

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

13/6/2012
Case No.: 61704/2011

DELIVER WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	☒ NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	☒ NO
(3) REVISED.	
12/04/2012	
DATE	SIGNATURE

In the matter between:

NKOMO, KHIWA MORGAN
NKOMO, NTSELE JUNIA

1st Applicant
2nd Applicant

and

FIRSTRAND BANK LIMITED
F.S VAN DER WESTHUIZEN
M.P VAN DER WESTHUIZEN
THE SHERIFF, KRUGERSDORP
REGISTRAR OF DEEDS, PRETORIA

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent

JUDGMENT

MNGQIBISA-THUSI J

{1} This is an application in which the applicants are seeking the following orders:

- 1.1 that the default judgment granted against the applicants on 12 March 2010 be rescinded;

1.2 that the warrant of execution and the subsequent sale in execution of the applicants' immovable property be set aside.

[2] On or about 17 September 2007, the respondent approved the applicants' home loan application for the amount of R 700 000 secured by a mortgage bond over the immovable property situated at Portion 86 (a Portion of Portion 3) of the farm Paardeplaats No 177, I.Q., Krugersdorp ("the property").

[3] During May 2009 the applicants defaulted on their repayments and fell into arrears. As a result of the applicants' default and after compliance with the provisions of section 129(1)(a) of the **National Credit Act 34** of 2005, on 23 October 2009 the first respondent issued summons against the applicants claiming the following:

3.1 payment of the sum of R712 658.54;

3.2 Interest at the rate of 9.55% per annum as from 20 June 2009 to date of payment, both days inclusive, as contemplated in the said mortgage bond;

3.3 An order declaring:-

PORTION 86 (PORTION OF PORTION 3) OF THE FARM
PAARDEPLAATS NO 177, REGISTRATION DIVISION: IQ IN
EXTENT 1, 0706 HECTARES held by DEED OF TRANSFER:
T156933/2007, executable.

- [4] The section 129 notice was sent to the applicants' chosen *domicilium* address on 1 June 2009.

- [5] The applicants admit to receiving the summons. However, the applicants did not file a notice to defend. The applicants allege that they were not able to secure the services of an attorney as they were having financial difficulties.

- [6] The applicants are challenging the validity of the section 129 notice on the ground that its contents are not in accordance with the provisions of that section and that they do not remember receiving the notice.

- [7] The above argument does not assist the applicants. The section 129(1) (a) notice was duly served on the applicants at their *domicilium* address. Furthermore, the contents of the notice substantially complies with the provisions of section 129(1) (a) of the Act. Further, the risk of non-receipt of legal notices where a consumer has chosen a *domicilium* address lies with the consumer. *Rossouw v Firstrand Bank Limited* 2010 (6) SA 439 (SCA); *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD).

- [8] A default judgment was granted against the applicants on 12 March 2010. Further the order also declared the property executable. A writ of execution was issued by the Registrar on 17 October 2010 which was served on the applicants.

- [9] A sale in execution was scheduled for 2 June 2011 after the applicants were notified thereof. However, the sale did not proceed after the applicants negotiated with the applicants and made a payment towards their arrears.
- [10] The applicants subsequently fell into arrears again and the property was sold at an auction to the second respondent on 17 November 2010.
- [11] The applicants are seeking the rescission of the default judgment and the consequent setting aside of the writ of execution and the sale of the property on the ground that the default judgment was erroneously sought or erroneously granted.
- [12] Rule 42(1)(a) provides that a court may, in addition to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. This means that the applicant has to show that the court in granting the default judgment had committed an error "in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record. *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD). If the applicant can prove the error committed by the court, it is not necessary for him to explain his default.

- [13] The applicants are basing their application mainly on the ground that the property in question was the home of their dependent son and his family. Further that the Registrar was not empowered to grant the default judgment as it entails execution against a person's home without referring the matter to open court.
- [14] The applicants are also challenging the sale of the property on the ground that the sale was irregular in that when the first respondent sold the property, it had not given them prior notice about the intended sale.
- [15] It is common cause that the property was not the primary residence of the applicants, who were the mortgagors. In *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC), the Constitutional Court ruled that it was unconstitutional for the Registrar to grant default judgment where the home of the defendant is declared executable. The Court indicated that in all cases where it is sought to execute against the home of a mortgagor, such matters should be referred to court to be determined by a judge who will decide on the executability of the home of a person after taking into consideration all the relevant facts. Further the decision in *Gundwana (supra)* has retrospective effect.
- [16] The applicants on their own version concede that the property was not their primary residence as envisaged in the *Gundwana (supra)*. At the

time the default judgment was granted, the applicants' son why occupying the premises. I am therefore of the view that the applicant's right to adequate housing has not been prejudiced by the granting of the default judgment.

[17] The first respondent correctly pointed out, with reference to the decision in Gundwana, that in their papers the applicants did not show that they have a bona fide defence to the first respondent's claim. I am in agreement with the contention of the respondents that since the property in question was not the applicants' primary residence, the decision in Gundwana does not apply.

[18] I am therefore of the view that the Registrar did not erroneously grant nor was the order erroneously sought. The applicants knew about the default judgment by at least 2 June 2010 when the notice of the sale in execution was delivered to them. As a result of this knowledge they had contacted the first respondent to negotiate. Thereafter they had paid the arrear instalments. The applicants have not given an explanation as to why they have not brought this application earlier in view of the challenges they raised with regard to the validity of the default judgment. By paying the agreed amount was an indication that they were not intending to challenge the correctness of the default judgment and had acquiesced to it.

[19] Accordingly the following order is made:

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"The application for the rescission of the judgment granted on 12 March
2010 and ancillary relief is dismissed with costs".



NP MNGQIBISA-THUSI
Judge of the High Court