REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO:36132 /2012

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

1/3/2013.

In the matter between:

**Lawangee: Babu Ramguthy** **First Applicant**

**Lawangee: Leelawanthie** **Second Applicant**

and

**Absa Bank Ltd** **Respondent**

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**JUDGMENT**

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**Mia AJ:**

[1] The applicants seek an order that the judgment granted on 11 June 2009 by default be rescinded and further seek leave to defend the main action. The application is brought in terms of Rule 31(2).

[2] The applicant states that he only became aware of the judgment on 20 August 2012 when the Sheriff delivered a notice of execution against the immovable property upon first and the second applicant. The judgment was granted by default by the registrar. The applicant states that he did not receive a notice in terms of section 129 of the National Credit Act 134 of 2005 (The Act) or the summons or writ of execution and will suffer great prejudice if the judgment is not rescinded as there has been non-compliance with section 129 of the Act. Due to this non-compliance they were not informed of the opportunity to consult a debt counsellor at the relevant time. The application for rescission is dated 27 August 2012.

[3] In resisting the application, Mr Van Niekerk submitted on behalf of the respondent that the section 129 notices were served on the applicants' addresses per registered post. In view of the time that has passed since 2009 a track and trace report is not available which can positively confirm service on the applicants. The summons and writ of execution were affixed to the main entrance. Mr Van Niekerk referred this Court to the judgment in *Sebola and Another v Standard Bank of South Africa Ltd and another( Socio- Economic Rights Institute of South Africa and others as Amici Curiae* 2012 (8) BCLR 785 at paragraph [79] where the court stated;

"*If in contested proceedings the consumer asserts that the notice went astray after reaching the post office, or was not collected, or was not attended to once collected, the court must make a finding whether, despite the credit provider's proven efforts, the consumer's allegations are true, and if so, adjourn the proceedings in terms of section 130(4)(b).*"

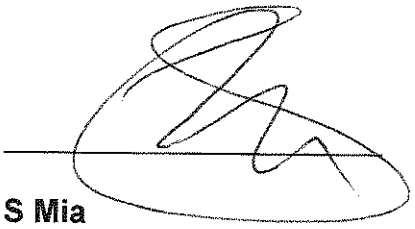
[4] In view of the track and trace report not being available due to the passage of time the applicants' statement that it did not come to their attention is entirely possible. The Sheriff's comment on the returns of service for the summons and writ of execution read as follows: "FENCED AND GATES LOCKED. UNABLE TO GAIN ENTRY. NOBODY AT HOME." In view of the comments on the Sheriff's returns it is possible also that the summons and writ of execution attached to the gates did not come to the applicants' attention. The notice of the sale in execution was served on them and they appear to have responded within a reasonable time. In light of there being no positive proof to rebut the applicant's evidence that they did not receive the section 129 notice and the summons, I am satisfied that they were not in wilful default. The applicants' assertion that they would have at the relevant time consulted a debt counsellor must be taken in account. In view of the notice not coming to the applicants' attention they were denied the use of an important safeguard and mechanism introduced to assist debtors in the position of the applicants.

[5] Mr Van Niekerk submitted that having regard to the view expressed by Cameron J in *Sebola supra* this Court must make a finding regarding the respondent's efforts and the applicant's allegations and if the applicants statements are accepted postpone the proceedings in terms of section 130(4)(b) of the Act. Whilst this may be applicable, I hold the view that this can only happen before the judgment is granted. In circumstances such as the present when the judgment has been granted already, if the applicant's version is accepted then the mechanism

afforded in terms of the section 129 notice has not been afforded to the applicants and constitute good cause for granting the rescission.

[6] Having regard to the above the following order is granted:

1. The judgment granted on the 11 June 2009 is hereby rescinded.
2. The applicants are granted leave to defend the main action.
3. The respondent is ordered to pay the costs of the application.



**S Mia**

**Acting Judge of the South**

**Gauteng High Court, JHB**

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| for the applicant: | T P Moloto(Right of appearance in terms of S4(2) of Act 62 of 1995) |
| Instructed by: | T P Moloto & Co Inc |
| Counsel for the respondent: | Adv. D Van Niekerk |
| Instructed by: | Hammond Pole Majola |