REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION
JOHANNESBURG

CASE NO. 24072/2016

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

5 APRIL 2017
DATE

SIGNATURE

In the matter between:

SALLY ROBERTSON Applicant

and

FIRSTRAND BANK LIMITED t/a WESBANK Respondent

JUDGMENT

BHAM AJ

INTRODUCTION

[1] On 30 June 2015, the Applicant and the Respondent concluded a written Instalment Sale Agreement whose terms were governed by the National Credit Act, 34 of 2005, ("***the NCA***"). That agreement is hereinafter referred to as "***the Kia Agreement***".

[2] The Kia Agreement related to the instalment sale by the Respondent to the Applicant of a Kia Cerato Koup 1.6T GDI motor vehicle. There were 71 monthly instalments payable in terms of the Kia Agreement in an amount

of R7 183,22 each. The first such instalment was payable on 25 August 2015.

[3] The Applicant paid the first two instalments. However, the Applicant defaulted in making payment of the third instalment and, even though she has since made lower monthly payments, she has not made any further instalments payments in the amount provided for in the Kia Agreement. She has since 14 October 2015 been in default of her obligations in terms of the Kia Agreement.

[4] The Applicant also encountered difficulties in meeting various of her other financial obligations, not only to the Respondent pursuant to various agreements concluded with it but also to other financial institutions. Consequently, she turned to the NCA and approached a debt counsellor for assistance as contemplated under section 86 of the NCA. The debt counsellor so approached was Adri du Plessis ("***Du Plessis***") of Adcap (Pty) Limited. Du Plessis notified the Applicant's creditors of the Applicant's debt review and thereafter made application to the Magistrates Court for an order for the re-arranging of the Applicant's obligations to her creditors.

[5] An order was made in the Germiston Magistrates Court on 9 June 2016. Having regard to the issue relating to the effect of this Order insofar as it relates to the Kia Agreement, I shall deal with it more fully below.

[6] Subsequently the Respondent issued summons against the Applicant for an order directing the Applicant to return the Kia motor vehicle which formed the subject matter of the Kia Agreement, failing which authorising the Sheriff to attach that motor vehicle and handing it over to the Respondent. Summons was served on the Applicant. She did not enter an

appearance to defend. The Respondent was granted default judgment on 2 August 2016 ("***the default judgment***").

[7] The Applicant's attorney became aware of the default judgment on 10 August 2016. The Applicant became aware of the default judgment on 11 August 2016. The Applicant thereafter instituted the present application for a rescission of the default judgment. She did so only on 29 September 2016. In terms of the Rules of Court, she was required to have done so by 7 September 2016.

[8] Having failed to enter an appearance to defend which led to the default judgment, the Applicant then failed to timeously institute the present rescission application. Consequently, the Applicant requires and has sought, in the first instance, condonation for the late filing of her rescission application. For purposes of such condonation, the Applicant is required to satisfactorily explain her delay in instituting her rescission application. In addition, she is required to demonstrate that it is in the interests of justice that she be granted condonation. This test was formulated as follows by the Constitutional Court in **Ferris and Another v FirstRand Bank Limited**:[1]

> *"[10] In Bertie Van Zyl this Court held that lateness is not the only consideration in determining whether condonation may be granted. It held further that the test for condonation is whether it is in the interests of justice to grant it. As the interests-of-justice test is a requirement for condonation and granting leave to appeal, there is an overlap between these enquiries. For both enquiries, an Applicant's prospects of success and the importance of the issue to be determined are relevant factors."*

[9] There was no suggestion on the papers by either the Applicant or the Respondent that there is any importance in the issues raised in this application which go beyond the Applicant and the Respondent.

Consequently, the two factors to consider for the Applicant's condonation application is the Applicant's explanation for her delay in bringing the condonation application and the Applicant's prospects of succeeding in the rescission application should condonation be granted.

[10] In this regard, in considering the Applicant's prospects of success in the rescission application, the Applicant will again be required to explain her failure to have entered appearance to defend, which resulted in the default judgment having been granted.[2]

[11] In relation to the merits of the Applicant's proposed defence, she would be required to establish reasonable prospects of success relating thereto both in the condonation application and for purposes of the rescission application if condonation is granted. The test for reasonable prospects of success apply both to the condonation application as well as the rescission application should condonation be granted.

[12] Prior to considering the Applicant's case for condonation (which will include a consideration of her explanation for the delay in instituting the present application as well as her prospects of success in the rescission application), a chronology of events and an analysis thereof is required.

THE CHRONOLOGY OF EVENTS AND AN ANALYSIS THEREOF

[13] The Kia Agreement was concluded on 30 June 2015. Having paid the first two monthly instalments, the Applicant then defaulted in paying her third monthly instalment. The Respondent, in its answering affidavit and with reference to the Applicant having defaulted in her obligations under the Kia Agreement so soon after its conclusion, concluded that the Applicant had no

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1 2014 (3) SA 39 (CC).

2 As stated above, summons was duly served on the Applicant prior to default

intention to service her contractual obligations. The Applicant did not file a replying affidavit and thus this contention by the Respondent was unchallenged. Indeed, even in her the founding affidavit, the Applicant gives no indication of why she would have concluded the Kia Agreement at a time when she would probably have been aware that she was already encountering difficulty in meeting her obligations to various creditors.

[14] During October 2015, the Applicant applied for debt review with Du Plessis in terms of section 86 of the NCA. On 29 October 2015, Du Plessis sent out a notice in terms of section 86(4)(b)(ii) of the NCA to the Applicant's credit providers. Thereafter, on 12 November 2015 Du Plessis notified the Applicant's creditors, also in terms of sections 86(4)(b)(i) & (ii) of the NCA, that the Applicant's application for debt review was successful and that the Applicant's debt obligations were in the process of being restructured.

[15] On 5 June 2016, Du Plessis issued a proposal recommending that the Magistrates Court make an order restructuring the Applicant's obligations to her creditors as envisaged by section 86(7)(c)(ii) of the NCA. In this regard, and as appears from the proposal recommended by Du Plessis, 9 credit agreements formed the subject matter of her proposal. This included the Kia Agreement. In relation to the Kia Agreement, Du Plessis suggested that the Applicant's monthly instalments be reduced to R5 096,72 payable over 142 months. Du Plessis' proposal included two other credit agreements concluded between the Applicant and the Respondent, one of which also related to a motor vehicle. The Respondent took issue only with the proposal relating to the Kia Agreement. In its answering affidavit, the Respondent stated that Du Plessis' proposal in relation to the Kia Agreement

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judgment having been granted.

was "*nothing short of ludicrous*" and further that it (the Respondent) had refused to allow the Applicant to "*abuse the process and restructure her obligations in terms of the current agreement, which at the time of her applying for debt review was only four months old*". The description of Du Plessis' proposal relating to the Kia Agreement as "*ludicrous*" and the contention that the Applicant, in relation to the Kia Agreement, sought to abuse the debt review process was not challenged by the Applicant. She did not file a replying affidavit.

[16] Du Plessis' recommendation came before the Magistrates Court, Germiston on 9 June 2016 under case no. 1164/16. The Magistrates Court Order, for a restructuring of the Applicant's obligations to her creditors, was granted in relation to eight of the credit agreements which formed part of Du Plessis proposal and recommendation. But, in relation to the Kia Agreement, the magistrate had written on the Court Order, "*Excluded from debt review*". Furthermore, in ordering the Applicant to make payments for purposes of distribution to her credit providers in terms of the restructuring proposal, the figure of R10 202,00 was, in manuscript, changed to R5 105,28. The amount of R5 096,72 which related to the Kia Agreement was deducted from the proposal made by Du Plessis in the Magistrates Court.

[17] The parties disagree on what actually occurred in the Magistrates Court which caused the insertion of the wording, "*Excluded from debt review*" on the Magistrates Court Order. The Respondent contends that the Magistrates Court rejected Du Plessis' recommendation in respect of the Kia Agreement. In this regard, the Respondent states that the Magistrates Court finding was not that Du Plessis' recommendation in respect of the Kia Agreement was to be held over for later determination, nor did the Magistrate

direct that the debt counsellor should rework her recommendation in respect of the Kia Agreement. The Respondent states that the Magistrate made a clear and final directive rejecting the attempt to restructure the Respondent's obligations under the Kia Agreement. Again, it is important to note that the Applicant did not challenge the Respondent on this in a replying affidavit. Instead, in her founding affidavit, and pre-emptively, the Applicant denies that Du Plessis' recommendation relating to the Kia Agreement was rejected. The Applicant states that she was advised that the "*Debt Counsellor*" had instructed the appearance attorneys (who are not identified) to "*exclude the relevant claim due to the fact that the matter became opposed*". The Applicant further states that she was "*advised*" that as there was no re-arrangement by the Magistrates Court and no re-arrangement by consensus, the enforcing court would be requested to re-arrange the credit agreement.

[18] The Applicant does not state who had so advised her. In this regard, there is no confirmatory affidavit either by Du Plessis or the "*appearance attorneys*". Consequently, the Applicant has not stated the source of her "*advice*" nor does she subsequently (in a replying affidavit) challenge the Respondent's version of events regarding what occurred at the Magistrates Court.

[19] There is yet a further reason to accept the Respondent's version that the Magistrate had rejected the Du Plessis proposal in relation to the Kia Agreement. This is because the proposal in the form of a recommendation which was placed before the Magistrates Court related to 9 credit agreements and was placed before the Magistrate as a package. There is no suggestion in section 86 of the NCA that Du Plessis was then statutorily entitled to take out of the entire proposal a single agreement which formed

part of the package. However, the Respondent was entitled to object to the proposal, even in relation to a part thereof. And the Respondent, on its version, so objected to the proposal insofar as it related to the Kia Agreement. Furthermore, in terms of section 87 of the NCA, in relation to the debt counsellor's proposal, the Magistrates Court was required to conduct a hearing and having regard to the proposal and information before it, and the consumer's financial means, prospects and obligations, could either reject the recommendation or application or make an order, *inter alia*, re-arranging the consumer's obligations.

[20] The Magistrate did make an order re-arranging the Applicant's obligations, but not in relation to the Kia Agreement. The Magistrates Court is not, in terms of section 87, given the power to defer for later consideration a part of the proposal. It must either reject the proposal or make an order, *inter alia*, re-arranging the consumer's obligations. It made the latter Order, and in making such an order, the re-arrangement of the Applicant's obligations left the Kia Agreement obligation intact (as part of the Magistrates Court Order). Consequently, in my view, the order made by the Magistrates Court in relation to the 9 credit agreements placed before the Magistrates Court pursuant to the proposal made by Du Plessis re-arranged the Applicant's consumer obligations by –

20.1. rescheduling her payment terms and periods in respect of 8 of the credit agreements; and

20.2. leaving intact her payment obligations in terms of the Kia Agreement.

[21] After the Magistrates Court Order of 9 June 2016, neither the Applicant nor the debt counsellor took any steps nor made any suggestions to the Respondent that the Kia Agreement would form the subject matter of a

separate "*debt review*" in terms of the NCA. Instead, they remained decidedly silent.

[22] On 17 June 2016, the Respondent served summons on the Applicant. On the same day, the Applicant simply "*forwarded same to the offices of the Debt Counsellor*" in order for them to advise her regarding the steps she needed to take to protect her rights. Significantly, the Applicant in her founding affidavit does not state that by then steps were already afoot for a "*debt review*" to be undertaken separately in relation to the Kia Agreement. The Applicant then states that on 1 August 2016, she received a letter from the offices of her debt counsellor to which was annexed a mandate and fee agreement. But, the Applicant's notice of intention to defend had to be served, in terms of the Rules of Court, by 29 July 2016. The Applicant offers no explanation for her default in this regard nor does the Applicant attempt, in her founding affidavit, to explain why her debt counsellor's offices took no steps in this regard. Her papers are simply silent on this point.

[23] On 2 August 2016 the Respondent took default judgment, as it was entitled to. An Order of Court was made, *inter alia*, directing the Applicant to forthwith return the Kia motor vehicle to the Respondent, failing which the Sheriff was authorised to attach that vehicle and hand it over to the Respondent.

[24] On 2 August 2006, the Applicant completed an attorney's mandate form which was forwarded to her attorneys. Again, there is no explanation why, even at that stage, there was no communication with the Respondent regarding the Applicant's failure to enter appearance to defend.

[25] Instead, it was only on 10 August 2016 that a letter was addressed by the Applicant's attorney to the Respondent. In that letter, the Applicant's

attorney contended that the Applicant was "*under debt review*". However, no further details regarding the "*debt review*" was set out in that letter. There was then a proposal made for the restructuring of monthly payments in respect of the Kia Agreement. Again, the applicant offers no explanation why such a proposal was made only two months after the Magistrates Court Order.

[26] On the same day, the Respondent's attorneys addressed an e-mail to the Applicant's attorneys advising that default judgment had been granted, that the Respondent was not in a position to accept any further offers from the Applicant and that the Kia vehicle should be returned to the Respondent (alternatively that the full contractual balance should be settled whereafter ownership in the vehicle could be transferred to the Applicant). It was clear from this e-mail that the Respondent would no longer consider proposals by the Applicant to restructure her payment terms under the Kia Agreement.

[27] On 5 September 2016, the Sheriff attached the Kia motor vehicle which was in the possession of the Applicant's husband. In her founding affidavit the Applicant makes no reference to this event at all. And, this was two days prior to the date on which the Applicant ought to have brought her rescission application (i.e. by 7 September 2016). It must again have been clear to the Applicant that the Respondent did not have the appetite to further engage with the Applicant for the restructuring of payments in relation to the Kia Agreement.

[28] By now, the Applicant would have been aware both that her the debt counsellor had taken inadequate steps subsequent to the Applicant handing the summons over to her debt counsellor, and further that the Respondent was not interested in engaging further with the Applicant in relation to the Kia

Agreement and the default judgment. Consequently, the Applicant must have known at this stage that should she wish to set the default judgment aside, she would have to bring a rescission application. She had until 7 September 2016 to bring that application, if she was going to comply with the time periods set out in the Rules of Court.

[29] Yet, again the Applicant took no steps to comply with the Rules of Court. Instead, she continued to leave matters in the hands of the debt counsellor and her attorney. But, neither the Applicant nor the debt counsellor nor the Applicant's attorney in any way seek to explain why they had seen fit to ignore the date of 7 September 2016. The Applicant's only explanation is that her debt counsellor, in the period subsequent to becoming aware of the default judgment, offered to settle the whole of the arrears pertaining to her Kia Agreement account out of her own pocket. Yet, even in this regard, the Applicant states that payments thereafter would be made in accordance with either a revised proposal or some other agreed amount. Indeed, she states that, "*a post judgment agreement was to stipulate the way forward*".

[30] But through all of this there remains no explanation for why steps were not taken to bring the rescission application timeously, particularly as it related to the rescission of a default judgment granted because no appearance to defend was entered in response to the summons served on the Applicant.

[31] I am consequently inclined to accept, as contended by the Respondent, that the Applicant, having put herself in a position of extending herself beyond her means and consequently not having been able to meet her financial obligations, thereafter seemed to believe that everything she

encountered could be resolved and sorted out by a debt counsellor. The Applicant took absolutely no responsibility for ensuring that timelines, both in relation to entering an appearance to defend as well as in relation to bringing the present application, were met. She, in this sense simply "*passed the buck*". This is unsatisfactory.[3] And, this is not even a case where the Applicant's explanation was unsatisfactory. Rather, this is a case where the Applicant did not attempt, either herself or through the debt counsellor or through her attorney, to explain why no consideration was given to the due date of 7 September 2016, even in circumstances where it was abundantly clear that the Respondent intended to proceed with execution of the default judgment.

[32] The rescission application was then launched only on 29 September 2016, which in itself was one week after the Applicant's attorneys had informed the Respondent's attorneys of the Applicant's intention to bring the rescission application. Again, there is no attempt to explain why, even at this stage, the Applicant took a week to prepare her papers and bring the rescission application. The Applicant has simply ignored the requirement that she, in seeking condonation for the late filing of her rescission application, ought to have fully explained her delay.

THE CONDONATION APPLICATION

[33] The Applicant is required, for purposes of the condonation application, to satisfactorily explain her delay. For reasons set out above, I am not satisfied that she has done so. In my view, the Applicant has simply sought to seek refuge in having left matters in the hands of her debt counsellor and to some extent her attorneys. But the Applicant makes no

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[3] See **Ferris** *supra* at para [12].

attempt to explain significant gaps in time and why no steps were taken in order to bring the rescission application timeously. Even in her reliance on the debt counsellor and her attorney, there is no explanation forthcoming for why such steps were not taken.

[34] However, that is not the end of the matter. As set out in **Ferris** *supra*, I should also consider the Applicant's prospects of success in relation to the rescission application, were condonation to be granted.

[35] The first point to make in this regard is that part of the Applicant's prospects of success in the rescission application relate to a satisfactory explanation for a failure to enter an appearance to defend after the service of summons. I have already dealt with this aspect above. In my view, the Applicant simply did not make any attempt to explain the failure to enter an appearance to defend beyond stating that she handed the matter over to the debt counsellor for advice. There is no affidavit from the debt counsellor (Du Plessis) for failure to have timeously entered an appearance to defend, or for that matter even to communicate with the Respondent indicating that the matter was being dealt with by the debt counsellor who was seeking legal assistance on behalf of the Applicant. Consequently, and in considering the prospects of success on the rescission application, in my view, the Applicant will not establish a satisfactory application for her failure to enter an appearance to defend after service of summons on her.

[36] That then leaves me to consider the Applicant's prospects of success in relation to the merits of the application. In this regard, the essence of the Applicant's case is that the Respondent was required to have given a notice in terms of section 86(10) of the NCA to terminate the debt review. The Applicant also contends that the Respondent was required to

give notice under section 130(1) of the NCA. However, the Applicant's contention in this regard is premised on the contention that the Kia Agreement was still being "*reviewed*" in terms of section 86. In my view, this contention is ill-founded.

[37] Having regard to the outcome of the Magistrates Court hearing, an Order was made in terms of which payment terms relating to 8 of the credit agreements placed before the Magistrate were re-scheduled but not in relation to the Kia Agreement. On a proper interpretation of the Magistrates Court Order, the Applicant's obligations under the Kia Agreement remained intact.

[38] Consequently, and having regard to the terms of section 88(3) of the NCA, the Respondent was entitled to institute the legal proceedings against the Applicant which led to the default judgment. In this regard, it is not in issue that the Applicant was in default under the Kia Agreement. In addition, the final order made by the Magistrate had restructured the Applicant's payment terms under 8 of the 9 credit agreements but left the Applicant's obligations under the Kia Agreement intact. By continuing to default on those obligations, the Applicant had defaulted on her obligations in terms of the re-arrangement ordered by the Magistrates Court, as contemplated by section 88(3)(b)(ii).

[39] In my view, the Applicant's prospects of success on the merits, insofar as this is considered, both in relation to the condonation application and the rescission application, are poor.

[40] In the result, I make an order in the following terms –

40.1. The application for condonation for the late filing of the rescission application is dismissed.

40.2. The Applicant is ordered to pay the Respondent's costs.

BHAM AJ

Heard: 24 April 2017
Judgment delivered: 5 May 2017

Appearances:

For Applicant: Attorneys Smith & Grove

For Respondent: Advocate Karen Meyer instructed by Attorneys C F van Coller Incorporated.