

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 3318/2018

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED



SIGNATURE

30/04/2024
DATE

In the matter between:

MILDRED NOSISA MLINJANA

Applicant

and

NEDBANK LIMITED

1st Respondent

PRESHOTHAN GOVENDER

2nd Respondent

Coram: Ingrid Opperman J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 30 April 2024

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] In this application, the applicant seeks the rescission of a default judgment granted by the Registrar in favour of the First Respondent (*Nedbank*) on 23 March 2018 (*the monetary judgment*) and an order granted in favour of Nedbank on 15 June 2020 (*the executability order*).

The relevant factual matrix

[2] The applicant and Nedbank entered into two credit agreements being an Instalment Sale Agreement in respect of a motor vehicle and a Loan Agreement for the purchase of an immovable property. Sometime in 2017, the applicant encountered financial difficulties and breached the provisions of both agreements.

[3] On 16 January 2018 section 129 notices in terms of the National Credit Act 34 of 2005 (*the NCA*) in respect of both Agreements, were served on the applicant by the sheriff. In respect of the Loan Agreement, there was personal service. On 30 January 2018, arising from the applicant's breaches, and having sent the section 129 notices to the applicant, Nedbank instituted action proceedings for the return of the motor vehicle and payment of R3 600 616.31 plus interest, in respect of the Loan Agreement. After the institution of the action proceedings, the applicant made payments in respect of the motor vehicle and Nedbank accordingly did not persist with the process to have the motor vehicle returned.

[4] On 23 March 2018 and after the applicant remained in default of the Loan Agreement, the Registrar granted judgment against the applicant in the amount of R3 600 616.31 (*the monetary judgment*).

[5] On 17 May 2018, the applicant became aware of the monetary judgment granted against her. On 31 May 2018, she launched an application for the rescission of the monetary judgment. On 7 August 2019, the rescission application was dismissed by Segal AJ (*the first rescission application*).

[6] On 9 June 2020, the executability order, against the immovable property forming the subject of the Loan Agreement, was granted. On 8 December 2020, the immovable property was sold to the second respondent in a sale in execution. The second respondent was initially not a party to these proceedings, but Nedbank raised the issue of his non-joinder which prompted the applicant to join him. The second respondent has paid for the immovable property in full.

[7] On 4 March 2021, the current application was launched (*the second rescission application*).

The relief sought

[8] The notice of motion seeks an order, in relevant part, in the following terms:

1. The Court Order granted on 9 June 2020 [15 June 2020] in favour of the respondent is set aside.
2. The Default Judgment entered into by the Registrar in favour of the respondent on 23 March 2018 is set aside.
3. Alternative to paragraph 2:
 - 3.1. Condonation of the late filing of the application for the reconsideration of the Default Judgment of 23 March 2018 is granted.
 - 3.2. The Default Judgment of 23 March 2018 in favour of the applicant is reconsidered and set aside.

[9] The joint practice note records the nature of the applications as being limited to paragraphs 1 and 2 of the notice of motion together with condonation for non-compliance with the court's practice directives and a court order.

[10] The Caselines file contained an amended notice of motion seeking declaratory relief being that the Court did not have jurisdiction to entertain the action instituted by Nedbank and that the order granted by the Court on 15 June 2020 is null and void and that it falls to be set aside.

[11] The amended notice of motion provided for the delivery of a notice of opposition and opposing papers and then concluded that if no notice of opposition to oppose was delivered, the application would be placed on the unopposed motion roll without any further notice.

[12] After the conclusion of this hearing and on 4 March 2024, I caused a note to be sent to the parties enquiring whether the amendment was ever moved and/or granted. I asked this because such relief does not accord with the issues defined by the parties and recorded in the joint practice note filed at Caselines 007-17. I requested the parties to state clearly what relief was being sought with reference to the notices of motion (as amended or not) or as agreed to (the joint practice note).

[13] Nedbank's legal representative, Mr Bester, responded that the amendment was never moved nor granted. The applicant's legal representative, Mr Maninjwa, responded that because no objection to the amendment was received, the amendment was affected and no formal application was needed. This proposition is in direct contradiction to that which is stated in the intended amendment being that in the absence of opposition, the amendment would be enrolled in the unopposed motion court. In my view, Nedbank was entitled to expect the applicant to comply with its own formalities which on its own say so, it did not.

[14] In addition, Mr Maninjwa contended that applicant's counsel, Mr Mbana, had engaged with the Court about amended prayer 1 and that this had evidenced the fact

that the notice of motion had been amended. He contended that the amended relief was in any event competent under the prayer '*further and/or alternative*' relief.

[15] On 8 April 2024 and in further correspondence with the court, Mr Bester, asserted that the joint practice note defines the issues to be determined.

[16] I agree that it is to the joint practice note that one must look for guidance. The purpose of a joint practice note is to assist with, amongst other things, distilling the issues which fall for determination by the court and to focus the debate.

[17] The issues, which were identified for determination, agreed to and recorded in the joint practice note by counsel for the applicant, Mr Mbana, and counsel for the respondent, Mr Matsiela, were:

1. Whether the registrar had the power to grant default judgment against the applicant.
2. Whether the court/registrar had the requisite jurisdiction to grant default judgment in view of the respondent's non-attachment of a notice in terms of s 129 (1) (a) to the particulars of claim.
3. Whether the respondent's particulars of claim disclosed a cause of action.
4. Whether the respondent had the right to amend its particulars of claim after default judgment had been granted by the registrar.
5. Whether or not this court erroneously granted the order declaring the applicant's immovable property as specially executable.
6. Whether the applicant's failure to timeously comply with a court order compelling her to file her Heads of Argument, Chronology and List of Authorities (in the main application) should result in the dismissal of the rescission application.

[18] A further issue raised by Mr Matsiela (representing Nedbank) under the rubric '*Summary of the respondent's contentions on the main issues*' in the joint practice note was whether, having regard to the fact that the first rescission application had been dismissed, the applicant was entitled to '*a second bite*' at rescinding the money judgment.

The second rescission application

[19] Is this second rescission application at all competent? Ought the applicant not to have appealed the Segal AJ order, the one in which Segal AJ dismissed the first rescission application?

[20] It is regrettable that Segal AJ did not provide reasons for the dismissal of the first rescission application which reasons are crucial to decide whether she dealt with the merits of the application which is the test in determining whether the Segal AJ order is final.¹

[21] A dismissal of a rescission is ordinarily a final order and no explanation appears on the papers as to why no reasons for the finding were requested by the applicant.

[22] Assuming, without accepting, that the procedure chosen by the applicant is competent, she has failed to apply for condonation for the late launching of the second rescission application let alone advance reasons to support such relief. The second rescission application was launched 34 months after the applicant became aware of the money judgment against her.

Was the Registrar entitled to grant the monetary judgment?

[23] The applicant contends that the Registrar never had the power to grant the court order of 23 March 2018 because in terms of the proviso to rule 31(5)(b) of the Uniform Rules of Court, the application for default judgment and the order declaring the immovable property specially executable ought to have been heard in open court.

[24] The applicant contends further that Nedbank contravened both Chapter 10.17 of the Practice Manual of the High Court, Johannesburg and the principles laid down in *ABSA Bank Ltd v Mokebe and Related Cases*.²

¹ *Mlokonya v Company Unique Finance (Pty) Limited* [2016] JOL 35623 (ECG), *Benson and another v Standard Bank of South Africa (Pty) Ltd and others* [2019] JOL 419292 (GJ)

² 2018 (6) SA 492 (GJ)

[25] Chapter 10.17 of the Practice Manual provides as follows:

‘2. Where action proceedings have been instituted and the provisions of Rule 31(5) are applicable, the Registrar shall refer the application for the money judgment and the declaration that the property is executable, to open court. The Registrar may not grant the money judgement separately, if the debt is related to a mortgage bond over an immovable property.’

[26] In *Mokebe*³ the full court of this Division held that it is both desirable and necessary for a money claim and a claim for a declaration of executability under a mortgage bond to be heard simultaneously as envisaged in the Practice Manual. It was held that there is ‘*a duty on banks to bring their entire case including the money judgment, based on a mortgage bond, in one proceeding simultaneously*’ and that, should the matter require postponement for whatever reason, ‘*the entire matter falls to be postponed and piecemeal adjudication is not possible*’.

[27] Nedbank did not take issue with these pronouncements, but it was argued that the judgment in *Mokebe* was delivered after the monetary judgment by the Registrar was made and thus does not have application. I agree.

[28] The monetary judgment was granted on 23 March 2018 at a time when not only the Registrar, but also the courts in this Division, entertained piecemeal adjudication of claims based on mortgage bonds ie the money judgment would be granted and the executability leg would be enrolled on a later date. *Mokebe* was delivered on 12 September 2018 and the approach was thereafter changed. This does not render the order of the Registrar granted before this date unenforceable or null and void.

³ Supra

Failure to attach the correct section 129 notice to the summons and the effect thereof on the disclosure of a cause of action

[29] The Applicant argues that Nedbank's failure to have attached to its particulars of claim the section 129(1) of the NCA notice in respect of the Loan Agreement which was secured by the immovable property, was fatal to Nedbank's case. She contended that in the absence of this notice, the registrar should have refused to grant judgment as required by section 130 of the NCA.

[30] It will be recalled that Nedbank instituted action relying on 2 causes of action being the Instalment Sale Agreement in respect of a motor vehicle and a Loan Agreement for the purchase of an immovable property. The section 129 notice sent in respect of the Instalment Sale Agreement was attached twice, once to evidence compliance with section 129 for purposes of the Instalment Sale Agreement as 'POC6' and once to evidence compliance with section 129 for purposes of the Loan Agreement as 'POC 12'.

[31] This mistake is fully explained in the answering affidavit. Claim A in the particulars of claim relates to the Instalment Sale Agreement in respect of a motor vehicle. This agreement was concluded on 28 April 2016. In that agreement, the Applicant chose as her *domicilium* address, 69 Broadwoods, Broadacres, Bryanston. Claim B in the same particulars of claim relates to the Loan Agreement and the purchase of immovable property. This agreement was concluded on 7 July 2016 and in that agreement the Applicant chose 3A Gillian Road, Buccleuch, Johannesburg as her *domicilium* address. In the mortgage bond that was registered on 24 November 2016 as Nedbank's security over the immovable property, the Applicant chose as her *domicilium* address, 75 Karee Drive, Carlswald Estate. To ensure that the summons came to the Applicant's attention, Nedbank attempted service of the section 129

letters, by the sheriff of the court on each occasion, and on each of the addresses that the Applicant had supplied in the various agreements and the mortgage bond. It was simply an oversight that the incorrect section 129 letter was annexed as annexure POC12. The sheriff provided Nedbank's attorney with yet a further address that is mentioned in the section 129 letter that was ultimately served on the Applicant. When Nedbank's attorney was preparing the Rule 46A application, the fact that the incorrect section 129 letter was annexed to the particulars of claim was noticed by the attorney, and the oversight was corrected, by simply replacing the incorrect section 129 letter with the correct section 129 letter in an amendment which was served on the Applicant.

[32] Pleadings in proceedings to enforce a credit agreement are required to contain allegations of the manner in which the section 129 notice was delivered, so as to place the court in a position to determine whether there was delivery in terms of the NCA.

[33] The applicant's breach of the Loan Agreement is pleaded extensively in paragraphs 22 and 23 of the particulars of claim. Compliance with section 129 of the NCA is pleaded in paragraphs 25 to 27.1 of the particulars of claim although the incorrect annexure was attached.

[34] Nedbank's particulars of claim contained the necessary allegations that the section 129 notice was served on the applicant by the sheriff. Moreover, the applicant does not deny being in receipt of the said notice. She also conceded that the correct section 129 notice mentioned the arrears.

[35] In summary, there was factual compliance with the requirements of section 129 of the NCA and I conclude that the default judgment was properly granted on a complete cause of action pleaded in the particulars of claim which included averments relating to the service of the section 129 notice.

[36] I need not concern myself with the entitlement (or not) of Nedbank to amend the particulars of claim after the monetary judgment was granted, as I have already found that the averments pleaded disclosed a complete cause of action in compliance with section 129 of the NCA. Ideally, the Registrar ought to have picked up on the incorrect annexure. Had she done so, she would have raised a query which would have resulted in the amendment prior to the order being granted. Be that as it may, the actual section 129 notice constitutes evidence (*facta probantia*) which in any event, strictly speaking, does not belong in the particulars of claim (which should contain the *facta probanda*). It is sound practice to attach the section 129 notice to show compliance as it assists a court when considering the particulars of claim in deciding whether a credit receiver was made aware of the exact amount that she was required to pay in order to avoid cancellation of the agreement.

[37] In this instance, the section 129 notice reads:

‘We are instructed that you are indebted to our client in terms of a Loan agreement secured by a Mortgage Bond over erf 111 Carlswald Estate for an amount of R 3, 494,707.50, which amount includes arrears of R 64, 563.99 together with further interest on the sum of R 3, 949,707.50 calculated at the rate of 10.75% per annum, compounded monthly in arrear from 1 October 2017 to date of final payment.’

[38] The notice, which was admittedly received, was thus not defective.

[39] The sole purpose of the section 129 letter is to inform the applicant that she is in default of her loan obligations. Paragraph 4.4 of the section 129 notice clearly afforded the applicant an opportunity to bring her account up to date. What is common cause, is that the section 129 notice was served on the applicant personally. In the applicant’s first rescission application, she attached a letter dated 15 January 2018 in which she had instructed her then attorney of record to offer ‘*In respect of the house*

arrears’ R100 000 to be paid before the 2nd of February 2018 and the balance ‘*of the arrears*’ at the end of February 2018 and end of March ‘*respectively*’. Thus, the facts show that the applicant did exactly what the section 129 notice invited her to do ie to make (or to attempt to make) arrangements to settle the arrears which her attorney acknowledged as a fact.

[40] The version advanced in the first rescission application was not that the section 129 notice was defective or that she did not know what she was expected to do but rather that her debt had been fully extinguished. She even attached a reconciliation to evidence this. This was countered by Nedbank in an opposing affidavit with the following:

‘A statement on the Loan Agreement was annexed to the particulars of claim (annexure POC10), and is dated 25 January 2018. As at 25 January 2018, the applicant was in arrears to the tune of R179 015.23. Default judgement was granted on 23 March 2018. I annex hereto an updated statement on the Loan Agreement dated 8 June 2018 as annexure "AA5". From the statement it is clear that (i) the monthly instalments that were to be paid by the applicant amounted to R37 098.04; (ii) the instalments for January 2018, February 2018, March 2018, April 2018 and May 2018 were not paid. It is therefore clear that at the time that default judgment was granted, the applicant owed the respondent significantly more than the arrear amount stated in the particulars of claim.’

Conclusion

[41] In my view, a second rescission application was not open to the applicant. She ought to have applied for leave to appeal the Segal AJ order after calling for reasons for the judgment. Leave ought to have been sought at that juncture to rely on the ‘new’ grounds of rescission with an explanation as to why they were not advanced at the time.

[42] Assuming the second rescission application were competent, it also falls to be dismissed on the merits as discussed and analysed herein. In addition, I would have

refused condonation as the 34 month delay in launching it has, in my view, not been explained at all alternatively adequately.

[43] Finally, something needs to be said about the manner in which the matter was presented: The Caselines file was not presented in an orderly fashion and it took an inordinate amount of time to work out which papers belong where, what I was obliged to read and what I was entitled to consider. In the end I had regard to: a) that which served before the Registrar (the monetary judgment); b) that which served before Segal AJ (the first rescission); c) that which served before Judge Maier-Frawley (the executability order); d) the papers in the second rescission and confined myself to the issues defined in the joint practice note and matters ancillary thereto. It is in respect of this latter feature that, by way of example only, considerable judicial resources were wasted in trying to figure out what had occurred: the second respondent filed a notice to abide his joinder to the litigation but what happened after that? Was he called upon to file papers? I was minded to call for a further explanatory note to understand how things on this front had unfolded but by virtue of my finding herein, accept that his rights won't be affected⁴; e) The dismissal application dealt with hereinafter and f) the condonation application.

[44] Absent from the joint practice note too is a factual chronology and the relevant portions of the papers to be read. Had the practitioners worked through the Caselines file and listed that which was required to be read by the Court, the uncertainty about whether the amendment had been moved or granted would, by way of example, not have existed⁵.

⁴ See *Cuducap (Pty) Ltd v Philippus Johannes de Bruyn* (Case no 69/2023) [2024] ZASCA 62 (29 April 2024) where the court's obligations in respect of a third party who may have a direct and substantial interest in the litigation is restated and emphasized.

⁵ As discussed in paragraphs [10] to [16] herein.

[45] I urge practitioners to heed the Directives of this Division which have been introduced to assist with the efficient conduct of a hearing. The time may well be near to impose sanctions including punitive costs or the disallowance of fees by counsel and attorney who are derelict in their obligations. This potential consequence is spelt out in Chapter 25.19 of the Consolidated Practice Directive 1 of 2024 which became effective from 26 February 2024 (although the preparation of a joint practice note directing the court to the relevant portions of the papers to be read has been a practice of this Division for a long time and was not introduced for the first time on 26 February 2024).

[46] The applicant has delayed the finalisation of this matter: On 23 March 2022 an order was granted compelling the applicant to file her heads of argument, chronology and practice note within 5 days of date of service of the order. Having failed to comply with such order, Nedbank brought an application to dismiss the second rescission application launched on 4 March 2021. The affidavit in support of such dismissal application was deposed to by Mr Bester on 8 April 2022 and in it he explained that the applicant's replying affidavit was filed late after an indulgence was granted to the applicant's attorney. He stated that it was filed on 7 May 2021 and since *'that date the Applicant has not taken any steps to progress the matter despite being asked to do so by me on several occasions.'* On 23 February 2023, Manoim J removed the dismissal application from the roll and directed the applicant to bring an application for condonation for the late filing of her heads of argument and practice note, which condonation application, he ordered, would be heard together with this second rescission application. The applicant filed a condonation application on or about 14 March 2023 which was not opposed.

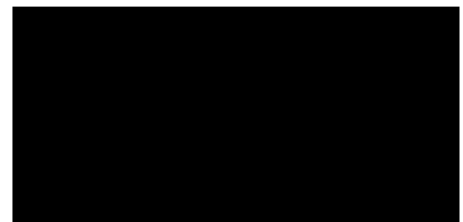
[47] Nedbank sought punitive costs in the dismissal application which costs were reserved. In my view, punitive costs are warranted having regard to the conduct described herein. I have a discretion in respect of costs and having regard to the facts and circumstances set out herein, exercise it in favour of Nedbank. Nedbank did not seek punitive costs in the main application, and I do not intend awarding such costs *mero motu*.

Order

[48] I accordingly grant the following order:

- (a) Condonation for the non-compliance with the order of Nichols AJ dated 23 March 2022 is granted with the applicant to pay the costs of such application.
- (b) The applicant is to pay the costs of the dismissal application as between attorney and client.

The application (referred to in the judgment as the second rescission application) is dismissed with costs.



INGRID OPPERMAN J
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for applicant: Adv P Mbana

Instructed by: SA Maninjwa Attorneys

Counsel for the first respondent: Adv L Matsiela

Instructed by: Cliffe Dekker Hofmeyer Inc

Counsel for the second respondent: No Appearance

Date of hearing: 8 November 2023

Date of supplementary heads of argument: 17 and 28 November 2023

Date of Judgment: 30 April 2024