REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **39484/2016**

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

5/3/18

Date:

WHG VAN DER LINDE

5/3/18

In the matter between

Hlangabeza Gumede	Applicant
and	
ABSA Bank Ltd	First respondent
Dawid Stefanus van der Spuy	Second respondent
Sheriff of Randburg South West	Third respondent
Registrar of Deeds, Johannesburg	Fourth respondent

Judgement

Van der Linde, J:

Introduction

[1] This is an application under rule 42(1)(a) of the uniform rules of court, alternatively the common law, for rescission of a default judgment for R1 748 496.43 and interest, and which also declared the applicant's primary residence executable; and to set aside the subsequent sale in execution. Registration of transfer to the new purchaser has not taken place. The debt owed by the applicant was pursuant to a loan, secured by mortgage bond, repayable in monthly instalments, but accelerated if one was missed.

[2] At the end of the hearing on 20 February 2018 and at the invitation of the court, counsel for the applicant said that the applicant is ready to pay up all arrears and so reinstate the agreement by operation of law in terms of the National Credit Act 34 of 2005 ("the NCA"). I intimidated that I would reserve judgment on the application and that I should be informed immediately that occurred.

[3] After I had prepared this judgment and my registrar had notified the parties that I was about to hand it down, my registrar received an email from the applicant's attorneys on 22 February 2018 ostensibly concerning payment by the applicant of the arrears. In response, my registrar directed a letter to the attorneys on both sides calling for further heads of argument, and pursuant thereto, I received those.

[4] Ultimately the issues raised in the letter and the further heads of argument do not affect the rump nor outcome of this judgment, and so I proceed to deal with what was raised before me in argument by counsel in court, and then return to the issues raised subsequent to the hearing.

[5] Three points were argued by Ms Lekokotla who moved the application. Counsel also applied for the admission of two supplementary affidavits: the first dealing with the lack of a track and trace report to the first respondent's ("the bank", and I will refer to it as such) opposition to the application, and the second dealing with the asserted lack of authority of

the bank's deponent to oppose the rescission and setting side application. Counsel for the bank, Mr Horn, did not oppose the admission of those affidavits and they were received, as was a responsive affidavit by the bank.

[6] The three points on the merits raised by applicant's counsel were first, that the s.129(1) notice in terms of the NCA was not received by the applicant and so in terms of s.129(2) the original summons proceedings could not have been commenced; second, that the description of the property both in the writ of execution and the notice of sale in execution did not comply with the degree of specificity exacted by rule 46; and third, that the bank's deponent did not have authority to oppose the applicant's application. I deal with these points in turn.

Did the bank discharge its notice obligation under s.129(1) of the NCA?

[7] The applicant's case is that he simply did not receive the s.129(1) notice. He does not dispute that Bromhof post office serves the area in which his property, in which he was residing, is situate. The bank's summons asserts that the s.129 notice dated 7 March 2016 was delivered to that post office by both ordinary and registered mail; that the domestic item tracking report, also annexed at p280 and following of the application papers, proves that the notice was dispatched to the applicant's address; that it reached the correct (Bromhof) post office; and that a notification informing the applicant that the notice is available for collection by him was dispatched to him by that post office.

[8] The applicant says he never received the summons, but he must have had it by the time he deposed to his founding affidavit, because he refers to it and to some of its attachments in that affidavit. He also refers specifically to the track and trace report that was attached to the summons, and his answer to the bank's case in its summons that it had delivered the s.129 (1) notice, is as follows:

"The section 129 letter was sent to the incorrect post office therefore the reason (sic) why I did not receive the notice of registered letter. The Saxonwold post office does not service the Northwold are, the Northwold area is serviced by the Bromhof post office."

[9] In its answering affidavit the bank explained that the applicant had misread the track and trace report, and that in fact it shows that the notice was posted at the Saxonwold post office, thence sent to the Bromhof post office, there scanned, and a notification then sent from there to the applicant. The track and trace report was not annexed to the answering affidavit, and so the applicant challenged these assertions in rely.

[10] This absence also motivated the applicant's application to amend his notice of motion to include a prayer for setting aside the default judgment (initially he had only asked for setting aside the sale in execution) on the basis that the s.129(1) notice had been sent to the incorrect post office.

[11] This elicited a supplementary answering affidavit by the bank, to which its deponent annexed the track and trace report, and in which she explained that the s.129 notice was posted at the Saxonwold post office on 23 March 2016; that this was evident from the track and trace report itself as well as the second page of the notice itself which contained the registered mail receipt bearing the date stamp of the Saxonwold post office; that the notice was in transit on 23 March 2016; that the notice was at the Bromhof branch of the post office on 29 March 2016; and that the notification was sent to the recipient, the applicant. This was all confirmed in an affidavit by the attorney dealing with the matter. That is the last word on the topic.

[12] The facts must then in my view rest there. Does this constitute compliance with the section? In my view it does, on the authority of the Constitutional Court in Sebola V Standard Bank of SA Ltd.[1] That court held that if a credit provider had put up the type of evidence to which I have referred above then, *"in the absence of contrary indication"*, a credit provider may

[1] 2012 (5) SA 142 (CC) at [77], 78].

credibly aver that notification of the notice's arrival reached the consumer, and that a reasonable consumer would have ensured retrieval of the notice from the post office.

[13]The *"contrary indication"* must of course emanate from the consumer. Here contrary indication did emanate from the consumer, and it was the assertion that in fact the registered piece was posted to the Saxonwold post office. But this assertion has been shown to have been incorrect. The conclusion is then inevitable that the bank had properly delivered the notice in terms of s.29(1), and the application to rescind the default judgment must fail.

Did the property description fall short?

[14]The description of the property in the writ of execution commences with the usual title deed description, followed by the street address. The writ is addressed to the sheriff, and it directs him to attach the property so described. It was said that this description falls short of the standard required by rules 46(1)(b) and 46 (3).

[15]At the relevant time, rule 46(1)(b) required *"a full description of the nature and situation (including address) of the immovable property to enable it to be traced and identified by the sheriff; and shall be accompanied by sufficient information to enable him or her to give effect to subrule (3) hereof."* The emphasis is mine.

[16]Subrule (3) says nothing further about the description; it concerns the mode of attachment, and says that the sheriff must serve a notice on the owner, on the registrar of deeds, and on the occupier.

[17]Adopting a purposive approach to the interpretation of the rule, as is self-evidently invited by the very terms of paragraph (b) of the subrule (*"to enable him or her to give effect"*), it seems to be that the description complies. One is dealing with a property in ostensibly a residential area and, accepting that on the deeds description it could potentially have been an undeveloped erf, the sheriff is given enough information to trace it. The street address

furnished is specific, the suburb in which the property is situated is specific, and the city is provided. And of course, as it happens, the sheriff was in fact able to locate the property and to attach it in accordance with subrule (3). In my view the objection to the writ must fail.

[18]The objection to the notice of sale in execution is, conceptually, the same: that the description falls short of what the relevant subrule requires. The relevant subrule is rule 46 (7)(b), and it requires *"a short description of the property, its situation and street number, if any ..."*. Again my emphasis.

[19]The notice of sale in execution again provided the deeds registry description and the street address. But it also said: *"Improvements: The property consists of: Lounge, TV Room, 3 X Bedrooms, 1 X Bathroom, Kitchen; 1 X Store room; 1 X Carport; 1 X Garage and Swimming pool. (The nature, extent, condition and existence of the improvements are not guaranteed."*

[20]The applicant said that this description omitted: 1 x bedroom, 1 x bathroom and toilet; 1 x guest toilet; 1 x study; 1 x carport; 1 x garage; 1 x bar area; 1 x outbuilding with toilet and shower (maid's quarters); 1 x outbuilding study area; 1 x patio with braai area; and 1 x open dining room leading to a lounge area.

[21]Relying on Pillay v Messenger Magistrates' Court, Durban and Others,[2] Cummings v Bartlett NO and Another,[3]and De Fortier v Firstrand Bank Ltd and Others In Re Firstrand Bank Ltd v De Fortier,[4] the applicant submitted that the description actually furnished fell short. The central argument was that the applicant was prejudiced, because potential purchasers who may have been attracted to the sale in execution had the full detail been given, would not have responded to the lesser description actually given.

[22]In Pillay's case only the deeds description was given and thus held to have been inadequate. In Cummings the property description provided the title deed description but did not supply the street address. The following was added: *"The following improvements are believed to*

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[2] 1951 (1) SA 259 (N).
[3] 1991 (4) SA 135 (E).
[4] (57489/2011) [2015] ZAGPPHC 823 (8 December 2015).

be in the property but nothing is guaranteed: Partly erected business complex comprising brick and cement construction."

[23]In fact, the property could, in terms of its title deed, be used either for business or residential purposes. It was zoned for general and industrial purposes, permitting the property to be used for industrial usage, shops or flats. The local authority had granted permission to construct a complex consisting of nine shops, 11 flats, 12 garages, a restaurant and offices on the property, and permission had also been granted to sell the shops, flats, offices and restaurant under sectional title. Further, four garages and a water tank had been completed, and various foundations had been laid for the remaining development. The court held that there had been non-compliance with rule 46(7).

[24] And in De Fortier Caron it was held that there had been non-compliance because the existence of a guest cottage and a flat had not been mentioned. The court had regard to the fact that a guest house business was being operated from the premises, and concluded that thus the "kind" of property being sold had not been identified.

[25]The bank in turn relied particularly on Röntgen v Reichenberg[5] and Mzimela v Absa Bank Limited and Others.[6] In the former it was said that only the type of improvement is required to stated (my emphasis): *"Enough must be stated to identify <u>the kind of property</u> to be sold, bearing in mind that a prospective buyer will obviously want to inspect the property himself rather carefully, before committing himself to the payment of a few hundred thousand rand."*

[26]This concept of identifying the kind of property to be sold underlies the three cases on which the applicant relies. In Pillay the notice conveyed that the land was unimproved; in Cummings the commercial aspect of the property was wholly understated, if at all; and in De Fortier Caron again, the business dimension was not stated.

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[5] 1984 (2) SA 181 (W) at 184A.
[6] (6960/2016) [2016] ZAKZDHC 27 (10 August 2016).

[27]That feature does not appear in this case. Yes, the outbuilding study area was not mentioned, but the inside study was mentioned. There was thus no misleading or understatement here of the kind mentioned in those three cases.

[28]The second judgment relied on by the bank appeals to me, and I quote from it below, omitting footnotes (my emphasis):

"[4] The description of the property put up in the advertisement, and in the conditions of sale, gave the property description contained in the title deed, the address of 3.... S..... C....., D..... N..... and went on to describe the property in the following terms: 'Dwelling under brick and tile consisting of: entrance hall, lounge, dining room, study, family room, sun room, kitchen, 7x bedrooms, 5x bathrooms, scullery, laundry, building, walling, paving, swimming pool.'

[5] In the founding affidavit, the applicant claims that a number of features of the property which ought to have been included in the advertisement were omitted. These are a double lock-up garage, a triple open plan garage, a double garage at the rear of the property, an entertainment area with built in braai facilities on the ground floor adjoining the pool, a koi pond located in the garden area, a barroom, air conditioners in all the rooms, jacuzzi baths in three of the bedrooms, the fact that the house is a multi-story dwelling, the fact that the property has two road frontages, an entertainment area on the second floor with unhindered sea views, that all six bedrooms are en suite and that there is also a custom-made fireproof strong room on the property.

[6] The requirement for the description in the advertisement is governed by rule 46(7)(b) which, in its material parts, requires 'a notice of sale containing a short description of the property, its situation and street number, if any . .

[7] In argument, the applicant relied primarily on the failure of the advertisement to mention the garages and the fact that the property had two road frontages. It was submitted that these omissions meant that the provisions of rule 46(7)(b) were not complied with in the advertisement.

[8] It is clear that the provisions of the rule are peremptory.[1] The purpose is to guard against a debtor being 'despoiled without a corresponding reduction of his liabilities and satisfaction of his creditors.' It stands to reason, accordingly, that the purpose of the advertisement is to attract bidders. There is, as was submitted by the first respondent, a continuum stretching from a bare, technical description of the property to what has been termed the eulogistic style of auctioneers' advertisements. Neither of these two extremes meets the requirement of the rule. They are met by a description which is somewhere between them.

[9] The first respondent submitted the following as principles by which to judge whether or not the rule has been satisfied. The description must be short. It must contain more than the basic cadastral or technical description. It should state whether or not there are buildings or improvements on the land. What must be inserted are the main characteristics of the property which might reasonably be expected to attract the interest of potential purchasers. It neither requires nor allows the listing of all the features in the eulogistic style of

auctioneers. A submission in Rossiter that where there was no indication in the advertisement as to whether there were any buildings on the property, the reasonable reader could only have concluded that the land was vacant land, was rejected.
[10] The above principles are not attacked by the applicant and I agree with them. Taking this into account, it is my view that the advertisement complied with the provisions of the rule. I see no reason why a potential purchaser would not have been attracted to the property by the omissions highlighted by the applicant. It is clearly a luxury property. It clearly has a number of facilities and a highly sought after street address. It seems unlikely that a person reading the advertisement would come to the conclusion that there were no garages on the property simply because they were not specifically mentioned. It is certainly not necessary to mention each potential feature of a property."

[29]The principle that I extract from this case is that where the kind of property has been correctly described, what remains is a question of degree. Certainly the description does not take the place of that which an estate agent may have provided. Nor is it permitted to be so sparse as to be off-putting to the potential purchaser. Where the description is wrong, that is one thing; but where the description simply falls short, or does not list every single facet of the improvements, it does not in my view fall short of the rule.

[30]In this case the kind of property was correctly identified. On the applicant's version, certain facets of the property were not listed. Taking the principles referred to above into account, and reminding myself of the relevant phrase of the subrule – *"a short description of the property"* – I believe that the description passes muster.

Authority

[31]There remains the issue of the alleged lack of authority of the bank's deponent to have resisted the applicant's application. I believe the bank's response to this, namely that a witness called by a party to testify on its behalf need not be authorised to testify, is sound; and that if there is a challenge to the authority of the attorneys, the procedure is that prescribed by rule 7, which in this case was not triggered by the applicant.

The subsequent issues

[32]My registrar received the following email on 22 February 2018 just before 13h00 (my emphasis):

"From: Bianca Gugu Gumede [mailto:bianca@ngassociates.co.za]
Sent: 22 February 2018 12:56 PM
To: Sibusiso Dlamini
Cc: 'Buhle Lekokotla'; 'Kris Harmse'
Subject: H Gumede / ABSA

Dear Judge van Der Linde

We refer to the matter of Hlangabeza Gumede v ABSA Bank & Others (Case no: 39484/2016) which was heard before this honourable court on Tuesday, 20 February 2018.
We have paid the balance of the outstanding arrear amount as per the figure contained in the application for default judgment as reflected on page 121 of the court bundle. ((R133 960.79 less the amounts already paid in the total amount of R74 000.00 (pages 184 to 189 of the court bundle). We initially paid R60 000.00 and thereafter realized that we short paid by R635.50, for this reason we paid an amount of R700.00 this morning. We attach proof of payment to this effect.
We have also paid an amount of R10 822.70, which appears to be interest that was owed on the arrear amount. The details thereof are contained on pages 123 to 127 of the court record, in particular page 127 thereof. We attach proof of payment to this effect.
We have been requesting the first respondent's attorneys to give us proof of their taxed costs in respect of the default judgment. They informed us that they do not have the taxed costs but they have today sent us proof of the actual costs that were paid by ABSA in respect of this matter. We have attached an email received from ABSA's attorneys attaching the costs paid by ABSA for the period April 2016 to June 2017 in the amount of R43 644.98.
In light of the fact that judgment will be handed down tomorrow morning and in order to show our bona fides and to live up to the undertaking that we made before this honourable court, we have paid a total amount of R43 700.00 in respect of the costs. We highlight to the honourable court that the costs that ABSA's attorneys have sent to us for payment relate to the period from April 2016 to June 2017. The default judgment was granted in ABSA's favour on 29 August 2016 and the property was declared specially executable on the same day (pages 85 – 86 of the court bundle).
The sale in execution took place on 23 March 2017. This means that the costs that the applicant has paid for exceed the period of the default judgment as well as the sale in execution. Our client paid this amount in order to not get into an unnecessary fight about their reasonableness. We will however, request the actual invoices later in order to ascertain exactly what they relate to and whether they are reasonable. However, for purposes of this matter we decided to pay the costs anyway.
We attach the following documents for the Honourable Judge's attention:
1. Our email sent to ABSA's attorneys yesterday regarding our payment of R60 000.00 in respect of the arrear amount;
2. Our email sent to ABSA's attorneys this morning regarding our payment of R700.00 in respect of the arrear amount;
3. Our email sent to ABSA's attorneys this morning regarding our payment of R10 822.70 in respect of what appears to be interest on the arrear amount;
4. Email from ABSA;s attorney this morning setting out their invoiced fees and disbursements in the amount of R43 644.98 for the period April 2016 to June 2017. In this email ABSA's attorneys incorrectly recorded the arrear amounts as R330 035.23. In this

regard I refer to ABSA's attorney's affidavit in support of the default judgment where the arrear amount is set out as R133 960.79 (page 121 of the court bundle);
5. Our email sent to ABSA's attorneys this morning regarding our payment of R43 700.00 in respect of what we believe to be reasonable costs for the default judgment.
Yours faithfully"

[33]In response to this email, my registrar, at my direction, addressed the following email to the parties' attorneys:

"Dear sirs/Mesdames
Re Gumede v ABSA Bank and others, case no. 39484/2016
We direct this letter to you at the instructions of Judge Van der Linde.
Attached to this email is a letter from the attorneys representing the applicant, as well as attachments thereto. Judge Van der Linde has requested both parties to submit written argument to my email address as above by not later than next Tuesday, 27 February 2016, ay 16h30 as to whether any of the material submitted by the applicant after the hearing:
(a) May or should be admitted;
(b) Has or should have any effect on the outcome of the application currently being considered, and if so, what that effect should be.
The Judge has asked that I direct the attention of the parties to s.26(3) of the Constitution as also the judgment in the Constitutional Court in Nkata v FRB 2016 (4) SA 257 (CC).
The Judge has also informed me that he will nor hand down the judgment that he has prepared tomorrow morning, as indicated; and he has requested that apart from the written argument referred to above, no further email correspondence should be entered into on the matter.
Kind regards
Sibusiso Diamini
Registrar to Judge Van der Linde"

[34]Heads of argument were received from both parties. It appears from these that there is a dispute between the parties as to whether the applicant's payment of the arrear amounts owing when the default judgment was granted would result in the reinstatement of the loan agreement in terms of s.129(3) of the NCA. The applicant appears to contend that it does.[7]

[35]The bank disputes this, contending that all arrears are to be paid up in terms of that section.[8] Commensurate with their respective positions, the applicant submits the further material is admissible to prove the payment; the bank disputes this, and submits that on any basis the further material is irrelevant and thus not admissible in this application.

[36]The relevant part of s.129 of the NCA provides as follows (my emphasis):

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[7] Compare applicant's supplementary heads of argument, para 23: *"For the above reasons, the applicant has also complied with section 129(4) of the NCA."*
[8] Bank's supplementary heads of argument, para 5.

"129. Required procedures before debt enforcement
(1) ...

(2) ...
(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider ***all amounts that are overdue****, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.*
(Section 129(3) substituted by section 32(a) of Act 19 of 2014)
(4) A credit provider may not re-instate or revive a credit agreement after-
(Words preceding section 129(4)(a) substituted by section 32(b) of Act 19 of 2014)
(a) the sale of any property pursuant to-
(i) an attachment order; or
(ii) surrender of property in terms of section 127;
(b) the execution of any other court order enforcing that agreement; or
(c) the termination thereof in accordance with section 123."

[37]In Nkata v Firstrand Bank Ltd and Others (The Socio-Economic Rights Institute of South Africa intervening as Amicus Curiae),[9] to which the parties were referred in the email sent by my registrar, the Constitutional Court held the phrase *"all amounts that are overdue"* quoted above refers to the arrear instalments, and not also accelerated debt. The court also held that the preclusion of the reinstatement *"after . . . . **execution** of any other court order enforcing that agreement"* referred not to the process of execution but to the realisation of the proceeds of the sale in execution.

[38]The underlay of the reasoning in that court is that all the arrears have to be paid up,[10] and not only those owing at some earlier point in time.[11] Reinstatement, meaning the dismantling of the effects of contractual acceleration, can only occur if all the arrear monthly instalments are paid; it is akin to a purging of a contractual default. Such an interpretation also fits the scheme of the section involved, which is to cause the credit agreement to be reinstated; there can be no question of the agreement being reinstated if it needs to drag

[9] 2016 (4) SA 257 (CC).
[10] Ibid, [121].
[11] Ibid, [85].

along some unpaid arrear lump of debt that does not fit the contractual scheme of requiring the debt settlement in monthly instalments.[12]

[39]The parties also made submissions concerning the importance of s.26(3) of the Constitution, for which I am grateful. That section places an obligation on this court to act proactively in finding a solution to the debtor's predicament that is less drastic than losing a home. But integral to that predicament is of course the acknowledgement of the fact that the debt to the bank is real, and must be honoured. Having regard to the circumstances, particularly the apparent ability of the debtor to pay as is evident from his recent payment record referred to above, it seems appropriate to afford some relief.

Conclusion

[40]In the result the application cannot succeed. I have however decided that this is an appropriate case to suspend, under rule 45A, the execution of the order for a short period of time to enable the applicant, if he is so minded, to attempt to pay the arrears. I had in mind here paragraph 5 of the applicant's attorney's letter of 22 February 2018, despite not admitting the subsequent material in evidence, simply on the basis that it expresses a desire on the applicant's part, and is not disputed by the bank (emphasis supplied):[13]

"Please also provide us with the breakdown of the arrear monthly instalments from after the date of the order declaring the property executable. Our client is also prepared to pay those instalments, even though, depending on the amount he may have to reach a settlement arrangement with your client for their payment."

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[12] This interpretation also fits the judgment in Nedbank Limited v Fraser and Another, Nedbank Limited v Chabalala and Another, Nedbank Limited v Machitele and Another, Nedbank Limited v Moccasin Investments (Pty) Limited, Absa Bank Limited v Young Star Traders CC and Another (2011/00418, 2011/9315, 2010/28374, 2010/31703) [2011] ZAGPJHC 35; 2011 (4) SA 363 (GSJ) (4 May 2011) on which the applicant relies: *"[41] Similarly in my view, where the provisions of the NCA are applicable it is open to a debtor to exercise the rights conferred in section 129(3) of the NCA within the time period therein provided and redeem the immovable property from the execution process by making payment not of the full sum of the judgment debt, interest and costs, but of the overdue amounts of the arrears together with default charges and legal costs of enforcing the agreement up to the time of reinstatement."*

[13] Bank's supplementary heads of argument, para 9.3.

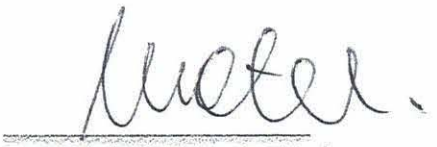
[41]Costs as between attorney and client are contractually justified, as submitted by the bank. But I have a discretion and here, where there have been such anxious attempts to pay the arrears, I believe the fair result is to afford only the usual scale of costs. In the result I make the following order:

(a) The applicant's email of 22 February 2018 and its attachments are disallowed.

(b) The application is dismissed with costs.

(c) The execution of this order is suspended for fifteen days.

Date argued: 20 February 2018
Date judgment: 5 March 2018



WHG van der Linde
Judge, High Court
Johannesburg

Appearances

For the Applicant:	**Adv. B.D. Lekokotla**
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For the Respondent:	**Adv. N.J. Horn**
Instructed by:	**Smit Sewgoolam inc** 12 Avonwold Road Saxenwold Johannesburg Tel: 011 646 0006 Fax: 011 646 0016