**REPUBLIC OF SOUTH AFRICA**

**IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA**

**JUDGMENT**

13/8/15

~~Reportable~~/Not reportable

**Case no: 25117/10**

In the matter between:

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| **FIRSTRAND BANK LIMITED t/a RMB PRIVATE BANK** | Plaintiff/Applicant |
| and | |
| **WILLEM FREDERICK PIENAAR** | 1st Defendant/Respondent |
| **ELAMARIE PIENAAR** | 2nd Defendant/Respondent |
| **KAIZAN TRADING PROMOTIONS CC** | 3rd Defendant/Respondent |

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**JUDGMENT**

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MNGQIBISA-THUSI, J

[1] The plaintiff is seeking summary judgment against the defendants, jointly and severally, the one to pay the other to be absolved, for:

1.1 payment in the amounts of R3 715 846.11.

1.2 payment of interest on the amount of R3 715 846.11 at the rate of 7.1% per annum, from 10 May 2014 to date of the final payment, such interest calculated daily and compounded monthly in arrears.

1.3 Costs on an attorney and client scale.

[2] Against the first defendant for an order declaring the immovable property described below specially executable, namely:

Section No. 1 as shown more fully described on Sectional Plan no. SS1065/1998 in the scheme known as HAARTEBEESFONTEIN 324-JR/246 in respect of the land and buildings situated at Portion of 246 of the farm HAARTEBEESFONTEIN, Registration Division JR, province of Gauteng, Local Authority: City of Tshwane Metropolitan Municipality, of which section the floor area, according to the said sectional plan is 412 (Four Hundred and twelve) square metres in extent, and an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan held by Deed of Transfer No: ST26283/2006.

[3] During May 2004, the plaintiff granted the first defendant a housing loan, which was covered by a mortgage bond over an immovable property situated on Portion of 246 of the farm HAARTEBEESFONTEIN (immovable property). The loan was granted for the acquisition of the immovable property. The second and third defendants bound themselves as sureties for the first defendant's debts to the plaintiff.

[4] The first defendant defaulted on his monthly instalments. As a result, of the default, the plaintiff issued summons and the first defendant did not file a

notice of intention to defend. On 11 October 2010, default judgment was granted against the defendants.

[5] On 30 October 2013 the defendants obtained an order rescinding the default judgment on the following terms:

5.1 "That judgment by default be and is hereby rescinded, costs in the cause.

5.2 That no costs are allowed for drafting founding, answering and replying affidavits of both parties."

[6] In the founding affidavit to the rescission application, the following grounds were presented as to why the default judgment should be rescinded:

6.1 that the plaintiff had failed to show that the notice in terms of section 129 (1) (a) of the National Credit Act[1] (the Act) was delivered to the first defendant;

6.2 that the plaintiff had not complied with the with the *Sebola*[2] judgment.

[7] On 28 May 2014, the plaintiff served the first and second defendants with a fresh Section 129 (1) (a) notice and on the third defendant on 29 May 2014. After the period stipulated in the notice expired and the defendants had not applied for debt review, the plaintiff filed a new application for default judgment, which was served on the defendants' attorneys on 7 August 2014.

[8] On 3 September 2014, the defendants served the plaintiff with a notice of intention to defend. As a result, the plaintiff filed an application for summary judgment against the defendants. The defendants did not, however, file an

[1] Act 34 of 2005.
[2] This is reference to *Sebola and Another v Standard bank of SA Ltd and Another* 2012 (5) SA 142 (CC).

affidavit resisting summary judgment. The application for summary judgment was set down on the unopposed roll for 27 October 2014.

[9] On the day of the hearing of the application for summary judgment, the defendants counsel raised a point *in limine* in the form of an application in terms of Rule 30(1) of the Uniform Rules of Court. In the Rule 30(1) application, the defendants seek the striking off the plaintiff's summary judgment application on the ground that it was an irregular step.

[10] In support of the Rule 30(1) application, Mr Van Der Merwe, counsel for the defendants, submitted that it was irregular for the plaintiff to seek summary judgment without having served the defendants with a notice of bar after Preller J had granted the order rescinding the default judgment on 30 October 2013. Counsel argued that in the founding affidavit of the rescission of judgment, the defendants had shown, besides the fact that the section 129 notice was not effectively delivered to them, that the defendants had bona fide defences to the plaintiff's claim. Counsel further argued that in view of the defendants' disclosed bona fide defences, the plaintiff's claim, it was incumbent on the plaintiff, once the default judgment was granted, to request the defendants to file their plea, failing which to serve the defendants with a notice of bar. In short, what the defendants' counsel argued, was that although the default judgment was rescinded mainly due to the fact that the court found that there was no evidence showing that the section 129 notice effectively served on the defendants, because the defendants had raised other bona fide defences in the founding affidavit, the court impliedly granted the defendants leave to defend. Counsel submitted that it was therefore necessary for the plaintiff to serve them with a notice of bar.

[11] Mr Maritz Counsel, counsel for the plaintiff, submitted that the application for summary judgment was not an inappropriate step in that the rescission of the default judgment was granted solely on the ground that the plaintiff could not prove that the section 129 notice was delivered to the defendants. Mr Raubenheimer, counsel for the plaintiff in the application for rescission, who was present at the hearing of the rescission application, has filed an affidavit

in which he confirms that the court granting the rescission order did not deal with the merits of the plaintiff's case. The court rescinded the default judgment solely on the ground that there was no proper delivery of the section 129 notice.

[12] Plaintiff's counsel argued that once the court rescinded the default judgment, the parties were taken back to the position they were at when summons were issued. Since the plaintiff had re-served the section 129 notice on the defendants and the defendants had not applied for debt review, the plaintiff was entitled to apply for default judgment. Counsel submitted that when the default judgment was served on the defendants, that were an opportune moment for the defendants to have served the plaintiff with a Rule 30 Notice if they felt that the application for default judgment was an irregular step. Instead, the defendants served the plaintiff with a notice of intention to oppose. Counsel further argued that once the defendants had taken the procedural step to communicate their intention to oppose the granting of default judgment, it was open to the plaintiff to seek summary judgment. Since the defendants oppose such application, they should have filed an affidavit resisting summary judgment, which they failed to do.

[13] Rule 30 of the Uniform Rules of Court reads as follows:

"**30 Irregular proceedings**

(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if –

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2)."

[14] As correctly pointed out by counsel for the plaintiff, once a party whose view is that the other party has taken an irregular step takes a further step in the proceedings, like filing a notice to oppose, such party is precluded after taking such further step, from filing a Rule 30 notice. I am satisfied that the plaintiff was entitled, once the first defendant served it with the notice of intention to oppose, to file its application for summary judgment.

[15] Nothing turns on the fact that the defendants, in their application for the rescission of the default judgment, alluded to having bona fide defences. The alleged bona fide defences were not considered or taken into account by the court when grating the order of rescission. The court granting the rescission order did not go into the merits of the rescission application. The mere fact that the defendants alluded in the founding affidavit to defences it might have with regard to the plaintiff's claim, it was up to the court, and not the defendants' belief/perception, to determine whether the defences raised are bona fide defences after argument on whether there are bona fide defences or not. I am therefore of the view that the point regarding the defendants' Rule 30 ought to be dismissed. Nothing stops the plaintiff from setting down the application for summary judgment. It is up to the defendants to decide whether to oppose the plaintiff's summary judgment by filing an affidavit resisting summary judgment.

[16] Accordingly, the following order is made:

1. The application in terms of Rule 30 of the Uniform Rules of Court is dismissed with costs.

2. The defendants are granted leave to file an affidavit resisting summary judgment, if any, within 30 court days from the date of this order.

**NP MNGQIBISA-THUSI**
**Judge of the High Court**

**Appearances:**

For Plaintiff: Adv S Maritz

Instructed by: Tim Du Toit Attorneys Inc

For Defendants: Adv A Botha

Instructed by: Van Heerden and Krugel Attorneys