REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 48765/2010

in the matter between:

FIRST RAND BANK **PLAINTIFF**

AND

NTAKA LEGINAH NDILEKA **DEFENDANT**

JUDGMENT

Collis AJ:

INTRODUCTION

[1] In the present application the Applicant seeks rescission of a summary judgment granted against her on the 29th March 2011. She further

seeks the setting aside of a writ, which was issued pursuant to the said order and cost of the application.

[2] The application is premised in terms of Rule 42(1)(a), alternatively in terms of the Common Law

PLAINTIFF'S CAUSE OF ACTION

[3] During March 2006 the Defendant passed a Mortgage Bond B22293/2006 in favour of the Plaintiff as security for a loan of R345000, 00 together with interest thereon as provided for in the said Bond. Upon default of her repayments the Plaintiff obtained judgment against her.

DEFENCES

Rule 42(1)(a).

[4] Applicant applies to have the judgment taken against her rescinded, firstly on the basis that the judgment was erroneously taken against her in that the Plaintiff as credit provider had failed to annex to its Particulars of Claim. its registration certificate with the National Credit Regulator.

[5] The citation of the Plaintiff as per the Particulars of Claim reads as follows:

"First Rand Bank – A Division of First Rand Bank Limited (hereinafter called the Plaintiff) a bank duly registered and incorporated in terms of the banking laws of the Republic of South Africa and registered as a Credit Provider as defined in section 40 of the National Credit Act 34 of 2005."

[6] In its citation. the Plaintiff has alleged registration with the National Credit Regulator which registration as Credit Provider was not denied by the Defendant.

[7] The annexing to the Particulars of Claim of a copy of the registration certificate, would merely have been confirmation of such registration. but was not material and necessary to the allegation of such registration.

[8] As a consequence, I could not find any in merit in the first point in limine raised.

[9] The second ground upon which the Applicant contends the judgment was granted in error, relates to the authority of the Deponent to the Founding Affidavit filed in support of the application for Summary Judgment.

[10] The Applicant denies the deponent one Sanet von Mohlman, had any personal knowledge of the matter. In the affidavit in support of the present application, the Applicant sets out in paragraph 5 the following:

"I have never heard of Sanet Van Mohlmann who has deposed to the affidavit in support of the application for summary judgment. I had no dealings with her whatsoever and I deny that the facts fall within her personal knowledge and that the file is in her possession and under her direct control and that in the course of her dealings in this matter she has obtained any personal knowledge. I submit further that Mohlmann, never having dealt with me misleads the court when she states that she has personal knowledge of the matter, at best she can verify the correctness of the contents of the file, not whether the contents are in fact factually correct"

[11] If one has regard to the affidavit filed by one Sanet von Mohlmann Paragraphs 2 and 3 is of relevance and quoted hereunder:

"(2) The facts contained herein falls within my own personal knowledge save where it appears otherwise from the contents and are to the best of my belief true and correct.

(3) The Plaintiff's file in respect of this matter is in my possession and under my direct control and I accordingly have obtained personal knowledge of the information therein. Further in the course of my dealings with this matter I have also obtained personal knowledge."

[12] The leading case on the point is the decision of Maharaj v Barcklays National Bank Ltd 1976 (1) SA 418 A at 423A- 424D, where Corbett CJ remarked as follows:

"In the latter event, such other person's ability to swear positively to facts is essential to the effectiveness of the affidavit as a basis for summary judgement; and the Court entertaining the application therefore must be satisfied, prima facie, that the deponent is such person. Generally speaking, before a person can swear positively to

the facts in legal proceedings they must be within his personal knowledge. For this reason the practice has been adopted, both with regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the Magistrates Courts), of requiring that a deponent to an affidavit in support of summary judgment other than the plaintiff himself should state at least. that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated.....

The mere assertion by a deponent that he 'can swear positively to the facts" (an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient. unless there are good grounds for believing, that the deponent fully appreciated the meaning of the words...."

[13] In Standard Bank of South Africa Ltd v Kroonhoek Boerdery CC 2011 JDR 0980(GNP) Tuchten J remarked as follows:

" One of the aids of ensuring that this is the position is the affidavit filed in support of the application and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts"

[14] To the present matter at hand, the Applicant merely states "she had never heard of Sanet von Mohlman." To my mind, given the fact that the Respondent is national bank; it follows in all likelihood she would never have dealt with her.

[15] The Applicant further denies Ms. Von Mohlmann could possess personal knowledge or that the file in question is within her possession.

[16] Applicant, save for putting forward a bare and bold denial, sets out no facts to support such contention. It remains uncertain, what informed the Applicant of Ms. Von Mohlmann's, lack of personal knowledge, which Applicant alleges she possessed.

[17] Differently put, a mere denial of the bank's employees personal knowledge, would not suffice, and in order for a court to find such deponent lacks personal knowledge a court has to conclude that the deponent would be unable to competently testify to the documents with her employer bank relevant in the case in question. This I could not find.

[18] For the above reasons, I similarly could find no merit in the second point in limine raised, and as a result could find no grounds in rescinding the judgement in terms of Rule 42(1)(a).

COMMON LAW

[19] In the alternative, applicant applied for a rescission of the Summary Judgment granted against her in terms of the Common Law, and in this instance first applied for condonation for the late bringing of this application.

[20] An applicant for rescission at common law must show good cause. The requirements for good cause were restated by the Supreme Court of Appeal in Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) para 11:

"With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success."

[21] In this regard paragraphs 22 and 23 of the Founding affidavit, is of relevance. Therein the, Applicant explains she first obtained knowledge of the judgment during February 2012. She proceeded to investigate the matter and thereafter instructed her attorney and consulted with them on 13th March 2012. She explained the delay in bringing her application before the court timeously was brought on by her being out of the country by virtue of that fact that she is a flight attendant.

[22] The Respondent at paragraph 8 of the Answering affidavit merely denies the Applicant ought to be given condonation for the late filing of the application, without disclosing the basis for such opposition.

[23] I am satisfied that the lateness of bringing of this application has been explained and deems it fit to grant the applicant, such condonation.

EXPLANANTION OF DEFAULT

[24] In Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) Moseneke J at 528 remarked as follows:

"The Applicant, being the party which seeks relief bears the onus of establishing 'sufficient cause' whether or not 'sufficient cause' has been shown to exist depends upon whether:

(a) the applicant has presented a reasonable and acceptable explanation of her default;

and

(b) The Applicant has shown the existence of a bona fide defence that is one that has some prospect or probability of success"

[25] In the decision of Chetty v Law Society Transvaal 1985 (2) 756 (A) at 764J-765A-D, Muller JA; explained the above rule as follows:

"It is not sufficient if only one of these two requirements is met, for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing, the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain for the Rules was neverless permitted to have a judgment against him rescinded on the ground that he had reasonable prospect of success on the merits."

[26] Before it can be found an Applicant was said to be in wilful default, such Applicant must have had knowledge of the action brought against her and of the steps required to avoid the default.

[27] In Harris v Absa Bank Ltd t/a Volkskas *supra*, Moseneke J, remarked:

"Such an Applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions"

[28] In this regard Applicant explained, upon service of the summons on her on 7th December 2010; she was already under debt review. She immediately handed a copy of the summons to her debt counsellor, one Russel Dickerson. An Appearance to Defend the action was served on the Respondent on 14 January 2011.

[29] On 4th February 2011, the Respondent served the Summary Judgment Application on her attorneys, which application was to be heard on 29th March 2011.

[30] Applicant proceeded to explain, albeit her attorneys had received notification of the Summary Judgment application, the matter indeed had been misdiarized at her attorneys firm.

[31] If one has regard to the Applicant's affidavit resisting Summary Judgment the said affidavit was served on the Respondent's attorney on the 7th March 2011. It thus follows the affidavit resisting summary judgment was at the Court's disposal upon the hearing of the Summary Judgment, and as a result, must have been considered by the Court.

[32] The Applicant's default at the hearing for the Summary Judgment at best relates to the absence of her legal representative at such hearing, but could not relate to the absence of her defence, which would have been enunciated in her affidavit resisting summary judgment.

[33] The Applicant does not annex to her Founding Affidavit an affidavit by her legal representative to explain or even confirm his firm having diarised the date of the hearing incorrectly.

[34] This, the Applicant was required to do, as it would have given credence to the reasons for her absence at the hearing.

[35] In the absence thereof, I cannot but conclude, the Applicant being aware of the date of the Summary Judgment application, and having filed an affidavit resisting such application (*and in so doing appreciating the legal consequences of a judgment*), failed to take steps to avoid the default (*by her absence or that of her legal representative*) at the hearing. As a result she has failed to disclose the absence of wilfulness.

APPLICANT'S PROSPECT OF SUCCESS ON THE MERITS

[36] In essence the Applicant contends Summary Judgment ought not to have been entered against her as the Respondent (Plaintiff in the main action) had terminated the debt review proceedings by simply ignoring the instalment offer made to them through her debt counsellor. Furthermore in terms of the instalment offer, the Respondent was engaged to exercise good faith in its dealings with her and in so doing.

it was incumbent on the Respondent to seriously and in a meaningful manner give consideration to her proposal.

[37] In paragraph 10 of the Particulars of Claim, the Plaintiff alleges the following:

"The Defendant has referred the credit agreement to a debt counsellor for review thereof, which review process has been terminated by the Plaintiff in accordance with the provisions of Sec 86(10) of the National Credit Act 34 of 2004. The notice was dispatch by registered post on 9th November 2010 to the Applicant's chosen domicilium as per the underlying agreement."

[38] In her Founding Affidavit the Applicant sets out, upon appointing her debt counsellor, and submitting an application for debt review to her counsellor, the latter informed the Respondent that she had applied for debt review on 31 July 2010. Her counsellor processed her application and on 27th September 2010, informed the Respondent her application had been successful.

[39] On the same day her counsellor, had made an instalment offer to the Respondent, which instalment offer the Respondent was requested to accept within five (5) working days. This instalment offer, the Respondent simply ignored resulting in the Notice of Termination of the debt review.

[40] In terms of Sec 86 (10) a credit provider who wishes to terminate the debt review application, has to give notice to the consumer; debt counsellor and the National Credit Regulator.

[41] Counsel acting on behalf of the Applicant had submitted to the court, the Respondent (Plaintiff) had failed to allege in its Particulars of Claim, that termination of the Debt Review Application was indeed also given to the debt counsellor and the National Credit Regulator.

[42] If one however has regard to the said Notice of Termination annexed to the Particulars of Claim, it clearly indicates, same was also dispatch by electronic mail to the Applicant's Debt Counsellor, and the National Credit Regulator albeit no such allegation is contained in the Particulars of Claim.

[43] The Court when considering the Summary Judgment application, had to consider, whether the Respondent (Plaintiff in the main action) had exercised its right to terminate the review proceedings within the prescribe time limit as set out in Section 86(10) of the National Credit Act.

[44] In terms of Sec 86 (10), a credit provider can exercise his/her right to terminate if 60 (sixty) business days have elapsed since the date on which the consumer first applied for debt review and the process had not been finalized either by acceptance of the offer by a credit provider in their agreement in question or a debt counsellor upon rejection of a proposal has referred the matter to Court for determination.

[45] In this regard, the Applicant sets out that she first instructed her debt counsellor on 30th June 2010, who in turn informed the Respondent of her application for debt review on the 31st July 2010. On the 27th September 2010 the debt counsellor had notified the Respondent by dispatching Form 17.2 to the Respondent.

[46] With reference to Form 17.2 Applicant alleges, the Respondent had failed to respond by either accepting same or in turn to make a counter- proposal.

[47] On the 27th October 2010, Applicant proceeded to issue an application for debt review in the Magistrates Court for the district of Brakpan and service of such application proceeded via e-mail. The hearing of this application was only set down for the 18th March 2011.

[48] If this court has regard to Annexure "N2", made reference to in Annexure "LNN3" of Applicants affidavit resisting Summary Judgment Application, it reflects payments being made by the Applicant to the Respondent for the months of August 2010, September 2010 and November 2010.

[49] There as a result, has been an acceptance of the offer made by the Applicant through her Debt Counsellor albeit informally so, and the subsequent termination of the debt review process by the Respondent on the 9th November 2010, was in clear contradiction thereof.

[50] In terms of the National Credit Act the Respondent is enjoyed to exercise good faith in its dealings with the Applicant.

[51] Having regard to the payments made to the Respondent prior to the Debt Review Application being lodged, and even pursuant to the Debt Review Application being lodged, and the acceptance thereof by the Respondent, I am of the opinion the Applicant has disclosed good cause to have the judgment rescinded.

[52] Albeit the Applicant has failed to satisfy the requirement of wilful default, where she disclosed good cause to have the judgment rescinded, a court must come to her assistance.

ORDER

[53] For the reasons as set out above the order of this court reads as follows:

1. The application is granted with costs.

2. Judgment granted in favour of the Plaintiff against the Defendant on 27th March 2011 is hereby rescinded.

3. The warrant of execution issued herein, is hereby set aside

4. The Defendant is to file her declaration within 15 (fifteen) days of date hereof.

C. Collis
Acting Judge of the High Court of South Africa.

Appearances:

For the Applicant : Adv K. Levin

Instructed by	: Larry Marks Attorneys
For the Respondent	: Adv A. J. Venter
Instructed by	: Strauss Daly Inc.
Date of Hearing	: 16 May 2012
Date of Judgment	: 15 June 2012