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**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NUMBER:** 25017/2019

Date of Judgment: 13 October 2023

Reportable? No

Of Interest to Other Judges? No

In the matter between:

**R, S M**

Applicant

and

**NEDBANK LIMITED**

First Respondent

**SHERIFF, KROONSTAD**

Second Respondent

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**JUDGMENT**

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Mc Aslin AJ:

1. On 2 December 2019 the First Respondent obtained default judgment against the Applicant and his former wife to whom he was married in community of property.
2. The judgment arose from arrears owed in terms of a credit agreement concluded between the parties for the purchase of immovable property situated in Kroonstad, which loan was secured by a mortgage bond in favour of the Respondent.
3. The judgment, as is usual in foreclosure matters, was granted for the accelerated indebtedness under the loan agreement, which was in the amount of R944 849.35, together with interest and costs. In addition, the immovable property that was the subject of the credit agreement was declared specially executable.
4. The First Respondent commenced execution by placing the immovable property under attachment, but the property has not yet been sold in execution.
5. On 14 October 2022 the Applicant initiated an application, without joining his erstwhile spouse, for the rescission of the judgment in terms of Rule 31 of the Uniform Rules of Court and for an order that the credit agreement was reinstated pursuant to the payment of the arrears.
6. I was told the when the matter was heard that the Applicant is divorced from his wife, and they are not on speaking terms. Consequently, the Applicant would not be joining his wife in this application.
7. The irretrievable breakdown of the marriage is regrettable. However, the absence of Mrs P S R from these proceedings is material and I will deal with this issue later in this judgment.
8. It is not clear from the papers whether the Applicant relies on Rule 31(2)(b) or Rule 31(6)(b) as the basis for his rescission application.
9. There is no evidence that the Applicant has paid the judgment debt and interest thereon, and it is not disputed that the taxed costs of the First Respondent have not been paid. Consequently, there is no basis on which the rescission application can succeed in terms of Rule 31(6)(b).

10. Rule 31(2)(b) requires *inter-alia* that the application for rescission should be brought within 20 days of the date when the Applicant learnt of the judgment against him and his former wife.
11. There is no direct evidence of when the Applicant acquired knowledge of the judgment. However, it seems from the allegations in the founding affidavit that the Applicant was aware of the judgment before 31 March 2022.
12. The application for rescission was only instituted some 6 months later. Yet, there is no explanation for the delay in instituting the application.
13. It is then not necessary to consider whether good cause has been shown for the rescission of the judgment.
14. Irrespective of whether the application for rescission is brought in terms of Rule 31(2)(b) or in terms of Rule 31(6)(b), the Applicant fails to prove his case for rescission and the relief sought in prayer 1 of the notice of motion cannot be granted.
15. However, in prayer 2 of the notice of motion the Applicant asks that the credit agreement be reinstated on the basis that he paid the arrears on the credit agreement. In other words, the Applicant relies on section 129(3) of the National Credit Act 34 of 2005 ("the Act").
16. That provision reads as follows: *"Subject to subsection (4), a consumer may – (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order"*.
17. The seminal decision on this section of the Act is Nkata v Firstrand Bank Ltd 2016 (4) SA 257 (CC) where Moseneke DCJ, speaking for the majority, found the following: (i) the reinstatement of a credit agreement occurs by operation of law the moment the consumer pays all the amounts that are overdue in terms of the credit agreement; (ii) the default charges and reasonable costs of enforcing the credit provider's rights under the agreement would be overdue if the credit provider has demanded their payment

and, in the case of the legal costs, the credit provider has taxed the costs where they have not been agreed; and (iii) if a credit agreement is reinstated in terms of the Act, the default judgment and subsequent attachment of the immovable property is rendered without force or effect.

18. Thus, whilst section 129(3) of the Act is not a basis on which to rescind a default judgment, it does provide another avenue for rendering the judgment of no force or effect. Even in instances where the consumer has no defence to the claim of the credit provider and any application for rescission in the ordinary course would fail, the consumer can still achieve the same end provided he or she pays *“all amounts that are overdue”* in terms of the Act.
19. It follows, therefore, that the success of the relief sought by the Applicant in prayer 2 i.e. that the credit agreement be reinstated, turns on whether the Applicant paid the amounts that were overdue in terms of the credit agreement.
20. In opposing the application, the First Respondent attempted to show that quite apart from the arrears that were due under the credit agreement, the Applicant had failed to pay the First Respondent’s default charges and its taxed legal costs so that section 129(3) cannot apply.
21. There is no evidence that the First Respondent demanded payment of its default charges from the Applicant. In relation to the legal costs, the evidence shows that the First Respondent taxed its bill of costs after the Applicant says it paid the arrears, and the First Respondent concedes in its answering affidavit that it has not yet demanded payment of those costs from the Applicant.
22. Consequently, counsel for the First Respondent accepted during argument that the default charges and legal costs were not overdue when the Applicant says he paid the arrears. The only issue then for consideration is whether the Applicant has proven that he paid the arrears that were due under the credit agreement.
23. It is well-established in our law that a party who alleges payment bears the onus of proving the payment (Pillay v Krishna 1946 AD 946).
24. In his founding affidavit the Applicant says the following: *“After the Court order, I proceeded to pay the arrears on the credit agreement with the purpose of reinstate*

*(sic) the agreement ... . After I defaulted again on our credit agreement, the first respondent despite the agreement being reinstated, proceeded with [the] execution process based on the 2019 order ... . On 31 March 2022, the applicants again paid an amount of R115 000.00 towards the bond account. A copy of the proof of payment is attached hereto ... “.*

25. The Applicant mentions two payments. The first one is alleged to have extinguished the arrears. However, there is no mention of when the payment was made. All that is known is that it occurred sometime after the judgment was granted against the Applicant on 2 December 2019 but before the second payment was made on 31 March 2022.
26. The Applicant also fails to set out the amount that was paid, and he attaches no documentary proof of what the amount of the arrears was when this payment was made or, for that matter, of the payment itself.
27. The first payment is a bald allegation by the Applicant. It is denied by the First Respondent in its answering affidavit, and so the Applicant should have substantiated the allegation in his replying affidavit with reference to documents showing what the amount of the arrears was, when the payment was made and the amount of the payment. No replying affidavit was filed by the Applicant.
28. In light of the above I find that the Applicant has failed to discharge the onus on him of proving the first payment that he alleges he made.
29. In relation to the second payment, the Applicant furnishes the date and amount of the payment as well as documentary proof of the payment. These allegations are admitted by the First Respondent.
30. However, the Applicant does not set out what arrears were due on 31 March 2022, nor does he allege that the payment on that date extinguished the arrears. For the detail on the latter fact, the Applicant relies on an exchange of correspondence between the attorneys representing the parties.
31. On 1 April 2022 the Applicant's attorney, Mr Mathebula, wrote to the Respondent's attorney, Ms Cowley, and stated *inter-alia* the following: “*We confirm that our client has paid the arrears on the bond account in the amount of R115 000.00 and therefore the*

*bond is up to date. We therefore call upon your client to immediately thwart the execution process. We (sic) regard to your legal costs, we also request that you attend to furnish us with the bill of costs to have it taxed by the taxing master. We shall attend to serve you with the rescission application on the matter. Kindly attend to confirm that your client will stop the execution process."*

32. Ms Cowley responded to Mr Mathebula on 5 April 2022 in the following terms: *The sale in execution is not proceeding and we are instructing our costs consultant to draft the bill of costs on the attorney and client scale (as agreed in the loan agreement, mortgage bond and in terms of the judgment) for taxation as requested. The bill of costs will be presented to you shortly for consideration. Please serve your client's intended rescission application on our offices on behalf of our client. Service shall be accepted electronically. Our client reserves the right to oppose such application should it deem it necessary to do so in order to protect its rights. Our client's rights are fully reserved."*
33. In argument Mr Mathebula relied heavily on this exchange of correspondence and pointed out that Ms Cowley did not deny his assertion that the arrears had been paid. Consequently, so the argument went, Ms Cowley must be taken to have accepted, on behalf of the First Respondent, that the arrears in the amount of R115 000.00 had been paid, in which event the credit agreement was reinstated by operation of law.
34. I have several difficulties with this argument. Firstly, it is for the Applicant to prove that the arrears were paid. Yet, the amount of the arrears is never disclosed by the Applicant.
35. In that regard it needs to be noted that according to the letter of demand that was sent by the First Respondent to the Applicant and his former wife on 4 April 2019, the amount of the arrears was stated to be R101 513 .53. The certificate of indebtedness shows that on 1 June 2019 the amount of the arrears was R121 665 31, which would have increased by the monthly instalment of R10 075.89 plus interest until judgment was granted on 2 December 2019. Consequently, by the time default judgment was granted the arrears would have been in the region of about R185 000.00
36. It is inconceivable that almost 3 years later the amount of the arrears was only R115 000,00 unless the Applicant had paid some of the debt. As set out above, the

Applicant alleges only one other payment, but he fails to prove anything about the payment.

37. The second difficulty that I have with the Applicant's argument is that he relies on correspondence from the First Respondent's attorney to prove that the arrears were paid. Yet, there is no evidence to show that Ms Cowley knew the amount of the arrears on 5 April 2022.
38. A further difficulty is that the Applicant is not entitled to rely on isolated evidence that suits his case. He must address the complete version of the First Respondent.
39. In that regard Mr Van Zyl, who deposed to the answering affidavit, is employed by the First Respondent and would surely have known what arrears were owed by the Applicant. He denies that the arrears were paid by the Applicant, and on two occasions states quite pertinently that the credit agreement was not reinstated.
40. Presented with a clear denial that the arrears had been paid, it was incumbent on the Applicant to sustain his assertion in the founding affidavit by putting up the proof in reply. Yet, no replying affidavit was filed on behalf of the Applicant.
41. It is well established in our law that the approach to disputes of fact in motion proceedings is that the court must decide the matter on the facts stated by the respondent, together with those the applicant avers and the respondent does not deny.
42. On that approach I must resolve the dispute as to whether the arrears were paid in the amount of R115 000.00 by accepting the version of the First Respondent, which is that the arrears were not paid.
43. On the basis of the above I find that the Applicant has failed to prove that he paid all the amounts that were overdue and, consequently, the credit agreement was not reinstated in terms of section 129(3) of the Act.
44. I mentioned earlier in this judgment that the Applicant failed to include his erstwhile spouse, Mrs P R, in this application and indicated that he had no intention of doing so, even though the First Respondent took judgment against the Applicant and Mrs R jointly and severally.

45. The absence of Mrs R creates an insurmountable obstacle for the Applicant. She undoubtedly has an interest in knowing whether her judgment debt will be converted back to a credit agreement debt. At the moment, she may be forgiven for thinking that the judgment debt is going to be paid from the proceeds of the sale of the immovable property. But if I had found that the credit agreement was reinstated, then Mrs R would once again become liable to pay the monthly instalments.
46. There is also the obvious difficulty that my judgment will not be binding on Mrs R, who is free at some time in the future to bring another rescission application.
47. The absence of Mrs R from these proceedings is, in and of itself, a further reason to dismiss the application.
48. The credit agreement provides in clause 27.5 that the Applicant agreed to pay the legal costs incurred by the First Respondent as a result of the Applicant's default on the scale as between attorney and client.
49. In light of the above I make the following order:
- (i) The application is dismissed.
  - (ii) The Applicant is to pay the costs of the First Respondent on the scale as between attorney and client.

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C J Mc Aslin  
Acting Judge of the High Court  
13 October 2023

On behalf of the Applicant:

Mr Mathebula



Instructed by:

Mathebula Inc Inc

On behalf of the Respondent:

Adv. L Peter

Instructed by:

Lowndes Dlamini Inc