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

CASE NO: **07745/15**

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

..... **06 MARCH 2017**
SIGNATURE **DATE**

In the matter between:

ANNELINE REDDY Applicant

v

FIRSTRAND BANK LIMITED t/a WESBANK Respondent

JUDGMENT

MATOJANE J

[1] This is an application in terms of Rule 31(2)(b) of the Uniform Rules of Court, for the rescission of the judgment granted by default on 22 July 2015.

[2] The default judgment orders the return of a 2006 Ford Territory 4.01 TX A/T motor vehicle by the applicant to the respondent, failing which the sheriff would be authorised to attach the motor vehicle and hand it over to the respondent.

Factual background

[3] During October 2011 the parties entered into an Instalment Sale Agreement in terms of which the respondent sold the motor vehicle to the applicant. The applicant would repay, to the respondent, the total amount of R177 732.60 in monthly instalments of R2 712.21 on or before the first day of each month, commencing from December 2011.

[4] The applicant is a business owner and sole proprietor in the business of home renovations and cupboards. She states that on or about January 2014 she fell into arrears with the payment of her instalments as a result of a steady decline in business. On or about 25 January 2016, she became aware that default judgment had been granted against her. She states that the existence of the section 129 notice and the service of summons did not come to her attention.

[5] She admits that the notices and summons in the main action were dispatched to and served at her chosen *domicilium citandi et executandi* address, which address she states *"was only so elected for the purpose of entering into the Credit Agreement"*. It appears that this address was in fact the applicant's residential address at the time.

[6] The applicant avers that the *domicilium* address set out in the Credit Agreement was her previous address and, due to financial constraints, she was forced to move to a more cost-effective property. She addressed a letter to the respondent on or about 5 November 2014 wherein she requested a payment arrangement be entered into between the parties. Her new address was stipulated in the top right corner of this letter.

[7] The applicant alleges that she was under the impression, as she "is not a legal mind", that sending a letter which bears her physical address at that particular

point in time was sufficient to inform the respondent of her new address. She alleges that had service of the summons come to her attention she would have defended the action or attempted to reach a settlement with the respondent as a matter of urgency.

[8] The applicant submits that whilst she may not have a defence to this action, albeit that she was in dire financial straits, she wishes to enter into a reasonable agreement with the respondent whereby she will pay a lump sum towards the outstanding balance, as well as double the current monthly instalment on the vehicle until such time that the entire balance is paid off.

[9] It was argued on behalf of the applicant that even though the applicant was at fault, by not making arrangements for the summons to be forwarded to her from her chosen *domicilium citandi et executandi* address, she should not be denied relief from the drastic consequences of not being allowed to defend the claim against her. I disagree. In my view, failure by the applicant to comply with the requirements of the rules of Court has been intentional or due to indifference or gross negligence on her part. The applicant is a business owner who understood the clear terms of the Instalment Sale Agreement she agreed to.

[10] Paragraph 17 of the Terms and Conditions of the Instalment Agreement is headed 'Addresses' and reads as follows:

> "17.1 You agree that the postal/email address that you have provided on the quotation/cost of Credit is the address where we must send all post and other communication to you and that such communication will be binding on you.
>
> 17.2 You agree that the physical address that you have provided on the quotation/ cost of Credit is the address that you have selected as the address where we must send all legal notices to you.
>
> 17.3 You must let us know, in writing, by hand or registered mail, of any change to either of your addresses or your email address and telephone or cellular

numbers. If you fail to give notice of a change of address, we may use the last address we have for you.

17.4 You accept that you will be deemed to have received a notice or letter within five (5) business days after we have posted it to either the addresses you have given to us."

[11] Clause 19.1.12 of the agreement enables the applicant to consider avenues listed in the National Credit Act and provides:

> "You have the right to resolve any dispute that may arise between us by way of alternative dispute resolution, or to file a complaint with the National Credit Regulator, Banking Ombudsman or to make an application to the Tribunal. The conduct details are ....."

[12] In *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC), the Constitutional Court explained at paragraph 36 that:

> "The Act does not imply, and cannot be interpreted to mean, that a consumer may unreasonably ignore the consequences of her election to receive notices by registered mail, when the notifications in question have been sent to the address which she duly nominated. While it is so that consumers should receive the full benefit of the protections afforded by the Act, the noble pursuits of that statute should not be open to abuse by individuals who seek to exercise those protections unreasonably or in bad faith."

[13] A reasonable consumer, in this case the applicant who is a business woman, would have notified the respondent that the address at the right-hand top corner of her letter of 5 November 2013 is her new *domicilium* address. The section 129 notice was properly forwarded to the applicant and the summons was also properly served at the *domicilium* address of the applicant and she is deemed to have received the notice within five days as agreed.

[14] The application for rescission of judgement in terms of rule 31(2)(b) must show good cause why the remedy should be granted. That entails (a) giving reasonable explanation of the default; (b) showing that the application is made *bona fide;* and (c) showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospect of success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgement.

[15] The requirement of good cause normally will be satisfied if there is evidence of the existence of a substantial defence, which the defendant intends to prosecute conscientiously in the event of the judgment being rescinded. See *Terrace Auto Service Centre (Pty) Ltd and Others v First National Bank of South Africa Ltd* 1996 (3) SA 209 (W).

[16] The applicant has failed to make out a bona fide defence good in law or complied with the requirements for setting aside a judgement.

The following order is made:

The application is dismissed with costs as between attorney and client.

K E Matojane
Judge of the High Court
Gauteng Local Division, Johannesburg

APPEARANCES

PLAINTIFF:	Adv. C Bornman
Instructed by:	Witz Calicchio Isakow & Shapiro Attorneys

DEFENDANT:	Adv. K Meyer
Instructed by:	De Jager Kruger Van Blerk Attorneys
HEARING DATE:	23 February 2017
JUDGMENT DATE:	06 March 2017