REPUBLIC OF SOUTH AFRICA

THE KWAZULU-NATAL HIGH COURT, DURBAN

JUDGEMENT REPORTABLE

Case no: 7773/2011

In the matter between:

P.L. POSTHUMUS **Applicant**

and

FIRST NATIONAL BNK LTD **First Respondent**

THE SHERIFF OF THE HIGH COURT,
PORT SHEPSTONE **Second Respondent**

THE REGISTRAR OF DEEDS
PIETERMARITZBURG **Third Respondent**

Neutral citation: P.L. Posthumous v First National Bank Ltd (7773/2011) [2011] ZAKZD (July 2011)

Coram: MADONDO J

Heard: 15 M arch 2011

Delivered: **29 July 2001**

Summary: Application for debt review proceedings ─is made in the court having jurisdiction over the person of the consumer. Termination of the debt review process while the debt review proceedings are pending before court─ it is competent to do so depending on the circumstances of each particular case. In affording protection under National Credit Act 34 of 2005 ─ a balance between the interests and the rights of the consumers and of the credit providers must be achieved.
Rescission of judgment ─judgment was erroneously granted if there was an irregularity in that the court was not legally competent for the court to have granted it. Rescission application is brought under Rule 42(1)(a).Default judgment occurs where the defendant has failed to enter an appearance to defend and the rescission application is brought under Rule 31(2) (b) or common law. Requirements for rescission ─ are not in willful default and bonafide defence to the plaintiff's claim. Consumer's over-indebtedness is not a defence on merits. Joinder of parties ─a person to be joined in the matter must have a direct and substantial interest which will be prejudicially affected by the granting of the judgment.

ORDER

Application is dismissed with costs.

JUDGEMENT

MADONOD J

[1] In this application the applicant seeks an order:

(a) rescinding the default judgment granted on 11August 2010 in favour of the first respondent against her; and

(b) restraining the second and third respondents from registering the property known as Erf 712 Umtentweni (Extension 8) KwaZulu Natal, in the name of the purchaser of the aforesaid premises on execution pending the finalization of the relief sought in paragraph (a) above.

Parties

[2] The applicant is Petro Louise Posthumus, an adult female of 18 Mgazi Avenue, Umtentweni, KwaZulu-Natal Province.

[3] The first respondent is First National Bank – a division of FirstRand Bank Ltd, a bank duly registered and incorporated in terms of the banking laws of the Republic of South Africa and registered as a credit provider as defined in section 40 of the National Credit Act 34 of 2005 (the Act), having its principal place of business situated at 5th Floor, FNB Tower, 27 Diagonal Street, Johannesburg.

[4] The second respondent is the Sheriff of the High Court: Port Shepstone situated at 17a Mgazi Avenue, Umtentweni, KwaZulu-Natal Province.

[5] The third respondent is the Registrar of Deeds: Pietermaritzburg in his representative capacity. No specific relief is sought against the second and third respondents save giving effect to the order sought in terms of the Notice of Motion.

Factual background

[6] The application arises from the home loan credit agreement entered into between the applicant and the first respondent during 2005 and in terms of which the first respondent loaned and advanced the amounts of R495 000 and R350 000 to the applicant. The aforesaid amounts were secured by Mortgage Bond B9459/05 and Mortgage Bond B33106/05 respectively.

[7] The applicant, as security for her obligations under the bonds, bound the property described as:

Erf 712 Umtentweni (EXTENSION 8) Registration Division ET, Province of KwaZulu-Natal, in extent of 2498 (two thousand four hundred and ninety eight) square metres, held under Deed of Transfer No. T26503/2004.

[8] The applicant was in terms of the agreement to pay certain monthly instalments in reduction of the total amount owing under the bonds on or by the due date each month, provided therein.

[9] It was also an essential term of the agreement that should the applicant breach the agreement by failing to pay the instalment by the due date, the full balance owing including interest would become due owing and payable and that in such event the first respondent would be entitled, at its option, to institute proceedings for the recovery thereof and for an order declaring the mortgaged property executable. A certificate signed by any manager of the first respondent as to any amount owing in terms of agreement, would constitute *prima facie* proof of such indebtedness.

[10] The applicant breached the terms of the agreement by failing to pay one month instalment and in consequence thereof an amount of R945 734-70, being the total balance owing, together with interest calculated at the rate of 8.5% per annum, became due owing and payable by the applicant under the bonds.

[11] On 4 March 2009 the applicant lodged an application with the registered debt counsellor, Linda Yvonne du Plooy, for a debt review in terms of section 86(1) of the Act. On 13 March 2009 du Plooy advised the first respondent that the applicant's application for a debt review was successful.

[12] In a letter dated 16 July 2009, du Ploy requested the applicant's attorneys, CB Michael Attorneys, to set down the application for review in the Pretoria Magistrate's Court. On 4 August 2009 the applicant personally applied in Pretoria Magistrate's Court to have her debt obligations restructured and the matter was set down for hearing on 16 September 2009. However, the debt review application was later removed from the court's roll.

[13] On 20 April 2010 the first respondent directed a Notice of Termination of the debt review process in terms of section 86(10) of the Act to the applicant, the debt counsellor and to the national credit regulator.

[14] On 7 July 2010 the first respondent issued summons and it was served on the applicant on 15 July 2010 at her chosen domicilium address, 4 Pope Street, Umtentweni. In the said summons the first respondent claimed the payment of R945 734-70 together with interest thereon at the rate of 8.5% per annum, compounded monthly from the 15 of June 2010 to date of payment, and costs. Also, the first respondent sought an order declaring executable mortgaged property.

[15] The applicant did not enter an appearance to defend and as a result the first respondent applied for and was granted default judgment against the applicant on 11

August 2010.

[16] On 22 October 2010 the applicant was advised of the impending sale of the property by the registered post with no response. The property was sold in execution on 22 November 2010. Subsequent thereto, the applicant entered an appearance to defend on 26 November 2010.

[17] On 29 November 2010 the first respondent lodged an application for summary judgment. The applicant did not oppose the application by delivering an opposing affidavit, and it was granted on 22 December 2010. However, it is common cause between the parties that such judgment was in the circumstances of this case superfluous, and therefore a nullity.

[18] Though the applicant alleges that she became aware of the default judgment on 23 November 2010, she only lodged an application for recession on 18 January 2010.

[19] The applicant alleges that she received an instruction to reinstate section 86(1) application and as a result the application was reinstated and set down for hearing on 24 August 2011 at Pretoria Magistrate's Court.

[20] The applicant's contention is that she referred the debt review application to the Pretoria Magistrate's Court for hearing in terms of section 87 of the Act and that it is, therefore, not competent for the first respondent to terminate the debt review whilst the application is still pending before the Magistrate's Court.

<u>Issues</u>

[21] The issues raised by the facts in this matter, are whether:

(a) the debt review application is properly before Pretoria Magistrate's Court;

(b) whether it was competent for the first respondent to terminate the debt review proceedings in terms of section 86(10) whilst the matter was still pending before the Magistrate's Court; and

(c) Whether the applicant has satisfied the requirements for the rescission of judgment.

a) Debt review application

[22] In March 2009 the applicant acting in terms of section 86(1) of the Act applied to the debt counsellor to have her declared over-indebted. It is common cause that at the time the first respondent had not under the credit agreement taken steps, as contemplated in section 129 to enforce the agreement (see s86(2)). The first respondent only complied with the requirement of section 129(1) of the Act on 16 June 2010. On receipt of the application the debt counsellor notified the consumer, the first respondent and the credit regulator thereof.

[23] Section 86(6) sets out the procedure the debt counsellor must follow on acceptance of the application as follows:

> "(6) A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time-
>
> a) Whether the consumer appears to be over-indebted; and
>
> b) If the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless."

There is nothing to show in the present case that a determination that the applicant was or is over-indebted or a declaration of reckless credit has ever been made.

[24] After an assessment in terms of section 86(6), the debt counsellor must come to particular conclusion, based on the assessment made. In this regard section 86(7) provides:

> '(7) If, as a result of an assessment conducted in subsection (6), a debt counsellor reasonably concludes that-
>
> a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;

b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumers obligations under the credit agreement may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or

c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court either or both of the following orders-

i) that one or of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

ii) that one or more of the consumer's obligations be re-arranged by-

(aa) extending the period of agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the duties on which payments are due under the agreement ;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of chapter 5, or Part A of chapter 6.'

[25] It does not appear from the papers in the present matter that the debt counsellor has ever made any conclusion as to whether or not the applicant is over-indebted or that she is not over-indebted but she is experiencing or likely to experience difficulty in satisfying her obligation under the credit agreement. Nor is it stated whether or not any proposals have ever been made to the Magistrate's Court that her credit agreement must

be declared reckless credit or that her obligation should be re-arranged in any manor set out in subsection 7(ii)(aa);(bb);(cc) and (dd).

[26] Save stating that the proposals were submitted on 29 May 2009, there is nothing to show what proposals were those. Also, it does not appear from the papers whether or not any proposal was ever made to the applicant and the first respondent with regard to this matter. No allegation has ever been made that the matter was referred to the magistrate's court since the parties did not accept the proposal. It is not apparent from the papers on what basis the matter was referred to the magistrate's court.

[27] With regard the applicant's claims to have referred the matter under section 86(9) of the Act. In terms of this subsection the consumer may only directly apply to the magistrate's court if the debt counsellor has rejected the application as contemplated in subsection (7) (a), for an order contemplated in subsection (7)(c).

[28] The application was initially set down for hearing at Pretoria Magistrate's Court on 16 September 2009. However, it does not appear from the Notice of Set Down, Annexure 'F', as to who had set it down save to state that the founding affidavit of Petro Louise Posthumous and the supporting affidavit of Linda Yvonne du Plooy were attached thereto and that there would be used in support of the application.

[29] According to the applicant the matter was later removed from the roll on the ground that the debt counsellor, du Plooy, sold his book to a new debt counsellor. However, the matter was thereafter set down for hearing on 24 August 2011. In the Notice of Set Down, Annexure "G", the name of the applicant's attorneys, CB Michael Attorneys, appear at the bottom but the Notice is unsigned. No explanation has been given as to why the re-instatement of the application on the roll had to be done by the applicant's attorneys not by the debt counsellor. I do not think that any responsible officer of the court would take an unsigned Notice of Set Down seriously and set the matter down for hearing. It has not been proved that the application has satisfied all the requirements set out in section 86(6), (7), (8) and (9) of the Act. In the premises, the

papers do not show that the application was on 16 September 2009 and is presently properly before the Pretoria Magistrate's Court. Nor has it been alleged that after the application had been removed from the roll, the magistrate's court ordered that the debt review should be resumed (s 86(11)). The matter ought to have been referred to the magistrate's court by the debt counsellor.

[30] The application must be referred to the magistrate's court having jurisdiction in respect of the person of the consumer. See *National Credit Regulator v Nedbank Ltd 2009(6) SA 295 (GNP) at 314.* In *casu*, no jurisdictional connection between the application and Pretoria Magistrate's Court has been established. Nor does the applicant reside or carry on business within the jurisdiction of the Court in question. The applicant has therefore failed to prove that the Pretoria Magistrate's Court, before which the application is allegedly pending, has jurisdiction to entertain the application. Nor is it known, as stated above, who referred it to the magistrate's court and the circumstances under which such referral was made. Nor is it stated that the debtor counsellor who allegedly replaced du Plooy re-set the matter down for hearing and the basis for so doing.

(b) Termination of the debt review proceedings in terms of section 86(10)

[31] On notice to the applicant the first respondent, the debtor counsellor and the National Credit Regulator terminated the debt review on 20 April 2010 in accordance with the provisions of section 86(10) of the Act, which provides:

> '(10) if a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that agreement may give notice to terminate the review in the prescribed manner to –
>
> a) consumer;
> b) the debt counsellor; and
> c) the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.'

[32] The applicant's contention is that it was not competent for the first respondent to

terminate the debt review process whilst the application was still pending before the Pretoria Magistrate's Court. In *Standard Bank of South Africa Ltd v Kruger; Standard Bank of South Africa Ltd v Pretorius 2010 (4) SA 635(GSJ),* ***Kathree – Setilone AJ*** *at p642* said:

> 'Accordingly, I am of the view that, once the debt process has been initiated, which thereafter, results in the referral of the debt review to the magistrate's court, the credit provider is not entitled to institute court proceedings to enforce its claim until the magistrate's court has made a determination in terms of s87 of the Act'.

[33] The learned Acting Judge went on to hold that 'any contrary interpretation would render the entire debt review process ineffectual since the credit provider will simply wait for 60 working days, well knowing that no magistrates' court will be able to adjudicate the debt review in terms of s87 of the Act to finality within 60 business days from referral to it. In her view, 'such an interpretation would circumvent the protection afforded by the Act, and would be in conflict with the intention of the legislature.'

[34] The purpose of the Act is to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers by promoting the development of a credit market that is accessible to all South Africans. Also, to provide consumers with protection from deception and from unfair or fraudulent conducts by credit providers and credit bureaux. The main intention of the legislature in this regard is to address and prevent over- indebtedness of consumers by providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations. *See section 3(a)(e)(iii) and (8) of the Act.*

[35] In *Wesbank, division of First Rand Bank Ltd v Papier (14256/10) [2011] ZAWCHC2,* it was held:

> '… on a proper interpretation of subsection 86(10), the consumer is protected

> against enforcement proceedings by the credit provider, not only once a re-arrangement order has been made by a magistrate in terms of s87, but also while proceedings for such an order are pending. The corollary in that delivery of a notice of termination by a credit provider in term of s 86(10) is not competent once any of the steps referred to in ss86 (7) (cc), 86(8) or 86(9) have been taken. Obviously this impediment will cease to exist, once a magistrate's court has dismissed the application for re-arrangement or the application has been withdrawn or abandoned'.

In this case the action was stayed in order to allow the debt review process to take its course in the magistrate's court.

[36] It is apparent in the aforesaid decided cases that the court placed much emphasis on the protection and promotion of the consumers' rights to the neglect of the rights and interests of the credit providers. While protecting the interests and the rights of the consumers the court should always be mindful of the fact that it is also the purpose of the Act to 'promote equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers', as well as the provision of 'a consistent and harmonised system of debt restructuring, enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under the credit agreements'. *See section 3(d) and (i) of the Act*.

[37] In *Collet v First Rand Bank (766/2010)[2011] ZASCA 78 (27 May 2011*), regard being had to the purpose of the debt review, not to relieve the consumer of his obligations but to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the magistrate's court, it was held that the Act does not only serve the interests of consumers and that its construction therefore calls for a careful balancing of all relevant interests. In this case the court drew a distinction in the application of the provisions of section 86(10) between the consumer who is in default of his or her obligations and the consumer who is not in default when the matter is referred for debt review. The court held that where the consumer is not in default of any obligations, the credit provider is unable to terminate

the process because section 86(10) gives the right to terminate the debt review only where the consumer is in default. In such a case the court held that the credit provider must await the hearing in terms of section 87. Nor can the credit provider proceed to enforce the credit agreement because the consumer is not in default, where the consumer is in default the credit provider is entitled to enforce that credit agreement. The court held that a sounder approach is to recognise the express words of section 86(10) which gives the credit provider a right to terminate the debt review in respect of the particular credit transaction under which the consumer is in default, and only when he is in default, at least 60 business days after the application for debt review was made. The credit provider must also have complied with the requirements of section 129 and 130 of the Act.

[38] In the aforesaid case, the proposal by the debt counsellor in respect of the mortgage bond envisaged a debt re-restructuring in terms of which the monthly instalments payable on the mortgage be reduced from R6644-93 to R3500-00 but payable over the same period of time, that was 240 months this would deprive the respondent of nearly one half of what it was entitled to under the credit agreement. The court then held that in the circumstances the termination of the debt review by the respondent was understandable.

[39] It is common cause, in *casu* that when the applicant applied to the debt counsellor to be placed under debt review process, she was already in default of her financial obligations under the credit agreement. Nor was the credit provider requested to participate in good faith in the review or in any negotiations designed to result in responsible debt re-arrangement in terms of section 86(5)(b) of the Act. At the time the first respondent terminated the debt review the applicant had been in default of her financial obligations for thirteen (13) months. During this period the applicant did not make any attempt to pay any amount in reduction of the amount owed notwithstanding the fact that she was by then receiving rental in respect of the property in question. This evinces an intention on the part of the applicant not to meet her financial obligations under the credit agreement but to benefit illegitimately out of leasing the property in question. Such conduct by the applicant is in conflict with the provisions of section 3(i)

which places priority on the eventual satisfaction of all responsible consumer obligations under the credit agreement.

[40] It is common cause that the matter was removed from the roll on 16 September 2009. Therefore, it follows that when the first respondent terminated the debt review in April 2010 there was no application pending before the magistrate's court. Nor does it appear from the papers as to when the matter was re-instated and set down for hearing on 24 August 2010, and who set it down. Annexure "G" purported to be a Notice of Set Down is unsigned. Nor is there anything to show that the debt counsellor, who allegedly took over after du Plooy had ceased to handle the application, reinstated the application on the court's roll. No proof has ever been tendered to show that the application was initially referred to the magistrate's court in accordance with the provisions of section 86 of the Act.

[41] Though it appears from annexure "A" that du Plooy in a letter dated 16 July 2009 requested the applicant's attorneys to bring a debt review application to a proper court. A procedure is not sanctioned by the provisions of the Act. The debt review application must be brought to the magistrate's court by the debt counsellor. It is also alleged in the document that proposals were submitted on 26 May 2009 but there is nothing to explain what those proposals were or whether they were at any stage directed to the first respondent. It cannot, therefore, be said that the first respondent failed or refused to negotiate in good faith with the applicant. In any event at the time the applicant was in default of her obligations for more than sixty (60) days, in effect for thirteen (13) months', and this justified termination of the debt review. In the circumstances of this case, I am satisfied that the termination of the debt review was justified and reasonably necessary.

[42] In fact, such termination was a formality since there were no longer any debt review proceedings pending before the magistrate's court. The application had been removed from the roll six (6) months prior to the formal termination of the debt review process. No evidence has ever been tendered to prove that at the time the debt review was

terminated there were, in fact, debt review proceedings pending before the magistrate's court. Nor does it appear from the papers that at the time the proceedings were reinstated, such reinstatement was properly done in accordance with the provisions of the Act.

(c) Rescission Application

[43] The applicant has in terms of Rule 42(1)(a) lodged an application for the recession of the Default Judgment granted on 11 August 2010 in favour of the first respondent against her on the ground that the judgment was erroneously sought and erroneously granted. However, it is common cause that the property which is the subject of the judgment was sold to a third party at the sale in execution. It therefore follows that the third party has a legal interest in the subject – matter of the application which could be prejudicially affected by the granting of the order sought. The third party has not been joined in this matter and this application may fail on the ground of non joinder alone. See *United Watch & Diamond Co. (Pty) Ltd v Disa Hotels Ltd 1972 (4) SA 409(C) at 415H. Parkview Properties (Pty) Ltd v Haven Holdings (Pty) Ltd 1981 (2) SA 52(T); Standard General Insurance Co Ltd v Gutman NO 1981(2) SA 426 (C) at436B.*

[44] However, in order to bring this matter to finality on merits, I propose to deal with the rest of the questions raised by the facts of the matter. The judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the court to have it granted. See *De Wet v Western Bank 1979(2) SA 1031 (A) at 1038D; Tshabalala v Peer 1979(4) SA 27(T) at 30 H-31A; Athmaram v Singh 1989(3) SA 953(D) at 956D and 956 I.* In casu, it has not been contended that it was legally incompetent for the court to have granted such judgment and that it is for this reason the judgement is said to have been erroneously sought and granted.

[45] In casu, such a situation did not arise. The default judgment was obtained against the applicant on 11 August 2010 on the ground that she had failed to enter an appearance to defend within the prescribed period, after summons had been duly served on the applicant at her domicilium address, 4 Pope Street, Umtentweni, on 15 July 2010.

[46] In my view, the applicant should have brought the application for rescission in terms of Rule 31(2)(b) on the ground that the judgment was granted in her absence, if she was not in wilful default and having *bona fide* defence to the first respondent's claim. However, the applicant was entitled to lodge the application for rescission within twenty (20) days after she had knowledge of such judgment. The applicant became aware of the sale of the property on 23 November 2010 and she only filed an application for recession on 18 January 2011. Nor has she lodged an application for condonation. Her application may also fail on this ground.

[47] The applicant claims that at the time the summons was served, she was not resident in the property which has been declared executable. According to the applicant at the time the property was rented by tenants who according to her failed to notify her of the summons served. Once again the letter by the first respondent notifying her of the impending sale of the property dated 22 October 2010 was served at the same address. The applicant also claims not to have received it. Surprisingly, the letter addressed to the applicant at the same address by the second respondent dated 23 November 2010, in which the second respondent was notifying the applicant that the property had been sold in execution on 22 November 2010, she received it. This, in my view, could not have been a sheer coincidence. The applicant had obviously received the prior documents and she ignored them. The latter was different from the first ones in that it informed her that the property was then sold and it was for that reason she stood up in order to save the property which was valuable to her. I am therefore not satisfied that she was not in wilful default.

[48] The second requirement the applicant must satisfy in order to succeed on her application for recession is that she has a *bona fide* defence to the first respondent's claim. In her papers she does not show any defence on merits to the first respondent's claim. She only relies on the ground that it was not competent for the first respondent to terminate the debt review whilst they were proceedings, in this regard, pending before court. In Collet case, *supra,* it was stated that over-indebtedness is not a defence on merits. The proof that the first respondent's failure to participate in or its bad faith during

the debt review negotiations might have weighted in her favour. In the present case it has never been alleged that the applicant and the first respondent has ever been requested to facilitate the evaluation of the applicant's state of indebtedness and the prospects for responsible debt re-arrangement and that the first respondent failed to participate in good faith in the debt review.

[49] On the contrary, it was the applicant's conduct which led to the termination of the review process. No blame can legitimately be attributable to the first respondent's conduct. It is common cause that the applicant has been in default with her repayments under credit agreement for a period of more than two years. Nor has she made any attempt to pay any amount in reduction of the capital amount owing under credit agreement. The applicant has leased the property to certain persons in return for rental. All this period she has been benefitting out of the property to the detriment of the first respondent.

[50] It is evident from the above that the applicant does not need the property in question as a primary residence but for the purposes of generating income to the detriment of the first respondent. In consequence thereof, I come to the conclusion that the present case cries loudly for the balancing of the right and interest of the consumer with the right and interest of the credit provider. By her conduct the applicant has sufficiently demonstrated that she does not intend to eventually meet her financial obligations under the credit agreement.

[51] In the premises, I do not find any merit in the application for rescission and an order restraining the second and third respondents from registering the property in question in the name of the person who purchased it at the sale in execution on 22 November 2010.

[52] In the result, the application is dismissed with costs.

APPEARANCES

APPLICANT :	Adv Collingwood
Instructed by :	C/O Dickinson & Theunissen Inc.
Ref :	(Mr Smith/mg/MAT8464)
FIRST RESPONDENT :	Adv Konigkramer

Instructed by	:	Strauss Daily Inc.
Ref	:	(V Naidu/RL/FIR93/0244)