mr Lucky Madlabane exists or then worked in the Home Loans Department or that such conversation never occurred.

[20] No reason is given why these allegations cannot be investigated. Instead, the averments of the applicant stand unchallenged. What is more, the applicant's version of what occurred is strongly supported by the evidence adduced by the respondent at the stage of default judgment and before this court. At the stage when default judgment was sought a supplementary affidavit (pursuant to Rule 14A) was filed[7]. In it the arrears amount is given as R14 571,50. The account statements annexed thereto indicate that on 2 September and 6 September 2017 R30 000,00 and R15 000,000 respectively was paid. The arrear balance as at 6 September 2017 is reflected as R747,40. The arrear balance as at 9 February 2018 accordingly consists of this amount together with instalments and interest accrued after 6 September 2017. This state of the applicant's account is confirmed in a so-called "*Re-Calculation*" statement annexed to the answering affidavit in the present application.

[21] It is, in my view, significant that immediately prior to the payment made by the applicant the arrear amount reflected on the account statement was R45 767,40. This accords very closely with what she says she was told the arrear amount was.

[22] Mr Van Rooyen argued that, as a matter of fact, the applicant had not paid the arrears in full, nor had she paid the costs incurred in enforcing the agreement. As

[7] The original Rule 14A affidavit was deposed to on 31 July 2017 reflecting the state of the applicant's account as at that date. The supplementary affidavit is dated 9 February 2018.

such she could not avail herself of s 129(3) of the **NCA** or the judgment in ***Nkata v Firstrand Bank Ltd***[8].

[23] S 129(3) provides that a consumer may:

> "at any time before the credit provider has cancelled the agreement, remedy default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied."

[24] In ***Nkata***[9] it was held that "*all amounts that are overdue*" refers only to the arrear instalments. Reinstatement occurs by operation of law[10] and occurs upon payment of the arrears that are due, the permissible default charges and the legal costs. Importantly, it was held that legal costs are only due and payable when they are reasonable, agreed or taxed and on due notice to the consumer[11]. That did not happen in this instance. Accordingly, it was open to the applicant to reinstate the agreement[12] upon payment of the amount in arrears.

[25] Does the fact that the full amount that was overdue was not paid preclude reliance on s 129(3)? It may well be so notwithstanding the amount of the difference, however, small. I need, however, not decide the issue. There are two reasons. Firstly, I need only determine whether the applicant has raised a *bona fide* defence against the respondent's claim which entitled her to rescission of judgment. She

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[8] 2016 (4) SA 226 (CC)
[9] *Supra* at par [108]
[10] *Supra* at par [105]
[11] Supra at [80]
[12] It was not in issue that the applicant was time bound in this instance and therefor precluded from relying on s 129(3) of the **NCA**.

contends that a bank official informed her of the amount of the arrears to pay and she paid that amount. She was told that no further legal steps would be taken. Although her case for rescission was argued upon a reinstatement basis, the facts relied upon also sustain an agreement not to proceed in the event that payment of R45 000,00 was made. There is also the argument, raised in the applicant's heads of argument, that in the circumstances of this matter the respondent was duty-bound to draw to the applicant's attention the outstanding amount of R767,40 so that she could avail herself of the protection afforded by s 129(3).

[26] When I take all of these aspects into consideration I am satisfied that the applicant has indeed raised a *bona fide* defence which enjoys some prospect of success. It follows that the applicant is entitled to rescission of the judgment of 20 February 2018. Mr Van Rooyen conceded, properly so, that the judgment of 19 June 2018 declaring the property executable would necessarily also need to be set aside. In respect of costs there is no reason to depart from the ordinary rule that costs follow the result.

[27] I, therefore, make the following orders:

1. The judgments of 20 February 2018 and 19 June 2018 under case number 2318/2017 are hereby rescinded.
2. The respondent is ordered to pay the costs of the application to rescind the judgments.

G.G GOOSEN

JUDGE OF THE HIGH COURT

Obo the Applicant:	*Adv Lambrecht*
Instructed by	*Leon Keyter Attorneys, 27 Uitenhage Road, North End, Port Elizabeth*
Obo the Respondent:	*Adv C van Rooyen*
Instructed by	*Jacques Du Preez Attorneys, 96 Mangold Street, Newton Park, Port Elizabeth*