Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

Case Nr: 744/2010
Case Heard: 06/05/2011
Date delivered: 20/05/2010

In the matter between:

Elishia Maria Greeff **APPLICANT**

and

Firstrand Bank Limited **RESPONDENT**

JUDGMENT

Olivier J:

BACKGROUND

1]. The applicant, mrs Elishia Maria Greeff, and the respondent, Firstrand Bank Ltd, are parties to a loan agreement in terms of which the respondent granted the applicant a loan for the purchase of an immovable property. As security a mortgage bond was registered over the property in favour of the respondent.

2]. It is not in dispute that the property is the only immovable property of the applicant and that the house on the property is the prime and only place of residence of the applicant and her children.

3]. The applicant failed to pay the monthly instalments as agreed. On 4 May 2010 the respondent caused a summons to be issued for, *inter alia*, payment of the outstanding balance of R315 615,75, and interest thereon, as well as for an order declaring the said property specially executable. No notice of intention to defend was filed and on 31 August 2010 the registrar granted orders to this effect in default judgment in terms of uniform rule 31 (5).

4]. It is common cause that the registrar at a later stage issued a writ of execution in respect of the property, on the basis of the default judgment. It is not clear exactly when the writ was issued, but it would appear to have been before the as yet unreported judgment of the Constitutional Court in **Gundwana v Steko Development CC and Others** (the **National Consumer Forum** as *amicus curiae*)[1].

5]. On 25 April 2011 the applicant delivered the papers in this application (or rather copies thereof, because the application was only lodged with the registrar on 30 March 2011) to the respondent. The relief claimed in the notice of motion is:

5.1] condonation of the non-compliance with the rules pertaining to form and service;

5.2] rescission of the default judgment and the setting aside of the writ, alternatively its suspension pending finalisation of the application;

1 Case CCT 44/10, [2011] ZACC 14, 11 April 2011

5.3] a declaration in terms of section 85 (b) of the National Credit Act[2] ("*the Act*") that the applicant is over-indebted;

5.4] the stay of a sale in execution which was to have taken place on 14 April 2011; and

5.5] an order that the respondent pay the costs of the application.

CONDONATION

6]. The application was initially set down for 8 April 2011, which would have been the 10th day after it had been "*filed*" with the respondent. There is no indication of the respondent having been prejudiced by the fact that there had not been 10 clear court days between these dates, or by the fact that the papers (or copies thereof) were delivered to the respondent before the application had actually been lodged. These points were not raised on behalf of the respondent and the application for condonation was never opposed. Insofar as condonation may be required it will therefore be granted, especially in view of what follows.

SALE IN EXECUTION

7]. On 8 April 2011 the matter was postponed to 6 May 2011 for hearing. The planned sale of 14 April 2011 has become irrelevant and Ms Jordaan, the attorney who appeared on behalf of the applicant, indicated that relief in this regard was no longer required.

2 34 of 2005

EXPLANATION FOR DEFAULT

8]. The test applicable where a rescission of a default judgment is claimed on the basis relied upon here is trite[3].

9]. As regards the failure to defend the action and the period between the date of the default judgment and the date of the application, it is the applicant's case that the summons never came to her attention and that she only became aware of it, and of the judgment, when a notice of the intended sale in execution was served on her 10 year old daughter on 7 March 2011.

10]. The provisions of section 36 (2) of the **Supreme Court Act**[4] are to the effect that a return of service will constitute *prima facie* proof of the contents thereof. It follows that such evidence may be challenged[5].

11]. This is exactly what the applicant did in her founding affidavit. The applicant pointed out that, according to the sheriff's return, the summons had been served by attaching it to the main door of her house[6] in her absence and stated:

11.1] that the house had been fenced in, that the gate had at all times been locked and the sheriff would not in the circumstances have had access to the main door of the house; and

3 **Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa**, 5th edition, vol 1, Cilliers *et al*, p715.
4 59 of 1959
5 **Erasmus Superior Court Practice**, Farlam et al, A1-95
6 The applicant's chosen *domicilium citandi et executandi*

11.2] that she never received or became aware of the summons before 7 March 2011.

12]. The only comment to this by Mr Robert Freeborough, the deponent for the respondent, was to repeat the statement in the return that the summons had been attached to the main door of the house.

13]. Mr Freeborough described himself as "*the Operations Manager: Legal Arrears of the Respondent*". He is clearly not the sheriff who claims to have served the summons and he could not on the face of it have any first-hand knowledge of whether and how the summons had been served. Mr Freeborough's statement in this regard therefore cannot be said to have created a genuine factual dispute. This Mr Benade, counsel for the respondent, readily conceded.

14]. The respondent apparently never took the trouble of having the particular sheriff approached for his comment on what the applicant stated in her founding affidavit and in the circumstances the applicant's version in this regard has to accepted as correct. Consequently it cannot be found that the summons had indeed been served in accordance with the provisions applicable to service at a *domicilium citandi*[7].

15]. As regards the period after default judgment had been granted (on 31 August 2010) and until the notice of the sale was served on 7 March 2011, the applicant states that she at no stage became aware (before 7 March 2011) of the judgment. No writ of execution or notice of attachment was served on her.

7 Uniform rule 4 (i) (a) (iv)

16]. Mr Freeborough's only reaction to this was to state that the applicant's version in this regard was "*improbable*". No basis was laid for this statement and quite clearly, and again readily conceded by Mr Benade, Mr Freeborough's reaction could not be said to have raised a genuine dispute as far as this is concerned. It was not disputed that the notice of sale had indeed been served on 7 March 2011 (nor, incidentally, that it had been "*served*" on a 10 year old child).

17]. Mr Freeborough did refer to telephonic conversations with the applicant on 16 and 22 November 2010. He stated that the applicant had, during those conversations, promised to make certain payments in reduction of the arrears and, more importantly, that the purpose of those calls to the applicant had been "*to advise her that the Respondent were (**sic**) waiting for a sale date of the property*".

18]. Mr Freeborough was, however, not prepared to say who it was that had phoned the applicant. He merely stated that she had been phoned.

19]. In reply the applicant admitted that the telephone conversations had taken place and that she had made some of the payments referred to by Mr Freeborough. However, she categorically denied:

19.1] that Mr Freeborough had been the person involved in those conversations; and

19.2] that she had at any stage during those conversations been made aware of the summons or of the default judgment.

20]. It consequently has to be accepted, even on Mr Freeborough's own version, that his remarks in this regard constituted hearsay evidence. No reason was advanced why it should be admitted as evidence to refute the applicant's clear statement on oath that the existence of the default judgment had only come to her attention on 7 March 2011.

21]. I therefore come to the conclusion that the applicant has indeed furnished a reasonable explanation for the failure to defend the action and for the fact that this application was only lodged in March 2011, some seven months after the default judgment had been granted. The application was lodged within the prescribed period of 20 days[8] after the applicant had become aware of the default judgment.

BONA FIDES

22]. There is no suggestion that this is not a *bona fide* application.

DEFENCE

23]. The applicant stated that she is over-indebted. In order to show good cause for the rescission of the judgment all the applicant had to do in this regard was to make out a case that she had a defence which she could raise at the trial and which could *prima facie* succeed[9].

24]. This differs from the test to be applied in considering whether the applicant should, at this stage and by this Court, in terms of section 85 (b) of the Act be declared to be over-indebted. In

8 Uniform rule 31 (2) (b)
9 **Grant v Plumber (Pty) Ltd** 1949 (2) SA 470 (O) at 476-477

such a scenario the applicant would have been burdened with an onus to prove on a balance of probabilities that she is indeed at this stage over-indebted as envisaged in section 79 (1) of the Act[10].

25]. Ms Jordaan, however, abandoned the relief that had been sought in terms of s 85 (b) of the Act. It is not therefore necessary to decide whether the applicant had shown on a balance of probabilities that she is over-indebted, or to consider Mr Benade's argument that it would not at this stage be competent for this Court to make an order in terms of section 85 (b).

26]. What has to be considered, however, is whether the averments in the founding affidavit regarding over-indebtedness would satisfy the standard required for the purposes of the rescission of a default judgment, in other words whether they made out a case for a defence that would *prima facie* have succeeded to defeat the respondent's claim at the time when default judgment was granted. I think not.

27]. The applicant, in dealing with her income and expenditure, and her liabilities, made it very clear that she was dealing with her present circumstances, in other words the circumstances that existed when she deposed to her founding affidavit on 23 March 2011, and not with the circumstances as at the date of her breach of the credit agreement, or as at the date of the default judgment some seven months earlier. The fact that she had only later become aware of the judgment did not prevent her from dealing with her earlier circumstances, and she also never even attempted to raise this as an excuse for not dealing

10 **Standard Bank of South Africa Ltd v Panayiotts** 2009 (3) SA 363 (W) para's [8] – [10], [40], [55] and [56].

with her earlier circumstances.

28]. The applicant did not make any allegations regarding the values of her assets. We know what the outstanding amount on the house is, but not its value. We know that the applicant has only one vehicle, but again not what its value is[11].

29]. The applicant has not even attempted to explain when and how she had fallen into a state of over-indebtedness, or why she had never before March 2011 (when she approached a debt councellor) taken steps to address the problem[12]. It is undisputed that she had fallen into arrears with her bond instalments before March 2010, in other words more than a year before she eventually approached a debt councellor (and even then clearly only after having been prompted to do so by a second notice in terms of section 129 of the Act[13]). By then this default judgment had, however, already been granted.

SECTION 129 (1) NOTICE

30]. There is, however, in my view another defence to the respondent's claim. It has not been raised on behalf of the applicant, but in my view it appears clearly from the very papers upon which the respondent had relied for the purposes of its application for default judgment.

31]. It concerns the section 129 notice (the first, and the only one predating the summons) referred to by the respondent in paragraph 7 of the summons, in alleging that the applicant had been properly notified in terms of section 129 (1) of the Act.

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11 **Standard Bank of South Africa Ltd v Panayoitts, supra,** para's [64.1] and [75]
12 Compare **Firstrand Bank Ltd v Olivier** 2009 (3) SA 353 (SECLD) para's [15] and [16]
13 To which I will revert in due course

Although the applicant herself also did not pertinently raise non-compliance with sections 129 (1) and 130 (1) of the Act as a defence, she did deny having received this notice.

32]. It is, as already mentioned, this notice upon which the respondent had relied as "*a critical cog in* (its) *cause of action*" and without which the institution of the respondent's action would not have been possible[14].

33]. The respondent claimed to have sent this notice to the applicant by registered post on 2 March 2010, and therefore well before the institution of the action. As I have said, the respondent for some unknown reason sent another section 129 notice to the applicant at a later stage. It is dated 22 February 2011, well after the issue and alleged service of the summons, and the fact that the applicant admits having received this later notice on 9 March 2011 is therefore irrelevant for the purposes of section 130 (1) (a) of the Act, which requires a credit provider to "*deliver*" such a section 129 notice to the consumer not less than 10 days before approaching a Court to enforce a credit agreement.

34]. Mr Benade was constrained to concede that non-delivery of the March 2010 notice would be a conclusive defence to the respondent's claim, but he argued, with reference to *inter alia* **Starita v Absa Bank**[15], that the posting of that notice constituted proper delivery for the purposes of the Act.

35]. It is also so that it was agreed, in clause 4.33.6.2 of the loan agreement, that any notice posted by registered post would "*be deemed to have been duly received by the addressee …. on*

14 **Rossouw v Firstrand Bank** 2010 (6) SA 451 (SCA) para [38]
15 2010 (3) SA 443 (GSJ) at 453 H

the fifth day following the date of such posting".

36]. That the mere posting of such a notice could, where the consumer had chosen posting as a means of the delivery of such a notice, constitute "*delivery*" of the notice, without the credit provider having to prove actual receipt thereof, was confirmed by the Supreme Court of Appeal in the **Rossouw** case referred to above[16]. It is, however, important to note that this would only be the position where the credit provider had indeed complied with the method of delivery chosen by the consumer.

"*It appears to me that the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders. With every choice lies a responsibility, and it is after all within a consumer's sole knowledge as to which means of communication will reasonably ensure delivery to him. It is entirely fair in the circumstances to conclude from the legislature's express language in s 65(2) that it considered despatch of a notice <u>in the manner chosen</u> by the appellants in this matter sufficient for purposes of s 129 (1) (a), and that actual receipt is the consumer's responsibility*."[17]
(My emphasis)

37]. The applicant indeed exercised her right to choose a method of delivery in terms of section 65 (2) of the Act. In clause 4.33 of the loan contract the following was agreed in their regard:

"*4.33 The parties elect the following addresses:-*

16 Paragraph 32, footnote 14
17 **Rossouw v Firstrand Bank, supra,** para [32]

4.33.1 <u>Postal addresses</u> for all forms, communictions and <u>notices</u> which will be <u>sent by registered or ordinary post</u>:-

4.33.1.1 the Lender nominates the postal address ….

4.33.1.2 the Customer nominates the <u>postal address</u> reflected on the first page of this agreement.

4.33.2 <u>Physical addresses</u> for the <u>service</u> of all forms, <u>notices</u> and documents <u>in respect of any legal proceedings</u> which may be instituted by virtue hereof:-

4.33.2.1 the Lender nominates the physical address ….

4.33.2.2 The Customer nominates the <u>physical address</u> reflected on the first page of this agreement"

(My emphasis)

38]. The applicant's chosen or elected addresses appear as follows on the first page of the agreement:

"ELISHIA MARIA GREEFF

Identity number 780822 0068 08 3

("the Customer")

39-8^TH STREET, HOMEVALE, KIMBERLEY,8301

Physical address

318 GEMSBOK STREET, GRIEKWASTAD, 8365

Postal address"

39]. The respondent's section 129 notice of March 2010 was addressed and posted (by registered mail) to 39 8th Street, Homevale, Kimberley, in other words to the applicant's chosen physical address, and not to the address chosen by the applicant for the receipt of, *inter alia*, notices sent to her by post.

40]. When I took this up with Mr Benade he argued, if I understood him correctly, that a notice in terms of section 129 would constitute a notice "*in respect of legal proceedings*"[18] and would as such form part of a so-called more serious category of notices[19] (than those intended in clause 4.33.1) and that such notices had been intended to be addressed to the applicant's physical address, rather than to her postal address. According to Mr Benade's argument the notices intended in clause 4.33.1 would then be so-called less serious notices.

41]. I cannot agree with mr Benade's argument in this regard. There is absolutely no reason at all why the parties would have intended to exclude a section 129 notice from those notices which the respondent could deliver by means of posting it. In fact, the delivery of section 129 notices by post has been expressly sanctioned as a method of delivery which a consumer can elect and which would constitute sufficient delivery for the purposes of sections 129 and 130 of the Act[20].

18 As envisaged in clause 4.33.2 of the loan agreement.
19 Presumably because of its essential role in the institution of legal proceedings.
20 **Rossouw v Firstrand Bank, supra**, para [30]

42]. After all, even a document "*potentially far more detrimental to the consumer*" like a summons may, where a *domicilium* address has been chosen, be served by merely leaving it at such address[21].

43]. Even if the interpretation of the agreement proposed by Mr Benade were to be accepted as correct, the fact then remains that the March 2010 section 129 notice was not delivered by "*service*", as agreed in clause 4.33.2. The sending of the notice by registered post could never have constituted "*service*". It is abundantly clear, to my mind, that the parties had intended to make it possible to choose different addresses for the method of posting, on the one hand, and for the method of service, on the other hand.

44]. In my view the inescapable consequence of the respondent's failure to comply with the applicant's chosen method for the delivery of this notice was that the respondent bore the risk of non-receipt, and the burden of proving that it had not only sent this notice by post, but that the applicant had indeed received it. The applicant's statement that she had never received the March 2010 notice was not disputed, or even challenged in any way. There is, for example, no evidence that a notice to collect registered post was delivered, that the registered letter was in fact collected at the Post Office or that it has not been returned to the respondent as undelivered.

45]. It follows that I am of the view that the default judgment should not have been granted, because the respondent had on its own allegations (read with the annexures to the summons)

21 **Starita v ABSA Bank, supra**, para [18.11]

not delivered the section 129 notice as required by the Act. This would of course constitute a proper defence and, in view of the conclusions to which I have already come as regards the applicant's explanations and the *bona fides* of her application, it follows that the default judgment should be set aside.

WRIT OF EXECUTION

46]. In his heads of argument mr Benade submitted, with reference to the **Gundwana** case referred to above[22], that the applicant had failed to "*show … that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home*"[23].

47]. The **Gundwana** case concerned the constitutionality of orders, in default judgment by the registrar, declaring mortgaged property specially executable. The requirement laid down in paragraph [59] of that judgment was intended to apply to judgment debtors seeking the rescission of such orders made by the registrar before the finding of unconstitutionality.

48]. The applicant, however, does not have to rely on the unconstitutionality of the registrar's order or of the writ. The rescission of the default judgment will automatically render the writ useless and of no force[24].

COSTS

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22 Paragraph [4], footnote 1
23 **Gundwana v Steko Development CC and Others (National Credit Forum as *amicus curiae*), supra**, para [59]
24 **Le Roux v Yskor Landgoed (Edms) Bpk en Andere** 1984 (4) SA 252 (TPA) at 257 H

49]. In some instances the rescission of a default judgment is regarded as an indulgence, and the applicant is then ordered to pay the costs of such an application[25].

50]. In this case there are, however, different considerations. The respondent has, through its failure to challenge the applicant's allegations concerning the alleged attachment of the summons to the main door of the *domicilium citandi*, caused a question mark to hang over whether the summons had indeed been served. It has also failed to produce proof of a notice of attachment by the sheriff[26], the service of which may have shown that the applicant had been aware of the judgment at an earlier stage than alleged by her.

51]. On the other hand the applicant failed to make out a *prima facie* case for a defence of over-indebtedness and she also failed to pertinently raise the defence that the first section 129 notice had not been sent to her chosen postal address.

52]. To my mind a fair result would in the circumstances be that each party pay its own costs, which would then include the costs of the postponement of 8 April 2011.

ORDERS

53]. The following orders are therefore made in this matter:

1. Condonation of the non-compliance with the rules

25 **Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd** 2000 (2) SA 1007 (C) at 1015G-H
26 Uniform rule 46 (3)

regarding form and service is granted.

2. **The default judgment granted by the registrar on 31 August 2010 under case number 744/2010 against the applicant in favour of the respondent is set aside.**

3. **The writ of execution granted by the registrar in enforcement of the said default judgment in respect of Erf 16845, Kimberley, is set aside.**

4. **Each party will pay its own costs, which costs will include those of 8 April 2011.**

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Applicant: Ms S Jordaan
Instructed by: Jordaan Attorneys, KIMBERLEY

For the Respondent: Adv H J Benade
Instructed by: Duncan & Rothman, KIMBERLEY