Reportable:	YES/ NO
Circulate to Judges:	YES NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: 138/13

In the matter between:

NAGEL APPLICANT

AND

NEDBANK LTD RESPONDENT

CORAM: LEVER AJ

JUDGMENT

Lever AJ

1. This is an application for rescission of a default judgment granted by the Registrar of this court on the 22nd of October 2013. The said default judgment was granted by the Registrar under the provisions of Rule 31 (5) as read with the provisions of Rule 46 (1)(a)(ii) of the Uniform Rules of the High Court. In the heads of argument filed on behalf of the applicant, it is evident that applicant relies on Rule 31(2)(b) in her application for rescission of the aforesaid judgment.

2. The underlying cause of action for the respondent's claim was based on a loan that allowed the applicant to purchase a residential property, provided for the registration of a mortgage bond over the relevant property in favour of the respondent and provided that the relevant property was specially hypothecated and mortgaged as security for the applicant's obligations to the respondent in terms of the said loan agreement.

3. A second mortgage bond was registered over the relevant property, also in favour of the respondent, under similar terms and conditions as the first mortgage bond.

4. The relevant Order issued as a result of the said default judgment provided for: the repayment of the capital sum in the amount of R545 084.67; interest thereon in accordance with the terms of the mortgage agreement; and provided that the mortgaged property be declared specially executable.

5. In her founding affidavit the applicant contends that the said default judgment only came to her knowledge by virtue of a writ of attachment against the relevant immovable property coming into her possession on the 11th November 2013. Thereafter the applicant consulted with her debt counsellor on the 12th November 2013 who obtained copies of the court file. The applicant then consulted with her attorney on the 13th November 2013. The present application for rescission of the said default judgment was launched on the 18th November 2013.

6. The factual basis for the rescission application set out by the applicant in her founding affidavit was, in summary, based on the allegations that she had approached the Magistrates Court, Kimberley for an order under the provisions of the National Credit Act[1] ("the Act") that she was over-indebted and re-structuring her indebtedness. Such an Order was granted in her favour on the 31st August 2011. For a time she paid the amounts required by the said re-structuring order. The applicant

[1] 34 of 2005.

concedes that she missed one months payment under the debt restructuring order. In fact applicant seems to concede that she missed a second months payment under the said order. At the very least, she has succeeded in creating confusion and doubt in this regard.

7. The applicant then avers that respondent brought an application to rescind the debt re-structuring order. She further avers that this application was dismissed with costs on the 10th September 2012. Thereafter applicant maintains that one month's debt review instalment was applied to legal fees and not paid over to the credit providers.

8. Applicant also states that on the 29th July 2012 she was admitted to hospital and that she was discharged on the 3rd August 2012. Applicant contends that due to her obligation to pay legal fees as well as medical expenses due to her hospitalisation she was unable to make a payment during August 2012. Applicant then avers that she paid the amount outstanding for August 2012 on the 15th of January 2013.

9. Applicant then contends that the respondent proceeded to enforce its claim by way of litigation without giving notice of termination of the debt review proceedings in the magistrate's court under and in terms of the provisions of section 86(10) of the Act. Applicant averred that the Act required such notice and that consequently, in the absence of such notice, the respondent's litigation to enforce its claim was premature.

10. Applicant also attacks the order granted by the Registrar declaring the relevant property specially executable. She does so on two grounds. Firstly, that there was no writ against movables and no return indicating that there were insufficient movables to satisfy the judgment debt. Secondly, that the relevant immovable property is the applicant's primary residence.

11. The respondent filed an answering affidavit and a supplementary answering affidavit.

12. The applicant then filed a replying affidavit which revealed that the basis of her application for rescission had undergone a complete and fundamental change. The applicant in reply contends that the original debt re-structuring order provided that she only had to pay the respondent R1,371.84 (one thousand three hundred and seventy one Rand and eighty four cents) per month. That she voluntarily increased this amount to R2200.00 (two thousand two hundred Rand) per month and later she voluntarily increased the amount to R3000.28 (three thousand Rand and twenty eight cents) per month and again to R3294.00 (three thousand two hundred and ninety four Rand) per month. Applicant further contended that even though she did not make at least one monthly payment, that as a result of these voluntary increases in monthly payments to the respondent overall she has paid the respondent an amount in excess of the amount she was obliged to pay the respondent under the debt re-structuring order for the relevant period and that thereby she was not in default of the debt re-structuring order.

13. At the hearing hereof, the applicant correctly abandoned the position adopted in her founding affidavit, namely that the respondent had to send a section 86(10) notice terminating the debt re-structuring Order. Ms Stanton who appeared on behalf of the applicant also correctly conceded that section 88(3) of the Act was applicable to the present circumstances. In the light of these concessions, it is not necessary to consider much of the original basis for rescission as set out in the applicant's founding affidavit.

14. In the heads of argument filled on behalf of the applicant, it is clear that the applicant relies on the provisions of Rule 31(2)(b) as the basis for her application to rescind the relevant default judgment. The provisions of the said rule place upon the applicant the burden of establishing "good cause" for

setting aside the relevant default judgment. In any event the applicant has not set out a basis for establishing grounds for rescission under the provisions of Rule 42(1) or the common law.

15. The applicant's present contentions raise four questions for the consideration of this Court. Firstly, whether the applicant is entitled to raise the ground for rescission of the default judgment that she had voluntarily paid more than was required by the debt re-structuring order granted by the Magistrates Court and the despite certain lapses in payment she had cumulatively paid more than was required by the Magistrate's Court Order, in her replying affidavit for the first time. Secondly, whether the version applicant now wishes to rely on as the basis for her rescission application is probable and consistent with the facts. Thirdly, whether the provisions of section 88(3) of the Act can be applied in the manner contended for by the applicant on the facts of the present case. Finally, after consideration of the preceding three questions, has applicant established "good cause" for the rescission of the relevant default judgment.

16. In order for the applicant to succeed in her application for rescission of the relevant default judgment all four of the questions set out above will have to be answered in her favour. If she were to fail on any one of them, then her application for rescission must fail.

17. The Registrar's order declaring the property specially executable will be considered separately.

18. Although the second, third and fourth questions are somewhat interrelated, for the sake of convenience they will be considered separately.

19. In considering the first question being whether or not the applicant is entitled to raise both a legal and a factual basis for her rescission application in her replying affidavit for the first time, the obvious point of departure is that in motion proceedings the affidavits constitute both the pleadings

and the evidence in the matter. An applicant is obliged to raise all legal and factual issues necessary to establish her case in her founding affidavit.[2]

20. The applicant is required to establish the case she relies on in her founding affidavit because the respondent is entitled to know what case it has to meet and to be afforded a fair opportunity to meet that case. Even though the respondent has in fact dealt with certain aspects of the applicant's present ground for rescission in its answering and supplementary affidavit, it cannot be said that the respondent has been afforded an opportunity to deal with every aspect of the applicant's present contentions. Nor can it be said that in framing its answering and supplementary affidavits that the respondent was ever afforded the opportunity of appreciating the true significance of dealing with the discrepancies in the cascade ostensibly annexed to the order that the Magistrate made. In the absence of such knowledge, it cannot be said that the respondent has had a fair opportunity of dealing with the applicant's present case.

21. The applicant has failed to establish or even set out the necessary facts for her present defense and ground for rescission in her founding affidavit. Unfortunately, for the applicant, the matter does not simply end there. The applicant has placed a version of events before the court on affidavit under oath where she stated in her founding affidavit that: "…I was ordered to pay the respondent R2 200.00 per month." In her replying affidavit also under oath, the applicant does not explain why she made the positive averment that she was ordered to pay the amount of R2200.00 per month in her founding affidavit. In her replying affidavit the applicant merely states: "…I submit that paragraph 9 of my Founding Affidavit did not set out the situation sufficiently enough…". Even though the relevant annexure to the founding affidavit did not support the said positive averment in the founding affidavit, such averment still constitutes evidence placed before this court under oath. In

[2] Quartermark Investments (Pty) Ltd v Mkhwanazi and Another [2014] 1 All SA 22 (SCA) at para [13] and Die Dros (Pty) Ltd v Telefon Beverages CC and Others 2003 (4) SA 207 (C) at para [28].

these circumstances the applicant is obliged to explain to this court why she made such positive contention if it was not correct. An allegation that the founding affidavit does not explain the situation sufficiently, without more, does not suffice in such circumstances.

22. For the reasons set out above, the applicant is not entitled to raise for the first time in her replying affidavit, the ground for rescission that despite certain lapses in payment under the Order granted by the Magistrate, cumulatively she had paid more than she was ordered to.

23. The above finding would be sufficient ground to dismiss the present application, but for the sake of completeness I will also consider the other questions set out above.

24. Turning to the second question, being whether the version set out by the applicant in her replying affidavit is probable and consistent with the facts. The applicant's present ground for rescission, is that the Magistrate ordered her to pay the respondent R 1 371.84 per month and that she had voluntarily paid more than this amount which resulted in a position where although she had missed certain payments, cumulatively she had paid more than she had been ordered to do by the Magistrate.

25. When considering this question it is legitimate to consider the overall manner in which the applicant has conducted her case. It is clear from considering the manner in which the case developed that applicant had misconceived the provisions of the Act. The basis for rescission set out in her replying affidavit was fundamentally different to the basis disclosed in her founding affidavit. In these circumstances I cannot escape the conclusion that the applicant conducted her case opportunistically.

26. Ms Stanton for the applicant argued that the cascade annexed as annexure “MD3” to the applicant’s founding affidavit correctly reflected the re-distribution order made by the Magistrate because that cascade bore the stamp of the magistrate’s court Kimberley and that the date reflected on that stamp corresponded with the date on the Order itself being annexure “MD2” to applicant’s founding affidavit. Whereas, she argued the cascade upon which the respondent sought to rely, being the one attached to annexure “DH2” to respondent’s supplementary affidavit did not bear a stamp from the magistrate’s court. The cascade being annexure “MD3” provided for a monthly payment to the respondent in the amount of R1 371.84.

27. Mr Wessels SC, who appeared for the respondent, argued that the cascade that correctly reflected the re-distribution Order issued by the Magistrate is in fact the one attached to the Order being annexure “DH2” to respondent’s supplementary affidavit. Mr Wessels bases this submission on two contentions. Firstly, that this is the Order upon which respondent sought to review (rescind) the distribution Order approximately a year after it was originally granted. In support of this contention he points out that the relevant cascade bears the initials of the deponent and the commissioner of oaths and that it forms an integral part of the application to review the first re-distribution Order. Secondly, Mr Wessels submits that the applicant’s behavior throughout the relevant proceedings is consistent with the cascade annexed to “DH2” correctly reflecting the Order issued by the Magistrate.

28. Considering the evidence that emerges from the application as a whole, it emerges that:

    28.1. In her founding affidavit, the respondent stated positively under oath that in the applicable cascade the respondent was listed at position number 5 in the cascade and that she was “ordered” to pay the respondent R2 200.00 per month.

28.2. Annexure “MD3” to her founding affidavit does not support the above mentioned positive averments in applicant’s founding affidavit.

28.3. As already set out above the explanation given by applicant for the difference does not suffice in the circumstances.

28.4. The applicant in the debt re-structuring process is the Debt Counsellor. The Debt Counsellor has filed a confirmatory affidavit which formed part of the applicant’s founding papers. In this confirmatory affidavit the Debt Counsellor confirms that the applicant was “ordered” to pay the respondent R2 200.00 per month.

28.5. The version that applicant was ordered to pay R2 200.00 per month is supported by certain correspondence between the Debt Counsellor and the respondent. In this regard specific reference is made to:

28.5.1. annexure “MD8” and “MD8a”, being a chain of e-mail correspondence, where the respondent seeks proof that the applicant was entitled to pay R2 200.00 per month despite the fact that this did not even cover the interest and that the capital sum continued to grow in these circumstances. “MD8a” in response to the e-mail “MD8” purports to attach a copy of the relevant Order. Unfortunately, the Court is not favoured with a copy of the said attachment to that e-mail.

28.5.2. Annexure “MD16b” an e-mail dated 16 June 2013 where the Debt Counsellor states, “The order was granted 31/08/11 for the amount of R2 200.00 pm. See attaché (sic).” Again the court has not been favoured with a copy of the attachment referred to herein.

28.6. The Debt Counsellor has not filed a confirmatory affidavit to the applicant’s replying affidavit. Neither the Debt Counsellor nor the applicant have explained why a positive averment was made in these circumstances that the applicant was ordered to pay the amount of R2 200.00 per month if this was not in fact correct.

28.7. The creditors listed on the cascade being annexure "MD3" are as follows:

28.7.1. Call Direct/Direct Axis …

28.7.2. CT Internasional Finance Devel…

28.7.3. Holiday Club …

28.7.4. Nedbank Home Loans/Personal L … R1 371.84 …

28.7.5. Select Online (Pty) Ltd …

28.7.6. Toyota Financial Services …

28.7.7. Vodacom Service Provider Co …

28.8. The creditors listed on the cascade annexed to the copy of the Order being annexure "DH2" to respondent's supplementary affidavit are as follows:

28.8.1. Bernard Raaff …

28.8.2. Call Direct/Direct Axis …

28.8.3. CT Internasional Finance Devel …

28.8.4. Holiday Club …

28.8.5. Nedbank Home Loans/Personal L … R2 200.00…

28.8.6. Select Online (Pty) Ltd …

28.8.7. Toyota Financial Services …

28.9. The difference between the two cascades is that Vodacom Service Provider Co. has fallen away and Bernard Raaff has been added to the second cascade.

28.10. The applicant has annexed two distribution accounts for the relevant debt administration to her founding affidavit. The first one dated 22 November 2012 annexure "MD8(b)" to the founding affidavit. The second one dated 11 March 2013 annexure "MD8(c)" to the founding affidavit. Both of these distribution accounts include payments to Bernard Raaff and make no provision for payments to Vodacom Service Provider Co.

28.11. One has to assume that the monthly distribution would be made in accordance with the cascade that formed part of the Order made by the Magistrate. There would be no other legitimate basis for making such distribution. Therefore, the fact that the distribution accounts give effect to the cascade attached to annexure "DH2" to respondent's supplementary affidavit is strongly indicative of the fact that it formed part of the Order made by the Magistrate.

28.12. At the hearing of this matter and before argument commenced the applicant handed in by agreement a schedule of payments made by the applicant to the respondent over the period 8 July 2011 to 11 August 2014. In relation to the question presently under consideration, the interesting thing is that prior to the Magistrate issuing the Order being considered, the applicant had already commenced paying the respondent monthly installments of R2 200.00 per month. This is clearly evidenced by the said schedule. The applicant does not tender any explanation why the Magistrate reduced this payment in these circumstances.

28.13. After considering all of the evidence set out above, I am forced to conclude that applicant's version being that she was only ordered to pay R1 371.84 and that she voluntarily paid more, which resulted in the position that despite certain lapses, at the end of the day she had paid more than required under the debt re- arrangement order made by the Magistrate, is not probable, nor is it consistent with the facts.

29. Turning to the third question set out above, Ms Stanton argued that in applying section 88(3) of the Act, I should follow the approach of the Court in the matter of Nedbank Limited v Thompson and Another[3], where Gautschi AJ stated:

> "In terms of section 2(1) of the NCA I am enjoined to interpret that Act in a manner that gives effect to the purposes set out in section 3. Section 3 includes as a purpose of the NCA to protect consumers by "promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers". These sections would, I consider, require me to interpret the word "defaults" in section 88(3)(b)(ii) to exclude minor, unwitting and excusable

[3] SAFLII ZAGPJHC 88 (23 April 2014).

defaults of the nature which occurred here, with the result that I would for that reason too find that the requirements of section 88(3) had not been met."[4] (references omitted)

30. In the circumstances that prevailed in the Thompson case, I would respectfully agree with Gautschi AJ. However, on the facts of the present case I have to decide whether the applicant's lapses are "minor, unwitting and excusable defaults".

31. The applicant, during 2012, on her own version did not pay one entire months installment under the Magistrates re-distribution Order. Applicant claims that she made up the shortfall in January 2013. Respondent claims that in fact during 2012 the applicant missed two months installments. Applicant disputes this contention. However, as already stated above applicant handed in a schedule of payments by consent at the start of proceedings. This schedule of payments handed in on the applicant's behalf show that in fact in 2012 there were only 10 payments paid by the applicant. In the context of the facts of the present case these cannot be considered minor defaults.

32. In the context of the facts of the present case, these cannot be said to be unwitting defaults.

33. Furthermore, the contentions made that these were excusable defaults because in the one case they covered the legal costs of the review referred to above and in the other presumably the hospital expenses referred to. In circumstances where the Magistrate made a costs Order in the applicant's favour in the review application would militate against a finding that non-payment on that ground was excusable.

[4] Supra para. 22.

34. If there was any substance to the applicant's contention that she made up the shortfall for August 2012 in January 2013, one would have expected to find two payments or a double payment in the schedule for January 2013. This is not the case.

35. In these circumstances, I also cannot answer the third question in favour of the applicant.

36. The fourth and final question relates to the question of whether or not the applicant has shown "good cause" to rescind the default judgment. Having regard to what is set out above I do not believe that applicant has shown good cause for the rescission of the relevant default judgment.

37. Turning now to deal briefly with the Order made by the Registrar under the provisions of Rule 46(1)(a)(ii) declaring the relevant property specially executable. It is evident that the said Order was made in circumstances where an affidavit was filed on behalf of the respondent alleging that the property appeared to be occupied by tenants. It appears that this allegation was based on the contents of the Sheriff's return of service for the summons that a certain Mr and Mrs Haai were occupying the house and that the applicant had left the address. The only explanation given by the applicant was that during the month of February 2013 she was based in Rustenburg part of the time and part of the time based in Bloemfontein. In these circumstances I cannot find that the Registrar ought not to have made the Order declaring the applicant's property specially executable.

38. The applicant has not established a basis for the rescission of the judgment concerned and her rescission application is accordingly dismissed with costs.

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L. LEVER AJ

COUNSEL:

FOR THE APPLICANT: ADV. STANTON

FOR THE RESPONDENT: ADV. MH WESSELS SC

DATE OF HEARING: 12 SEPTEMBER 2014

DATE OF JUDGEMENT: 06 OCTOBER 2014