IN THE HIGH COURT OF SOUTH AFRICA

GAUTEND DIVISION, PRETORIA

CASE NUMBER:62570/2015

In the matter between:

RUYLYN DU PLESSIS **APPLICANT**

~~DELETE WHICHEVER IS NOT APPLICABLE~~
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
2 May 2018 DATE
SIGNATURE

and

FIRSTRAND BANK LIMITED T/A WESBANK **RESPONDENT**

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This application was brought in terms of Rule 42(2) for the rescission of a Default Judgement granted by the Registrar on 3 November 2015. The application was opposed. Both counsel agreed that the court is requested to deal with the crisp issue raised by the applicant in reply which is couched as follows in counsel's Heads of Argument for the applicant:

> "1.6 It is submitted ...that it is irrelevant for the purpose of the determination of the **current application**, whether or not there has been proper compliance with section 129(1)(a)

1.7 The aforementioned submission is made against the background that the default judgment was not granted by the above Honourable Court, but by the Registrar of the above Honourable Court, which has the effect that it constitutes a nullity. It was therefore erroneously sought and in contravention of the provisions of the Act"

BACKGROUND

[2] Although the issues have been narrowed down it is necessary to give a brief background. It was common cause that the applicant had purchased a vehicle which was financed by the respondent and when she fell behind with her payments they instituted action. She was personally served with summons commencing action on 17 August 2015, she failed to defend the action and default judgment by the Registrar followed on 3 November 2015. This application was launched on 14 April 2016.

[3] In the founding affidavit the applicant contended that the institution of the action was premature in that the respondent's had failed to comply with their obligation to serve her with a section 129(1) notice in terms of the National Credit Act 34 of 2005, ('the NCA'). She also mentioned the fact that she had appointed an attorney to represent her and that settlement proposals were advanced, however, the settlement did not come to fruition. In answer the respondent raised a point *in limine*, that no case had been made out in the founding affidavit in support of the Rule 42 (2) application. The respondent contended that the section 129 notices were sent by registered post to the address provided by the applicant, which was the same address where the summons was served. The track and trace reports annexed to the summons provided proof that due notification was given to her.

[4] In her replying affidavit the applicant brought up a defence that there had been non-compliance with section 130 (3) of the NCA because the application had not been considered by the court but by the Registrar, therefore the judgement was a nullity in that it had been erroneously sought and granted by the Registrar. This was entirely new matter and the respondents had launched an application to strike out. They were granted

leave to respond to the new matter.

THE LAW

The Registrar's Authority to grant default judgment

[5] Before dealing with the matter it is necessary to examine where the Registrar derives his authority to grant default judgments. In terms of section 23 of the Superior Courts Act 10 of 2013, a Registrar of a Court is entitled to grant default judgment and such judgement shall be deemed to be an order of the court. Rule 31 (5)(b) provides for the grant of a default judgement by a Registrar where defendant has failed to defend the action after proper service of the summons and particulars of claim instituting action. In this matter default judgement was granted where no intention to defend was filed and served despite proper service of summons.

[6] The Registrar grants default judgment on application of the plaintiff in terms of Rule 31(5)(a). The Registrar administers the grant of a default judgment by utilizing one of the following procedures in Rule 31(5) (b) :

> "(i) grant judgment as requested;
> (ii) grant judgment for part of the claim only or on amended terms;
> (iii) refuse judgment wholly or in part;
> (iv) postpone the application for judgment on such terms as he may determine;
> (v) request or receive oral or written submissions;
> (vi) require that the matter be set down for hearing in open court;

Record has to be kept. Rule 31 (5)(d) provides for a reconsideration by the court on application by the judgment debtor within the prescribed period.

[7] Counsel for the respondent submitted that at the time default judgement was granted

the Registrar was authorised to do so and that the remedy available to the judgment debtor was to launch an application for reconsideration in terms of Rule 31(5)(d). Counsel for the applicant contended that the applicant was not obliged to use the procedure under the said rule because on applicant's version, the Registrar was incompetent to deal with the matter. In terms of section 130(3) of the NCA it was only the court which was competent to deal with the application for default judgment.

[8] In my view the Registrar's authority to grant default judgments has not been repealed. Our Constitutional Court has intervened in several matters where it was found that judicial oversight was required especially where certain constitutional rights of consumers were being infringed. In *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC), the default judgment by the Registrar was declared to be unconstitutional because in the circumstances of that case, judicial oversight was required in matters affecting rights conferred on judgement debtors in terms of section 26 of the Constitution. The Rule was amended to provide for a *proviso* which obliged the Registrar to refer such matters to open court.

A judgment erroneously sought and granted by the registrar in her absence Rule 42(1)(a)

[9] The applicant in reply abandoned her application for rescission in terms of Rule 42(2) as stated in the Notice of Motion. The *point in limine* that no case had been made out in support of this application in terms of the said rule was correctly taken.

[10] In reply it was now contended that the application was in terms of Rule 42(1)(a) and counsel for the applicant contended that the application was properly before the court. The said rule gives the court to *mero motu* or on application of the person affected, the power to rescind or vary any order or judgment erroneously granted in the absence of the person affected thereby. It is not necessary in this instance to show good cause. If there existed at the time of the grant of the judgement a fact which if the court was made aware of it, judgement would not have been granted or, if notice of the proceedings or intended proceedings was required by law and where such notice was not given, then the judgement

granted in these circumstances was erroneous, and it had to be rescinded, *Rossiter v Nedbank* (96/2014) [2015].

[11] It is important in considering this application to keep in mind that as at paragraph 13 of the answering affidavit the respondent contended that it had complied with its obligation to give notice in terms section 129 (1)(a) of the National Credit Act before commencing action and that it had complied with sections 129(5) and (7) of the said Act. The notices had been brought to the attention of the applicant as evidenced by the "track -and- trace" reports annexed to the particulars of claim. In my view, the fact that she abandoned her defences as stated in the founding affidavit is not an excuse for failing to deal with this version of the respondent in reply. The applicant instead placed reliance on her contention of the nullity of the default judgment. It is therefore apposite at this juncture to look into the cases relied upon by the applicant.

Nkata v Firstrand Bank Ltd 2016 (4) SA 257 (CC)

[12] This matter had to deal with the interpretation of section 129(3)(a) and 129(4)(b) of the National Credit Act. The High Court had refused to rescind the default judgment which was granted without compliance with section 129(1)(a), because Ms Nkata failed to give satisfactory explanation why she had delayed for two years after learning of the default judgment, to apply for a rescission and that she had later settled her dispute with the bank. Cameron J with whom Nugent AJ concurred in the minority judgment and Moseneke J in the majority Judgment in which Jafta J concurred, all concurred that although Ms Nkata had a bona fide defence when the default judgement was entered, her entitlement to rescission had, because of her conduct become perempted.

[13] Counsel for the applicant relied on additional reasons given by Jafta J in a separate judgment in this matter where he stated the following:

> Paragraph 166
>
> " In my view, as a matter of law, no legal fees were due because the institution of the legal action without compliance with s129(1) was irregular and the default judgment

was a nullity because the registrar had no power to grant it.....on authority of Motala and Changing Tides, the judgment granted by the registrar was a nullity."

Paragraph 169

"Parliament has considered compliance with s129(1) to be so important that it deemed it necessary to preclude a court from adjudicating the dispute until the court itself is satisfied that there was compliance. Notably, it is the court that must be satisfied and nobody else. This signifies that legal proceedings to which the Act applies must be determined by the court only."

Paragraph 170

" Furthermore, section 130(3) precludes a court from deciding the case unless it is satisfied that the notice requirements in s129 have been complied with. Section 130(3) provides:

" despite any provision of law contract to the contrary, in any proceeding commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if it is satisfied that –

(a) In the case of proceedings to which 127, 129 or 131 apply, the procedures required by those sections have been complied with (emphasis added)

Paragraph 173

"Here the legal fees claimed by the bank arose in circumstances where the bank had acted in breach of the Act in a number of respects. First, it failed to give reasons as required by s129(1) read with s130. Second, it sought and obtained a default judgment from the registrar of the High Court,something that is incompatible with s130(3) which requires such matters to be determined by the court."

Paragraph 181

"Ms Nkata's home was sold .....on the strength of a deault judgment that amounted to a nullity.....as Ponnan JA observed in Motala

"It is after all a fundamental principle of our law that a thing dome contrary to a direct

prohibition of the law is void and of not force and effect.....Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing."

Paragraph 185

"In my view, none of the submissions advanced by the bank to counter invalidity of the legal proceedings has merit. On the authority of this court in Sebola and Kubyana, the bank was prohibited from instituting legal proceedings. Not only were the proceedings prohibited, but s130(3) made the court's competence to adjudicate the matter dependent on the court being first satisfied that there was compliance with 129(1)."

[14] At paragraph 76 of the judgement, Moseneke J stated: *".....I am grateful for the concurring judgment of Jafta J and have noted the additional reasons he relies upon"* and at paragraph 158 Nujent AJ stated: " *I have also read the judgment of my colleague Jafta J, which takes us down untrodden paths. He finds the High Court judgment taken by default was null and void."* In my view, reliance by counsel for the applicant on the additional reasons given by Jafta J are misplaced because while he gave those reasons he concurred in the majority judgment and, for reasons in the majority judgment the default judgment stood. I find the following statements important in paragraph 94 by Moseneke important:

"The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt credit givers ought to be astute to recognize the imbalance in negotiating power between themselves and consumers..... This court has before expressed itself on the purpose of the Act. In Sebola in the context of s129(1)(a) Cameron J observed that at the core of the Act is the object to protect consumers. This protection must be balanced against the interests of the credit provider.....Kubyana sought to clarify the interpretation of Section 129(1) that was adopted in Sebola"

[15] In regulating the courts process and by making rules such as allowing the registrar to

grant default judgments, the courts have a responsibility to ensure that the interests of justice are served, and this function will only be exercised as an when disputes are brought for adjudication if they are inconsistent with the Constitution read together with other Laws. Counsel for the respondent contended that by allowing the registrar to grant default judgments, the purpose was to assist the courts in reducing the workload in the High Courts. In my view, the Registrar does not function as the court in that he does not exercise a discretion in considering the applications before him, such discretion is available only to the court. By having the necessary knowledge, he is in a position to make certain decisions as appears in Rule 31(5)(b)(i) to (vi). It is evident that in this process there is in-inbuilt protection afforded to the litigant. Consumers have been afforded further protection by being afforded the opportunity to approach the court for a reconsideration of the default judgment and where circumstances permit, to apply for rescission.

[16] Constitutional considerations have required that there be judicial oversight where execution against immovable property was ordered. Judicial oversight enables the court to consider all the relevant facts and to balance the interests of the litigants. It is a process not available to the Registrar. Judicial oversight was found to be necessary as seen in several judgements of the Constitutional Court beginning with *Japhta v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC); Gundwana , *Sebola,*and *Kubyana* supra.

[17] Counsel for the applicant on her contention of nullity of the default judgment also relies on the judgment of Jafta J in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC), in particular his reasons in paragraphs [22]; [23]; [25]; [27]; [34]; [100] and [101] of the judgment. It is my view again that reliance on these paragraphs is misplaced because the issues herein are distinguishable. There were three judgments, the first by Jafta J, the second being a majority judgment by Cameron J and the third also a majority judgment by Zondo J, the latter having concurred in the second judgment and Jafta not concurring in both majority judgments.

[18] In *University of Stellenbosch supra* the Constitutional Court was approached to

determine 'whether the Magistrates' Courts Act provided for judicial oversight when an emoluments attachment order is issued against a judgment debtor in favour of the judgment creditor.' An example of how the issue was determined is one I would agree with in determining whether the Registrar was authorized to grant default judgments. The Superior Court Act, the National Credit Act and the relevant rule has to be interrogated. The question being whether it was practically possible to have all default judgments subject to the National Credit Act dealt with by the court, even where no constitutional issues were raised. Another consideration is that s172 of the National Credit Act does not provide for the resolution of conflicting legislation in as far as s23 of the Superior Court Act was applicable and as provided in Schedule 1 of the National Credit Act. It is my view that although Jafta J correctly interpreted the provisions of the NCA, there was no consensus that all default judgements subject to the NCA should only be considered by the court.

[19] In *University of Stellenbosch supra* under the heading " Are emolument attachment orders issued by the court?" Zondo J examined the meaning of the words "issued from the court" and he observed the importance of determining the meaning in terms of s65J(1)(a). He stated at paragraph [178] "*If it is a judicial function, that may help us to conclude that it is the court that issues the order. If it is an administrative function, that would point to the function being performed by someone other than a magistrate or the court*". Having examined the process engaged in s65J and certain authorities Zondo J concluded that a finding by Jafta J, that judicial oversight was provided for in every case under the Act, was "*irreconcilable with the fact that one of the scenarios contemplated by s65J(2)(a) is where an emoluments attachment order is issued on the basis that there is a written consent of the judgement debtor and is not authorised by the court.*" Zondo J further found that the declaration of invalidity by the High Court based on a lack of a provision for judicial oversight was one of '*notional severance*' and a not remedy to resolve the issue. He did not confirm the order of the High Court and held that an appropriate remedy was one of reading-in, and an appropriate order in that regard was granted.

[20] It is my view that the function of the Registrar under Rule 31(5)(b) is administrative.

In exercising such function, he is obliged to ensure that the plaintiff has complied with the National Credit Act before instituting action, that the summons was properly issued and served, and that application is not one to be referred to court as provided in the proviso to the Rule. Not only did the applicant not defend the action, she abandoned her defence as stated in the founding affidavit. She does not dispute that the respondent has complied with the section 129 notification, nor does she allege any irregularity in the grant of the default judgment by the Registrar. It is my view that she has not made out a case for rescission and that this application should accordingly fail.

[21] In the result the following order is given:

[21.1] Application is dismissed with costs

TLHAPIVV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	**12 MARCH 2018**
JUDGMENT RESERVED ON	:	**12 MARCH 2018**
ATTORNEYS FOR THE APPLICANTS	:	**V H I ATTORNEYS**
ATTORNEYS FOR THE RESPONDENTS	:	**HACK STUPEL & ROOS**