REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 40615/2015

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

19/04/2018

SIGNATURE **DATE**

19/4/18

In the matter between:

FUTURE CHIRANGO MUVIRIMI	1st APPLICANT
PATRONELLA MUVIRIMI	2nd APPLICANT
and	
THE STANDARD BANK OF SOUTH AFRICA LIMITED	1st RESPONDENT
RIAZ SULIMAN GARDEE	2nd RESPONDENT
REGISTRAR OF DEEDS, PRETORIA	3rd RESPONDENT
SHERIFF, SANDTON SOUTH	4th RESPONDENT

In re:

THE STANDARD BANK SOUTH AFRICA LIMITED	PLAINTIFF
and	
FUTURE CHIRANGO MUVIRIMI	1st DEFENDANT
PATRONELLA MUVIRIMI	2nd DEFENDANT

JUDGMENT: REASONS FOR ORDER

AC BASSON, J

[1] On 6 March 2018 the following order was made:

1. The application for condonation is dismissed.
2. The rescission application is dismissed with costs. The applicants are ordered to pay the costs of the first and second respondents on an attorney and client scale including the costs reserved on 6 November 2017.

[2] Here are my reasons for this order: This is an opposed application for rescission of a judgment that was granted by default on 23 July 2015. In terms of the said order monetary judgment was granted against the first and second applicants ("the applicants") as well as an order declaring the immovable property in dispute specially executable. The applicants are also seeking an order that the sale in execution be set side and that the immovable property that has been transferred and registered in the name of the second respondent pursuant to the sale in execution be transferred back to the applicants. Only the first and second respondents ("the respondents") are

opposing this application. Answering affidavits were filed on behalf of the two respondents. A replying affidavit, albeit belatedly, was filed on behalf of the first and second applicants.

[3] The main action emanated from a home loan agreement concluded with the first respondent (Standard Bank of SA Limited). The said home loan was secured by way of the registration of a mortgage bond over the property. The applicants failed to punctually and timeously make payment of the instalments due and as a consequence whereof the first respondent instituted action for payment of the monetary amount and authorisation for execution upon its security. An order was grant by default on 23 July 2015.

[4] The applicants do not deny in their founding affidavit that they have fallen into arrears with the repayment of the instalments due. The basis upon which the applicants bring this rescission application is – (i) they did not receive the section 129 notice in terms of the National Credit Act ("the NCA");[1] (ii) the summons was not served upon them; (iii) the first respondent did not place facts before the court which granted the order for executablility of the immovable property as contemplated in terms of Rule 46 and that possibilities to liquidate the debt other than the sale of the immovable property exist; and (iv) they have applied for debt review. (I will return to these defences hereinbelow.)

[5] According to the applicants, they only obtained knowledge of the default judgment order on 19 March 2016. The rescission application was, however, only instituted on 29 August 2016. The rescission application is therefore late and the applicants have applied for condonation for the late filing of the rescission application. As late as 17 November 2017, the applicants filed a further affidavit amplifying on the reasons for the late filing of the rescission application. As will be point out hereinbelow, this affidavit does not take the matter any further.

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[1] Act 34 of 2005.

Sale in execution and transfer to the second respondent

[6] The property was sold on public auction on 27 October 2015 and on 20 January 2016 the property was transferred in the name of the second respondent. On 20 January 2016 a Notice to Vacate was served on the applicants via electronic mail and by way of Sheriff at the property. This notice indicated that the applicants' property had been sold in execution to the second respondent and that the applicants were no longer the lawful owners of the property.

[7] It is important to point out that, even before the Notice to Vacate was served on the applicants, the second respondent has already been engaged in communication with the first applicant via e-mail in respect of the property that he had bought in October 2015: On 8 January 2016 the first applicant in an email informed the second respondent that he will call the second respondent the next week as he (the first applicant) was in Zimbabwe. The topic of the e-mail is "*Topaz*"[2] which is a clear reference to the property in dispute. On 9 January 2016 the second respondent responded to this e-mail and informed the first applicant that he (the first applicant) had to make arrangements for his (the first applicant) son's accommodation as the second respondent now required the accommodation for himself. The first applicant responded to this email only on 29 February 2016 and confirmed receipt of the Notice to Vacate. The first applicant also copied the second applicant in the aforesaid e-mail. In this email dated 29 February 2016 the first applicant specifically stated that he had no objection to moving out of the property as per the Notice to Vacate but requested an extension until 31 March 2016 in order to find alternative accommodation.

[8] This exchange of communication between the first applicant and the second respondent is not without significance and in light of this exchange, there can in my view be no doubt that the applicants were fully aware of the sale in execution and the transfer of the property to the second respondent as far

[2] In the papers the disputed property is identified as "Topaz".

back as January 2016. Also significant is the fact that the applicants did nothing at the time to challenge the sale in execution and subsequent transfer of the property. The impression gained from a reading of these e-mails is that the applicants at that time accepted that they had to move out of the now disputed property. It is only much later that the applicants seemed to have had a change of heart and decided to challenge not only the court order granted in July 2015, but also to challenge the subsequent sale in execution.

[9] On 1 March 2016 the second respondent's attorney addressed an e-mail to the first applicant informing him that an extension of time to vacate would not be granted without payment of damages and that the applicants were accordingly obliged to vacate forthwith. The applicants failed to respond to this email and remained in unlawful occupation seven months after they were obliged to vacate. As a result, the second respondent instituted eviction proceedings in the South Gauteng Division of the High Court.

[10] It is of concern to the court that the first applicant in his founding affidavit makes no reference to this e-mail exchange between himself and the second respondent. This failure to do so casts, in my view, a dark shadow on the *bona fides* of the applicants' application for rescission and especially the explanation tendered by the applicants in their application for condonation for the late filing of the rescission application: The applicants' insistence that they only became aware of the default judgment in March 2016 is patently at odds with the information conveyed to the second respondent in the e-mails exchanged in January 2016. During argument, the court also took issue with the submissions advanced by counsel on behalf of the applicants who insisted that the applicants knew nothing about the court order and sale in execution until March 2016. Counsel, however, eventually conceded in argument that he did not properly read the papers and were not aware of the aforementioned e-mail exchange between the first applicant and the second respondent.

The eviction application and the service of the rescission application

[11] Turning back to the eviction proceedings: I have already pointed out that there is an application for eviction pending before the South Gauteng Division of the

High Court. From the papers before this court, it appears that, as in the present instance, the finalisation of those proceedings have been delayed by the applicants not having served their answering affidavits in time. The applicants' answering affidavit in the eviction application was due on 31 May 2016. As a result of the applicants' failure to file their opposing affidavit, the application to evict was enrolled on the unopposed motion roll on 30 August 2016. Despite not having filed any opposing papers, there was appearance by a legal representative on behalf of the applicants at the hearing. Counsel on behalf of the applicants then requested a postponement on the basis that they had now served their opposing papers the day before the hearing, being 29 August 2016. As a result, the matter could no longer proceed on 30 August 2016 and was postpone resulting in a delay in the finalisation of the eviction proceedings.

[12] Of significance to the present application, is the fact that, simultaneously with the applicants' answering affidavit in the eviction application, the applicants also served the recession application on the second respondent's attorneys of record. It is significant to point out that, at that time, the rescission application had not yet been served on the attorneys of the first respondent. In fact, if regard is had to the papers, it appears that the rescission application has to date not been served on the first respondent despite the fact that the first respondent is the judgment creditor. The first respondent only obtained knowledge of the rescission application after the second respondent's attorney liaised with them directly.

[13] On 14 September 2016 the attorney acting on behalf of the second respondent (Mr Meldrum) contacted Mr Van Zyl of Khoza Attorneys being the applicants' attorneys of record as per their Notice of Motion in the rescission application. Mr van Zyl of Khoza attorneys confirmed that they were not acting on behalf of the applicants in either the eviction proceedings or the rescission application and that their offices were wholly unaware of these proceedings prior to the second respondent's attorney of record serving documentation on them. According to the second respondent, it was apparent to him that the applicants were fraudulently making use of Khoza Attorney's good name and contact

details without their knowledge or consent. Further according to the second respondent, the applicants have been grossly *mala fide* in their opposition of the eviction proceedings as well as the institution of this rescission application as they have fraudulently been making use of the good name and contact details of Khoza Attorneys.

[14] Before I turn to the merits, I need to point out that, as in the case of the eviction application, the finalisation of this matter has likewise been delayed by the failure of the applicants to timeously file their papers: This matter was first enrolled on the opposed motion roll on 6 November 2016. Initially there was no appearance on behalf of the applicants. The first applicant, however, made his appearance in person at court at 11H30. After argument, the court granted the applicant an indulgence to file his replying affidavit within 10 days from the date of granting of the order and costs was reserved. The application was postponed to 6 March 2018. I have made provision in my order for a suitable costs order in respect of this postponement.

[15] On 17 November 2017, the first applicant filed a replying affidavit supplementing the grounds for condonation for the late filing of the rescission application as well as the first applicant's replying affidavit. Strikingly absent from this affidavit is any answer to the allegations contained in the second respondent's answering affidavit pertaining to the e-mail correspondence between the first applicant and the second respondent.

Condonation

[16] Default judgment was granted against the applicants on 23 July 2015. The rescission application was only served on the second respondent on 29 August 2016 despite the applicants having – on their own version – obtained knowledge of the default order on 19 March 2016. The application for rescission is therefore late.

[17] A rescission application can be instituted in terms of Rule 31(2)(b); Rule 42 or the common law. The requirements for a rescission in terms of Rule 31(2)(b) are – (i) there should be a reasonable explanation for the applicants' default

to defend the action; (ii) the application should be brought *bona fide* and not merely to delay; and (iii) the applicants should set out a *bona fide* defence. The application should be instituted 20 days after requiring knowledge of the order. In terms of Rule 42 the court may rescind or vary an order, *inter alia*, where the order or judgment was erroneously sought or erroneously granted in the absence of any party affected thereby. A rescission application in terms of Rule 42 must be instituted within a reasonable time. In terms of the common law a judgment can be rescinded on various grounds one of which is where a judgment had been granted by default if good cause can be shown.

[18] Where a rescission application has been instituted beyond the prescribed 20 days or not within a reasonable time, an applicant should apply for condonation. The principles regarding an application for condonation are well-known and I can do no better than to refer to the judgment of the Constitutional Court in *Grootboom v National Prosecuting Authority and Another*:[3]

> "[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.
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> ....
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> [35] It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case. In this case, the respondents have not made out a case entitling them to an indulgence. It follows that their application must fail."

[19] See also: *Melane v Santam Insurance Co Ltd*[4] where the court has set out all the considerations that must be taken into account in deciding an application for condonation:

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[3] 2014 (2) SA 68 (CC).
[4] 1962 (4) SA 531 (A).

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits."[5]

[20] I will now turn to the application for condonation bearing in mind the aforementioned principles.

Explanation for the delay

[21] The applicants advanced reasons for the late filing both in the founding affidavit and in the replying affidavit. The first applicant admits that the delay "*is gross*" but submits that he has a reasonable explanation for the delay and that the delay "*does not cause prejudice to the other parties*".

[22] Although the first application admits that he had received a Notice to Vacate, he insisted that he only became aware on 19 May 2016 that a default judgment was handed down on 23 July 2015. This allegation is patently untrue. I have already referred to the trail of correspondence between the first applicant and the second respondent dating as far back as January 2016 and the Notice to Vacate that was served on the first and second applicants on 20 January 2016. From the e-mails it is clear that the applicants knew as far back as

[5] At 232C – F.

January 2016 that the property had been sold. What makes matters worse for the applicants is the fact that the first applicant had agreed to vacate the property and had even negotiated with the second respondent for an extension in order to find alternative accommodation. To now claim that they only received knowledge on 19 March 2016 is not only opportunistic but simply untrue.

[23] I have already indicated that the additional reasons advanced in the replying affidavit do not take the matter further: In brief, the first applicant states that he was arrested in Zimbabwe on 31 January 2014 on charges of fraud and that certain travel restrictions were placed on him. This may be so but it does not deter from the fact that he already knew in January 2016 of the sale in execution and did nothing to address the matter.

[24] The applicants therefore have no explanation for the seven month's delay in bringing the recession application. This delay is furthermore excessive and requires a reasonable explanation. What perpetuates the seriousness of the delay is the fact that the second applicant in his founding affidavit withheld crucial facts from the court in that it is clear from e-mail correspondence between the first applicant and the second respondent that the first applicant in fact knew as far back as January 2016 that the property had been sold in execution. As already pointed out, at the time the first applicant made it clear that he was happy to vacate the property but only needed some time to find alternative accommodation. It is only at a later stage that the applicants had a change of heart apparently when the Notice to Vacate and the eviction proceedings have been served on them. Even then the applicants still waited before they instituted the rescission application. In this regard I am persuaded by the submission on behalf of the second respondent that it would appear that the sole purpose of the rescission application is an attempt to delay the pending eviction proceedings which are presently seized by another court. There is therefore no reasonable explanation for the delay in bringing the rescission application only on 29 August 2016.

[25] Apart from the fact that the applicants knew since January 2016 about the sale

in execution and did nothing, their explanation that they could not locate the court file is unsubstantiated and unreasonable. On the applicants' own version, they only started to look for the court file on 6 June 2016 which was already four and a half months after becoming aware of the judgment against them. There is no explanation for their inaction during the period 20 January 2016 and 6 June 2016. Then there is a further interval of two and a half months between 6 June 2016 and 23 August 2016 wherein the applicants have provided no explanation of what transpired in this period and what steps, if any, have been taken in order to launch the rescission application. They only launched the rescission application on 29 August 2016.

[26] Not only is the degree of lateness excessive (seven months) and for which the applicants have not been able to proffer a satisfactory explanation, the applicants have also not shown that they have any prospects of success in the rescission application. In order to be successful in a rescission application a party must show that they were not in wilful default of defending the main application and that they have a *bona fide* and substantial defence to the plaintiff's claim. In this regard the applicants only make bold and unsubstantiated allegations that they did not receive the section 129 notice or summons pertaining to the plaintiff's claim. However, they fail to explain why service that was done at their chosen *domicilium citandi et executandi* did not come to their attention. In respect of the service of the section 129 notice, it is now trite that the NCA does not require of the credit provider to bring the contents of section 129 to the subjective attention of the consumer. See in this regard: *Kubyana v Standard Bank of South Africa Ltd*:[6]

> "Conclusion: the obligation to deliver
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> [39] In sum, the Act does not require a credit provider to bring the contents of a s 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be to make the s 129 notice available to the consumer by having it delivered to a designated address. When the consumer has elected to receive notices by way of the

[6] 2014 (3) SA 56 (CC).

> postal service, the credit provider's obligation to deliver generally consists of dispatching the notice by registered mail, ensuring that the notice reaches the correct branch of the Post Office for collection and ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting her collection. This is subject to the narrow qualification that, if these steps would not have drawn a reasonable consumer's attention to the s 129 notice, delivery will not have been effected. The ultimate question is whether delivery as envisaged in the Act has been effected. In each case, this must be determined by evidence."

[27] The applicants also made an allegation that they have instituted debt review proceedings without providing the court with any particularity or proof that such a process had in fact been instituted. In respect of the fact that the applicants were in arrears with their bond payments, the applicants make no submissions. The applicants' only defence on the merits is the fact that there was an alleged debt review process. This submission is, however, at odds with what is stated in the application for default judgment. In that application (that served before the court on 23 July 2015, the plaintiff (Standard Bank of SA Limited) stated that it had implemented various steps to rehabilitate the arrears account prior to implementing legal action. Several calls were made to the first and second respondents (applicants in the rescission application) before the matter was handed over to the Legal Department. The first applicant does not address these allegations (in his founding affidavit in the application for rescission). The plaintiff furthermore attached to the application for default judgment the section 129 Notices as well as the Registered Item Notification Slip. Summons was served by the Sheriff on the first and second respondents' chosen *domiciliaum citandi et executandi*. From the papers that served before the court, the applicants as at 22 June 2015 were in arrears in the amount of R 86 645.93 which amounted to approximately 5.7 instalments. Lastly, the applicants have not placed any facts before the court as to any other manner in terms of which their debt of approximately R1.7 million can be settled.

[28] It is more significant that the applicants do not deny in their application for rescission that their bond account was in substantial arrear and that the applicants were indebted to Standard Bank.

[29] In conclusion, having regards to the all the facts I can find no reason to grant condonation: The explanation for the lengthy delay is not reasonable and certain periods remain unexplained. Furthermore, the applicants have omitted to disclose to the court the communication between them and the second respondent as far back as January 2016. As pointed out, the application for rescission has no prospects of success. Lastly, the prejudice that the second respondent will suffer if rescission is granted can also not be overlooked. I will now briefly turn to the position of the second respondent.

Second respondent

[30] I have already referred to the fact that the second respondent purchased the immovable property on public auction on 27 October 2015. The property was transferred into the name of the second respondent on 20 January 2016. In law, the second respondent is therefore the lawful registered owner of the immovable property in dispute. It is trite that a property cannot be vindicated from a *bona fide* purchaser unless there exists evidence that the sale in execution was a nullity. See in this regard: *Knox NO v Mofokeng & others*[7] where the court held as follows:

> "[4] The current matter concerns the situation where a judgment is rescinded after the property sold at the sale in execution had been transferred to a bona fide purchaser, who had no knowledge of the claims of the owner at the time of registration of transfer. In the present instance, the immovable property in question has been sold and transferred (by way of registration in the name of the purchaser in the Deeds Office) to a bona fide purchaser following the sale in execution and has thereafter been sold and transferred by the first purchaser to a second bona fide purchaser. The dispute between the parties in the present matter turns on the implications of the abstract theory for the passing of ownership under such circumstances and the application of the common-law

[7] 2013 (4) SA 46 (GSJ).

adage that nobody can transfer more rights to another than he himself has ("*nemo dat qui non habet*"), which has been described as the "golden rule" of the law of property (see for example Badenhorst, Pienaar & Mostert (5 ed) *Silberberg and Schoeman's the Law of Property* at 73).

[5] It appears from the analysis of the case law and the relevant common-law principles dealt with below that the judgment debtor's entitlement to claim restoration of the property once the judgment, in terms whereof the property had been sold in execution, has been rescinded, depends on the factual circumstances present at the time of rescission. At least three factual scenarios can in general be envisaged, although other factual permutations are possible. The first scenario is where the sale in execution had not been perfected by delivery in the case of movables and registration of transfer in the case of immovables. As indicated above, in such event, the owner is in principle entitled to claim recovery of the property in question following the rescission of the judgment (see *Vosal Investments (Pty) Ltd v City of Johannesburg* 2010 (1) SA 595 (GSJ) [also reported at [2009] JOL 23873 (GSJ) – Ed]; *Jubb v Sheriff, Magistrate's Court, Inanda District*; *Gottschalk v Sheriff, Magistrate's Court, Inanda District* 1999 (4) SA 596 (D) [also reported at [1998] JOL 1940 (D) – Ed] at 605F–G). The second scenario is where the sale in execution had been perfected by delivery in the case of movables or registration of transfer in the case of immovables, but the purchaser had knowledge of the proceedings instituted by the judgment debtor for the rescission of the judgment in question prior to delivery or registration of transfer. In such event, the owner is also in principle entitled to recovery of the property in question, even where transfer had already been effected (see the *Vosal Investments* judgment, above, at paragraph [16]). The third scenario is where the sale in execution has been perfected by delivery in the case of movables or by registration of transfer in the case of immovables to a bona fide purchaser who had no knowledge of the judgment debtor's proceedings for the rescission of the judgment or where transfer of ownership has been effected prior to the institution of the rescission proceedings. The conclusion reached in the analysis below is that where transfer of ownership had been effected pursuant to the sale in execution by the time the judgment has been rescinded, the judgment debtor is not entitled to recover possession of the property in question, unless it can be established that the judgment and/or the sale in execution constituted a nullity. This conclusion is dictated and explained, in my view, by the application of the

abstract theory for the transfer of ownership, which will be dealt with in greater detail elsewhere in this judgment."

[31] In this regard the second respondent specifically states in his answering affidavit that when he purchased the property on 27 October 2016 at a public auction held by the Sheriff Sandton South, he was a *bona fide* purchaser and that he had no knowledge during the period between the purchase of the property at the auction and when the transfer of the property was registered, that the applicants intended to apply for a rescission of the default judgment and apply to set aside the sale in execution. This intention was also not conveyed to the second respondent in the e-mail correspondence. Moreover, despite the first applicant's assertion that no party will suffer any prejudice if rescission is granted, the second respondent is adamant that he continues to be prejudiced by the fact that the applicants remain in occupation of the property whilst he is under an obligation to service the bond repayments in respect of the property. He is further prejudiced by the fact that he is unable to lease out the property to prospective tenants in light of the applicants continued unlawful occupation thereof.

Conclusion

[32] In light of the aforegoing, the condonation application and the rescission application fall to be dismissed. The application to set aside the sale in execution must likewise be dismissed. In respect of the latter issue, the applicants have also not placed a single shred of evidence before the court upon which this court may come to a conclusion that the sale in execution was not conducted in accordance with the applicable Rules of Court and statutory provisions. The second respondent is furthermore suffering severe prejudice as a result of the obstructive actions of the applicants: He is currently liable for the monthly bond repayments, rates and taxes and is unable to rent out the property. There is also no evidence before the court to come to the conclusion that the second respondent was not a *bona fide* purchaser.

[33] In respect of costs, the second respondent has sought punitive costs against the applicants. I am, in light of the facts, in agreement that the applicants'

conduct *vis à vis* the second respondent warrants a punitive costs order.

[34] In respect of the first respondent, I am likewise of the view that the applicants' conduct warrants a punitive costs order.

JUDGE AC BASSON

JUDGE OF THE HIGH COURT