IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

13/02/2015

In the matter between: Case No: 41720/2011

CHRISTIAAN WILLEM JOUBERT Applicant

yes

and

13/02/2015

FIRSTRAND BANK LIMITED First Respondent

ELIZABETH MARIA VAN EYSSEN Second Respondent

DEPUTY SHERIFF, POTCHEFSTROOM Third Respondent

IN RE:

FIRSTRAND BANK LIMITED Applicant

and

CHRISTIAAN WILLEM JOUBERT Defendant

JUDGEMENT

F DIEDERICKS (AJ):

1

In this application Applicant seeks an order to set aside the Default Judgement granted against him by this Court on the 12th December 2012.

2

Judgement was granted in the amount of R1 691 606,00 (one million six hundred and ninety one thousand six hundred and six rand) and the property mentioned in the Default Judgement was declared executable. The Registrar was further authorized to issue a Writ of Execution against the property mentioned in the order.

LEGAL PROCESS LEADING TO THE SALE OF EXECUTION:

3

The legal process leading to the sale of execution of the property mentioned in the Court Order can be outlined as follows:

3.1 Summons was issued from this Court on 21st July 2011 by First Respondent against Applicant;

3.2 The summons was served on Applicant on the 26th July 2011 at his *domicilium citandi et executandi* at 3 Wagner Street, Van der Hoffpark, Potchefstroom by affixing same to the principal door of the property. (See return of service page 129 of the papers – Annexure AB 1);

3.3 No appearance to defend was entered by Applicant as a result of which Default Judgement was granted on the 12th December 2011;

3.4 A Sale of Execution was held on the 04th September 2012 and the property was sold to Second Respondent.

OTHER PARTY:

4

This Application was also served on Second Respondent (purchaser of the property at the Execution Sale) who decided not to oppose this Application subject thereto that First Respondent does not charge her any interest until this Application is finalised.

(See RA 4 - page 229)

5

First Respondent is however opposing this Application.

REQUIREMENTS FOR RESCISSION OF JUDGEMENT:

6

It is trite law that an Applicant who seeks to set aside a Default Judgement must prove the existence of the following grounds i.e.

6.1 Judgement was granted in his absence;

6.2 Applicant must tender a reasonable explanation for his default to enter appearance to defend;

6.3 That the Application is made *bona fide* and not with the intention to delay the Respondents claim;

6.4 That the Applicant has a *bona fide* defence.

CONDONATION:

7

It is common cause that Applicant did not file this Application within the time frame afforded by the rules, and he therefore also seeks condonation in this regard.

PREVIOUS LITIGATION:

8

Applicant did not mention in his founding Affidavit that the Judgement in respect of which summons was issued in the case *in casu,* was preceded by another summons also issued against him in 2010. This issue was however raised by Respondent in the papers.

9

The first Summons issued against Applicant was in Case Number

40796/2010, served on Applicant at his very same chosen *domicilium* address on 16th July 2010.

(See Return of Service bound in on page 2 of the second bundle dealing with default judgement)

10

This Summons, on account thereof that the parties became locked in negotiations to assist Applicant, became stale and Applicant had to issue a fresh Summons i.e. the Summons *in casu.*

Negotiations were between Respondent and Applicant's ("Debt Counsellor") the identity of whom will become clear infra.

DEPOSING OF APPLICANT'S FOUNDING AFFIDAVIT:

11

It must be noted that Applicant did not attend to the deposing of his Founding or Replying Affidavit himself. He merely filed confirming Affidavits in this regard.

12

These Affidavits (Founding- and Replying Affidavits) were deposed to by Applicant's wife, Hester Maria Joubert. For this reason this Court will therefore refer to Mr Christiaan Willem Joubert as "the Applicant" and to his wife, Hester Maria Joubert as "the Deponent".

13

The Deponent explains in paragraph 1.2 that the reason for the above situation is that she has throughout the relevant times that relate to this Application, personally dealt with First Respondent and it's Attorneys due to the illness of her husband.

14

In paragraph 8.7 of her Affidavit the Deponent declares that she is a Director of an Administration Business where she was appointed in a number of matters as an Administrator in terms of the Magistrates Court Act for debtors with less than R50 000,00 (fifty thousand rand) debt.

She further mentioned that: "Unfortunately the income received from this Business is not enough to cover all our (her and Applicants) (my insertion) expenses without income from the Applicants practice."

15

It is common cause that the "practice" of Applicant referred to above is an Attorneys practice. Applicant is a duly admitted Attorney of this Court.

16

From the contents of paragraphs 8.7, 8.8, 8.9 and 8.10 it appears that Applicant, through the Deponent, was negotiating with all creditors including First Respondent, in either her capacity as the wife of Applicant or in her capacity as Director of the Administration Business, or both, the latter seeming to be the most probable.

These negotiations as will be seen later, was not only during Applicants illness but took place since 2010 i.e. at the time that the first Summons was issued.

17

The Deponent herself did not reveal the identity of the other directors of the Administration Business, if any.

18

The First Respondent, in its answering Affidavit, did however reveal the identity of the other directors of the Administration Business. It was none other than her husband, the Applicant, himself.

The above "identity" is clearly reflected in Annexure AC 2.1 (page 158 of the papers) indicating that the Directors of the Private Company known as C.H.C. Administrators (Pty) (Ltd) (Registration number NR2003/029931/07) was since the inception thereof on 25th November 2003 the Applicant and Deponent. A third Director was appointed as from 08th November 2005.

19

From the above I am of the view that it is fair to assume that Applicant (as

Attorney and Director) as well as Deponent (as Director) at all times had a sound knowledge of the contents of the "National Credit Act". At the very least, they were more knowledgeable in this field compared to the normal public or sometimes illiterate members of public who more often than not becomes clients of Applicant and/or Deponent and whom they serve/represent in cases as the case *in casu.*

FACTS DEPOSED TO BY DEPONENT IN SUPPORT OF CONDONATION AND DEFENCE:

20

The shortened facts underlying Applicants woe and predicaments he found himself in was outlined by Deponent as follows:

20.1 On 20th January 2011 the Applicant was bit by 'n so-called "brown recluse spider".

20.2 This allegedly resulted in Applicant not being able to work in his profession as Attorney which in turn had a negative impact on Applicant and Deponents household income. Their accounts, including the bond payments to Respondents, started to fall in arrears.

20.3 Deponent further states that Applicant was hospitalised during the first half of the year. She however does not mention whether it was until end of June or end of July.

The doctors apparently considered, at a certain stage, to amputate his leg, due to the spread of infection.

Applicant had severe pain and was dosed with morphine on a permanent basis. He also received other medication.

20.4 The above illness is confirmed by two Doctors i.e. Dr A J Oberholzer and Dr C J Naude in letters attached to Applicants Founding Affidavit as Annexures HJ 6.1 and HJ 6.2 dated 11/10/2012 and 15/03/2011 respectively.

20.5 The contents of these letters confirm the illness and extent thereof but not the periods of hospitalization.

20.6 No specific periods of hospitalization is indicated on the papers but for the fact that Applicant was taken to theatre on two occasions i.e. 26th January 2011 and 31st January 2011 (see Annexure HJ 6.2)

He was, according to Annexure HJ 6(1), bed-ridden but no fixed period thereof is mentioned. It is therefore unknown for how long he was so bed-ridden and/or hospitalized.

The only known facts therefore are that he was ill, hospitalized and/or bed-ridden for the first six months of 2011. That was before Summons was served during the next six months of the year i.e. on the 26th July 2011.

21

The above is then the facts that existed and pertaining to Applicants position prior to service of Summons.

SERVICE OF SECTION 129(1) OF THE NATIONAL CREDIT ACT NOTIFICATION AND/OR THE SUMMONS:

22

The Applicant and Deponent denies that they ever received the Summons or the Section 129 (1) Notice in terms of the National Credit Act, 2005, Act 34/2005 (the "National Credit Act").

They therefore also deny any knowledge of the pending litigation and/or the fact that Default Judgement was granted.

They contend having learned that Judgement was granted only when they obtained knowledge of the fact that a Sale of Execution of the property was scheduled for the 04^{th} September 2012. The Deponent had knowledge of the Execution Sale on the 31^{st} August 2012 and her husband, according to her, obtained this knowledge only on/about 29^{th} September 2012 on account thereof that Deponent withheld this information from him due to his illness.

23

The Respondent, in answer, indicated the reasons why the Court should not accept the reasons advanced by Applicant for his delay in bringing this Application, relied on certain C.O.S. entries made by its employees which deal with all communication between the parties since 2010.

Same forms part of the papers and are Annexures AC1, AC2, AC3, AC4, AC5, AC6, AC7, AC8, AC9, AC10 and AC11 on pages 156-176 of the record.

24

At first it was objected on behalf of Applicant that these documents could be used on account thereof that it is inadmissible on account of hearsay evidence.

This objection was later withdrawn and it was conceded that these documents can be relied on and taken into account by this Court. It represents a true reflection of communication between the parties.

25

Of importance, as mentioned above, is that one should keep in mind that there was previous litigation between the parties during 2010.

The C.O.S. entries in respect thereof reflects entries which refer to the period when the First Summons was issued (2010) and thereafter and also to entries after that Summons became stale and the Second Summons (the case *in casu*) was issued and thereafter.

<u>THE 2010 PERIOD (WHEN THE FIRST SUMMONS WAS ISSUED):</u>

26

On Annexure AC 1 (page 156) an entry is found next to the date 13/08/2010 that Respondent received a call from Mrs (referring to Deponent) and that Respondent could not communicate with her without a Power of Attorney. Deponent, according to this note indicated that "they" have signed it and will fax it to Respondent. She requested a fax number and was also informed that the matter was at **Legal** and that the Attorneys are busy with a judgement on the account.

27

The above is in line with the evidence of Deponent where she indicated that Respondent did not initially want to communicate with her.

28

On 24th August 2010 (Annexure AC (2) – page 157) Respondent received a call from a certain "Hester" from C.H.C. Administrators.

(See AC (2) – page 157)

29

It is noted that:

29.1 Deponent's name is Hester, and

29.2 She, together with Applicant, was the Directors of C.H.C. Administrators. They in fact, are still Directors.

30

In this call, on 24th August 2010, the "Hester" from C.H.C. Administrators called Respondent on behalf of her "client", (the Applicant/her husband/the Co-Director of her Company/the Debtor of Respondent) in order to make arrangements on behalf of her client/husband/Co-Director of C.H.C. Administrators.

31

Certain arrangements where then made as reflected in AC (2). (Page 157).

32

In Annexure AC (3) (page 161) there are indications that already since May 2010, Applicant and Deponent had knowledge about the First Summons and that litigation was pending.

33

The significance of the above is that it seems that although Applicant as well as Deponent knew at all times during the 2010 litigation that Summons was issued against them, they never intended to defend that action.

What they in fact did was to engage Respondent in negotiations up and until such a stage that the Summons became stale and Respondent could, by Law not obtain judgement.

HISTORY AFTER THE CURRENT SUMMONS WAS SERVED:

34

As mentioned above, Summons was served on the 26th July 2011. The following history was captured on Respondents C.O.S. entries after this date.

35

On 10 August 2011 (AC 7– page 165) there was a discussion between Deponent and Respondents' representatives wherein she was informed that a R.A.R. was in place but that this would not pend litigation. Deponent replied that she was not aware that the account was handed over for litigation. She was however informed then that litigation would be pended subject to payment of R30 000,00 (thirty thousand rand) in September. She was advised that Respondent is proceeding with judgement.

36

On Annexure AC 8 (page 166) there is an indication that there was a previous Sale of Execution (the first one) which was stopped on 12^{th} April 2012. This was done because "client" made the payments as indicated in AC 8.

37

On 10/07/2012 it is indicated that:

a) Respondent tried to contact Applicant per cell phone without success;

b) The previous sale was stopped subject to amounts of R9 000,00 (nine thousand rand) and R3 000,00 (three thousand rand) that should be paid;

c) Applicant paid with cheques but the cheques were not honoured.

38

According to AC 10 (page 175) on 10/07/2012 there was a conversation between Deponent and representatives of Respondent where it is noted that a Sale of Execution would be stopped which was scheduled for today (10/07/2012) on account thereof that Applicants notice was incorrect. (It is not clear what notice is referred to here). The note refers thereto that a new S.I.E. (Sale in Execution) date will be arranged and Respondent will “ascertain” *(sic)* that it will advise them of same.

39

Before issue of this Summons, an email was sent to Respondent.
(See Annexure AE on page 177 of record).

40

In this email arrears was admitted and it is mentioned that this was on account of Applicants illness.

41

On the face of this email it would seem that it was written by Applicant, Chris Joubert.

42

During argument it was argued on behalf of Applicant that he never sent that email. It was argued that it was written by Deponent who inserted her husbands' (Applicants) name at the end thereof on account thereof that the Respondent would not talk to her but only to Applicant.

43

The above was disputed by Respondent querying why this document would then have been written in the "third person" if Deponent wrote it.

44

The Court takes note of the fact that according to Annexure AC 1 (page 156) the Deponent was in possession of a Power of Attorney to represent her husband/Applicant since 2010. The Court therefore finds the argument put forward on behalf of Applicant somewhat strange. Why would Deponent have written the said letter pretending to be the Applicant whilst she had a Power of Attorney to act on his behalf?.

45

If this Court now have regard to all the above, the following seems to be the position.

45.1 Applicant fell in arrears with payment of his bond in 2010, when he was healthy;

45.2 Summons was issued by Respondent in 2010;

45.3 This action was never apposed although Applicant had knowledge of the action and of the fact that his bond payments were in arrears.

45.4 The 2010 Summons became stale and a fresh Summons had to be issued which is the action *in casu.*

46

Very much the same situation now exists in the action *in casu* that existed in the 2010 action.

47

In the previous action Applicant resorted to negotiate and never intended to enter an Appearance to Defend the action. *In casu* the Applicant seeks the relief as set out in his Notice of Motion and sets out his reasons for condonation of his late filing of the Application in the Founding Affidavit. He deals with a *bona fide* defence i.e. that Section 129 of the Credit Act was not adhered to and also deals with the aspect that he was not in wilful default. The reasons therefore, being his ill health.

DEFENCES *IN CASU*:

48

In a dramatic turn of events, Applicant in his Replying Affidavit, resorts to the very same tactics as he had previously i.e. that he wants to settle by selling the house and pay the bond from the proceeds from the sale.

49

It is clear from the contents of paragraph 4.2 (on page 191 of the papers) that Applicant intends to have the Default Judgement set aside in order to put him in a position to negotiate a settlement with Respondent in terms whereof the property will be sold so that the bond can be paid in full.

(See also the content of paragraph 57 of Applicants Replying Affidavit on page 207 of the papers).

This Court also considered the proposal of Applicant to eventually resolve the dispute between the parties as outlined above.

50

The Deponent with regard to the proposed sale of the property deposed as follows under Oath in paragraph 4.2 of the Replying Affidavit on page 199 of the papers:

"At this stage we have already obtained a <u>cash buyer</u> (my emphasis) for the properties not (sic – to read note) there are two neighbouring stands involved in an amount of R4 250 000,00 (four million two hundred and fifty thousand rand) as appears from the Agreement of Sale which has already been concluded and which I attach hereto as Annexure "RA 1". This purchaser ready (sic) to make payment in full upon registration and the only reason why transfer cannot occur is due to the Judgement which has been taken and the subsequent *caveat* which has been registered by First Respondent over the property."

In the next sentence the Deponent again refers to the so called "cash purchaser".

51

If one turns to the Agreement of Sale of the property, Annexure RH 1, the following is found:

51.1 The Agreement is not a cash sale. According to paragraph 2 thereof, the sale is subject thereto that the purchaser secures a loan from a financial institution against registration of a bond; and

51.2 (a) The Agreement is not signed by both parties. Full signatures of the buyer and one witness appears on page 6 (of 7) of the Agreement. The initials of these two individuals appear on all the other pages.

(b) The Court considered the possibility that page 7 could have been left out from the papers as a result of a *bona fide* error.

However, this aspect was properly canvassed during argument and at no stage did Applicant's Council tender page 7 to Court with a request that it should be allowed on account of a *bona fide* mistake.

This Court would have received and allowed it, had this been done.

(c) No initial purporting to be those of the Seller and/or his witnesses can be found on any of the pages of RH 1.

52

Under the circumstances the Court can come to no other conclusion than to find that there is no Contract of Sale between Applicant and any buyer, let alone an alleged "cash sale".

53

In this regard the evidence of the Deponent is found to be false.

54

A further aspect that needs to be considered is that Deponent, on behalf of Applicant, disputed the outstanding balance due by Applicant and advances various reasons for disputing same. In short, the amount in which Judgement was granted is disputed <u>as a defence.</u>

55

In paragraph 8.5 (page 26 of the papers) the Deponent states as follows: "In view of the above the outstanding balance as set out by First Respondent in the Certificate of Balance, is therefore disputed. The Applicant is preparing a supplementary Affidavit dealing with the calculations which will be presented to the above Honourable Court once calculations have been finalised.

56

No such further Affidavit was filed, neither did Applicant file these calculations when filing his Replying Affidavit.

57

During argument this Court enquired about these calculations and the answer tendered by Applicants Advocate was that they were not done on account thereof that it would have been too expensive to have them done.

58

A further aspect is that Respondent challenged Applicant to file hospital records to indicate periods of hospitalization and absence from office during the period of negotiations between the parties.

59

Applicant failed to file these hospital records. Instead, Applicant filed the hospital records contained in bundle RX (bundle 4 of the papers).

60

In perusing same, it is clear, that these records only deals with treatment during 2014.

61

It argued along the lines that because Applicant had a fall-back in 2014, the Court should therefore be able to determine the magnitude, extent and consequences of Applicants illness and absence from his practice in 2012. In this regard this Court can merely remark that this argument calls for speculation.

62

Applicant further, as explanation why he failed to enter an Appearance to Defend argued that according to the Return of Service, the Summons was served on his *domicilium* address i.e. 3 Wagner Street, Van der Hoffpark, Potchefstroom, by affixing same to the main front door.

63

63.1 In passing, it must be mentioned that the alleged manner of service accords with the Notice of Return of Service.

The Applicant however on the other hand has another version regarding the problems surrounding the service itself in that he (or the Deponent on his behalf) mentions that, with reference to the Return of Service (Annexure 9 – page 239) it should be understood to mean that the Summons was served by way of attachment to the front gate. (See paragraph 22 – page 197 of papers).

The Deponent goes further to explain that the reality thereof is that if this Summons was affixed to the front gate, it must have become lost due to weather or other reasons beyond their knowledge and control.

64

During argument the Court was referred to photographs of the entrance gate to the said property. Same are to be found on pages 230, 231 and 232 of the record.

65

It was argued that it is clear from the photographs that no person could have reached the main front door on account of the high wall together with the electric wiring on top of it and no one could access the property through that gate.

66

On account thereof it is argued that the Sheriff could never have served the Summons by affixing it to the front door and the Applicant therefore disputes service and denies that he ever received the Summons.

67

No argument was advanced regarding the validity of a Service by attaching a

Summons to the front gate as deposed to by Applicant.

The Applicant further sets out a defence that Respondent failed to comply with Section 129 (1) of the Credit Act, 2005, Act 34/2005 in that according to the papers it is clear that the said Notice was sent to the address 3 Wagner Street, Van der Hoffpark, Potchefstroom.

68

In this regard reference was again made to the photographs found on pages 230, 231 and 232 of the papers and it was pointed out that there is no post box in front of the premises.

In passing it must be said that it is unknown to this Court when these photographs were taken and/or when the wall, fencing and electric gate was erected.

69

In this regard (Section 129 (1)) it was argued that the Section 129 (1) Notice never came to the attention of the Applicant (Debtor) as was required by Law at the time that Judgement was granted, and that on account thereof the Judgement should be rescinded.

CONDONATION APPLICATION:

70

The Applicant is applying for condonation of the late filing of his Application for rescission of judgement (paragraph 1 of the Notice of Motion).

71

It is common cause that Applicant filed his Application out of time.

72

The reasons advanced by Applicant why the Application for rescission of judgement is late and why condonation is seeked, is outlined as follows in paragraphs 7.2 and 7.3 of this Founding Affidavit i.e.:

72.1 Due to the fact that Applicant was under the impression that the First

Respondent would not proceed with the re-issuing of the Writ of Sale in Execution knowing well that there was no proper compliance with the provision of Section 129 read with 130 of the National Credit Act; and

72.2 The Applicant was at all times under the impression that the proceedings instituted against Applicant by the First Respondent were defective and that the Court should not have, with respect, granted Judgement by Default against Applicant. (my emphasis) The underlined words above, in passing, can in my view not be understood otherwise than to mean that the Applicant knew that Judgement was granted but was of the view that the Court should not have done so.

73

Apart from the reasons for condonation outlined in paragraph 73 above, the Deponent (on behalf of Applicant), further also explains in paragraphs 15.4 and 15.5 why the Applicant failed to launch this Application within the prescribed period according to the rules, after he should have known about the Judgement on account of the Sale of Execution that took place on the 04th December 2012.

The explanation tendered here is:

a) The Applicant was too ill to fully resume his practice and the Deponent withheld knowledge of the Sale of Execution from him; and

b) Applicant only became aware of the Judgement since round or about 29th September 2012.

74

The above is directly in contradiction of what is deposed to in paragraph 12.2 of the Founding Affidavit, i.e. "During July 2012 the Applicants physical situation has substantially progressed and I have in fact advised them that he is now able to work fully and therefore generate income from his practice as before his illness and final arrangements could now be made for the liquidating of the outstanding arrear amount.

75

This Court has its doubts whether these reasons are convincing but I am inclined to grant Applicant the benefit of such doubt.

76

The delay is also not excessive, the prejudice and inconvenience minimal. Condonation should therefore be granted and such Order is therefore made.

APPLICANTS DEFENCES:

I know turn to consider Applicants defences as outlined above.

77

JUDGEMENT FOR WRONG AMOUNT:

Regarding Applicants defence that Judgement was granted for a wrong amount I am not convinced on the papers before me that this "defence" is either *bona fide* raised or has any substance at all.

78

Applicants failure to file the calculations as promised (undertaken by him) in his Founding Affidavit is fatal to his "defence" raised in this regard. This Court regards this failure as tantamount to a waiver of this defence especially after having indicated to Applicants Council that the Court would even be willing to receive same during argument.

79

I therefore conclude that regarding this "defence", the Applicant has no defence at all.

THE DEFENCE OF NON COMPLIANCE WITH SECTION 129 OF THE NATIONAL CREDIT ACT:

I have already referred above, to the crux of the argument regarding Applicants defence of non compliance with Section 129 (1) of the Credit Act, 2005, Act 34/2005. This is in fact the Applicants main defence.

80

The argument supporting this defence is that:

80.1 Respondent delivered the Section 129 (1) Notice per registered mail to Applicants home (street) address at 3 Wagner Street, Van der Hoffpark, Potchefstroom.

80.2 It is common cause that the said address is Applicants chosen *domicilium citandi et executandi* address according to the bond registered over the property, the relevant portion of which reads as follows in paragraph 23 of the Mortgage Bond: "Enige kennisgewing kragtens hierdie verband beteken met betrekking tot geregtelike stappe, of dreigend of ingestel, of enige dagvaardings of ander Hof proses stukke ten opsigte van enige eis wat daaruit voortspruit, word geag geldig aan die Verbandgewer beteken te wees indien dit afgelewer is by of per geregistreerde pos gestuur is, geadreseer aan Wagnerstraat 3, Van der Hoffpark, Potchefstroom by welke adres die Verbandgewer hierby *domicilium citandi et exectuandi* aanvaar vir die doel van enige verrigtinge of stappe wat kragtens hierby verband ingestel of gedoen mag word, en met dienverstande dat as geen *domicillium* adres in die blanko ruimte hierbo ingevul is nie, daar geag word dat die Verbandgewer sodanige *domicillium* by die verbinde eiendom aanvaar het, of by enige een van die verbinde eiendomme as daar meer as een is. Enige ander kennisgewing mag of per hand gelewer of per gewone pos gestuur word.

Enige kennis wat per pos, hetsy geregistreerd of andersins, kragtens hierdie klousule gegee word, word geag deur die Verbandgewer ontvang te gewees het op die derde dag na die dag waarop dit gepos is."

81

The abovementioned mortgage bond forms part of the documentation filed in the Application for Default Judgement and was available in the Court file at the hearing of this Application.

82

It was further argued on behalf of the Applicant that:

a) There is no postal delivery at the said address; and

b) If there were postal delivery, such delivery would have been practically impossible.

In this regard reference was again made to the same photographs used by Applicant to indicate that the Summons could not have been attached to the main front door by virtue of the fact that the property is surrounded by high walls and electric fencing with an electric wooden gate. (Photographs on pages 230, 231 and 232).

The only difference in the argument was that it was pointed out to Court that there is not a post box at the premises.

Under the circumstances Applicant denies ever having received the Notice in terms of Section 129 (1) of the Act.

83

Applicant referred to the reported cases of SEBOLA & ANOTHER V. STANDARD BANK OF SOUTH AFRICA LIMITED & ANOTHER 2012(5) SA 142(CC) and KUBYANA V. STANDARD BANK OF SOUTH AFRICA LIMITED & ANOTHER 2014(3) SA 56(CC) and argued that on account of these decisions and having regard to the evidence at hand, the Judgement should be set aside, it being clear that Applicant never received the said Notice in terms of Section 129 (1) of the Act.

84

The Respondent argued that, whilst agreeing with the principals as set out in the **SEBOLA** & **KUBYANA** matters, that the Court should pause to consider the contents of paragraph 46 of the Case of **KUBYANA V. STANDARD BANK OF SOUTH AFRICA LIMITED 2014(3) SA 56(CC)** which reads as follows:

"46. The Act does not imply, and cannot be interpreted to mean, that a consumer may <u>unreasonably ignore the consequences of her election to receive notices by registered mail, when the notifications in questions have been sent to the address which she duly nominated.</u> While it is so that consumers should receive the full benefit of the protections afforded by the Act, <u>the noble pursuits of that statute should not be open to abuse by individuals who seek to exercise those protections unreasonably or in bad faith.</u>" (Underlined portions are my emphasis)

85

The Court has noted the contents of paragraphs 75 – 79 of <u>**SEBOLA**</u> case and the contents of paragraphs 52 – 55 of the <u>**KUBYANA**</u> cases to which the

Applicant referred.

86

In applying the contents of the paragraphs in these two cases to the case *in casu* it is clear that:

a) Section 129 (1) notice was sent to Applicants street address, where, although it is his *domicillium* address, there is no postal delivery and subsequently that the said notice was never received by him.

b) That the Applicant has affectively rebutted the inference of delivery.

87

On account of the above it is clear to me that it cannot be found in this case that First Respondent can claim to have complied with the provisions of Section 129 of the National Credit Act in the event that it had a duty to make sure that the notice has come to the attention of the Debtor.

88

On this argument, seen in isolation, I am of the view that the Judgement could have been set aside in the event where the said defence was available at the time when Default Judgement was granted i.e. 12 December 2011.
(See SWADIF (PTY) LTD V. DYKE 1978(1) SA 928(A) AD 939.)

89

The Judgement in the **<u>SEBOLA</u>** case was delivered 07th June 2012, almost 7 (seven) months after Default Judgement was granted against the Applicant.

The Judge who granted Default Judgement against Applicant would obviously not have applied the principals as set out in the **<u>SEBOLA</u>** case.

He would have applied the legal principals as it stood at the time when he granted Default Judgement.

90

I also accept that the Judge, in granting the Default Judgement, would have taken note of the fact that the Supreme Court of Appeal has dismissed the **SEBOLA'S** appeal on the 11th August 2011, two months prior to his granting of the Default Judgement *in casu*.

91

I am convinced that the Judge, in granting Default Judgement, knew that he was bound by the principals as laid out in the case of **ROSSOUW & ANOTHER V. FIRSTRAND BANK LIMITED, 2010(6) SA 439(SCA)**, as that was the applicable Law at the time that Default Judgement was granted.

92

According to the ROSSOUW judgement, proof by the Bank that it had dispatched the notice was sufficient, even if the notice did not reach the Debtor.

(See also the reference to this position in **SEBOLA'S** case in paragraph 2 thereof.)

93

I am therefore of the view that the defence as set out in the **SEBOLA** case was not available to Applicant at the time when Default Judgement was granted.

94

The Judge, who granted Default Judgement, granted it with due regard and in accordance with the Law as it stood at the time.

95

I therefore find that the defence raised in accordance with the principals as laid down in **SEBOLA's** case was not available at the time when Default Judgement was granted and cannot be seen to be available to him now.

If that would be the case, this Court would release a ghost to haunt several judgements granted prior to the 07th June 2012.

96

In view of the above, I am of the view that Applicants application should be dismissed.

97

I thought it fit to further consider the question whether Applicant has succeeded in persuading that he is *bona fide* in bringing this application and that the application is not brought with the intention to delay the Respondents claim.

(see **WRIGHT V. WESTELIKE PROVINSIE KELDERS BEPERK 2001(4) SA 1165(C) 1180 – 1181**)

98

To my mind, the above principal as outlined in the **WRIGHT** case indicates a remarkable resemblance with the remark made in the **KUBYANA** case by the Constitutional Court in that:

"46. The Act does not imply, and cannot be interpreted to mean, that a consumer may unreasonably ignore the consequences of her election to receive notices by registered mail, when the notifications have been sent to the address which she duly nominated. WHILE it is so that consumers should receive full benefit of the protections afforded by the Act, **the noble pursuits of that statute should not be open to abuse by an individual who seeks to exercise those protections unreasonably or in bad faith**." (my emphasis)

99

In considering the above, the following is noted:

99.1 The Applicant is an Attorney, duly admitted by this Court and is still practicing as such;

99.2 The Applicant and Deponent are Directors of a Company dealing exclusively with issues regarding the National Credit Act and both are accepted to have proper knowledge of the contents of the Act;

99.3 Neither the Applicant nor the Deponent revealed to this Court what their respective involvement in this Administration Business was. It was revealed by the Respondent;

99.4 During the 2010 litigation, Applicants took the very same stance regarding the non delivery of the Section 129 (1) notice which resulted in them negotiating with First Respondent until the Summons became stale, forcing First Respondent to issue a fresh Summons;

99.5 They challenged the amount in which Judgement was granted with promises to do their own calculations. When the time to deliver these promises arose at the hearing, they were not met;

Applicant and Deponent relied heavily on Applicants illness during the first half of 2011 for Applicants falling behind in their bond payments. When challenged to supply records indicating periods of hospitalization and when he was bed-ridden, no documentation is supplied. Documentation is supplied in respect of his illness in 2014. (See bundle RX)

99.6 The evidence regarding when Applicant was ill and able to resume his practice is contradicting in paragraph 12.2 compared to the contents of paragraph 15.4.

99.7 The evidence tendered that Applicant has a "cash buyer" is simply false as pointed out *supra*.

99.8 The Applicant clearly wants to have the Default Judgement to be set aside for the sole purpose to place him in a position to negotiate a settlement based on favourable economic advantages for himself, whilst negating the fact that he has not paid any monies to Respondent since Judgement was granted.

100

I therefore find that the above can hardly be found to be reasonable towards the Respondent under the prevailing circumstances.

101

I therefore find that Applicant is attempting to abuse and has also in particular abused (in 2010/2011) the protection afforded to him in terms of the National Credit Act 2005, Act 34/2005, in a manner as contemplated in paragraph 46 of the **KUBYANA** decision.

102

The Applicants application is therefore dismissed with costs.

SIGNED AT PRETORIA ON THIS 26 DAY OF January 2015.

F DIEDERICKS (AJ)