IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 3097/2012

In the matter between:

OLIVER JOHN MUDDIMAN	APPLICANT

and

REGISTRAR OF DEEDS, KWAZULU-NATAL	FIRST RESPONDENT
STANDARD BANK OF SOUTH AFRICA LIMITED	SECOND RESPONDENT
SHERIFF FOR LOWER TUGELA	THIRD RESPONDENT
DERRICK GEORGE BAIRD	FOURTH RESPONDENT

JUDGMENT Delivered on 18 May 2012

<u>SWAIN J</u>

[1] The applicant was the registered owner of an immovable property, being the residence of the applicant, which was encumbered by a mortgage bond registered in favour of the second respondent, as security for money loaned and advanced by the second respondent, to the applicant.

[2] The applicant breached the terms of the loan agreement and as a consequence:

[2.1] The second respondent instituted action against the applicant claiming judgment for the amount outstanding, together with an order declaring the property executable and costs on the attorney and client scale.

[2.2] The applicant alleges that the summons did not come to his attention and the action was accordingly not defended.

[2.3] The Registrar of this Court consequently granted default judgment against the applicant on 24 May 2011.

[2.4] The second respondent then launched an application to declare the property executable, which the applicant alleges also did not come to his attention, and the relevant order was consequently granted without opposition on 11 July 2011.

[2.5] The second respondent’s attorneys caused a writ of attachment to be issued and served.

[2.6] The property was sold in execution to the fourth respondent, on 07 October 2011, for a purchase price of R1,950,000.00.

[2.7] Registration of transfer of the property was effected into the name of the fourth respondent on 15 November 2011.

[3] The applicant seeks orders rescinding and setting aside the judgment, the order declaring the property executable, the writ of attachment and the sale in execution. An order is also sought directing the first respondent, being the Registrar of Deeds, to expunge from his records any reference to the transfer of the property to the fourth respondent, together with any encumbrance upon the property which was registered simultaneously with, or subsequent to, the transfer to the fourth respondent.

[4] The applicant relies upon a number of grounds for the relief sought. As regards the order sought rescinding the judgment, it is common cause that the notice in terms of Section 129 of the National Credit Act, was sent by the second respondent to the wrong address. It is clear that the notice in terms of Section 129 of the Act is a mandatory requirement prior to litigation to enforce a credit agreement. It is a compulsory step in the proceedings.

Nedbank v National Credit Regulator
2011 (3) SA 581 (SCA) at pg 586 para 8

[5] At the time when the Registrar granted judgment by default, a certificate was filed by the second respondent's attorney certifying that the provisions of Section 129 had been complied with, which was erroneous.

[6] I accordingly agree with the submission of Mr. Pillay S C, who

together with Ms Singh, appeared for the applicant, that the judgment was erroneously sought and erroneously granted by the Registrar in accordance with the meaning of those terms contained in Rule 42 of the Rules of this Court. It is clear that because of the failure of the second respondent to comply with the provisions of Section 129 of the Act, it was not legally competent for the Registrar to have granted judgment.

[7] By virtue of the fact that the order of this Court declaring the property executable and the writ of attachment depended for their validity upon the validity of the judgment, they must consequently suffer the same fate of invalidity, as the judgment.

[8] As regards the sale in execution, it is common cause that before the sale took place, the applicant caused notice of the voluntary surrender of his estate, as provided for in Section 4 of the Insolvency Act No. 24 of 1936 (the Act), to be published in the Government Gazette. It is also common cause that this notice was brought to the attention of the second respondent's attorney, as well as the third respondent, being the Sheriff who conducted the sale, before the sale took place. Despite such knowledge the sale proceeded and the property was sold to the fourth respondent.

[9] The applicant relies upon the provisions of Section 5 (1) of the Act, which reads as follows:

"**5 Prohibition of sale in execution of property of estate after publication**

of notice of surrender and appointment of *curator bonis*

(1) After the publication of a notice of surrender in the *Gazette* in terms of section *four*, it shall not be lawful to sell any property of the estate in question, which has been attached under writ of execution or other process, unless the person charged with the execution of the writ or other process could not have known of the publication: Provided that the Master, if in his opinion the value of any such property does not exceed R5 000, or the Court, if it exceeds that amount, may order the sale of the property attached and direct how the proceeds of the sale shall be applied".

[10] Mr. Troskie S C, who appeared for the second and fourth respondents, submitted that in the light of the fact that it was common cause that the applicant had failed to publish notice of the surrender of his estate, in a newspaper circulating in the district of the applicant's residence in terms of Section 4 (1) of the Act, the provisions of Section 5 (1) of the Act, were not applicable. I disagree. The provisions of Section 4 (1) which require publication in the Gazette as well as a local newspaper, are in terms of Section 6 (1), requisites for the acceptance by the court of the surrender of the debtor's estate, save and in so far as any failure in this regard, may be regarded as a formal defect or irregularity, in terms of Section 157 (1) of the Act.

ex parte Harmse [2004] 1 All SA 626 (N)

cf ex parte Oosthuysen 1995 (2) SA 694 (T)

This is because Section 6 (1) specifically provides as follows

"If the court is satisfied that the provisions of Section 4 have been complied with".

In addition, if the debtor wishes to withdraw a notice of surrender after having obtained the consent of the Master to do so, Section 7 (2) provides that the debtor is obliged to publish the notice of withdrawal and the Master's consent, in the Government Gazette as well as the local newspaper, in which the notice of withdrawal appeared. It is therefore clear that publication in the Gazette, as well as the local newspaper, is required for an acceptance of the surrender of the estate, as well as a withdrawal of the surrender.

[11] Contrasted with this are the provisions of:

(a) Section 5 (1) where after "publication of a notice of surrender in the Gazette in terms of Section 4" it shall not be lawful to sell any property of the estate, which has been attached under writ of execution or other process and

(b) Section 5 (2) where after "publication of a notice of surrender as aforesaid in the Gazette" the Master may appoint a *curator bonis* to the debtor's estate.

What is immediately apparent is that the provisions of Section 5 (1) and 5 (2), deal with urgent interim matters in connection with the debtor's estate. The object of Section 5 (1) is to conserve the debtor's property, for the benefit of all the debtor's creditors, pending the determination by the court of the application for surrender.

Meskin – Insolvency Law pg 3 – 14 (1) para 3.7

Although no period is fixed for the duration of the prohibition, it seems that such prohibition continues only until the day the application is, or should have been, adjudicated upon by the court, either on the day advertised, or upon the date to which the application was postponed, by the court at the first hearing thereof.

Mars – The Law of Insolvency in South Africa 9th Ed pg 54

This will obviously only be the case, where the surrender of the estate is not accepted by the Court on the advertised date, or any adjourned date. In addition, if the application lapses in terms of Section 6 (2), or is withdrawn in terms of Section 7 (2), the prohibition will no longer be operative. In order to prevent abuse of creditor's rights, by virtue of the provisions of Sections 5 (1), time periods are provided for in Section 4 (1), within which publication must take place, and a maximum interval between publication of the notice and the hearing, is provided for.

Oosthuysen *supra* at 698 C - D

A failure however to comply with these time limits is a formal defect or irregularity in terms of Section 157 (1) of the Act, and the extent of any failure is a factor to be considered by the court, in exercising its discretion in terms of Section 6 (1) whether to accept the surrender.

***ex parte* Harmse pg 634 d - e**

cf Oosthuysen *supra* 698 F – G

[12] It is however important that there be certainty as to the effect of publication in the Gazette because it "would be untenable if creditors were left in doubt as to whether a proposed sale would be lawful".

Oosthuysen at 698 E

It would equally be untenable if "the person charged with the execution of the writ or other process" was left in doubt in this regard.

When regard is had to the interim nature of the provisions of Section 5 (1), the need as a matter of urgency to preserve property of the debtor for the benefit of all creditors, and for certainty on the part of creditors and persons charged with the execution of writs, as to the application of Section 5 (1), publication of the notice of surrender in a local newspaper, as well as the Government Gazette, is not a pre-requisite of Section 5 (1) of the Act. To require publication in a local newspaper, in addition to the Gazette, serves only to introduce a further avenue of uncertainty and delay, contrary to the objectives and express provisions of Section 5 (1). The validity of the application for surrender is a separate enquiry, distinct from the objectives sought to be achieved in terms of Section 5 (1). If there has not been publication of the surrender in a local newspaper, with the result that the surrender is not accepted by the Court, then the prohibition will fall away. That Section 7 (1) provides that "a notice of surrender published in the Gazette may not be withdrawn without the written consent of the Master" is consistent with the interpretation that I have placed upon Section 5 (1). If only publication in the Gazette is sufficient to bring about the serious consequences of Section 5 (1), then it is obvious why a notice published only in the Gazette, may not be withdrawn without the Master's consent.

[13] On similar grounds of urgency and certainty, Section 7 (2) only requires that there be publication in the Gazette of the notice of surrender, before the Master may appoint a *curator bonis* to the estate of the debtor, to take the estate into his or her custody and take over the control of any business, or undertaking, of the debtor. In such a case the *curator* is a caretaker of the debtor's property.

Meskin *supra* at para 3.8

and will continue to control the estate after the surrender has been accepted, and until a trustee or provisional trustee has been appointed, unless the Master gives instructions to the contrary.

Mars pg 57

[14] It is for the above reasons that a distinction must be drawn between the publication required for a surrender and withdrawal of the debtor's estate, in terms of Section 4 (1) and 7 (2) of the Act (both the Gazette and the local newspaper) and the publication which renders sales of the debtor's property in execution unlawful and entitles the Master to appoint a *curator bonis* to the debtor's estate, in terms of Section 5 (1) and Section 5 (2) (publication in the Gazette alone).

[15] The effect of Section 5 (1) of the Act is that the subsequent sale in execution was unlawful and a nullity. As stated in the case of

Menqa and another v Markom and others
2008 (2) SA 120 (SCA) at 130 A – B

"If the sale in execution is null and void because it violates the principle of legality, as in the present case, then the Sheriff can have no authority to transfer ownership of the property in question to the purchaser who will thus not acquire ownership despite registration of the property in his or her name".

The registration of the property into the name of the fourth respondent accordingly did not make him the owner of the property.

Menqa *supra* at 130 B

[16] In argument Mr. Troskie relied upon the decision in

Legator McKenna Incorporated and another v Shea
2010 (1) SA 35 SCA

in which the SCA held that there had been a valid transfer of property by way of registration in the Deeds Office, where although the agreement of sale was invalid in terms of Section 2 (1) of the Alienation of Land Act 68 of 1981, there were no defects in the "real agreement". The abstract theory of transfer required that there be delivery (by way of registration of transfer), and a real agreement, the essentials of which were an intention on the part of the transferor to transfer ownership and the intention on the part of the transferee to become the owner of the property. I understood his argument to be that the third respondent had the intention to transfer ownership and the fourth respondent had the intention to acquire it and consequently the fourth respondent had acquired ownership of the property. However, it is clear in the present case, that the third respondent possessed no authority to sell the property, because the sale in execution violated the principle of legality. Consequently, there was no "real agreement".

[17] The main thrust of Mr. Troskie's argument was that I should not exercise my discretion in favour of the applicant to rescind the judgment because he submitted that the applicant knew "of its impending occurrence or under circumstances where applicant knowingly elected not to oppose" the grant of the judgment. He also submitted that the applicant had wilfully sought to mislead this Court as to his lack of knowledge of events. Although there may be some merit in these submissions, what must also be considered is the conduct of the second respondent in obtaining judgment on an entirely erroneous certificate in terms of Section 129 of the Act, as well as proceeding with the sale in execution, contrary to the provisions of Section 5 (1) of the Act. Of further concern is that a representative of the second respondent, in an affidavit filed in support of the application for leave to execute against the immovable property, stated the following:

"A forced sale valuation was done of the property. I advise the above Honourable Court that this valuation is R4,400,000.00, which is more than the amount owing by the respondent under the bond".

[18] However, the property was sold at the sale in execution to the fourth respondent for R1,950,000.00, where the only bidders were a representative of the second respondent and the fourth respondent. By virtue of the judgment debt being R3,115,899.60, it is clear that there is a considerable shortfall owed by the applicant to the second respondent, as a consequence of the sale. The applicant alleges that it is unexplained why the second respondent stopped bidding so early, as it would be expected that the second respondent would continue bidding until the debt was exceeded. Of significance in this regard is that the fourth respondent had made three offers to purchase the property before the sale, the last of which was made on 29 September 2011 for the sum of R4,300,000.00, which was forwarded by the applicant to the second respondent's attorney. This offer was not accepted because the second respondent required proof of the bond granted and the seller's pro-forma account. Regardless of the reasonableness or otherwise of the rejection of this offer, it is clear that the second respondent, via its attorney, was aware before the sale in execution, that the fourth respondent had offered R4,300,000.00 for the property. Why the second respondent was accordingly prepared to stop bidding and allow the fourth respondent to acquire the property for R1,950,000.00, is incomprehensible in the absence of any explanation by the second respondent.

[19] When all of the above is considered, I am satisfied I should not exercise my discretion against the applicant for the reasons

advanced by Mr. Troskie. I am also satisfied that I should not order any award of costs against the second respondent to be on the attorney and client scale, as requested by Mr. Pillay.

[20] As regards the relief sought against the fourth respondent, Mr. Troskie submitted that an order should not be granted in terms of which the first respondent was ordered to expunge from his records any reference to transfer of the property into the name of the fourth respondent. His submission was based upon certain *dicta* in Menqa, where the Supreme Court of Appeal declined in that case to grant an order directing the Registrar of Deeds to register the property in the applicant's name. The reason why the Supreme Court of Appeal declined to do so was based upon constitutional considerations relevant to the facts of that case.

Menqa at 129 F – G

It is clear that the judgment debtor (applicant) as owner of the property would be entitled to recover the property by way of a *rei vindicatio.*

Joosub v J. I. Case SA (Pty) Ltd.
1992 (2) SA 665 (N) at 674 G – H

Menqa at 130 B

The concern of the Supreme Court of Appeal in Menqa was that Markom would be unjustifiably enriched at the expense of Menqa, who had purchased the property and as a consequence paid money to the bond holder, thereby reducing Markom's debt. On the present facts however it is clear that on the setting aside of the sale in execution and the deletion of the registration of the property in the name of the fourth respondent, the second respondent would be obliged to return the purchase price to the fourth respondent. The fourth respondent has not in his affidavit averred that he has passed any encumbrances over the property in the interim and consequently there can be no prejudice to the fourth respondent if an order is granted as prayed, declaring that any encumbrance upon the property be likewise expunged. Any other claims that the parties may have against each other as a consequence of the order I intend making, I need not speculate upon.

[21] The fourth respondent also instituted proceedings against the applicant for his eviction from the property (under Case No. 695/2012). Mr. Troskie submitted that this application should be adjourned *sine die* pending the outcome of the present application. By virtue of the decision I have reached in this application, there would be no point in adjourning the other application which falls to be dismissed, with the applicant in that application (fourth respondent in the present application) to be ordered to pay the respondent's costs (applicant in the present application).

[22] Although it is clear that the second respondent should be ordered to pay the applicant's costs, in the present application, I am not satisfied that the fourth respondent should also be ordered to do

so, albeit that the fourth respondent also opposed the application. The fourth respondent however was not privy to what preceded the sale in execution and should simply be ordered to pay his own costs.

The order I grant is the following:

a) The default judgment granted by the Registrar of this Court on 24 May 2011 against the applicant in favour of the first respondent under Case No. 3054/2011 is rescinded and set aside.

b) The order of this Court between the parties and under the case number as aforesaid granted by default on 11 July 2011 which *inter alia* declared executable the immovable property situated at 15 Baobab Crescent, Salt Rock, KwaZulu-Natal and fully described as:

> "Erf 795 Salt Rock (Extension No. 4) Registration Division FU, Province of KwaZulu-Natal in extent of 1200 (one thousand two hundred) square metres, held under Deed of Transfer No. T25792/08 ("the property")

then registered in the name of the applicant is rescinded and set aside.

c) The writ of attachment of the property issued out of this Court on 21 July 2011 in consequence of the said judgment is set aside.

d) The sale in execution of the property by the third respondent to the fourth respondent at the instance of the second respondent on 07 October 2011 is set aside.

e) The first respondent is directed to expunge from the records under his control, any reference to the transfer of the property to the fourth respondent and any encumbrance upon the said property which was registered simultaneously with, or subsequent to, the said transfer to the fourth respondent.

f) The second respondent is ordered to pay the applicant's costs.

g) The fourth respondent is ordered to pay his own costs.

h) In the application for eviction (Case No. 695/2012), the application is dismissed, and the applicant (in that application) is ordered to pay the respondent's (in that application) costs.

K. SWAIN J

Appearances: /

Appearances:

For the Applicant	**:**	Mr. L. Pillay S C with Ms R. Singh
Instructed by	**:**	K. Maharaj Incorporated. Durban
For 2nd & 4th Respondents	**:**	Mr. A.J. Troskie S C
Instructed by	**:**	Goodrickes Attorneys Durban
Date of Hearing	**:**	07 May 2012
Date of Filing of Judgment	**:**	18 May 2012