FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case no: **489/2012**

In the matter between:

NONHLUPHEKO SINA NOPHALE	Applicant
and	
ABSA BANK LIMITED	First Respondent
KHELETSO PETRUS KHUTLANE	Second Respondent
MASEBOLAI LYDIA KHUTLANE	Third Respondent
SHERIFF, BLOEMFONTEIN EAST	Fourth Respondent
REGISTRAR OF DEEDS	Fifth Respondent

DELIVERED BY: SNELLENBURG, AJ

HEARD: 24 MAY 2012

DELIVERED: 21 JUNE 2012

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[1] This is an application for

(i) the rescission of a default judgment granted in terms of Uniform rule 31(5)(b);

(ii) an order that the transfer of immovable property pursuant to the judgment be set aside;

(iii) and ancillary relief.

[2] The first respondent, **ABSA Bank Limited**, summonsed the Applicant, **Mrs Nophale**, for

(i) payment of the amount of **R40 883.60;**

(ii) interest thereon at a rate of **14** percent per year, calculated and capitalised in advance from **18 February 2009** to date of payment in full;

(iii) an order to have the immovable property decribed as **Erf 15190, Mangaung, district BLOEMFONTEIN**, **Free State Province**, also known as **15190 Swanepoel Street, Bloemanda, BLOEMFONTEIN** [the immovable property] declared specially executable; and

(iv) cost in the amount of **R250.00** plus Sheriff fees in the amount of **R174.99**.

[3] The first respondent's cause of action is based on the applicant's failure to comply with her obligations in terms of an agreement, entered into during **1987**, between the applicant and the first respondent's predecessor in title, **Allied Building Society**, in terms whereof the loan was extended to the applicant to purchase the immovable property described as **Erf 15190, Mangaung, district BLOEMFONTEIN**, **Free State Province**, also known as **15190 Swanepoel Street, Bloemanda, BLOEMFONTEIN**. The loan was secured by a mortgage bond registered over the said immovable property. In terms of the allegations in the particulars of claim the applicant had defaulted in her monthly payments, as a result whereof the total outstanding balance as on **18 February 2009** became immediately due and payable.

[4] Service of the summons was effected on the Applicant on **28 April 2009** by service thereof on the applicant's daughter in the temporary absence of the applicant at the immovable property,

also being the *domicilium citandi et executandi*. The applicant did not defend the matter, where after the first respondent applied for default judgment in terms of the provisions of Uniform rule 31(5), the same which was duly granted by the court registrar on **20 August 2009**.

[5] It is this judgment that the applicant seeks to set aside.

[6] On **26 August 2009** a writ against immovable property was issued by the court registrar, in lieu of the execution order, the same which was duly served on the applicant in person at the said *domicilium* address on **11 September 2009**.

[7] After attachment of the said property it was sold to the second and third respondents by public auction on **23 October 2009**. The immovable property was transferred and registered in the said respondents' names on **8 November 2010**. The second and third respondent purchased the said immovable property for the sum of **R160 000.00**. They borrowed **R130 000.00** of the said purchase

price from the first respondent and the loan was secured by way of mortgage bond registered over the immovable property.

[8] The Applicant applies for an order in the following terms:

"*(a) That, non-compliance with Rules of the Court relating to time limits and/or late lodgement of the application shall be condoned;*

(b) That, the default judgment granted by the Registrar of the Court against the Applicant in favour of the First Respondent on 20 August 2009 under case number 1865/2009 shall be rescinded and/or set aside;

(c) That, the attachment and the subsequent judicial sale of the residential property known as Erf 15190, Mangaung, district Bloemfontein, Free State Province, also known as 15190 Swanepoel Street, Bloemanda, Bloemfontein by Fourth Respondent to Second and Third Respondent, acting at their (sic the) behest of First Respondent, shall be declared null and void and be set aside;

(d) That, the registration of transfer by Fifth Respondent under title deed T14965/2010 of the residential property referred to in

prayer (c), to Second and Third Respondent, be declared null and void and thereby set aside;

(e) *That, Fifth Respondent shall be directed to reverse the aforesaid registration of transfer and revert ownership and/or title in respect of the residential property mentioned in prayer (c) to the Applicant;*

(f) *That, the Applicant shall be liable for costs of the application, save in the event of opposition by any of the Respondents.*"

[9] The application is opposed by the first respondent and also by the second and third respondents. The first respondent opposes the application *in toto*, whilst the second and third respondents only move for an order that the relief set out in paragraphs (c), (d) and (e) of the notice of motion be dismissed.

[10] It is apposite to firstly deal with the court registrar's order that the immovable property be declared specially executable.

[11] Execution against immovable property which is the home of the judgment debtor, without any judicial oversight in terms of the

provisions of section 66(1)(*a*) of the Magistrate's Court Act, 32 of 1944 [Magistrate's Court Act], was declared unconstitutional by the Constitutional Court in **JAFTHA v SCHOEMAN AND OTHERS; VAN ROOYEN v STOLTZ AND OTHERS** 2005(2) SA 140 (CC) [**JAFTHA**]. The Constitutional Court ordered that the defect in section 66(1)(*a*) of the Magistrate's Court Act be remedied by reading in the words '*a Court, after consideration of all relevant circumstances, may order execution*' before the words 'against immovable property of the party' in section 66'.

[12] Admittedly the **JAFTHA**-judgment gave rise to divergent judicial interpretation, specifically with regards to the power of the court registrar in terms of Uniform rule 31(5) to order execution against immovable property. The Supreme Court of Appeal however held, in **STANDARD BANK OF SOUTH AFRICA LTD v SAUNDERSON AND OTHERS** 2006 (2) SA 264 (SCA) [**SAUNDERSON**] that, although the issue did not strictly arise in that matter, the court registrar could order execution of immovable property which is the home of a judgment debtor. A practice direction was however issued by the Supreme Court of Appeal to the effect that from date of that judgment, in any summons

initiating action in which the plaintiff claims relief that embraces an order declaring immovable property executable, the summons shall inform the defendant as follows:

> "*The Defendant's attention is drawn to Section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the Defendant claim that the order for execution will infringe that right, it is incumbent on the Defendant to place information supporting that claim before Court.*"

[13] The Constitutional Court had the final say in **GUNDWANA v STEKO DEVELOPMENT AND OTHERS** 2011 (3) SA 608 (CC) [**GUNDWANA**], where it was held unconstitutional for the court registrar to declare immovable property specially executable when ordering default judgment under rule 31(5) of the Uniform rules of Court to the extent that this permits the sale in execution of a person's home. The judgment specifically overruled the **SAUNDERSON**-judgment to the extent that it had held that the registrar was constitutionally competent to make execution orders when granting default judgment in terms of rule 31(5)(b).

[14] In **<u>GUNDWANA</u>**, **Froneman, J** held [at para 53] that the constitutional considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor, in satisfaction of a judgment debt sounding in money. What it does is to caution courts that, in allowing execution against immovable property, due regard should be taken of the impact that that may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving the drastic consequences, then an alternative course should be judicially considered before granting execution orders. The Court furthermore reiterated that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.

[15] The court order in **<u>GUNDWANA</u>** placed no limit on the retrospectivity of the order. That however does not entail that all

transfers made subsequent to invalid execution sales are automatically invalid. It is apposite to quote the remarks of **Froneman** J, with regards to the effect of the retrospectivity of the declaration, as it is particularly relevant to the relief that the applicant claims:

> "[58] There may be fear that the decision in this matter will lead to a large-scale legal uncertainty about its effects on pass matters, where homes were declared specially executable by the Registrar, and sales in execution and transfers followed. The experience following JAFTA may be an indication that this fear is overstated. It must be remembered that these orders were issued only where default judgments were granted by the Registrar. In order to turn the clock back in these cases, aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule, under which the property was declared executable, is not sufficient to undo everything that followed.[1] In order to do so the debtors will have to explain the reason for not bringing the rescission application earlier, and they will have to set out a defence to the claim for judgment

[1] ***OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS,*** ***2004 (6) SA 222 (SCA) ([2004] 3 ALL SA 1) at paras. 27 – 38; and BENGWENYAMA MINERALS (PTY) LTD AND OTHERS v GENORAH RESOURCES (PTY) LTD AND OTHERS (CC), case no CCT39/10, 13 November 2010) ([2010] ZACC 26), as yet unreported in paras. 81-85***

against them.[2] It may be that, in many cases, those aggrieved may find these requirements difficult to fulfil.

[59] From what has been stated above, in relation to the legitimacy of resorting to execution in order to obtain satisfaction of judgment debts sounding in money, and that only deserving cases would justify other means to satisfy the judgment debt, it follows that a just and equitable remedy, following upon the declaration of unconstitutionality, should seek to ensure that only deserving past cases benefit from the declaration. I consider that this balance may best be achieved by requiring that aggrieved debtors, who seek to set aside past default judgments and execution orders granted against them by the Registrar, must also show, in addition to the normal requirements for rescission, that a Court, with full knowledge of all relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypotheticated property that is the debtor's home.

[60] Once these hurdles have been cleared, and it is determined that special execution should not have been allowed, the question of the effect of invalid execution sales and subsequent transfers will have to be considered as a next step. It is not possible to lay down inflexible rules to deal with all the permutations that

[2] ***GRANT v PLUMBERS (PTY) LTD,* 1949 (2) SA 470 (O); *CHETTY v LAW SOCIETY, TRANSVAAL,* 1985 (2) SA 756 (A) at 764I-765D; and *DE WET AND OTHERS v WESTERN BANK LTD,* 1979 (2) SA 1031 (A) at 1042**

may arise in these cases. Existing legal principles and rules will be sufficient to deal with most cases in a just and equitable manner." My underlining.

[16] It is efficacious in matters like these to keep in mind the object of judicial oversight, namely to determine whether the rights in terms of section 26(1) of the Constitution are implicated. **MKHIZE v UMVOTI MUNICIPALITY AND OTHERS** 2012 (1) SA 1 (SCA) at para. 26. As stated in the **MKHIZE**-matter by **Malan, JA** applying the **JAFTHA**-principle does not mean that all past executions in which there was no enquiry are rendered invalid. Once again, the validity of such executions will depend on circumstances of each case. Judicial oversight is constitutionally required so that a judicial officer can '*engage in a balancing process*' and '*consider all the relevant circumstances of a case*' to determine whether there is good cause to order execution against immovable property concerned.

[17] Willingness of mortgagers to put their homes for the security of loans they acquire is not but self-sufficient to put those cases beyond the reach of **JAFTHA.** An evaluation of the facts of each

case is necessary in order to determine whether a declaration, that hypothecated property constituting a person's home is specially executable, may be made.[3]

[18] The requirements that the applicant in this matter has to meet, are therefore to show good cause:

(a) by giving a reasonable explanation of her default;

(b) by showing that her application is made *bona fide*;

(c) by showing that she has a [prima facie] *bona fide* defence to the plaintiff's claim, which *prima facie* has some prospect of success. **COLYN v TIGER FOOD INDUSTRIES LTD T/A MEADOW FEED MILLS (CAPE)** 2003 (6) SA 1 (SCA), para. 11;

(d) by giving a sufficient explanation why the application is only brought at this stage;

(e) by showing that a Court, with full knowledge of all relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially

[3] ***Gundwana v Steko Development and Others 2011 (3) SA 608 (CC), supra para 49***

hypotheticated property that is the debtor's home. (**<u>GUNDWANA,</u>** *supra* para 59)

[19] Only after all the requirements in para [18] have been met, and it is thus determined that the execution should not have been allowed, that the next phase of the enquiry, relating to the effect of the invalid execution sales and subsequent transfers, commences. This means that even where the applicant meets all the requirements for rescission, the court may still refuse to set aside the execution in light of consequences flowing from transfers subsequent to the invalid execution. This comprises that the court needs to exercise its discretion judicially, in light of the specific circumstances of the case.

[20] The distinction needs to be made between the explanation required for default to defend the action as referred to in para [18(a)] above, and the explanation for the fact that the application for rescission is only brought at this stage, as referred to in para [18(d)]. The explanation for default to defend the action obviously only relates to the period prior to the judgment being granted as

result of a failure to either give notice to defend or of filing a plea. The explanation required in terms of para [18(d)] should explain the entire delay from judgment until the time when the rescission application is made.

[21] It remains to consider whether the applicant has met the requirements to rescind the judgment granted in her absence by the Registrar.

[22] As has been mentioned above, the summons was served on the applicant on **28 April 2009**.

[23] The applicant says that, although she cannot recall the names and particulars of the employees of the first respondent whom she approached to make arrangements to remedy the said default, they informed her that the matter would be referred to the relevant office within **ABSA,** whereafter they would revert to her with a response. She says that she *bona fide* believed that, in light of the "negotiations" that had ensued, it was not necessary for her to enter appearance to defend.

[24] The first respondent denies that it made an arrangement or entered into negotiations with the applicant. It admits that the applicant, represented by Lesaka Legal Advisors, indicated on the 3rd of April 2009, that she was desirous to make arrangements to pay the amount of the arrear instalments outstanding at that stage, to wit R8218.72, before the end of April 2009. This was before the summons was issued or served. Two aspects emerge from these facts. Firstly, the fact that the first respondent proceeded to issue summons is indicative of the fact that it did not accept the proposed arrangement. Secondly, the bond provides that upon failure to pay monthly instalments any outstanding amounts would immediately become due and owing. The applicant had been in default with several months' instalments at that stage. I will revert to this aspect as it is also relevant when evaluating the prospects of success with the *bona fide* defence.

[25] Contrary to the first respondent's denial that the applicant had made the payment that she had proposed, the applicant appended a deposit slip to her replying affidavit evidencing, at least *ex facie* the document, that the amount was indeed deposited on 30 April 2009. The account number on the deposit slip corresponds with

the account number that appears on the statements of the home loan account, appended to the first respondent's answering affidavit. It appears therefore, at least *prima facie*, that the payment was made. That however does not dispose of this part of the enquiry, as the payment was made two days after the summons was served and it would not have purged the applicants default. It appears that the applicant was advised, during **May 2009**, that the payments were again in arrears with **R1864.56**.

[26] It is not the applicant's case that she had made any further payments before the default judgment was entered. The question remains, has the applicant explained her delay to defend the matter sufficiently so that the court can understand how it came about.

[27] The applicant does not explain what transpired after the payment on her version. She fails to deal with the letter of demand during May 2009. No further correspondence from her legal advisors is appended. She seems to rely solely on the April payment for support that she was under the impression that the first respondent

would revert regarding the proposed arrangements. That can however not be. Those arrangements, on her version, were made well in advance of the summons. No details appear regarding when, where and to whom these enquires were directed on which she relies. What stands undisputed is the fact that she failed to make any further payments until after the judgment had already been granted.

[28] The applicant already had the benefit of legal advice prior to service of the summons and it raises some concern that she fails to meaningfully respond and deal with the events after the payment. As the papers stand, the applicant has not even disclosed what the arrangements would have comprised of. The explanation is anything but sufficient to fully explain the delay to defend the matter.

[29] The requirements for rescission are not to be considered in isolation. The inadequacy of the explanation for the applicant's default may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the

defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success. **COLYN** *supra* para 12; **MELANE v SANTAM INSURANCE CO LTD** 1962 (4) SA 531 (A) at 532; **CHETTY V LAW SOCIETY, TRANSVAAL** *supra* (fn 22) at 767J - 769D.

[30] The applicant's *bona fide* defence to the first respondent's claim sounding in money, is premised solely on the contention that the 30 April 2009 payment would have satisfied the arrears on the loan. That is clearly not correct. Notwithstanding the payment, on her version, the instalments were still in arrears at that time, namely when summons was served. The fundamental problem for the applicant regarding the judgment for payment of the balance owing on the loan, is the fact that on her own evidence she failed to make any further payments after April 2009. The judgment was only granted during August 2009. At best for the applicant she would have been in arrears with her instalments for at least 5 months and the whole of the outstanding balance would in any event be due and payable. The first respondent was and would have been entitled to a judgment against the applicant. There can be no dispute about that. The fact that a payment that did not

purge the default, seems not to have been taken into consideration regarding the applicant's indebtedness, does not entitle the applicant to rescission. It would not have had such material impact on the judgment amount. To my mind that must be sorted out when the reconciliation is done regarding any monies still owing or that is owed to applicant if the sale is not set aside.

[31] The *bona fide* defence on which an applicant relies for rescission of the judgment in money, must have existed when the judgment was entered. The applicant has failed to establish a *prima facie bona fide* defence with any prospects of success, let alone some prospects of success regarding the judgment sounding in money as well as the orders relating to payment of interest and costs.

[32] That still does not dispose of this matter as at least the order for execution is struck by the declaration of invalidity. The court has a discretion at common law to grant partial rescission. **DE WET AND OTHERS v WESTERN BANK LTD** 1979 (2) SA 1031 (A) at 1041C. **TERRACE AUTO SERVICES CENTRE (PTY) LTD AND OTHERS v FIRST NATIONAL BANK OF SOUTH AFRICA LTD** 1996 (3) SA 209 (W) at 214E - F.

[33] In **TERRACE AUTO SERVICES CENTRE**, *supra,* the court, with reference to **KAVASIS v SOUTH AFRICAN BANK OF ATHENS LTD** 1980 (3) SA 394 (D) and **ZEALAND v MILBOROUGH** 1991 (4) SA 836 (SE) where it was held that a court did not have the power under rule 31(2)(b) to rescind a judgment partially, refused to exercise its discretion at common law to grant only partial rescission of a judgment. Rubens, AJ held in that case that where a party disclosed a *bona fide* defence to only part of a judgment, there was no reason why the plaintiff in such matter should not be afforded all the procedural advantages he would have had, had the default not occurred. He accordingly held that such party was entitled to rescission of the judgment in its entirety. In so doing he declined to follow the reasoning in **MAIA v TOTAL NAMIBIA (PTY) LTD** 1991 (2) SA 188 (NM) and **SOS KINDERDORF INTERNATIONAL v EFFIE LENTIN ARCHITECTS** 1993 (2) SA 481 (Nm) where it was held that rule 31(2)(b) did not preclude the partial rescission of a judgment.

[34] As was the case in **TERRACE AUTO SERVICES**, I am not concerned with rescission in terms of rule 31(2)(b), but rather with the Court's discretionary power at common law to set aside a

judgment granted by default. I will add however, that if the matter had concerned an application of the rule, I would have been inclined to follow the **MAIA** line of cases. The facts in the present matter illustrate the absurdity to which the full bench in **SOS KINDERDORF** referred. The applicant has no bona fide defence to the part of the judgment sounding in money. It is only the execution order that can be impeached. It would indeed be absurd in this instance to rescind the judgment in its entirety.

[35] It is therefore necessary to consider whether the applicant has shown that this is a case deserving of the benefit of the declaration of invalidity. As stated above, the applicant must explain why she only now approaches the court and, if the explanation is sufficient, that a Court, with full knowledge of all relevant facts existing at the time of granting of the default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home. Where relief in an application for rescission will have final effect, the principles enunciated in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) at 634E – 635C are applicable, at least to that part of the application. The relief regarding the setting

aside of the execution order and the subsequent transfer will constitute final relief *vis-à-vis* the second and third respondent.

[36] It is apposite to point out that, in both the summons as well as the writ of execution the applicant was referred to her rights in terms of sections 26(1) and (3) of the Constitution, as well as to the provisions of Uniform rule 31(5)(*d*).

[37] The applicant relied on the unreported decision in this division of **<u>KAKELAME AND ANOTHER v THOABALA AND OTHERS</u>** [unreported case with FSB case no 1267/2010] at p.5 where the Court held that, notwithstanding an obvious and long delay which was not explained sufficiently, it had to grant the order for rescission, otherwise it would mean that the Court would be ratifying a nullity which in turn meant that the applicants' (in that matter) home would be taken from them because of an irregular step. The Court further held that the prejudice that would stem from such an order could not be justified just because of a long delay that it took to make the application. In light of **<u>GUNDWANA</u>**

reliance on the judgment under consideration is misplaced and its *dictum* is no longer applicable.

[38] The applicant does not say when she was advised of the constitutional declarator regarding the invalidity of the execution order. In light of the case that the applicant advances that date is not decisive in this matter.

[39] The applicant explains the delay from date of judgment to date of issuing this application on the mainly two grounds. Firstly the applicant relies on arrangements made with the first respondent, according to her, after the writ was issued but before the sale in execution transpired. The applicant says that in light of the fact that she inter alia authorised a debit order in favour of the first respondent, she was under the impression that the sale, which should according to her in any event not have taken place, would be set aside. Secondly the applicant relies on a lack of funds for not taking any steps to issue this application sooner.

[40] The applicant enjoyed legal assistance from before the summons was served. After she acquired knowledge of the sale she enlisted the services of her present attorneys. They held instructions but, according to the applicant, she could not advance the funds at once that was necessary to make a rescission application.

[41] The period of the delay needs to be evaluated in stages on the case that the applicant advances. It is an obvious long delay.

[42] The applicant states that she and first respondent had an arrangement that the sale in execution would be cancelled, as she would

(a) pay a capital amount of R6559,29 and

(b) authorise a monthly debit order for payment of **R1 500,00**. According to the applicant, the payment only needed to be made the afternoon of the day of the sale. Applicant says that she complied with these demands and that the sale should therefore have been cancelled. To this end, she says that she phoned the first respondent's attorneys to advise them that she was at the bank, and about to make the deposit, ant that she was just waiting in the queue.

[43] The first respondent disputes the applicant's version. It relies on a letter of 1 October 2009 wherein the conditions are contained for it to consider cancelling the sale. The conditions comprises of payment of the arrears; payment of legal costs to date; payment of an instalment in advance; proof of payment of all outstanding municipal accounts; supply of the applicant's salary advice and either a written undertaking to pay the monthly instalments, or authorisation of a debit order for the amount of the monthly instalment before 19 October 2009 in absence of which the sale would continue. None of the conditions were met before 19 October 2009.

[44] The applicant's version does not withstand judicial scrutiny. The evidence of Me Pretorius, supported by her handwritten notes of telephone conversations with the applicant on the day preceding as well as the day of the sale, proves that the applicant was advised to make at least payment of the full amount of arrears as

well as all the legal costs to date, before 09h30, in order to have the sale suspended. The only reference to a debit order appears from the letter by the first respondent's attorneys of 1 October 2009. The applicant clearly received the same but failed to comply with the conditions. The payment by her was not in terms of the proposed conditions to suspend the sale and only took place after the sale to the second and third respondent. The debit order was likewise only authorised after the sale. It does not appear that the applicant informed the first respondent of the debit order. The arrangement on 22 October 2009 was clearly another attempt to accommodate the applicant.

[45] The first respondent's version is neither farfetched, nor clearly untenable. The auction was scheduled to commence at **09h30** on **23 October 2009**, as advertised and it would be nonsensical to suspend the sale without having received confirmation of payment of the amount as agreed. The explanation does however explain how it came about that the sale proceeded. It also evidences a willingness by the applicant to stop the sale at that stage. These facts need to be given proper consideration if it be found that the delay can be explained.

[46] On **18 November 2009** and subsequent to the sale in execution of the applicant's immovable property, the applicant's current attorneys of record addressed a letter to the first respondent's attorneys, **Messrs Neumann Van Rooyen Sesele**, **Welkom**, in which it is recorded:

> "*Our client's instructions is that the said residential property was allegedly attached and sold by a public auction following a default judgment granted on 20 August 2009 by the Registrar of the High Court. Our client's instructions is* (sic are) *that the said judgment is void ab initio and that the <u>subsequent attachment and sale</u> is, by parity of reasoning, <u>also void</u>. Our client has instructed us to approach the High Court for the <u>set aside of the said sale in execution</u>. We <u>are accordingly preparing the necessary papers in order to move the said application without any avoidable delay</u>.*"

The letter continues to place on record instructions from the client that she made arrangements with the first respondent's attorneys to make payment of the amount of **R6 559,29** on **23 October 2009** and that it was expressly agreed that, upon payment of the said amount, the sale in execution would be cancelled, but notwithstanding they have been informed of the payment, that the sale in execution went ahead, contrary to the agreement reached. The letter then continues:

> "*We therefore shall appreciate if you could favour us with the full names and address of the third party who purportedly purchased the said residential property, as well as the purchase price. We believe that the said third party has a material interest in the matter and we intend to serve him/her with the papers as well.*
>
> *Lastly, we shall appreciate if you could advise us in writing if your client is willing to consent that the registration of transfer to the third party be suspended pending the determination of our client's said application. If we do not hear from you in this regard by the end of business on 23 <u>instant</u>, we shall approach the High Court for an appropriate relief.*"

[47] The first respondent's attorneys, by way of correspondence dated respectively **7 December 2009** and **21 January 2010**, responded to the applicant's attorneys, informing them that, as the money was not paid into the bank account on time of the auction, the sale continued.

[48] The said letter of demand leaves no doubt that the applicant was of the opinion that the judgment granted by the court registrar, as well as the subsequent attachment and sale, is *void ab initio*. It is also evident that the attorneys held instructions, not only to apply to the High Court to set aside the sale in execution, but they were, at that stage, already preparing the necessary papers in order to move the said application without any *avoidable delay*. The letter of demand also acknowledges the material interest which the second and third respondents, as purchasers of the property, hold in the matter.

[49] Notwithstanding the said letter of demand, during **November 2009**, the applicant took no further steps to set aside either the judgment and/or the subsequent sale in execution until the present application which was issued on **6 February 2012**, therefore two years and two months later.

[50] The second and third respondents took transfer of the said property on **8 November 2010**, therefore almost eleven months after the letter of demand. No correspondence of any nature was

addressed to them advising them of the applicant's attitude regarding the sale or of her intentions. No steps were taken to stop transfer of the immovable property into the names of the second and third respondents.

[51] The applicant continued to occupy the property as she still does. The second and third respondents not only paid the purchase price for the property, partially financed by the first respondent and secured by mortgage bond over the immovable property, but they also paid the outstanding municipal debt (arrear taxes and expenses incurred by the applicant) with regards to the property. They have made further payments in the amount of **R13 457.05**, for taxes and expenses which had accrued whilst the applicant has been occupying the property. The second and third respondents have continued to pay the taxes and expenses in relation to this property.

[52] This application was motivated by the fact that the second and third respondents issued an application for the applicant's eviction in the Magistrate's Court, Bloemfontein. That application was

already issued on **24 August 2011** in terms of the provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998.

[53] The applicant's explanation for the delay of the two years and two months, since the letter of demand, is contained in paragraph 15 of the founding papers, which reads as follows:

> "*The said residential property is my primary residence and I share same with my eight children, of which two are minors. I am the breadwinner and the whole family is dependent upon me. After I consulted with Mr Majola he informed me of his financial requirements to enable that this matter should be instituted in Court. Unfortunately, I could not raise the said amount at once and had to pay in trances from my relatively meagre income.*
>
> *The institution of eviction proceedings also put strain on my finances as I had to redirect some of the money I had accumulated towards payment of the defence of the eviction case.*
>
> *I did explore the possibility of representation by the Legal Aid Board, but my application was unsuccessful, on account of the fact that I was employed and earned above the threshold of persons that are entitled to free legal services. … As indicated herein before the delay was*

occasioned by a multiplicity of factors such as ignorance on my part, impecuniosity, continued deduction of monthly instalments, the eviction application, to mention a few."

[54] A lack of finances (inability to pay) is well recognised as an exculpatory ground which may, depending on the circumstances of a matter, constitute a reasonable explanation for delay or default to act.

[55] The vague statement that the applicant was advised what the financial requirements were to enable the matter to be instituted in Court and that she could not raise the amount at once, but had to pay in trances from her "relatively meagre income", is simply insufficient to constitute a reasonable explanation for a delay of more than two years. The applicant only appended two salary advices for the time of the sale in execution. It can be said, that from this it appears that the applicant had substantial deductions. But the applicant also received a yearly bonuses and increases. That does not disclose what her monthly income was for the entire period of the delay and/or how the income is dispersed; what the amounts were that she paid in "trances"; where she got the funds

to pay to the attorney; what the estimation of the costs were to institute the application, in other words a sufficient explanation to explain the continued default. Obviously a respondent cannot be expected to meaningfully respond to a general and vague averment in this style; nor is the Court in a position to evaluate not only the explanation, but the applicant's *bona fides*. It must be borne in mind that, at **18 November 2009**, when her attorneys wrote the letter of demand, they intimated to the first respondent's attorneys that they in fact were already preparing the papers and they were fortified in their view, that they would make the application without unavoidable delay. Financial instructions would at that stage have been discussed in order for the attorneys to already have started to prepare the papers. The respondents, to my mind, also correctly pointed out that the applicant failed to advise when she allegedly applied to the Legal Aid Board for assistance. The eviction proceedings were only instituted during **August 2011**. It could not have put strain on the applicant's finances with regards to the application for rescission of the default judgment granted on **20 August 2009** and which she was of the opinion, at that stage already, was *void ab initio*.

[56] The applicant also relies on the debit order that was never cancelled as grounds for her *bona fide* belief that the sale had been set aside. But that statement is at odds with her reliance on the fact that she made payments in trances to her attorneys to have the sale set aside. Unfortunately, the applicant has again not made a proper disclosure. The first respondent says it was unaware that the debit order was going off against the bond account monthly. When it was discovered, the necessary adjustments were made and it was refunded together with the balance after the proceeds of the sale was taken into account. It is not clear why the applicant failed to stop the debit order before May 2011. She has no received the benefit of those payments, however.

[57] Even if I accept that the debit order caused financial strain, that payment was cancelled during May 2011. The applicant would have had the benefit of that amount monthly to give her attorneys instructions. That still leaves an inordinate delay of 9 months before this application was made.

[58] From the aforementioned it follows that the applicant has failed to give a sufficient explanation for the entire period of her delay. Whilst financial inability may well have been a material factor at certain periods of the delay, there are insufficient averments or evidence so as to conclude that it can be a reasonable explanation for the entire period of the delay. Notwithstanding that, the respondents challenged the applicant's allegations regarding her financial inability; she failed to deal with the matter more sufficiently in her replying affidavit.

[59] The delay should to my mind also not be evaluated in isolation of the fifth requirement, although it will be relevant if at the end a residual discretion must be exercised.

[60] The Applicant deals with the fifth requirement in paragraph 17 of her founding affidavit. She relies on general, generic and vague statements that the default judgment would not have been granted if consideration of circumstances such as the amount of arrears outstanding as at date of default judgment; the fact that the property concerned was acquired partially with the assistance of a

State subsidy; the property was occupied at all material times; the property was used for residential purposes and not commercial purposes; whether or not the applicant had movables which could satisfy the judgment and the value of the said property at time of default judgment, had been taken into consideration.

[61] During argument, it was correctly conceded that the applicant had failed to advance cogent evidence or facts to satisfy the requirement. It was also conceded that the property was not acquired partially with assistance of a State subsidy. The fact that the property was occupied at all material times and used for residential purposes obviously brings the matter within the ambit of the said invalidity. The applicant submits that the balance outstanding on the bond was not astronomical high and was capable of settlement by other means of debt recovery. The applicant, however, fails to take the Court into her confidence with regards to how this would have been done. Contrary to the submission by the applicant that the outstanding balance was a substantial amount at date that the order for execution was granted. The applicant does not deal with whether she had movable assets that could be satisfied and merely states that the

Court would have needed to consider whether or not she had movable assets which could satisfy the judgment. The applicant does not place any information before Court with regards to what the value of the property was at time of the default judgment and simply refer to the purchase price during **October** of the next year when the property was eventually sold.

[62] Save to rely on the fact that the granting of the order and subsequent sale has been declared invalid by the Constitutional Court, the applicant never states that she would be deprived of access to adequate housing. The applicant was advised of her rights in terms of section 26 of the constitution on more than one occasion and had legal advice throughout the proceedings. The applicant was advised of her rights in terms of Uniform Rule 31(5)(*d*) twice. Yet she did not avail herself of these rights. I am not convinced that a court hearing the matter would have been persuaded not to grant the execution order.

[63] Even if I am wrong with my aforementioned conclusions in finding that the applicant has not satisfied the fourth requirement, the next

phase of the inquiry entails consideration of other relevant circumstances that may influence a court exercising its discretion judicially, from still dismissing the application.

[64] The applicant was aware of the sale of the property, at the very best for her, on **18 November 2009**, when the letter of demand was sent and the first respondent was requested to suspend transfer of the property into the names of the purchasers, to wit second and third respondents.

[65] The applicant took no steps to avert the possible prejudice of which she now complains, notwithstanding the fact that her attention was repeatedly drawn to the constitutionally guaranteed rights contained in section 26(1) and (2) of the Constitution. As stated above, the applicant had the benefit of legal advice since before service of the summons and thereafter. The possible transfer of her immovable property to the second and third respondents called for urgent action and her inaction to take any steps whatsoever constitutes a compelling consideration which negates an order that the transfer be set aside. The applicant had

almost eleven months to stop the transfer and as already mentioned, has placed little to no information before Court with regards to why she could not do so during that timeframe. The applicant could at least have interdicted the second and third respondents from taking transfer of the property.

[66] The consequences of the orders that the applicant moves for must be considered now, as the setting aside of the transfer, as stated above, constitutes final relief vis-à-vis the second and third respondent. They have been paying the rates and taxes with regards to the immovable property since date of purchase and also had to pay all outstanding municipal costs and rates and taxes in order to secure transfer of the immovable property into their names. The applicant does not deal with her ability to repay those amounts which was paid. The fact that R158 477.34 was repaid to the applicant does not assist herm as she will have to repay the amount that was refunded to her if she succeeds with the application.

[67] There is no indication that the applicant would be able to reimburse the second and third respondents for their expenditures. They are innocent parties that now also have legitimate interests in this matter. Their interests could and should never have been endangered had the applicant acted when all the facts called for urgent action.

[68] Added to this the second and third respondents were obliged to institute eviction proceedings. Notwithstanding that those proceedings were initiated in **August 2011** the present application was only issued **February 2012**, therefore six months after those proceedings were initiated.

[69] The matter is to be distinguished on the facts from cases that would normally serve. In this matter the applicant has brought about the consequences by not acting. Her delay to make the application is inordinate.

[70] On a conspectus of all the circumstances in this matter, the applicant's conduct has been inconsistent with a *bona fide*

intention to seriously protect her rights or to rescind the judgment. In any event, in light of the consequences of the applicant's inordinate delay, I am not inclined to exercise any discretion in the applicant's favour.

[71] In the result the application is dismissed with costs.

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SNELLENBURG, AJ

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