IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case no. 9948/12

In the matter between:

SUNITHA RAJBUNSI	Applicant
and	
CHANGING TIDES 17(PTY) LTD N.O.	First Respondent
DESMOND MAYNE N.O.	Second Respondent
SHERIFF OF THE HIGH COURT INANDA	Third Respondent
MASTER OF THE HIGH COURT PIETERMARITZBURG	Fourth Respondent
REGISTRAR OF DEEDS PIETERMARITZBURG	Fifth Respondent

JUDGMENTDelivered on 09 September 2013

STRETCH A.J.:

[1] On 2 November 2012 Pillay J granted a rule nisi, returnable on 21 November 2012, calling upon the respondents to show cause why orders in the following terms should not be granted:

(a) that the applicant be granted condonation for the late launching of her application;

(b) that the judgment granted by default against the applicant and her deceased husband in favour of the first respondent by the registrar of this court on 20 October be rescinded, set aside, declared a nullity or be declared null and void;

(c) that the order made by Swain J on 8 August 2012 granting the first respondent leave to execute against the applicant's immovable property be rescinded or set aside;

(d) that the applicant be granted 30 days from the date of the issue of the rule nisi to:

   (i) launch an application to have the second respondent removed as the executor of her husband's deceased estate;

   (ii) launch an application to have the letters of executorship issued by the fourth respondent withdrawn and/or cancelled;

   (iii) launch an application for the applicant to substitute the second respondent as executor;

   (iv) that the sale in execution of the applicant's immovable property set down for the same day be stayed pending an application to have it set aside;

(e) that any sale agreement entered into between the first or second respondent and any prospective buyer be declared null and void; alternatively, be set aside as having no force and effect;

(f) that the third respondent be interdicted and restrained from scheduling any further sale in execution;

(g) that the fifth respondent be interdicted and restrained from registering transfer of the immovable property into the name of any other party;

(h) that the orders referred to in paragraphs (d) to (g) above shall operate as interim orders with immediate effect pending the finalisation of the applications referred to in paragraphs (a) to (c) above;

(i) that any respondents opposing the granting of the aforesaid relief should pay the costs thereof;

(j) that the matter be considered urgent and that the applicant's failure to comply with the rules and forms relating to service and process be condoned;

(k) that the applicant be granted leave to supplement her application papers insofar as it may be necessary.

[2] On the return date the application was adjourned to the opposed motion roll for 28 February 2013 and the rule nisi was extended until then, with the applicant being given the opportunity to deliver a reply by 9 January 2013.

[3] On 28 February 2013 the application was adjourned sine die and the rule nisi was extended until confirmed or discharged, with the applicant being directed to pay the wasted costs on the scale as between attorney and client.

[4] On 9 May 2013 the matter was argued before me as an opposed motion.

[5] In a nutshell, the history of the matter is the following:

(a) On 29 September 2010 the first respondent issued summons against the applicant and her spouse (PreethumRajbunsi) for joint and several payment of R540 879,80 in respect of default in repayment of a loan which the applicant and her spouse had obtained from Main Street 65 (Pty) Ltd, which loan had been guaranteed by the South African Home Loans Guarantee Trust (the Trust) of which the first respondent was the duly appointed trustee.

(b) Not only was this guarantee an express condition for the granting of the loan, but also that an indemnity bond be registered over the immovable property known as erf 548

Woodview, Kwazulu-Natal (the property) in favour of the Trust as security for indemnity to be given to the Trust.

(c) In the premises the first respondent not only sued for payment of the aforesaid sum with interest, but also for an order declaring the property specially executable with costs on the scale as between attorney and own client.

(d) Summons was served on 2 October 2010, and the time for entering appearance to defend having expired, the first defendant applied for and was granted default judgment by the registrar of this court against the applicant and her spouse jointly and severally, the one paying the other to be absolved, on 21 October 2010, which order included an order declaring the property specially executable.

(e) It however transpired that the applicant's spouse had passed away some time before the registrar had granted default judgment. The applicant was initially appointed as executor of his deceased estate, but was subsequently substituted with the second respondent.

(f) On 26 June 2012 the first respondent brought a further application for leave to execute against the property, this time citing the present applicant and the present second and third respondents, as respondents. On that day Steyn J questioned whether there had been proper compliance with section 129 of the National Credit Act 34 of 2005 (the NCA) and the application was adjourned sine die, in particular for the applicant to comply with the requirement of "delivery" of the notice in terms of section 129(1)(a) of the NCA as provided for in *Sebola v Standard Bank 2012 (5) SA 142 CC*.

(g) The first respondent duly complied and on 8 August 2012 Swain J granted the first respondent leave to execute against the property in terms of section 30(b) of the Administration of Estates Act 66 of 1965, ordering the present applicant to pay the costs of the application.

[6] It was contended in argument before me on the applicant's behalf that this application has been brought in terms of rule 42 of the uniform rules of this court. This, despite the fact that the applicant has sought condonation (purportedly in terms of rule 31) for the late launching of her application both in her notice of motion and in separate heads of argument submitted by counsel, not being the same counsel who argued the matter before me. It seems from the heads of argument ostensibly dealing with the merits, that the application for the setting aside of the default judgment (and I must assume that this is the one granted by the registrar) is in terms of rule 42 whereas the prayer for the removal of the second respondent as executor is in terms of rule 31, as the heads of argument refer to "good cause" having been shown, which is one of the requirements which this Court has to consider when

contemplating the setting aside of a default judgment in terms of rule 31. In any event, counsel appointed to argue the applicant's case before me was unable to take the matter any further except to submit that the applicant was "seeking rescission in terms of rule 42".

REQUIREMENTS FOR COMPLIANCE WITH RULE 42

[7] In terms of the provisions of the rule itself, it may only be utilised in order to vary or rescind a judgment if such an order or judgment is

(a) erroneously sought or erroneously granted in the absence of any party affected thereby, or

(b) one in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission, or

(c) granted as a result of a mistake common to the parties.

[8] It is contended on the applicant's behalf that summons was issued against the applicant and a party who is deceased, and is accordingly "ineffective" as it ought to have been issued against the applicant and the second respondent, or against the applicant in her personal capacity and again in her representative capacity as the erstwhile executor of her spouse's estate, and thus the default judgment was erroneously sought and granted.

[9] Strictly speaking, if the second respondent had not yet been appointed, the applicant ought to have been cited in her personal capacity and in her representative capacity as the first executor of her deceased

husband’s estate. In my view however, the first respondent’s failure to cite the applicant in her representative capacity or to cite the second respondent, is neither here nor there. It is common cause that the applicant was married to the deceased in community of property. The registrar granted default judgment against the applicant and her deceased spouse jointly and severally. This simply means that even if the applicant was cited in her representative capacity or if the second respondent was cited as the executor, the effect of the judgment would remain the same.

[10] The applicant in any event, does not dispute her factual indebtedness. Her primary dissatisfaction seems to be with the order made by the registrar declaring the property specially executable, which order I shall deal with in due course.

THE REQUIREMENTS OF RULE 31

[11] Rule 31(2)(b) makes provision for a defendant to apply to court upon notice to the plaintiff to set aside a judgment which has been taken in default of any appearance by the defendant. This must be done within 20 days of the defendant having gained knowledge of the judgment.

[12] A defendant against whom default judgment has been taken as contemplated in this sub-rule is not entitled to the setting aside of the judgment as a matter of course. Rule 31(2)(b) requires that, in order for this Court to exercise its discretion in favour of the defendant, the defendant must show “good cause” for the setting aside of the judgment.

[13] In this context "good cause" requires two things to be shown. Firstly, the defendant must set out reasons for the failure to deliver a notice of intention to defend or reasons for failure to deliver a plea. Secondly, the defendant must demonstrate that his application for a rescission is bona fide by setting out the grounds of his defence. The setting out of the grounds of the defendant's defence requires the defendant, in the application for a rescission of the order or judgment, to demonstrate a substantial defence to the plaintiff's claim and that he has a bona fide and presently held desire to raise that defence against the plaintiff in the event of the judgment being set aside. It is trite that the grounds of the defence must be set forth with sufficient detail to enable this Court to conclude that there is a bona fide defence and that the application is not being brought purely for the purposes of delay.

[14] It is argued on the applicant's behalf that the first respondent failed to comply with the ruling in *Gundwana v Steko Development and Others 2011 (3) SA 606 CC* where it was held that it is unconstitutional for a registrar to declare immovable property specially executable when ordering default judgment under rule 31(5) to the extent that this permits the sale in execution of a person's home, and that judicial oversight is required in this regard. It is also argued that the applicant did not receive the requisite notice provided for in section 129 of the NCA. This may arguably be so, but the matter does not end there. The first respondent indeed sought the judicial oversight referred to in *Gundwana*by virtue of the second application before Swain J

by which time the incorrect citation of the parties had also been corrected. As for non-compliance with section 129 of the NCA, this was raised as a concern by Steyn J resulting in the first respondent supplementing its papers to provide for proper compliance. There is sufficient authority to support the view that non-compliance with section 129 of the NCA is not in itself fatal and can be rectified: see *Munien v BMW 2010 (1) SA 549 KZD.*

[15] Of particular significance is the fact that the filing notice, notice of set down for 8 August 2012 and the supplementary affidavit deposed to on the first respondent's behalf, was served personally on the applicant on 18 July 2012.

[16] In the premises Swain J was in the best position, on 8 August 2012, to refuse the application for leave to be granted in terms of section 30(b) of the Administration of Estates Act to execute against the property of the applicant and the second respondent as executor of the estate, if there were sufficient grounds before him to do so such as non-compliance with section 129 of the NCA or simply because of considerations of justice and fairness in the Learned Judge's discretionary exercise of his judicial oversight. The Learned Judge however, granted the application with costs.

[17] The sheriff's return of service reflects that all the relevant papers were served on the applicant personally, advising her that the application for leave to execute against the property would be heard on 8 August 2012. Proof of this is annexed by the applicant herself to her founding papers. There is no explanation whatsoever, either in the application papers or in the heads

of argument, as to why the applicant did not attend court on that day to raise the spurious arguments which she wants this Court to accept now in this purportedly urgent rescission application launched three months after the order was made by Swain J and coincidentallyon the eve of theproposed sale in execution. There is also no explanation for this inordinate delay. Voluminous heads of argument, devoted specifically to the question of condonation, are devoid of any reference whatsoever to the matter before me.

[18] It would be an exercise in futility for me to set aside the registrar's order declaring the property specially executable when that order has in any event been sanctioned by a judge in compliance with *Gundwana.*

[19] In my view the applicant has not only failed to show good cause as is required by rule 31, but has also failed to place before this Court any logical or acceptable grounds for me to exercise my discretion under the common law. She has manifested a complete disinterest in this case right up until the 11^{th} hour. In the words of Trengrove AJA quoting from a Full Court decision in the lower court, she is the author of her own problems and it would be "*inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct":*

De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 AD at 1044D

[20] Instead, it seems to me that what the applicant has attempted to do is to appeal whatever occurred in the absence of any challenge from her, under the guise of an application for rescission. This is not acceptable and an abuse of the process of this court.

[21] In the premises I make the following order:

1. The rule nisi is discharged and the interim relief granted in terms thereof is set aside.

2. The applicant is directed to pay the costs of this application.

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STRETCH A J

FOR THE APPLICANT:	Ms A Moodley instructed by Chetty, Asmall&Maharaj, Pietermaritzburg (ref KC/nr/KC2207) Tel no 033 3452 358
FOR THE FIRST RESPONDENT:	Mr D.B. Joubert instructed by RandlesInc, Pietermaritzburg (ref AA van Lingen /CP/08S900379)
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