

Reportable	YES / NO
Circulate to Judges	YES / NO
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IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

JUDGMENT

CASE NUMBER: 1993/2011

KAGISHO JOSEPH MOCWANE
PATIENCE MARGARET MOCWANE

FIRST APPLICANT
SECOND APPLICANT

AND

STANDARD BANK OF SOUTH AFRICA LIMITED
ALETTA ELIZABETH BOTHA

FIRST RESPONDENT
SECOND RESPONDENT

Date of hearing: 08 November 2013
Date of judgment: 07 February 2014

PHATSHOANE J.

1. Mr Kagisho Joseph Mocwane and Ms Patience Margaret Mocwane, the first and second applicants, brought an application for condonation of the late filing of their application for rescission of the two judgments issued out of this Court; for an order to rescind the

default judgment dated 07 March 2012 entered by the Registrar of this Court; for rescission of an order of this Court dated 08 June 2012 declaring a property known as Erf 1[...], Kimberley, executable. Ancillary relief is also sought.

2. The applicants, aged 60 and 57 years are married to each other. On 12 November 2007 they entered into a home loan agreement with Standard Bank of South Africa Limited, the first respondent, in terms of which the Bank advanced to them a loan in the amount of R800 000.00. On 20 December 2007 they caused to be registered a first continuing covering mortgage bond in favour of the Bank over their immovable property, Erf 1[...], Kimberley, as security for the loan.
3. The Bank attached to its papers annexure “DAH1”, a copy of a printout of the applicants’ bond account, reflecting the amounts paid with effect from January 2008 to 10 March 2013. The applicants met their bond repayments obligations from January 2008 in the amount of R7 283.42 until November 2008 when the debit order was reversed. Thereafter, no payments were made on the bond account until August 2010, almost a year and nine months later. The applicants were therefore in default in terms of Part B clause 14 of the terms and conditions of home loan agreement which provides in part:

“14.1 Default in terms of this agreement will occur if:

14.1.1 You fail to make repayment, in full, on or before the payment date, of any amount owing by you”

4. The applicants intimate that during March 2010, because of financial constraints, they applied for debt review in terms of s 86 of the National Credit Act, 34 of 2005, (the NCA) at Credit Matters Debt Counsellors. By way of a letter dated 17 March 2010 the Bank was notified of this application. The repayments on the bond account resumed in August 2010 on a restructured basis in terms of the debt review process and continued for a period of 8 months. They ceased on 29 April 2011. Since then no payments were received from the applicants. There is a dearth of information from them why they failed to effect payment. They also did not produce any proof of payment to controvert the Bank’s allegation and essentially confine themselves to bare denials.

5. On 25 August 2010 the Bank terminated the debt review in terms of s 86(10) of the NCA. It contended that it did so properly because the applicants were in default under the credit agreement which was being reviewed. The similarly worded Notices of termination read:

“With reference to the above we confirm that our client was notified by your debt counsellor of your application for debt review in terms of the provisions of the National Credit Act 34 of 2005 (the Act).

You are in default with your obligations in terms of the abovementioned credit agreement and since more than 60(sixty) business days have lapsed since you applied for debt review, we hereby give you notice in terms of section 86(10) of the Act, terminating the debt review with immediate effect.

Should you wish to raise a dispute with our client with regard to this termination, kindly contact our client on [.....] not later than 10 business days from the date of this letter, failing which our client will proceed with legal action against you for the recovery of your indebtedness towards our client.”

6. The aforesaid Notices of termination of the debt review were sent by prepaid registered post to: 7 H[...] Street R[...], Kimberley, the applicants’ chosen domicilium as reflected in the home loan agreement and the mortgage bond. They have consented in terms of the home loan agreement to this method of service.
7. During December 2011 the Bank issued summons against the applicants for the payment of an amount of R885 606.93; payment of interest at the rate of 7.45% per annum, calculated daily and compounded monthly in arrears from 15 November 2011 until date of payment; an order declaring the property executable; and costs on an attorney and client scale.
8. The summons was served by affixing same to the outer principal door of the applicants’ chosen domicilium address on 14 December 2011. On 07 March 2012 Default Judgment was entered against the applicants by Registrar for the payment of the amount claimed in the summons together with interest and costs. The prayer to declare the property executable was referred to open Court. The Notice of Set Down for the latter proceedings was served on one Mr Tshepo Mocwane, who the applicants state they do not know. They claim not to have received the summons and the Notice of Set Down. On 08 June 2012 the Bank obtained an order declaring their property executable in the unopposed

motion Court. Long after the judgments were obtained against them, around September 2012 the applicants state that they completed a fresh application for debt review.

9. It is common cause that the applicants became aware of the judgments when the writ of execution was served on them by the Sheriff on 03 July 2012. The applicants say that during July 2012 they approached Oertel Attorneys for assistance. Their attorney advised them that they did not have prospects of success in having the judgments rescinded because the Bank had terminated the debt review in terms of s 86(10) of the NCA. They intimated that they were not satisfied with the advice because they were not aware of the termination of the debt review and cannot afford to lose their primary residence. They nevertheless, reluctantly, accepted the advice and did nothing.
10. Seven months later, the applicants received a notice which informed them that the property was to be sold by public auction on 28 February 2013. They intimate that they did not bring an urgent application to stay the sale for fear of the risk of an uncertain outcome. The property was sold to Ms Alletta Elizabeth Botha, the second respondent, at a public auction. I was informed by counsel, from the bar, that both parties agreed that the registration of the transfer of the property into Ms Botha's name was to be withheld pending the determination of this application. Ms Botha abides the decision of the Court.
11. The applicants further state that they contacted their attorney again and instructed her, notwithstanding to her previous advice, to apply for the rescission of the judgments. Those instructions culminated in the launching of the present application on 18 March 2013, about eight months after they became aware of the judgments.
12. The Bank resisted the application on the basis that the applicants have not shown good cause and that they are in wilful default. It contended that, with full knowledge of the judgments against them, they waited eight months before they brought the application. In any event, it was argued, the applicants have no *bona fide* defence to the Bank's claim.
13. In terms of Rule 31(2)(b) of the Uniform Rules a defendant may within 20 days after he or she has knowledge of a judgment by default apply to Court upon notice to the plaintiff to

set aside such judgment and the Court may, upon good cause shown, set aside the judgment on such terms as to it seems meet. On the applicants' own version their application for rescission is 8 months late. They had accepted, albeit reluctantly as they put it, that they had no prospect of success to bring the application for rescission of the judgments. In their replying affidavit they tried to paint a picture that they had been waiting for some documents from the Bank such as bank statements and were therefore not in a position to file the application within 20 days.

14. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9 para 11 the Court made the following pronouncement:

"[11]....The authorities emphasise that it is unwise to give a precise meaning to the term 'good cause'. As Smalberger J put it in *HDS Construction (Pty) Ltd v Wait* [1979 (2) SA 298 (E)]:

'When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352 - 3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'

With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which *prima facie* has some prospect of success (*Grant v Plumbers (Pty) Ltd* [1949 (2) SA 470 (O)], *HDS Construction (Pty) Ltd v Wait* supra, *Chetty v Law Society, Transvaal* [1985 (2) SA 756 (A)]).

15. The eight months delay in bringing the application is quite inordinate. I am also of the view that the explanation the applicants proffered for the delay is manifestly flimsy and unreasonable. I should mention at this juncture that their main defence is that they did not receive the Notices of termination of the debt review. It strikes me as very odd that they did not file the application for rescission when the judgments came to their attention. It was certainly peculiarly within their knowledge that they did not receive the Notices of termination of the debt review. In their own words, they were shocked and surprised when they received the writ of execution because the Bank was barred from instituting proceedings against them.

16. I now turn to the question whether the application is made bona fide or whether the applicants have a bona fide defence to the Bank's claim which *prima facie* has some prospects of success. The first issue arising for consideration is whether the Bank correctly terminated the debt review process or was entitled to terminate it in view of the fact that it had already been notified by the debt counsellor that the applicants had applied for a debt review. The second issue primarily hinges on whether there was proper delivery of the Notice of termination of the debt review process.
17. On the first issue the applicants argued that they were not in default with their monthly repayments obligations in terms of the credit agreement when they applied for debt review and therefore the Bank was barred from terminating the debt review and initiating litigation against them. The applicants' bare denial that they were not in arrears is not supported by any evidence. From "DH1" not only were they in default with their contractual monthly payments but were also in default after their debt was ostensibly rearranged.
18. Section 86 of the NCA provides in part:

"86 Application for debt review

- (1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.
- (2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.
- (3) A debt counsellor-
 - (a) may require the consumer to pay an application fee, not exceeding the prescribed amount, before accepting an application in terms of subsection (1); and
 - (b) may not require or accept a fee from a credit provider in respect of an application in terms of this section.
- (4) On receipt of an application in terms of subsection (1), a debt counsellor must-
 - (a) provide the consumer with proof of receipt of the application;
 - (b) notify, in the prescribed manner and form-

- (i) all credit providers that are listed in the application; and
 - (ii) every registered credit bureau.
- (5) A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection (4) (b), must-
 - (a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement; and
 - (b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.
- (6) A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time-
 - (a) whether the consumer appears to be over-indebted; and
 - (b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.
- “(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that-
 - (c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-
 - (i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and
 - (ii) that one or more of the consumer's obligations be re-arranged by-
 - (aa) extending the period of the agreement and reducing the amount of each payment due accordingly;
 - (bb) postponing during a specified period the dates on which payments are due under the agreement;
 - (cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or
 - (dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.
- (8) If a debt counsellor makes a recommendation in terms of subsection (7) (b) and-
 - (a) the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or
 - (b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.”

19. There is no indication on the papers that the applicants' state of indebtedness and their prospects for responsible debt rearrangement was evaluated by their appointed debt

counsellor as required in terms of s 86(5). There is equally nothing pointing to the fact that the debt counsellor had determined that they were over-indebted as set out in s 86(6). Nevertheless, I will assume for their sake that an evaluation of over-indebtedness was conducted because payments on the rearranged basis were made for a period of some eight months before it stopped. A puzzling aspect of their case is that, although they applied for debt review in March 2010, there is no order by a magistrate issued in terms of s 86(7)(c) or 86(8) of the NCA declaring them to be over-indebted. In the applicants' own words, they do not know why their debt counsellor failed to bring an application to the Magistrates' Court in terms of s 86(7) or 87 of the NCA to declare them to be over-indebted. In *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA) at 515 para 11 the Court remarked:

"[11] The debt counsellor is charged to determine whether the consumer 'appears' to be overindebted, and must issue a proposal recommending any or all of the orders set out in s 86(7)(c). The debt counsellor's involvement in the debt review is no end in itself, but part of an ongoing process culminating in the order of the magistrates' court under s 87 (or a voluntary rearrangement under ss 86(7)(b) and 86(8)(a)). Only then can the debt review be said to be complete. The role of the debt counsellor does not end with his referral of the matter to the magistrates' court. His 'proposal' takes the form of an application governed by the rules of the magistrates' court and he is required to be present in court, participate in the hearing and assist the court by way of furnishing evidence, making submissions or answering questions."

20. Section 88 of the NCA deals with the effect of a debt review or re-arrangement order or agreement. It partly provides:

"(3) Subject to section 86 (9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86 (4) (b) (i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-

- (a) the consumer is in default under the credit agreement; and
- (b) one of the following has occurred:
 - (i) An event contemplated in subsection (1) (a) through (c); or
 - (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal."

21. In *Collett v FirstRand Bank Ltd* (supra) at 516 para 12 the Court pronounced:

"[12]....A sounder approach is to recognise the express words of s 86(10), which gives the credit provider a right to terminate the debt review in respect of the particular credit transaction under

which the consumer is in default, and only when he is in default, at least 60 business days after the application for debt review was made. It must be emphasised that it is only when the consumer is in default that the credit provider has this right. If he is not, the debt review continues without the credit provider being entitled to terminate it. It is not that the credit provider is 'derailing' the process when he terminates the debt review: it is the consumer that is in breach of contract, not the credit provider. If the consumer applies for debt review before he is in default the credit provider may not terminate the process. But if the consumer is in default the consumer is entitled to a 60 business days' moratorium, during which time the parties may attempt to resolve their dispute."

22. From the analysis set out above the applicants had been in default and at least 60 business days after the application for debt review was made. In these circumstances the Bank cannot be faulted for having terminated the debt review. What remains is whether the applicants were properly notified of the termination of the debt review. They contended that they did not receive the Notices of termination of the debt review from the Bank. Furthermore, that the Bank failed to prove that the Notices of termination of the debt review were delivered to them.
23. It is common cause that although the notices were sent to the applicants by prepaid registered post they were returned to the sender because they were not collected at the post office by the addressees. From the Track and Trace report, the Notices were dispatched to the applicants on 25 August 2010 from the Tshwane Post Office. They were received by the Kimberly Post Office on 27 August 2010 but were returned to the sender on 01 October 2010. The Bank argued that it needs only to prove that it dispatched the registered letters to the correct address and does not have to show that the Notices were actually received by the addressees.
24. Section 86(10) of the NCA provides:

"(10) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to-

 - (a) the consumer;
 - (b) the debt counsellor; and
 - (c) the National Credit Regulator,

at any time at least 60 business days after the date on which the consumer applied for the debt review."

25. In terms of s 129(1)(b) if the consumer is in default under a credit agreement, the credit provider, subject to s 130(2), may not commence any legal proceedings to enforce the agreement before (i) first providing notice to the consumer, as contemplated in s 129(a) or in s 86(10), as the case may be; and (ii) meeting any further requirements set out in s 130. No method has been prescribed for the delivery of the Notice in terms of s 86(10) of the NCA to the consumer. In *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) the ConCourt dealt extensively with the meaning of “delivery” of the notice within the context of s 129 read with s 130 of the NCA and did so against the background of s 65(1) and (2), s 96 and s 168 of the NCA that indicate how delivery of notices must be effected. In my view this would also apply to a delivery of a Notice in terms of s 86(10) of the NCA. The following dictum appears at para 87 of the *Sebola* judgment:

“[87] To sum up: 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.”

26. It has been held, with reference to the delivery of a Notice in terms of s 129, in *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 (5) SA 569 (WCC) that where the letter in terms of s 129 was sent by registered post to the mortgaged property (the agreed *domicilium citandi et executandi*) and that it actually reached the appropriate post office in accordance with settled authority, the applicant has duly provided notice to the consumer as required by s 129(1) of the NCA and the risk of non-receipt therefore rests squarely with the addressee. In the unreported decision of the SCA, *ABSA Bank Limited v Mkhize* (716/12 [2013] ZASCA139, delivered on 30 September 2013 at page 23 paras 50-51 the Court made the following remarks:

“[50] The conclusion, Absa submitted, would have the result that a consumer who deliberately avoided collection of the notice, could frustrate the credit provider’s right. The answer to that is that where there is proof of deliberate failure to collect the notice, after adjourning the hearing, and prescribing the steps to be taken by the credit provider, the court may conclude that the consumer was acting in bad faith and enter judgment. The Eastern Cape High Court, Grahamstown (Alkema J) [Balkind v Absa Bank 2013 (2) SA 486 (ECG) para 48], faced with the same difficulties as those in this appeal, while agreeing with the approach of Olsen AJ, suggested that where the facts show that the consumer was residing at the chosen domicilium, that the notice was sent to the correct post office, that notification was sent to the correct address and there is no ‘satisfactory explanation’ why the consumer did not collect it, a finding of ‘fictional fulfilment’ would be appropriate.

[51] I do not think it necessary to go so far.”

27. Save to deny receipt of the notices the applicants do not advance reasons why they had not collected their mail. They do not say that the address to which the notices were sent is not their chosen domicilium nor are they saying that the notices went astray or to the wrong post office. The conclusion that can be reached is that they simply avoided the collection of the notices. The Bank, as it is statutorily enjoined, also sent the Notices of termination of the debt review to their debt counsellor, Ms Jolande De Beer, and to the National Credit Regulator by telefax and e-mail, respectively. There is nothing in the papers showing that the debt counsellor did not receive the Notice of termination of the debt review or that the telefax to which the notice was sent was not assigned to the debt counsellor concerned. The applicants’ argument that they did not receive the notices cannot hold.

28. Lastly, the applicants contended that the property in issue is their primary residence. Their two grandchildren and a disabled child reside with them. They earn an average monthly income of approximately R14 000.00 from which they are able to meet their monthly obligation in terms of the rearranged proposal. They contended that these were some of the circumstances that they could have placed before the Court prior to their property being declared executable. As already alluded to, this new debt restructuring proposal came in very late when the Bank had long terminated their previous debt review. In *Seyffert And Another v FirstRand Bank Ltd t/a First National Bank* 2012 (6) SA 581 (SCA) at 587 para 15 it was held:

“15...It may well be pointless in most cases where the matter has already been referred to a debt counsellor to do so again. Indeed, a court should be slow to exercise its discretion to make either

of the orders envisaged in s 85 where the matter has been dealt with by a debt counsellor, or a debt review has justifiably been terminated, and where no material change in circumstances has been demonstrated”

29. Emotive as execution against a residence may be, there are circumstances in which it cannot be avoided. The fact that the mortgaged property is the defendant's family home is, in itself, not a reason to deny the mortgagee's contractual right to realise its security. See *ABSA Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) at 497-498 para 37. In *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) at 269 paras 2-3 the Court held:

“[2] A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later, when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.

[3] The value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms.”

30. The *Standard Bank of South Africa Ltd v Saunderson and Others* (supra) was overruled by the ConCourt in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) only to the extent that it held that a registrar is constitutionally competent to make execution orders when granting default judgment in terms of Rule 31(5)(b) in respect of immovable property. On the whole I am satisfied that the applicants did not establish good cause or a *prima facie* case fit for trial. Their application falls to be dismissed.

ORDER

1. The application is dismissed with costs.

MV PHATSHOANE
JUDGE

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No appearance for Second Respondent