REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES / NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

18/12/18
Date

ML TWALA

CASE NO: 16944/2014

In the matter between

ZODWA VELA MASEKO	**APPLICANT**
AND	
FIRSTRAND BANK LIMITED	**FIRST RESPONDENT**
THE DEPUTY SHERIFF OF THE HIGH COURT (RANDBURG WEST)	**SECOND RESPONDENT**
MOTSWAKO TRADING	**THIRD RESPONDENT**
KGAUGELO MABUDUSHA	**FOURTH RESPONDENT**
REGISTRAR OF DEEDS	**FIFTH RESPONDENT**

JUDGMENT

TWALA J

[1] This is an opposed application wherein the applicant sought the following orders:

a) Condoning the late filing of the application for rescission of the judgments granted on 5 August 2014 and 27 February 2015;

b) Rescinding the judgments granted on 5 August 2014 and 27 February 2015;

c) In the event of the judgment being granted, then setting aside the sale in execution;

d) Staying the transfer of the property Erf 87 Broadacres, Extensin 9 Township, pending the final decision on this application;

e) Costs of suit in the event the application is opposed.

[2] The second to fifth respondents did not file any opposing papers. I therefor propose to refer only to the first respondent in this judgment. Counsel for the first respondent submitted that the parties have agreed that the application for condonation for the late filing of the application for the rescission of judgment is not being opposed. Therefore, there being no prejudice to be suffered by any of the parties, the application for condonation was granted.

[3] Counsel for the first respondent raised a point in limine at the start of the hearing in that the applicant did not raise the issue of re-instatement of the loan agreement before it was cancelled by the first respondent due to non-payment of the arrears in its founding papers but only in its replying

affidavit. It is contended by counsel for the first respondent that as such, the issue of the re-instatement of the loan agreement should be struck out from the replying affidavit.

[4] Counsel for the applicant contended that the application for the rescission of judgment is based on the non- compliance of the first respondent with the provisions of section 129 of the National Credit Act, 34 of 2005 (NCA). Although there is no mention of the individual subsections of s 129 in the founding affidavit, it is a subsection of s 129 which deals with the issue of re-instatement of the loan agreement. In the replying affidavit, so the argument goes, the applicant merely amplified the provisions of s 129 but did not bring about a new matter.

[5] I am in agreement with counsel for the applicant that, although the applicant in its founding affidavit did not specifically mention the relevant subsection of s 129 of the NCA or followed its wording, the application for rescission of judgment is primarily based on non-compliance with the prescripts of s 129 by the first respondent. I am of the view therefore that the point in limine is ill-founded and falls to be dismissed.

[6] It is common cause that on the 21st April 2011 the applicant and the first respondent concluded a mortgage loan agreement whereby the first respondent loaned the applicant a sum of R1 750 000 together with an additional sum of R350 000. As security for the debt, the first respondent registered a bond over Erf 87 Broadacres Extension 9 Township, Registration Division J.R Province of Gauteng, Measuring 401 Square Metres, Held by Deed of Transfer No: T45949/2011. It is further common cause that the street address of the property is 42 Gateside Manor, Gateside Streeet, Broadacres Extension 9, Randburg.

[7] It is further common cause that the applicant defaulted and fell into arrears with its payments as per the mortgage loan agreement as a result whereof the first respondent launched an application for the recovery of the outstanding amount. The first respondent continued to obtain judgment by default on the 5th of August 2014.

[8] It is contended by counsel for the applicant that, when the applicant was experiencing financial difficulties, she approached the first respondent to enter into some arrangement regarding payment of its instalments in terms of the loan agreement. She informed the first respondent that she was no longer living on the property as she has rented it out and gave her new cellphone number to the first respondent. She never received the s 129 notice, so the argument goes, for it was sent to a wrong address. If she received the letter she would have attended at the offices of the first respondent and to make suitable arrangements to pay her arrears.

[9] It is further contended by counsel for the applicant that, the applicant did not receive the notice of motion although it was served at her new address by the sheriff. After she became aware of the judgment, so it is contended, the applicant paid a sum total of R100 000 on the 14th and 15th of September 2015 to cancel a sale in execution of the property and to re-instate the loan agreement. The judgment of the 5th of August was granted in error as there was non-compliance with the provisions of s 129 of the NCA and should be rescinded.

[10] Counsel for the first respondent contended that the s 129 letter was sent to the domicilium address as per the loan agreement. The applicant did not inform the first respondent of the change of address in writing as required by the loan agreement. Further, so the argument goes, the applicant has lost her

right to rescind the judgment as she stated in her e-mail to One Vision Investment that the bank has continued to take the property and she has come to terms with that and she is not contesting it. Since the applicant acquiesced this judgment, she is deprived of her right to rescind it.

[11] It is contended further by counsel for the first respondent that the applicant made a payment of R100 000 in September 2015 to avoid and or stop the sale in execution of the property but not to re-instate the loan agreement as envisaged in the provisions of s129 of the NCA and the case of Nomsa Nkata v Firstrand Bank Limited and Others (CCT73/15) [2016] ZACC

[12] It is trite that, for an applicant to succeed in an application for the rescission of judgment, it must establish to the satisfaction of the Court that it was not in wilful default and that it has a bona fide defence to the claim of the respondent which is good in law.

[13] In *Standard Bank of SA Ltd v Develex 876 CC and Another (70053/14) [2017] ZAGPPHC 675 (21 September 2017)* the Court stated the following: *"The rules of engagement are different due to the commercial power difference that exists that justifies the differentiation. In the instance of s 129 of the NCA, juristic persons have the equivalent of business rescue proceedings in terms of the Companies Act whereby the debtor is given a chance to be rehabilitated from their unmanageable state of indebtedness, through the aid of a business rescue practitioner who takes over the management of their monetary affairs. The process can be applied voluntarily or at the behest of a creditor. On the other hand a natural person who is a consumer under the NCA is notified of his right to apply for debt review, which he can then exercise voluntarily. The process under NCA can be avoided only if it is not promising to yield any positive results or its*

processes have failed. The difference is that the NCA's application is mandatory to the creditor prior to the enforcement of the debt, as the purpose is to eradicate or minimise the impact of reckless credit through debt review or rescheduling. The differentiation is rationally connected to the purpose for which the NCA was enacted."

[14] In *Sambo v Steytler Boerdery (C592/2013) [2015] ZALCCT 20 (25 March 2015)* the Court stated the following:

"a party to legal proceedings who files and then withdraws an application for leave to appeal cannot apply again because it has clearly and unequivocally conducted itself in a manner that is inconsistent with the intention to appeal."

[15] I am unable to agree with counsel for the first respondent that there was compliance with the provisions of s 129 since the letter was sent to the domicilium address. It is clear from the e-mail of the 17th March 2014 sent by the applicant to the first respondent that the applicant informed the first respondent that she has rented out the property to raise the bond repayment amount. Further it is her testimony that she informed the first respondent telephonically of her new address and this is not disputed by the first respondent. It is my respectful view therefore that, having sent the s 129 letter on the 17th February 2014 and having been furnished with the new contact details of the applicant on the 17th March 2014, in order to comply with the provisions of s 129 the first respondent should have issued another letter in terms of s129 and addressed it to the new address of the applicant and has failed to do so.

[16] As stated in the case of Develex 876 CC supra, the provisions of the NCA are mandatory and failure to comply therewith is an illegality which cannot

be condoned by the court. It would defeat the purpose of the NCA if non-compliance with the provisions of s 129 can simply be condoned where there is no reasonable explanation justifying the non-compliance.

[17] In terms of s 129 the creditor may not proceed to institute legal proceedings to enforce the agreement before first providing notice to the consumer informing him of his rights to apply for debt review. This process can only be avoided if it is established that it is not going to produce positive results. There is nothing before this Court that suggests that the notice in terms of s 129 was not issued and addressed to the applicant at her new address for it would not have brought about positive results. In my view the legal proceedings which culminated in the default judgment being entered against the applicant on the 5th of August 2014 are a nullity as they were instituted prematurely. I therefore hold the view that the judgment of the 5th of August 2014 was wrongly entered against the applicant and as such she is entitled to rescission thereof.

[18] I respectfully disagree with the contention that the applicant has forfeited her right to apply for rescission of the judgment because on the 13th May 2015 she informed One Vision Investment that she has come to terms and is not contesting the fact that the first respondent is taking the property. The applicant stated in the same e-mail that the issue of the default judgment was never a part of her instruction to One Vision Investment and that it is her prerogative to deal with it in the future. It is on record that the applicant has launched two applications for rescission of judgment, the first on the 22nd April 2015 and the second on the 11th May 2015 having instructed different firms of attorneys and not One Vision Investment. The ineluctable conclusion is that the applicant never abandoned her right to apply for the rescission of the judgment but was making it clear to One Vision Investment

that she did not instruct them on the rescission of judgment. Moreover, two days before writing to One Vision Investment, the applicant had launched an application for the rescission of the judgment.

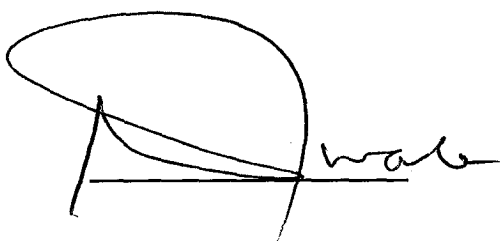
[19] I agree with counsel for the first respondent that the declaratory judgment granted by the court on the 27th of February 2015 was based on the monetary judgment granted on the 5th of August 2014. It is my respectful view therefore that the judgment of the 27th of February 2015 cannot stand on its own since it is depended on the monetary judgment of the 5th August 2014 and therefore falls to be rescinded as well .

[20] I have noted from the answering affidavit of the first respondent that the first, third and fourth respondents have, as a result of this application, cancelled the sale agreement concluded between them and therefore prayers 3 and 4 of the notice of motion have become mute between the parties.

[21] In the circumstances, I make the following order:

I. Both the judgments granted on the 5th August 2014 and 27th February 2015 respectively are rescinded;

II. The first respondent is to pay the costs of this application.



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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 3rd December 2018

Date of Judgment: 13th December 2018

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