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

CASE NO: 7593/10

In the matter between:

MARC HENRY ZAMMIT	First Applicant
LISA ANN MARIE ZAMMIT	Second Applicant

and

THE STANDARD BANK OF SA LIMITED	Respondent

JUDGMENT

Rall AJ,

[1] The applicants, who are married to each other in community of property, seek the rescission of the summary judgment granted against them by default on 25 August 2010. The judgment was for, *inter alia*, payment of the balance outstanding on a mortgage bond over the applicants' home and an order declaring the property executable.

[2] In addition, the applicants have applied for condonation of their failure to apply for rescission within the time limit prescribed by rule 31(2)(b). This was in response to a point taken by the respondent in its answering affidavit in the rescission application.

[3] However, the applicants cannot and need not rely on that rule. Firstly, rule 31(2)(b) does not apply to the rescission of a summary judgment by default, but to the rescission of a default judgment in terms of rule 31(2)(a), that is, where the

defendant is in default of a notice of intention to defend. Secondly, the applicants may apply for rescission under the common law and in terms thereof they must show sufficient cause. [1] This involves firstly, giving a reasonable and acceptable explanation for the default and secondly, showing a *bona fide* defence on the merits which, *prima facie*, carries some prospects of success.[2] The applicant for rescission may, in addition, have to explain any delay in bringing the rescission application.[3]

[4] The applicants instructed attorneys who delivered an appearance to defend the action. However, no affidavit in opposition to the application for summary judgment was delivered and as a result, summary judgment was granted by default in the absence of the applicants and their legal representative. The reason that they give for failing to deliver an opposing affidavit is that their Durban attorneys failed to inform those instructing them of the application for summary judgment. In my view, this is a satisfactory explanation. The default was due to fault on the part of attorneys in circumstances where that fault cannot be attributed to their clients.

[5] According to the applicants they only became aware of the judgment when a writ was served on 7 September 2010. The rescission application was only delivered on 8 November 2010. This two month delay is explained by the applicants as follows. They had instructed their attorneys to handle two matters on their behalf, this matter and an unrelated matter. They agreed on a fee of R8500.00 for each matter. It was also agreed that before the attorneys would start doing anything in either matter, the agreed fee had to be paid. The applicants paid their attorneys R8500.00, intending it to be for this matter. However, the attorneys mistakenly allocated the payment to the other matter and so did not start working on this matter. The mistake was realised on 4 November 2010 and the rescission application was launched four days later.

1 De Wet v Western Bank 1979(2) SA1031(A) at 1042 F-H
2 Chetty v Law Society Transvaal 1985(2) SA756 (A) at 765 A-C
3 Athmaram v Singh 1989(3) SA 953(D) at 958

[6] In my view, the delay is not inexcusably long and in any event has been explained.

[7] The first defence which the applicants raise is that they did not receive a notice in terms of s129 or s86(10) of the National Credit Act, 34 of 2005 (the NCA). In this case the respondent only had to give notice in terms of the latter section and proof of posting would be sufficient. The respondent has alleged in its summons that the debt review has been cancelled, and annexed to the summons is proof of posting of a notice to the first applicant. However no proof of posting of such a notice to the second applicant was annexed to the summons or put before me.

[8] The respondent argues that because the applicants are married to each other in community of property, notice to one spouse is sufficient. However, the bond is registered in both applicants' names, the respondent has sued both applicants and the application for debt review was made by both applicants. I am accordingly of the view that it is arguable that for the notice in terms of s86(10) to be valid it had to be given to both applicants.

[9] Secondly, the applicants allege that the summons does not allege compliance with s86(10) and that it is therefore defective. I do not agree. Whilst it is correct that there is no reference to that subsection in the summons, there is an allegation in it that the debt review process had been cancelled, and the annexed letter of cancellation refers to the subsection.

[10] Thirdly, the applicants raise a defence based on s86 of the NCA. They allege that the respondent was not entitled to terminate the debt review proceedings because an application had been made in terms of s87 of the NCA to the Pinetown Magistrates' Court before the summons was served in this matter. Relying principally on the full bench decision of the Western Cape High Court

in the unreported case of *Wesbank v Papier and Anor* (Case No 14256/10), Mr Havemann, who put up a capable and helpful argument on behalf of the applicants, argued that the application in terms of s87 precluded the respondents from proceeding against his clients.

[11] On the other hand, the respondent's counsel urged me to follow the decision in *Firstrand Bank v Mvelase* 2011(1)SA 470 (KZP). He also contended that the *Papier* case was in any event distinguishable from the present one because in the former case no application to the magistrates' court had been brought by the time action was instituted.

[12] I reserved judgment in order to give further consideration to the above two cases. However, whatever my views were on the matter and whatever the merits of counsel's argument became totally irrelevant on 27 May 2011 when the Supreme Court of Appeal handed down its judgment in the matter of *Collett v Firstrand Bank and Anor* (Case No 766/2010 [2011] ZASA 78). In that case the court came down squarely on the side of the decisions, including the *Mvelase* case, in which it was held that a credit provider could cancel a review process notwithstanding the fact that the matter was pending before a magistrate in terms of s87 of the NCA.

[13] In my view that is not the end of the matter however. Apart from what I have stated in paragraph [8] above, there are possible defences open to the applicants arising from the *Collett* case. Firstly, based on what is stated in paragraph [28] of the judgment, it is arguable that in order for a s86(10) notice to be valid, it has to be filed at court and there is no evidence in this case of this having taken place. Secondly, it would still be open to the applicants to request this court at the trial to order that the review process be reopened in terms of s86(11) and thereby delay judgment being granted (see paragraphs [15] to [18] of the judgment).

[14] These defences are not all defences to the respondent's claim but are ones

which, if valid, would at least be sufficient to delay judgment and are sufficient for purposes of an application for the rescission of a summary judgment.

[15]I am accordingly of the view that they are defences which have some prospect of success. I am furthermore of the view that the applicants are *bona fide* in bringing this application. They are simply attempting to prevent their home from being sold. I accordingly find that the applicants have made out a case for rescission of the judgment. It is therefore not necessary for me to consider the other points raised on behalf of the applicants.

[16] Counsel for the respondent agreed to my suggestion that in the event of rescission being granted, no point would be served in allowing the application for summary judgment to proceed. Instead he suggested that the matter should proceed to trial on the expedited roll. No objection to this was raised on behalf of the applicants and this seems eminently sensible. The issues are crisp and capable of speedy disposal.

[17] Finally, on the merits of the case I need to deal with the application which the applicants brought to stay the sale in execution of their property. In that application a rule was granted on 10 November 2010 in terms of which firstly 'That execution be stayed pending the outcome of the said application for rescission…' and secondly that the first part of the rule 'be effected forthwith'(sic). The rule was ordered to operate as an interim order 'pending the return day of the *rule nisi'*. Finally the order contained a final costs order reading 'That the applicant (sic) pay the costs of this application unless the respondent opposes this application.' The rule was ultimately adjourned *sine die* with the costs reserved. What costs these are in the light of the costs order of 10 November 2010 and of the fact that the respondent did not oppose the application, is not clear. Presumably they are the costs occasioned by the adjournment.

[18] The order of 10 November 2010 is rather confusing but the interim relief will

probably lapse once the judgment is rescinded. Nevertheless, in order to avoid any confusion it is probably best that the rule be discharged.

[18] The only fair costs order is for the costs of both the application for summary judgment and the application for rescission (including the application for condonation) to be reserved for decision by the trial court. That court will have all the facts before it and so will be best equipped to decide the issue of costs. As far as the costs of the application to stay the sale is concerned, it would be best to clarify the situation by ordering the applicants to pay those costs, in line with the order granted at their request

[18] I therefore make the following order:

1. The judgment granted against the applicants on 25 August 2010 is rescinded.
2. The application for summary judgment is refused.
3. The applicants are given leave to defend the action.
4. It is directed in terms of practice rule 21.3 that the action be enrolled on the expedited roll and that the provisions of practice rule 21.4 shall apply to this matter.
5. The *rule nisi* granted on 10 November 2010 is discharged.
6. The applicants are ordered to pay the costs of the application for the order granted on 10 November 2010.
7. The costs of the applications for summary judgment, rescission and condonation are reserved for decision by the trial court.

RALL AJ

Date argued: 24 May 2011

Date of judgment: 2 June 2011