REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 47272/12
DATE: 15/6/2015

In the matter between:

MORRIS NARE KGOMO	First Applicant
HELLEN KGOMO	Second Applicant
and	
STANDARD BANK OF SOUTH AFRICA	First Respondent
RICHARD MALUSI MAHLANGU	Second Respondent
REGISTRAR OF DEEDS, JOHANNESBURG	Third Respondent

JUDGMENT

Introduction

[1] This is an application for rescission of a judgment granted by default on 30 January 2014. It is unusual in that the parties rely on seemingly conflicting

judgments of the Constitutional Court in seeking and resisting rescission respectively.

[2] Judgment was granted for the amount of R276 278, 15, together with interest, an order declaring certain immovable property to be specially executable, an order authorising the Registrar to issue a warrant of execution against the property and costs on the attorney and client scale. The grant of default judgment followed on the applicants' default on their mortgage loan with the first respondent ("the bank").

[3] The property in respect of which judgment was granted is Erf [.....], O. V. T., Registration Division IQ, Gauteng. The rescission is sought in terms of rule 42(1)(a) of the uniform rules of court on the basis that it was erroneously sought and erroneously granted in the absence of the party affected by it.

[4] An interdict was also sought preventing the Registrar of Deeds from transferring ownership of the property to the second respondent. However, it transpired that the property had already been transferred to the second respondent on 13 August 2014, before the application for rescission of judgment was commenced. There was no attempt to amend the notice of motion to accommodate this development.

Factual background

[5] The main basis for the applicants' contention that the judgment was erroneously sought and granted was the bank's failure to comply with

section 129(1) read with s 130 of the National Credit Act, No. 3 of 2005 ("the NCA"). They require delivery of a notice before legal proceedings are commenced. The notice draws the debtor's attention to his or her default and invites him or her to consider using one of the non-judicial mechanisms provided for in the Act with a view to agreeing on a plan to bring the payments up to date.

[6] The bank averred in its particulars of claim that -

> *"[!]he notice has been delivered to the post office responsible for delivering of post to the defendants' address. The post office would in the normal course, have secured delivery of a registered item notification slip informing the defendants that a registered article was available for collection. The plaintiff believes that the registered item notification of arrival slip reached the defendants and that the defendants, as reasonable people, would have retrieved the notice from the post office. The plaintiff is not aware of any circumstances to show the contrary."*

[7] The particulars went on to refer to a copy of the notice which was annexed together with proof that it had been sent by registered mail and the relevant "track and trace" report from the website of the post office.

[8] The applicants' address on the notice appears as follows:

> *"E and NM Kgomo*
> *[...] S. S.*
> *O. V.*
> *2091"*

[9] It is common cause that this is not in fact the address of the applicants. The error came about as a result of the erf number having been substituted for the street number. Their address is in fact 40 Sterling Street, O. V.. As a result, it was common cause that the notice did not reach the applicants before the bank issued summons.

Ambit of Rule 42(1)(a)

[10] Rule 42(1)(a) reads as follows:

> *"The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vaty:*
>
> *(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."*

[11] Based *inter alia* on the judgments of the Supreme Court of Appeal in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*[1] and *Lodhi 2 Properties Investments* CC & *Ano v Bonde Developments (Pty) Ltd*[2], the following principles govern rescission under rule 42(1)(a):

[11.1] the rule must be understood against its common law background;[3]

[11.2] the basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio,* but subject to certain exceptions of which rule 42(1)(a) is one;[4]

[11.3] the rule caters for a mistake in the proceedings;[5]

[11.4] the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;[6]

[11.5] a judgment cannot be said to have been granted erroneously in the

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1 2003 (6) SA 1 (SCA).

2 2007 (6) SA 87 (SCA).

3 *Colyn* above at paras 1-5.

4 *Colyn* above at para 4.

5 *Colyn* above at paras 5 and 9.

6 *Lodhi* above at paras 24 and 26.

light of a subsequently disclosed defence which was not known or raised at the time of default judgment; [7]

[11.6] the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court;[8] and

[11.7] the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2}(b).[9]

[12] The applicants have founded their case squarely on rule 42(1)(a) and **it** is against the backdrop of these principles that the present application must be considered.

Non-compliance with section 129(1) read with 130 of the NCA

<u>The relevant provisions</u>

[13] Section 129(1) of the NGA provides as follows:

> ***"129 Required procedures before debt enforcement***
>
> *(1) If the consumer is in default under a credit agreement, the credit provider-*
>
> > *(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and*

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[7] *Lodhi* above at paras 17 and 27.

[8] See the wording of the rule. See also *De Wet & Others v Western Bank Ltd* 1979 (2)(SA 1031 (A) at 1038 E-H.

[9] See para 47 below.

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as *contemplated in paragraph (a), or in section 86 (10),* as *the case may be; and*

(ii) meeting any further requirements set out in section 130."

[14] Section 130 provides in relevant part as follows:

"130 Debt procedures in a Court

(1) Subject to subsection (2) a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), or section 129 (1), as the case may be;

(b) in the case of a notice contemplated in section 129(1), the consumer has-

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposal; and

(c) in the case of an instalment agreement, secured loan or lease, the consumer has not surrendered the relevant property to the credit provider in terms of section 127.

(2)

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a *court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-*

(a) in case of proceedings to which sections 127, 129 and 131 apply, the procedures required by those sections have been complied with;

(b)

(c)

(4) In any proceedings contemplated in this section if the court determines that-

(a)

(b) the credit provider has not complied with the relevant provisions of this Act, as *contemplated in subsection (3)(a), ... the court must-*

(i) adjourn the matter before it; and

> *(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed."*

[15] There are three important decisions of the Constitutional Court dealing with the interpretation of these provisions. I deal with each in turn.

The Sebola judgment

[16] The first judgment of the Constitutional Court dealings with these provisions was *Sebola and Another v Standard Bank of South Africa Ltd and Another.*[10] *Sebola* also involved an application for rescission of judgment.

[17] In *Sebola,* the notice in terms of section 129(1) had been sent by registered mail. The applicants in that case, Mr and Mrs Sebola, testified that they had never received it. It turned out that this was because the postal services had diverted the notice to the wrong post office. The Sebolas were able to show from the track and trace report that the notice, although addressed to their address in North Riding, had instead been diverted to the Halfway House post office.

[18] Given that the Sebolas had chosen postal delivery of notices in terms of section 65(2) of the NCA,[11] it was argued by the credit provider that the

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[10] 2012 (5) SA 142 (CC).

[11] Section 65 reads in relevant part as follows:

> *"65 Right to receive documents*
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> *(1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.*
>
> *(2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must-*
>
> *(a) make the document available to the consumer through one or more of the following mechanisms-*
>
> *(i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;*
>
> *(ii) by fax;*

(iii) by email; or

(iv) by printable web-page; and

(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)."

addressing of the notice to the correct address and its despatch via the post office represented sufficient compliance with the requirement of delivery of the notice. The Constitutional Court disagreed.

[19] The majority emphasised the significance of section 129, saying -

> *"[59]* So *the notice requirement cannot be understood by focusing solely on* s *129. But this does not diminish the significance of that provision. As SERI and the NCR contended, one of the statute's core innovations* is *significantly consumer-friendly and court-avoidant procedures. These procedures are designed to help debtors to restructure their debts, or find other relief, before the guillotine of cancellation orjudicial enforcement falls."*

[20] After a careful analysis of the relevant provisions, Cameron J, in whose judgment the majority concurred, summarised the position as follows: [12]

> *"The requirement that* a *credit provider provide notice in terms of* s *129(1)(a) to the consumer must be understood in conjunction with* s *130, which requires delivery of the notice. The statute, though giving no clear meaning to 'deliver', requires that the credit provider seeking to enforce* a *credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. If, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim. If it finds that the credit provider has not complied with* s *129(1), it must in terms of* s *130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed."*

[21] Given that the credit provider in that matter was not able to prove that the

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[12] At para [87].

notice had been delivered to the correct post office, the Constitutional Court reversed the order of the high court, which had refused rescission, and replaced it with an order granting rescission.

[22] The applicants in this matter rely on *Sebola* to argue that rescission of judgment should be granted.

The Ferris judgment

[23] The next judgment of the Constitutional Court that is relevant is *Ferris and Another v FirstRand Bank Ltd*.[13] In that case, events played out differently from both the *Sebola* matter and the present matter. Mr and Mrs Ferris had similarly defaulted on a loan secured by a mortgage over their property. However they applied to a debt counsellor for debt review in terms of s 86(1) of the NCA. This was followed by an application by the debt counsellor to the Randburg Magistrates Court to have Mr and Mrs Ferris declared over-indebted and to rearrange their debt obligations.

[24] While this application was pending, FirstRand Bank sent a notice under s 86(10) to Mr and Mrs Ferris purporting to terminate the debt review, as the bank was entitled to do. However Mr and Mrs Ferris insisted throughout that they never received the s 86(10) notice as it was not properly delivered.

[25] Soon after purported despatch of the notice, the magistrate's court granted a debt restructuring order on the terms requested by Mr and Mrs Ferris. Only a week later, Mr and Mrs Ferris fell behind on their repayments under

[13] 2014 (3) SA 39 (CC).

the debt restructuring order. Without further notice, FirstRand then issued summons for payment of the full balance of the loan plus interest and an order declaring their home specially executable. Mr and Mrs Ferris pleaded in response that the debt review had not been terminated by virtue of the failure to deliver the 86(10) notice. The bank ultimately conceded that the notice was not delivered.

[26] FirstRand replicated on the basis that it was in any event entitled to enforce the loan without further notice because Mr and Mrs Ferris had breached the debt restructuring order.

[27] The Constitutional Court accepted this argument. It held that the Ferris' breach of the debt restructuring order entitled it to proceed against them without further notice, regardless of any failure to deliver the section 86(10) notice.[14] Indeed the debt restructuring order gave the bank this right expressly.

[28] The Constitutional Court also went on to say the following in upholding the high court's dismissal of the Ferris' application for rescission of judgment:

> *"However, even if further notice were required, its absence is a purely dilatory defence*[15] *– a defence that suspends proceedings rather than precludes a cause of action – and is not an irregularity that establishes that a judgment has been 'erroneously granted', justifying rescission under Rule 42(1)(a).*"[16]

[29] It is on this extract from the *Ferris* judgment that the bank relies, in resisting

[14] At paras 14-17.

[15] *Sebola* above n 7 at para 53. The reference is that of the Constitutional Court in its judgment at fn 18.

[16] Above at para 17

the application for rescission of judgment. The bank argues that, although the notice was not delivered, the defence raised based on non-compliance with s 129(1) and s 130 is purely dilatory and therefore does not justify a finding that the judgment was erroneously granted.

The Kubyana judgment

[30] In *Kubyana v Standard Bank of South Africa Ltd*[17] the Constitutional Court revisited its decision in *Sebola.* In that case there was proof of delivery of the notice to the correct post office. The post office had sent notices to Kubyana at his address informing him that there was a registered item awaiting collection. It appeared that he had simply ignored these notices.

[31] It was argued, based on certain *dicta* in *Sebola,* that the fact that the registered item was returned to the bank as not having been delivered, meant that it had been shown that the notice had not been delivered. [18]This was rejected in both the main and the concurring judgments.

[32] The court in its main judgment adopted the following approach to the interpretation of the NCA:

> *"[21] Thus, the promotion of equity in the credit market is to be achieved by balancing the respective rights and responsibilities of credit providers and consumers. It follows that the correct interpretation of s 129 is one that strikes an appropriate balance between the competing interests of both parties to* a *credit agreement."*

[33] It then went on to qualify those paragraphs of the *Sebola* judgment [19] that

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[17] *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC).

[18] At para 11.

[19] e paragraphs 79 and 87 of Sebola, dealt with at paras 41 – 54 of *Kubyana.*

could be read as meaning that any proof that the notice did not in fact come to the attention of the debtor, no matter what the reason, was sufficient to hold that the notice had not been delivered. Instead the court held that –

[33.1] the bank was not required to prove that the notice had in fact come to the subjective attention of the debtor (or "consumer" in the language of the statute);

[33.2] a debtor must respond reasonably when the creditor has properly taken steps to bring the notice to his or her attention;

[33.3] not bothering to respond to a notice requiring him or her to go to the post office and collect a registered item did not amount to reasonable conduct on the part of a debtor.[20]

[34] Notwithstanding the qualification of the breadth of some of the dicta, the court's earlier decision in *Sebola* was otherwise affirmed.[21]

Analysis

[35] Based on these judgments, what are the implications of the admitted failure to deliver the notice in this case? Clearly, the applicants in this matter do not fall in the same category as the defaulter in *Kubyana.* There is no remissness or unreasonableness on the part of the applicants in the sequence of events that resulted in the failure of delivery of the notice. The bank has plainly failed to comply with the requirements of *Sebola* as

[20] At paras 45 - 48.
[21] This is apparent from a conspectus of the *Kubyana* judgment and the conclusion at para 54.

qualified in *Kubyana.* Moreover, the error on the bank's part is apparent from the particulars of claim and the annexures to it.

[36] The question that arises is whether non-compliance with section 129(1) and the relevant parts of s 130 is merely a dilatory defence that does not give rise to an erroneous seeking or granting of default judgment. If so, rescission of judgment must be refused. Answering this question requires closer scrutiny of the relevant provisions.

[37] The heading to s 129 is *"[r]equired procedures before debt enforcement'* . In terms of s 129(1)(b), the delivery of the requisite notice is an essential step in the absence of which the applicant or plaintiff *"may not commence any legal proceedings to enforce the agreement".* This is peremptory language.

[38] Consistent with this, the following extracts from the judgment of the majority in *Sebola* suggest that strict compliance with section 129(1) is required:

> *"[60]1t is true that {consumer-friendly and court-avoidant] procedures are available to consumers from the outset of the credit relationship. Indeed, as the bank pointed out, the regulations require that most credit agreements include, from their inception,* a *statement of the consumer's right to apply for alternative dispute resolution and for debt counselling. But access to debt counselling and extra-judicial resolution will undoubtedly have their most potent impact when the guillotine is about to fall. And it is at this point, before the credit provider resorts to court process, that <u>the legislation insists</u> the consumer should have the benefit of* a *notice. This plain statutory objective must significantly influence the meaning we give to 'deliver' in s 130."* (emphasis added)

[39] In a similar vein, the court held as follows:

> *"[79]1f, in contested proceedings, the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended to once collected, the court <u>must</u> make* a *finding whether,*

> *despite the credit provider's proven efforts, the consumer's a/legations are true, and, if so, adjourn the proceedings in terms of s 130(4)(b)."* (emphasis added).

[40] Although the last extract was, for the reasons already given above, qualified in *Kubyana,*[22] nothing in *Kubyana* suggests that the Constitutional Court wished to relax *Sebola's* insistence on strict compliance with s 129(1) and s 130, albeit based on the court's interpretation of section 129 as not requiring subjective delivery.

[41] Significantly, in *Sebo/a,* the court had no hesitation, once it found that these provisions had not been complied with, in overturning the high court's refusal of rescission of judgment:

> *"[81] ...* So, *the Bank was obliged not only to send the notice to their address at the North Riding post office, which it did in fulfilment of its agreement with the Sebo/as; the statute also obliged it to show that the notice actually reached the correct post office. That did not happen. The Sebo/as were therefore entitled to rescission of the judgment granted against them. The proceedings against them should have been adjourned to allow the Bank to rectify the omission in regard to the notice.'* [23] (emphasis added)

[42] On the face of it, the approach of the Constitutional Court in *Sebola* in this regard, is difficult to reconcile with the approach reflected in the extract from the *Ferris* judgment on which the bank relies. For ease of reference, I repeat it and will refer to it as "the *Ferris* dictum":

> *"However, even if further notice were required, its absence is* a *purely dilatory defence*[24] – a *defence that suspends proceedings rather than precludes* a *cause of action – and is not an irregularity that establishes*

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[22] At para [44].

[23] References to "the court" are references to the majority judgment in the decision.

[24] *Sebola* above n 7 at para 53. The reference is that of the Constitutional Court in its judgment at fn 18.

> *that a judgment has been 'erroneously granted', justifying rescission under Rule 42(1)(a)."*[25]

[43] As authority for its view that the defence raised was purely dilatory and did not provide a permissible basis for granting rescission, the Constitutional Court referred to the decision of the majority in *Sebola,* where the court had held as follows:

> *[53] First, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while s 129(1)(b) appears to prohibit the commencement of legal proceedings a/together ('may not commence'), s 130 makes it clear that where action is instituted without prior notice, the action is not void. Far from it. The proceedings have life, but a court 'must' adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter.*[26] *<u>The bar on proceedings is thus not absolute, but only d</u>ilatory. The absence of notice leads to a pause, not to nullity. But to deduce this, it is necessary to read s 129 in the light of s 130. Section 129 prescribes what a credit provider must prove (notice as contemplated) before judgment can be obtained, while s 130 sets out how this can be proved (by delivery)."* (emphasis denoted by underlining added).

[44] However, as I have shown, the dilatory nature of the defence did not preclude the court in *Sebola* from granting rescission of judgment.

[45] A possible basis for reconciling the *Sebola* judgment with the *Ferris* dictum may be that, unlike the case in *Ferris,* the application for rescission of judgment in *Sebola* was not based on rule 42(1)(a). Given that the default judgment in question in *Sebola* had been given by the registrar in terms of rule 31(5)(b), one may assume that rescission of the judgment had been sought under rule 31(5)(d). There the applicant for rescission must show good cause, including a *bona fide* defence, on the same basis as that

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[25] Above at para 17.

[26] Section 130(4){b)(i) and (ii). The reference is that of the Constitutional Court in 59 of its judgment.

required under rule 31(2)(b).[27]

[46] However, it would be anomalous that a procedural error involving the failure to deliver a peremptory, statutory notice to the defendant, constituted a *bona fide* defence for purposes of a rescission application under the rule 31(5)(d), but not an error justifying rescission under rule 42(1)(a).

[47] What also suggests that the judgments are not to be reconciled on the basis of rescission having been sought under a different rule, is that the Constitutional Court gives as authority for the *Ferris* dictum, the following:[28]

> *"In* a *different context,* Mthanthi v Pepler *1993 (4) SA 368 (0) at 3761-J held that a merely dilatory defence* is *not bona fide. I emphasise, however, that good cause (including* a *bona fide defence)* is *not required for rescission under Rule 42(1)(a)* as *stated in [13] above."*

[48] Applying the *Ferris* dictum, that would seem to exclude noncompliance with s 129(1) read with s 130 of the of the NCA, as a basis for a *bona fide* defence in the context of an application for rescission of judgment in terms of rule 31(5)(d). Accordingly, the differing approaches to the grant or refusal of rescission of judgment in *Sebola* and in the *Ferris* dictum, cannot be reconciled on the basis that rescission was sought under different rules.

[49] However, it is in my view not necessary to reconcile the *Sebola* judgment and the *Ferris* dictum for two reasons. Firstly, the *Ferris* dictum seems to be an *obiter dictum.* The main thrust of the judgment in *Ferris* was that the respondent was entitled to proceed to enforce the debt without further notice because Mr and Mrs Ferris had defaulted under the debt

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[27] *Pansolutions Holdings Ltd v P* & G *General Dealers and Repairers* CC 2011 (5) SA 608 (KZD) at paras 5 – 15 and 17.

[28] *Ferris* at footnote 19

restructuring order granted by the magistrate's court. The court did not rely on the *Ferris* dictum in order to reach its conclusion.

[50] Secondly, the present matter is distinguishable from the *Ferris* matter because it dealt with a notice in terms of s 86(10) and the present matter involves a notice in terms of s 129(1). Although notices in terms of s 129(1) and 86(10) are treated in an identical way in s 129(1)(b)(i) and s 130(1)(a), the functions performed by the notices are markedly different. The function of the s 129(1) notice is to ensure that there is a pause during which non-judicial, dispute resolution mechanisms are encouraged, before legal proceedings are resorted to. By contrast, a notice in terms of section 86(10) performs the functioning of terminating a debt review. It thus signals the end, rather than the beginning, of attempts to resolve over-indebtedness through non-judicial dispute resolution. Granted, through the provisions of s 130(1)(a), s 86(10) also creates a pause before litigation is commenced. But there is no distinct, non-judicial dispute resolution process linked to it.

[51] In those circumstances it seems to me that the absence of a s 86(10) notice is more appropriately described as a purely dilatory defence than the absence of a s129(1) notice.

[52] *Ferris* is also partially distinguishable from the present matter insofar as the *Ferris* dictum relates only to the erroneous <u>grant</u> of rescission. In the present matter, the applicants for rescission assert that the judgment was both sought and granted erroneously.

[53] Consideration must also be given to the fact that the *Sebola* judgment

received the endorsement of the Constitutional Court in the *Kubyana* judgment, which is more recent than the *Ferris* judgment. [29] The Constitutional Court in *Kubyana* picked out those passages from the *Sebo/a* judgment that it believed to require qualification. *Sebofa's* treatment of non-compliance with s 129(1) and s 130 as justifying rescission of judgment was not one of the parts of the judgment singled out for clarification or correction.

[54] Based on *Kubyana,* strict compliance with s 129(1) remains the order of the day. Strict compliance requires that where s 129(1) is not complied with, section 130(4)(b) comes into play. It peremptorily requires that the court *"must* ... *adjourn the matter* ... *and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed".*

[55] The bank as plaintiff pleaded delivery of the notice to the applicants as defendants, in its particulars of claim. Yet it is clear that its pleading was erroneous and that there was no such delivery. In terms of s 129(1)(b), the respondent was precluded from commencing any legal proceedings without delivering a s 129(1) notice beforehand. In terms of s 130(1)(a), ten business days had to have lapsed after any notice, before legal proceedings were commenced. That too was not complied with. The judgment was therefore erroneously sought.

[29] See in this regard *Gcaba v Minister for Safety & Security and others* 2010 (1) SA 238 (CC) at para [77] which renders this is a relevant criterion in determining which Constitutional Court decision to follow where there may be difficulties in reconciling the judgments.

[56] The flawed s 129(1) notice, reflecting the incorrect address for the applicants, was an annexure to the particulars of claim. That the address was incorrect was apparent by comparing it with the correct address reflected in the particulars of claim. That address reflected a street number that did not coincide with the erf number. The error was thus apparent on the record when default judgment was granted. In any event, it is not necessary for compliance with the requirements for rescission in rule 42(1)(a) that the error be apparent on the record.[30] In those circumstances, the court was required to proceed in terms of s 130(4)(b)(i) and (ii) of the NCA by adjourning the proceedings and directing what steps the bank must take before the proceedings were resumed. It did not do so. The judgment was thus erroneously granted within the meaning of rule 42(1)(a).

[57] The judgment was granted in the absence of the applicants.

[58] On that basis, the applicants are entitled to rescission of the judgment granted against them.

Additional relief sought by the applicants

[59] In their notice of motion, the applicants also sought –

[59.1] in prayer 2, the setting aside of the subsequent sale in execution of the property;

[59.2] in prayer 3, an interdict preventing the registrar of deeds from transferring ownership of the immovable property;

[30] See para 11.4 above.

[59.3] in prayer 4, an order setting aside the order declaring the immovable property to be especially executable;

[59.4] in prayer 5, an order setting aside the writ of execution issued against the property;

[59.5] in prayer 6, an order of costs on the attorney and client scale.

[60] The rescission of the judgment justifies the setting aside of the sale in execution.

[61] However, as pointed out above, by the time that the application was launched, transfer of the property had already been registered in favour of the second respondent. Accordingly, the granting of an interdict would be of no practical effect. Nor was any attempt made to amend the notice of motion to provide for the setting aside of the transfer. Nor could there have been without the notice of amendment being served on the second respondent, the transferee, who has to date not participated in the proceedings. Counsel for the applicants stated that further proceedings would be required to deal with the consequences of the rescission of the judgment and cancellation of the sale in execution in this regard.[31]

[62] As far as the writ of execution is concerned, because this has already been acted upon by the deputy sheriff, I questioned whether there was any point at this stage in setting it aside. Although counsel for the applicants did not press for this relief because of my questioning, it seems to me that the

[31] On the impact of rescission of judgment in these circumstances, see *Knox NO v Mofokeng and Others* 2013 (4) SA 46 (GSJ) at paras 1 – 5.

applicants are entitled to it as a consequence of the rescission of judgment.

[63] Finally, as far as costs are concerned, the applicants sought to motivate a punitive costs order on the basis of the error on the part of the respondent in incorrectly addressing the notice in terms of s 129(1) of the NGA.

[64] In my view no ma/a *tides* was shown on the part of the respondent. It appears to have been a *bona fide* error. In those circumstances, there is no basis for a punitive costs order.

[65] I accordingly make the following order:

(1) The judgment granted by default on 30 January 2014 under the above case number is rescinded.

(2) The sale in execution of the immovable property known as Erf [.....], O. V. T., Registration Division 1.Q., the Province of Gauteng measuring 300 (three hundred) square metres, held by Deed of Transfer T067533/05 is set aside.

(3) The writ authorising the sale in execution is set aside.

(4) The order declaring Erf [.....], Ormonde Township to be specially executable is set aside.

},The respondent is ordered to pay the costs of the application.

~~A DODSON~~

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

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Counsel for the respondent:	ADV HP PRETORIUS
Instructed by:	LE ROUX VIVIER & ASSOCIATES, *clo* VAN STADE VAN DER ENDE INC 319 Alpine Avenue, Cnr Alpine *I* South Village Lane, Lynwood, Pretoria
Date of hearing :	4 May 2015
Date of judgment:	10 June 2015