IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE 16/5/2013 SIGNATURE

CASE NO: 71756/11

16/5/2013

IN THE MATTER BETWEEN

ELIZABETH HELENA BREYTENBACH Applicant

and

NEDBANK LTD Respondent

JUDGMENT

LEDWABA J:

[1] Default judgment was granted against the applicant on 14 June 2012 for the payment of R283 200,25 plus interest and costs. The Court further ordered the Registrar to issue a writ against the property.

[2] The Applicant is now applying for the condonation of her failure to lodge the application for rescission of the judgment within the prescribed time period and that the default judgment be rescinded. The application is opposed.

[3] As a point of departure it should be noted that the applicant is an estate agent and in her founding affidavit she states that she is residing at plot 158 Lynnwood Road, The Willows, Pretoria.

[4] Regarding the condonation application she stated that she only came to know about the judgment on 10 July 2012. Thereafter she contacted the Respondent's attorney regarding the procedure of setting aside the judgment and was informed that if she could make six consecutive payments the judgment could be rescinded.

[5] Her first available date to consult with her attorney and counsel was on 6 August 2012. The application for rescission was only issued on the 17th of August 2012. She submits that the respondent is not prejudiced by the late filing of the application.

[6] When submissions were made regarding the application for condonation, the respondent did not show it would be prejudiced if condonation is granted. In exercising my judicial discression I condone the late filing of the application.

[7] Now the main issues in dispute are the following:

7.1 Whether the applicant was in wilful default and whether there is a reasonable explanation for the default; and

7.2 Whether the application is brought *bona fide,* that is, whether the applicant has a *bona fide* defence to the plaintiff's claim.

[8] The summons was served on 17 January 2012 at forum Buffelspoort 421 Modimolle being the applicant's chosen *domicilium citandi et executandi.* She alleges that in February 2011 she entered into a mandate with the respondent in

terms whereof the property would be sold with the assistance of the respondent. The respondent did market the property as arranged.

[9] As to why an appearance to defend was not filed, she said in January 2012 she did not file the appearance to defend because she was told that the action proceedings would not proceed if she paid the arrears amount.

[10] According to the agreement reached between herself and the respondent's attorneys proceedings would be stayed, she paid three payments in the amount of R3500,00 the first payment to be in January 2012, then February 2012 and the last payment to be in March 2012 to settle the arrear amount.

[11] She failed to make the payments as agreed and only made two payments timeously and also failed to comply with further arrangements made in time.

[12] As a result on 29 May 2012 an application for default judgment incorporating Rule 46 was served on the applicant's *domicilium* being the address upon which summons was served and the applicant acknowledge to have received the said summons.

[13] The applicant had at least four months to file her notice of intention to defend and she failed to do so. As an estate agent, I think, if she was aware that she had a defence she could have filed the notice to defend.

[14] The defence raised by the applicant is that she never received the notice in terms of section 129 of the National Credit Act. The notice was forwarded to two addresses *viz* the plot on Lynnwood road which she alleges is surrounded with a wire and the other address being a vacant stand. She further alleged that the respondent should have obtained the track and trace reports.

[15] The other defence raised by the applicant is that she was under the impression that the negotiations between her and the respondent were still on even if she knew that she breached the agreement.

[16] It has been alluded that the applicant failed to make payments as arranged and the respondent resumed legal proceedings thereafter. I do not think there is anything untoward the respondents proceeding with the legal proceedings.

[17] The summons in this matter was issued before the *Sebola v Standard Bank of South Africa Ltd 2012 ZACC 11* which was decided in the Constitutional Court. The respondent has shown that the notices were sent by registered post. I do not think it will serve any purpose to rule that another section 129 notice should be sent.

[18] On careful analysis of the submissions made *in casu* I do not think that the applicant has succeeded to prove on the balance of probabilities that she was not in wilful default and that she has a bona fide defence.

[19] **I therefore make the following order:**

19.1 The applicant's application is dismissed with costs.

A P LEDWABA
JUDGE OF THE HIGH COURT

HEARD ON: 12 April 2013

FOR THE APPLICANT: Adv N Breytenbach

INSTRUCTED BY: Du Plessis Attorneys , Pretoria

FOR THE RESPONDENT: Adv M Tromp

INSTRUCTED BY: Van der Merwe Du Toit Inc, Pretoria