IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 3351/12

In the matter between:

CHERYL DOROTHY MARWICK	**1ST APPLICANT**
MICHAEL CONNAIRE MARWICK	**2ND APPLICANT**
CHARLES HORNER	**3RD APPLICANT**

and

ABSA BANK LIMITED	**1ST RESPONDENT**
THE SHERIFF OF THE KWAZULU-NATAL HIGH COURT – PIETERMARITZBURG	**2ND RESPONDENT**
THE REGISTRAR OF DEEDS	**3RD RESPONDENT**

JUDGMENT Delivered on 31 May 2013

STRETCH AJ:

[1] During October 2006 the first and second applicant ("Ms and Mr Marwick") purchased immovable residential property situated at 35 Oakleigh Avenue, Pietermaritzburg ("the property") for R2 250 000,00 after Ms Marwick (with Mr Marwick as surety) had obtained a loan from the first respondent bank ("ABSA") against the registration

of a mortgage bond for R1 750 000,00 over the property in ABSA'S favour.

[2] The Marwicks fell into arrears with their bond repayments and ABSA issued summons. On 7 May 2008 the Marwicks independently signed confessions to judgment (in terms of rule 31(1) of the uniform rules of this court) in favour of ABSA for payment of R1 891 637,00 together with interest and costs. Ms Marwick's confession included consent to an order declaring the property executable.

[3] On 19 and 20 November 2008 this court granted judgment against the Marwicks (jointly and severally) in terms of these confessions, the order on the 19th being for payment of the aforesaid debt, and that on the 20th declaring the property executable.

[4] On 30 April 2012 this court issued a *rule nisi*, calling on ABSA and the second and third respondents (the sheriff of this court and the registrar of deeds) to show cause why the following orders should not be made:

[a] that the judgments granted by this court on 19 and 20 November 2008 are rescinded;

[b] that ABSA and the second respondent are interdicted from proceeding with the sale in execution of the property;

[c] that a writ of execution which had been issued by the registrar of this court is stayed;

[d] that ABSA is directed to comply with an order granted in the magistrates' court on 11 April 2012, which order declared the Marwicks to be over-indebted, and re-arranged payment to five creditors (including ABSA) such re-arrangement to be reviewed by the magistrates' court at its discretion.

[5] It was further directed that the orders sought setting aside the writ and staying the sale in execution would operate as interim orders with immediate effect, pending the finalisation of this application. The Marwicks were further directed to 'continue' paying ABSA the amount R10 019,60 per month, pending the finalisation of the application.

[6] The Marwicks and the third applicant (Charles Horner, who had been their debt counsellor), also in their notice of motion sought an order directing Horner in terms of the provisions of section 85(a) of the National Credit Act 34 of 2005 ("the Act"), to make a recommendation to this court in terms of section 86(7) of the Act.

[7] The applicants contend for rescission of this court's judgments granted on 19 and 20 November 2008, on the following grounds:

[a] that the Marwicks were not apprised of their rights in

terms of section 129 of the Act, and that this renders the enforcement of the debt premature and the provisions of section 86(2) of the Act as not applicable;

[b] that when the Marwicks signed the confessions to judgment incorporating acknowledgments of debt, they were not legally represented and were unaware of the possible consequences of signing these documents, and that if this court had been alive to this it would not have granted the relief it did on 19 and 20 November 2008. In short, the applicants contend that this relief was erroneously granted;

[c] that the relief was also erroneously sought, in that when these orders were made (and unbeknown to the Marwicks), debit orders had not been processed in favour of ABSA for the months of August, September October, November and December 2008;

[d] that, in any event, this court ought not to have declared the property (being a primary residence) executable as the Marwicks were not afforded an opportunity to make representations to this court in terms of section 26 of the Constitution, and that ABSA had failed to comply with this court's practice directive dealing with applications to declare immovable property executable.

[8] The applicants further contend that this court should also make a declaratory order, directing ABSA to abide by the magistrates' court order restructuring the Marwicks' debt to it; alternatively, that this court should, in terms of section 85 of the Act,

refer the matter to debt counsellor Horner with a request that he evaluates the Marwicks' circumstances and makes recommendations to this court, or that this court should declare the Marwicks to be over-indebted and make an order to relieve their position.

[9] It is only necessary for me to consider the bouquet of proposals which I have referred to, if I find that the Marwicks have made out a case for rescission. If not, that is the end of the matter.

[10] The Marwicks admit that ABSA issued summons in 2008 because they had fallen into arrears with their bond repayments. What is disputed, is whether ABSA had complied with section 129 of the Act before it issued summons. The Marwicks say that it did not, and if it did, they would have exercised their rights there and then to be placed under debt review and to have their indebtedness to ABSA restructured and rearranged.

[11] Section 129(1) of the Act provides that if a consumer is in default, the credit provider may, before enforcing the debt, draw the default to the notice of the consumer in writing and propose that the consumer refers the credit agreement to a debt counsellor, an alternative dispute resolution agent, a consumer court or an ombud (with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date), and that the credit provider may

not commence legal proceedings to enforce the agreement before first delivering the aforesaid notice to the consumer in compliance with section 130 of the Act.

[12] It is contended that the Marwicks did not receive the notice; alternatively, that if they did, the notice is defective in that it does not specifically advise the Marwicks that they can approach a debt counsellor … 'with the intent that the parties develop and agree on a plan to bring the payment under the agreement up to date'.

[13] I am not persuaded that the Marwicks did not receive the notices, which appear to have been sent to a post office box address at the Liberty Midlands Mall. Both notices were dated during January 2008, and had been addressed to Mr and Ms Marwick respectively. Both notices reflect that the parties may approach an alternative dispute resolution agent, the consumer court or an 'ombud' with jurisdiction to assist them. During February 2008 ABSA's attorney received a letter sent from Mr Marwick's email address but addressed by Cheryl Marwick (Ms Marwick), apologising for not replying to the attorney's 'letters' and continuing as follows:

'It was only when I *brought the letters home and opened them all* that the error was revealed My husband had been faxing the legal dept of Absa (… his last fax was on *30/01/08 - the date of your letter*) and we naively thought that they were withholding legal action. Thank you for suggesting the *ombudsman and/or a.n.other.* My husband will be following this up' (emphasis added).

[14] The following is apparent from a reading of this letter:

(a) that the letters referred to were not sent to the Marwicks' home but had to be collected from somewhere;

(b) that if this letter had been typed by Mr Marwick unbeknown to Ms Marwick (as has been suggested in argument), he would not have referred to 'my husband';

(c) that the reference to *'the date of your letter'* happens to coincide with the actual date of the notices sent by ABSA's attorney, namely 30/01/2008. Neither of the Marwicks would have known when the attorney's letter was dated, if they had not perused it;

(d) that it is highly probable that Ms Marwick's referral to the ombudsman and/or others had its origin in the same references used by the attorney in the section 129 notice.

[15] In the premises I am satisfied that the Marwicks were advised of their rights in terms of section 129 prior to the enforcement of the debt.

[16] As for the contention that the section 129 notice is defective in that it does not specifically advise the Marwicks that they may refer the credit agreement to a third party 'with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date…', the

Act does not require the credit provider to advise the consumer of the intention behind drawing the default to the defaulter's attention nor does the Act require that a list of options which the consumer may choose to exercise when referring the credit agreement should be made available to the consumer in the section 129 notice as a type of checklist. To do so in any event would simply be absurd and achieve nothing whatsoever.

[17] I now turn to the contention that the judgment on confession granted on 19 November 2008 (for payment of the debt) was granted in error as the court would not have done so had it been made aware of the circumstances under which the confessions to judgment had been obtained (in a nutshell being that the Marwicks were not advised at the time as to what exactly they were signing as they were dealing with ABSA's attorney and did not have their own independent legal representation).

[18] There exists a factual dispute as to whether the Marwicks knew what they were signing. ABSA's attorney avers that he explained to them what they were signing and what they were committing to, despite the fact that there was no legal duty upon him to do so. I have taken the liberty of perusing the original documents under case number 4285/08 when judgment was granted against the Marwicks. I digress to mention that this file was reported to have gone astray and has taken some time to trace.

[19] From the time that the Marwicks delivered their notice of intention to defend, they made it quite clear that they were acting in person. The notice of intention to defend for example, has the words FIRST DEFENDANT IN PERSON and SECOND DEFENDANT IN PERSON in clear bold capitals below the signatures of the Marwicks on two different pages.

[20] The service affidavit of Mr Louw (the respondent's attorney) confirms that he delivered two copies of the application for summary judgment to the Marwicks' home address (as opposed to notifiying an attorney).

[21] More particularly each of the two originally signed consents to judgment comprises two pages. The first page, setting forth the judgment, runs onto the second page and is then signed by each of the Marwicks, whereafter they each again signed on the second page of their verification affidavits.

[22] Rule 31(1)(b) of the High Court rules specifically caters for the unrepresented debtor. It reads as follows:

"Such confession shall be signed by the defendant personally and his signature shall either be witnessed by an attorney acting for him, not being the attorney acting for the plaintiff, or be verified by affidavit."

[23] The requirements of the rule as regards this mode of execution are peremptory and rightly so, particularly in that the rule not only provides for the giving of judgment against a defendant on a confession, but it furthermore provides that such judgment may be applied for and given without any notice to the defendant. See:

Sunset Investments (Pty) Ltd v Bramdaw and Others
1973 (2) D&CLD 415 at 418B – G)

[24] It has not been argued that the provisions of the rule have not been complied with. What has been contended is that the Court granting judgment was not aware of the fact that the Marwicks did not have legal representation.

[25] These papers were perused by two judges, firstly by the judge who granted the judgment on confession and again the following day by another judge who declared the mortgaged property executable. That is clear *ex facie* the court orders themselves. It is trite that one of the prerequisites for the granting of a judgment on confession is either a properly executed verification affidavit, verifying the signature to the consent itself, or the consent must be witnessed by the debtor's own attorney. It is clear in this matter from the two verification affidavits that the Marwicks did not have an attorney. This would also have been seen by the judge granting the judgment.

[26] Accordingly the contention that the judgment was granted in error because the judge did not know that the parties were not legally represented must fail. In any event, even if the judge was unaware of this fact, proper compliance with rule 31 is all that is required for judgment to follow. I say so particularly because strict compliance with the rule elevates a judgment on confession to the level of one which cannot be rescinded.

[27] This is so for the following reasons:

(a) Rule 31(2) which traverses default judgment, reads as follows:

> "(2)(a) Whenever in an action the claim … is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down … for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.
>
> (2)(b) A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet."

(b) There is no similar provision in rule 31(1) for the setting aside of a judgment on confession. Naturally, as I have mentioned herein-before, if there is any irregularity in the consent to judgment itself, it may be set aside, for example where it is drawn up for the

defendant by or in the offices of the plaintiff's attorney (as in this case) unless verified by affidavit (as also in this case). See:

Mostert v SA Association 1868 Buch 286

(c) However, a consent to judgment duly executed cannot be arbitrarily revoked or withdrawn, nor can a defendant against whom judgment has been granted in term of a duly executed consent be entitled to apply for the rescission of such a judgment. See:

Moshal Gevisser (Trade Market) Ltd v Midlands Paraffin Co 1977 (1) SA 64 (N)

Morkel v Absa Bank Bpk 1996 (1) SA 899 (C) at 902F

Standard Bank of SA Ltd v Essop 1997 (4) SA 569 (D) at 576D

[28] The applicants have made their best endeavours to raise a bouquet of issues in an attempt make out a case for a rescission of the judgment sounding in money. However, none of these issues come even close to suggesting that the consent was not duly executed in the manner prescribed by rule 31 or that it is tainted by fraud. This being the case, I am of the view that the other issues raised are irrelevant to a determination of whether the judgment on confession ought to be set aside. By the same token I do not deem it necessary to address the various further proposals raised by the

applicants which proposals ought only to be given serious consideration in the event of the judgment on confession having been set aside.

[29] I now turn to the contention that the order, declaring the mortgaged property executable, ought to be set aside because, so it is contended, the Marwicks, when the order was made, had not been afforded the opportunity to address the Court on their right to housing and as such, the practice directives of this Court had not been complied with.

[30] Item 26 (issued on 10 January 2006) of this court's practice manual states that as from 15 December 2005 any summons initiating action in which a plaintiff claims relief declaring immovable property executable shall draw the defendant's attention to section 26(1) of the Constitution which accords to everyone the right to have access to adequate housing, and that should the defendant be of the view that the order for execution was infringing that right, that it was incumbent on the defendant to place information supporting that claim before the court.

[31] It is not disputed that the Marwicks were informed of this right *ex facie* the summons issued on 7 March 2008. In ***Gundwana v Steko Development and Others 2011 (3) SA 608 (CC)*** it was

declared unconstitutional for the registrar to declare immovable property specially executable when ordering default judgment under rule 31(5)(b) to the extent that this permits the sale in execution of the home of a person. The effect of this decision, read with subrule 5(b) and rule 46(1)(a)(ii), is that the registrar has to refer all applications for default judgment in which an order declaring specially executable a judgment debtor's usual or ordinary residence (such as the property in question), for hearing in open court; alternatively, that such applications should have been enrolled for hearing in open court in the first place.

[32] It has been argued on ABSA's behalf that the provision of judicial oversight provided for in ***Gundwana*** only came into effect when the judgment was delivered on 11 April 2011 (resulting in a practice directive being issued in this province to give effect to the decision), and as such did not apply when Madondo J made the order declaring the Marwicks's property executable on 20 November 2008.

[33] This is not necessarily the position. Froneman J in traversing the question of retrospectivity in ***Gundwana*** said the following (at paras 57 to 60):

'[57] But what about retrospectivity? In *Jaftha*, this court placed no limit on the retrospectivity of its order. The declaration of invalidity of the legislative provisions in that matter did not entail, however, that all transfers made subsequent to invalid execution sales were automatically invalid. Individual

persons affected by the ruling still needed to approach the court to have the sales and transfers set aside if granted by default. This was made clear in *Menqa and Another v Markom and others 2008 (2) SA 120 (SCA)*. A similar approach should be followed here.

[58] There may be a fear that the decision in this matter will lead to large-scale uncertainty about its effects on past matters, where homes were declared specially executable by the registrar, and sales in execution and transfers followed. The experience following *Jaftha* may be an indication that this fear is overstated. It must be remembered that these orders were issued only where default judgments were granted by the registrar. In order to turn the clock back in these cases, aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule under which the property was declared executable, is not sufficient to undo everything that followed. In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier, and they will have to set out a defence to the claim for judgment against them. It may be that in many cases those aggrieved may find these requirements difficult to fulfill.

[59] From what has been stated above, in relation to the legitimacy of resorting to execution in order to obtain satisfaction of judgment debts sounding in money, and that only deserving cases would justify other means to satisfy the judgment debt, it follows that a just and equitable remedy, following upon the declaration of unconstitutionality, should seek to ensure that only deserving past cases benefit from the declaration. I consider that this balance may best be achieved by requiring that the aggrieved debtors, who seek to set aside past default judgments and execution orders granted against them by the registrar, must also show in addition to the normal requirements for rescission, that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor’s home.

[60] Once these hurdles have been cleared, and it is determined that special execution should not have been allowed, the question of the effect of invalid execution sales and subsequent transfers will have to be considered as the next step. It is not possible to lay down inflexible rules to deal with all the permutations that may arise in these cases. Existing legal principles and rules will be sufficient to deal with most cases in a just and equitable manner.'

[34] ***Gundwana*** clearly makes provision for retrospective application in deserving cases and seems to somewhat shift the duty from the execution debtor in terms of practice directive 26 (to show cause why an order for execution should not be made), to the bondholder who, if it wishes to execute on a mortgage bond, should first approach a court of law for it to make a proper determination as to whether the sale in execution of the judgment debtor's home is justifiable in the circumstances of the case.

[35] Having said this, it is still incumbent on this court - not only because of what I have already stated, but also because ***Gundwana*** makes it abundantly clear that an aggrieved debtor must not only first show (as in the case of the judgment sounding in money) that the normal requirements for rescission have been met but also thereafter, that a court, with full knowledge of all the relevant facts existing at the time of the granting of the default judgment, would nevertheless have refused leave to execute against the debtor's home - to decide whether the requirements for rescission have been met with respect to the second judgment declaring the property executable. In the event of this question being answered in the affirmative, I do not deem it necessary to decide

whether a court with full knowledge at the time would have refused leave to execute. I say this because the second leg of this test is clearly (in terms of ***Gundwana****)* only of application in those special instances where persons whose homes were sold before ***Gundwana*** are seeking to have affected sales and transfers set aside.

[36] In the matter before me the sale has been interdicted pending the further determination of this court. It is accordingly only necessary for me to determine, on this leg, whether there are grounds for setting aside the judgment on confession, declaring the immovable property executable. In my view the same test applies as that which applied to the money judgment, and the facts of this case must also be distinguished from the typical default judgment situation catered for in the practice directives which follow the ***Gundwana*** decision. To emphasise, and stated differently, since there is in subrule (1) of rule 31 no provision similar to that in subrule (2)(b), a defendant against whom judgment has been granted in terms of this subrule is simply not entitled to apply for rescission of the judgment (unless of course there are persuasive allegations that the judgment was fraudulently obtained, which is not the case here).

[37] It has been argued on behalf of the Marwicks that they were invited in the summons to make representations in terms of section 26 of the Constitution “at the hearing of the matter” and that because Ms Marwick confessed to judgment declaring her property

executable, and because the matter was thereafter never “heard” as the Marwicks were not invited (after confessing to judgment) to attend court when “default” judgment was granted, that the judgment ought to be rescinded.

[38] This argument is unsustainable and in any event based on misconceptions. All that is required of the bondholder is to inform the judgment debtor of his/her constitutional right to have access to adequate housing and to invite him/her to place information before the court should the belief exist that such a right will be unduly infringed in the event of an execution order being granted. The practice directive does not refer to the “hearing” of the matter, nor does the summons in this case. What the summons does do is to advise Ms Marwick that if she objects to an order declaring her property executable, that she is “obliged” to place facts and submissions before the court, failing which she runs the risk of such an order being made. Against this backdrop Ms Marwick nevertheless signed a confession agreeing to this order being granted without any further ado. Furthermore, the judgment which was granted by Madondo J in terms of this confession is not a “default” judgment as urged for by the Marwicks and as envisaged in ***Gundwana*** and which led to the introduction of the practice directive. It is a judgment granted in terms of an unequivocal admission of the claim contained in the summons, which admission *ex facie* the formal document, has complied with all the peremptory requirements set forth in rule 31. In the premises, no grounds for rescission exist on a proper application of the legal principles pertaining to a consent to judgment.

[39] According to the summons, the property in Pietermaritzburg was mortgaged for R2 250 000,00 in 2006. It is averred that when summons was issued in March 2008, Ms Marwick was in arrears with her repayments of this loan to the tune of R125 626,88. The certificate of balance reflects the total amount due and payable to ABSA as at 17 January 2008 as being R1 891 637,00. On 3 April 2012 this court ordered the Marwicks to "continue" paying ABSA the amount of R10 019,60 per month pending the finalisation of this application. This is clearly a somewhat affluent estate and significantly distinguishable from the typical situation envisaged in ***Gundwana*** where an indigent debtor had already been evicted.

[40] In the premises I am in any event of the view that the relevant circumstances of this case, had they been fully considered by the court which made the order for execution based on the confession, are unlikely to have persuaded the court to act any differently.

[41] Insofar as it may be necessary to mention, the inclusion of Mr Marwick as a defendant in the order declaring the property executable is clearly an error not only because he is liable for payment of the money debt only by virtue of his position as a surety, but more significantly because the confession to judgment which forms the basis of this order states that only Ms Marwick consents to this judgment, duly verified by only her signature and only her verification affidavit.

[42] This is also clear not only *ex facie* the summons, but also from the original application for judgment declaring the property executable (case no. 4285/08), where relief is clearly sought against Ms Marwick as the mortgagor only. Accordingly, the amendment to that order which follows, must not be construed as a finding that the Marwicks have been partially successful in their rescission application. It is merely the correction of an obvious mistake which if undetected, would in any event have had no effect on Mr Marwick.

In the premises I make the following order:

ORDER:

1. The order granted by Justice Madondo on 20 November 2008 under case no. 4285/08 is amended by the deletion of the words "second defendant" wherever they may appear.

2. With respect to the order made by Justice Koen on 30 April 2012 under case no. 3351/12:

(a) The *rule nisi* is discharged.

(b) The interim relief granted in terms of paras 1.3 and 1.4 of the *rule nisi* is set aside.

(c) The first and the second applicants are directed (jointly and severally, the one paying the other to

be absolved) to pay the first respondent's costs of the rescission application (including the costs of the application for urgent interim relief heard on 30 April 2012) on the scale as between attorney and client.

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STRETCH AJ

Appearances /

Appearances

For the Applicants	:	Mr. A.R. Khan
Instructed by	:	Swaleh Mahomed Attorneys Pietermaritzburg
For the 1st Respondent	:	Mr. R. van Rooyen
Instructed by	:	Geyser Du Toit Louw & Kitching Inc. Pietermaritzburg
Date of Hearing	:	21 September 2012
Date of Filing of Judgment	:	31 May 2013