REPUBLIC OF SOUTH AFRICA

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

CASE NO: **3377/2017**

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
29/09/2020

In the matter between:

ANDILE ANELE LUVO MAGENGENENE Applicant

and

AUDI FINANCIAL SERVICES, A DIVISION OF WESBANK (PTY) LIMITED Respondent

JUDGMENT

Lapan AJ:

INTRODUCTION

[1] This is an application for the rescission of a default judgment granted against

the applicant by the registrar of this court on 14 December 2017. The judgment was granted in favour of the respondent for payment of the sum of R215 017.02 together with interest and costs.

[2] The applicant seeks rescission of the default judgment and the setting aside of a writ issued on 4 May 2017 for the attachment and sale of the vehicle more fully described below. The writ was issued following upon default judgment granted against the applicant by the registrar, on 25 April 2017, cancelling the agreement and authorising the attachment and sale of the vehicle to reduce the applicant's outstanding indebtedness to the respondent.

[3] The applicant states that he did not receive the summons nor the application for default judgment and that the default judgment was erroneously sought and granted in his absence as contemplated in uniform rule 42(1)(a).

[4] The respondent states that the summons and the application for default judgment was served on the applicant at his residential address which is his chosen *domicilium citandi et executandi (domicilium* address*)*.

[5] Before dealing with the merits of the rescission application and the prayer for condonation for the late filing thereof, the factual background is set out below.

BACKGROUND

[6] On 23 July 2015, the applicant purchased a new 2015 Audi A4 1.8T SE vehicle with registration number [....] (vehicle) from the respondent.

[7] Imperial Group (Pty) Ltd trading as Audi Centre Fourways (Audi Fourways) is the dealership where the applicant had selected the vehicle and its accessories. Had the applicant paid cash, he would have acquired the vehicle directly from Audi Fourways. Since the applicant required financing, the vehicle was purchased with the financial assistance of the respondent. Audi Fourways and the respondent are two separate legal entities operating under the same brand name, the former being a

dealer in motor vehicles and the latter being a financial services provider.

[8] As explained in the answering affidavit, the process involves the applicant making application to the respondent for financial assistance to acquire the vehicle. If the application is approved, the respondent purchases the vehicle from the dealer and, upon paying the purchase price, becomes the owner of the vehicle. Thereafter, the respondent concludes an instalment sale agreement with the applicant in terms of which it sells the vehicle to the applicant. The dealer delivers the vehicle to the applicant on behalf of the respondent as the owner of the vehicle.

[9] On 23 July 2015, an instalment sale agreement was concluded electronically between the applicant and the respondent in terms of which the respondent sold the vehicle to the applicant (agreement). The applicant took delivery of the vehicle on the same day.

[10] The salient provisions of the agreement are that the applicant pays the purchase price of the vehicle in monthly instalments, the respondent retains ownership of the vehicle until all instalments are paid and, in the event of breach, the respondent is entitled to take possession of the vehicle, retain all instalments paid and claim any damages suffered.

[11] On 5 August 2015, exactly 13 days after taking delivery of the vehicle, the vehicle broke down whilst being driven by the applicant. The vehicle was towed to the nearest Audi dealership which was in Sandton (Audi Sandton). Upon inspecting the vehicle, Audi Sandton determined that the breakdown was caused by a burnt-out clutch which was in turn caused by driver abuse. The applicant was informed that he was liable for the repairs and he was invited to arrange for an independent assessment of the vehicle to obtain a second opinion on the damage to the vehicle.

[12] The applicant declined to pay for the repairs or to arrange for an independent assessment of the vehicle. The vehicle was later towed to Audi Fourways, never to be collected by the applicant.

[13] The applicant states that he decided to cancel the agreement for two reasons, first, he believed that the vehicle must have been defective when delivered to him since new vehicles do not fail after 13 days and, second, Audi Fourways failed to provide him with a courtesy car after the breakdown of his vehicle.

[14] The applicant states that, on 19 August 2015, he notified the respondent of his intention to cancel the agreement and, on 26 August 2015, he unequivocally cancelled the agreement and communicated such cancellation to the respondent. The applicant also states that, on 5 August 2015, he returned the vehicle to the respondent. The respondent denies having received a notice of cancellation from the applicant and denies that the vehicle was returned to it.

[15] During August 2015, the applicant lodged a complaint against Audi Fourways with SA Consumer Complaints. A copy of the complaint has not been made available (first complaint).

[16] The first complaint is summarised in a letter, dated 26 August 2015, from Mr Odendaal, an arbitrator and mediator at SA Consumer Complaints, addressed to Audi Fourways, requesting a response to the complaint. In this letter, Mr Odendaal states that the applicant seeks cancellation of the agreement as prescribed in the Consumer Protection Act. Audi Fourways did not respond. In a letter dated 10 September 2015, Mr Odendaal advised the applicant that the dispute could not be resolved as Audi Fourways had failed to respond. Mr Odendaal advised the applicant to refer the dispute to the National Consumer Commission in terms of the Consumer Protection Act.

[17] In an undated report compiled by Mr Odendaal, he summarised the complaint, the investigation conducted by him and his findings (report). In his findings, the report notes that Audi Sandton was contacted and had advised Mr Odendaal that the clutch had burnt out due to the applicant's driving style. As a goodwill gesture, Audi Sandton offered to replace the clutch and pressure plate provided that the applicant pays the labour costs involved in doing so, in an amount of R5 306.70 incl VAT.

[18] The report notes further that the applicant rejected the aforesaid offer and advised that he still wanted to cancel the agreement. The applicant made the following comments as captured in the report:

> *"My reason for wanting to cancel this contract is because the car is of no use to me, as I constantly drive in traffic, so I will probably have this problem over and over again, and the bad service I have received from Audi since the car gave me the problem."*

[19] There is no indication in the report, or in any correspondence, that SA Consumer Complaints contacted the respondent for a response even though the report notes that the respondent financed the acquisition of the vehicle.

[20] On 18 September 2015, the applicant lodged a complaint with the Motor Industry Ombudsman of South Africa (Ombudsman). In the complaint, the applicant stated that he wanted the contract cancelled as he had lost trust in Audi Fourways due to its failure to provide him with a courtesy car and because the vehicle broke down after only 13 days (the second complaint). In response to the question as to what outcome the applicant hopes to achieve by lodging the complaint, the applicant stated that "*the supplier must cancel the transaction.*"

[21] On 5 January 2017, the respondent gave notice to the applicant in terms of section 129 of the National Credit Act 34 of 2005. This notice was not responded to.

[22] On 13 March 2017, the respondent instituted the action against the applicant claiming cancellation of the agreement and the return of the vehicle. The summons was served on the applicant at his residential address which was his chosen *domiclium* address. The return of service indicates that the applicant was temporarily absent from his residence and that the summons was served on an employee at his residence. The applicant failed to enter an appearance to defend. The applicant now states that he did not receive the summons and, since the agreement was cancelled by him on 26 August 2015, he no longer had a chosen *domicilium* address.

[23] On 25 April 2017, the respondent brought an application for default judgment in terms of rule 31(5)(a), claiming cancellation of the agreement and authorising the attachment and sale of the vehicle, the proceeds to be used to reduce the applicant's outstanding indebtedness to the respondent in the amount of R347 139.84.

[24] On 25 April 2017, default judgment was granted against the applicant by the registrar of this court and the vehicle was attached pursuant to a writ of attachment issued on 4 May 2017. The vehicle was sold at an auction for an amount of R222 000.00. In November 2017, the respondent brought a second application for default judgment in terms of rule 31(5)(a), claiming payment of the balance of the outstanding indebtedness, in an amount of R217 017.20, which was the amount owing after applying the proceeds from the sale of the vehicle.

[25] On 15 November 2017, the second application for default judgment was served on the applicant at his residential address. The return of service indicates that a new owner was at the premises who advised that the applicant had relocated.

[26] On 11 December 2017, the second complaint was finalised when the Ombudsman advised the applicant that Audi Fourways had failed to respond to the complaint and, therefore, that the dispute could not be resolved. The applicant was advised to refer the dispute to the National Consumer Commission in terms of the Consumer Protection Act. There is no indication that the Ombudsman contacted the respondent for a response to the complaint.

[27] On 14 December 2017, default judgment was granted by the registrar against the applicant for payment of an amount of R217 017.20 together with interest and costs.

[28] On 19 January 2018, the applicant lodged a complaint with the National Consumer Commission (Commission). In this complaint, the relief sought by the applicant was the "*acknowledgment*" of the cancellation of the agreement and the "*removal of the judgments*" against his name (third complaint). In the third complaint, the applicant pertinently stated the following (in manuscript):

"*I would like the judgment against my name for the purchase of this vehicle removed as car broke down within 14 days and we were poorly serviced and have every right to cancel this contract."*

[29] When asked, in the complaint form, what steps were taken to resolve the complaint, the applicant wrote: "*I would like the judgment against my name removed and cancellation of this contract acknowledged…".* The applicant fails to mention the outcome of the third complaint.

[30] The applicant states that he first became aware of the default judgment on 28 August 2019 when he applied for a loan to Absa Bank. He states that the default judgment is adversely affecting his credit record making it difficult to obtain financing. The applicant seeks rescission of the default judgment on the basis that he had cancelled the agreement and returned the vehicle to the respondent in August 2015.

THE RESCISSION APPLICATION

[31] The applicant relies on rule 42(1)(a) for his application to rescind the default judgment granted on 14 December 2017 and to set aside the writ issued on 4 May 2017. To succeed, the applicant must establish that the default judgment was erroneously sought or erroneously granted in his absence and that his rights or interests are affected thereby.

[32] The applicant also relies on the common law for the granting of the rescission application. In this regard, the applicant must show sufficient cause for setting aside the judgment which requires the applicant to prove, first, that he has a reasonable (and thus acceptable) explanation for his default, second, that the application is made *bona fide* and not with the intention of delaying the respondent's claim and, third, that the applicant has a *bona fide* defence to the claim. The last two requirements are interlinked. [1]

[33] The applicant also seeks condonation for the late filing of this application, if

the application is considered to be late since, in the applicant's view, the application was brought within a reasonable time after becoming aware of the judgment.

RULE 42(1)(a)

Was the default judgment erroneously sought or erroneously granted?

[34] The applicant is required to show that, at the time when the default judgment was granted, the Court, or the registrar in this case, was unaware of facts which, if known to it, would have precluded the granting of the order.

[35] The applicant contends that the judgment was erroneously granted for two reasons. First, the respondent delivered a defective vehicle to the applicant, in breach of the agreement, which resulted in the applicant cancelling the agreement on 19 or 26 August 2015 and returning the vehicle to the respondent. Second, the applicant alleges that the summons and the application for default judgment were not served on him and that he did not have a *domicilium* address as he had cancelled the agreement.

[36] The applicant makes the bald assertion that the respondent delivered a defective vehicle to him in breach of the agreement. The applicant had declined to appoint an independent assessor to provide a second opinion on the damage to the vehicle. Furthermore, the parties no longer have access to the vehicle as it was sold at an auction in 2017. Therefore, there is no evidence to substantiate the applicant's claim that the respondent delivered a defective vehicle to him on 23 July 2015.

[37] The applicant's contention that he cancelled the agreement is not borne out by the correspondence relied on being the two emails addressed to Audi Fourways on 19 and 25 August 2015. Audi Fourways was not appointed to act as an agent of the respondent and the two emails only go as far as advising Audi Fourways of the applicant's intention to cancel the agreement. There was no notice of cancellation let alone one that was addressed to the respondent.

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[1] *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B-C.

[38] The alleged cancellation is also not borne out by the applicant's three complaints. In the summarised version of the first complaint, it is specifically recorded that the applicant sought cancellation of the agreement. In the second complaint, the applicant stated that he wanted "*the supplier to cancel the transaction"*. In the third complaint, the applicant sought the *"acknowledgment*" of the cancellation of the agreement but without stating when or how such cancellation had been effected. Therefore, whilst the applicant might have wished to cancel the agreement, he did not actually do so by sending a notice of cancellation to the respondent.

[39] Furthermore, the vehicle could not have been returned to the respondent on 5 August 2015, as the applicant claims, as this was the day on which the vehicle broke down and was towed to Audi Sandton. Days later, and after assessing the damage, the vehicle was towed to Audi Fourways where it remained until repossessed by the respondent pursuant to the writ issued on 4 May 2017.

[40] For the aforesaid reasons, it is clear that there were no facts that would have precluded the granting of the default judgment. In view thereof, the default judgment was not erroneously sought or erroneously granted and the requirements of rule 42(1)(a) have not been satisfied.

RESCISSION UNDER THE COMMON LAW

The applicant's explanation for the default

[41] The applicant asserts that, because he cancelled the agreement and returned the vehicle on 5 August 2015, he had no further obligations to the respondent. As already mentioned above, the applicant did not cancel the agreement nor did he notify the respondent of his purported cancellation and neither did the applicant return the vehicle to the respondent at its chosen *domicilium* address.

[42] If the agreement was not cancelled then the applicant's explanation for the default in defending the action does not pass muster as the summons was served at

his chosen *domiclium* which was also his residential address at the time.

***Is the application made bona fide and does it raise a bona fide defence*?**

[43] It appears that the applicant elected to bring the application for rescission upon realising that his credit record is adversely affected by the judgment. This may be considered a *bona fide* reason for bringing the application. However, the applicant's proposed defence to the action, namely, that he cancelled the agreement because the respondent had delivered a defective vehicle to him, lacks merit.

[44] The applicant did not conduct an independent assessment of the vehicle to determine the cause of the breakdown on 5 August 2015 and, thus, his assertion that the respondent delivered a defective vehicle is speculative at best.

[45] More than five years have elapsed since the vehicle was delivered to the applicant on 23 July 2015 and even in the unlikely event that the vehicle is located, the applicant will be hard-pressed to establish that the vehicle was defective when it was delivered to the applicant, brand new, more than five years ago.

[46] Since the applicant did not cancel the agreement, he remained liable to pay the monthly instalments to the respondent and he breached the agreement when he fell into arrears with these payments. The applicant was not entitled to simply walk away from the transaction, abandon the vehicle and avoid all contact with the respondent. The applicant could have invoked the complaints resolution procedure set out at the end of the agreement, which involves lodging a complaint with the respondent's compliance officer for resolution of the complaint within 6 weeks.

[47] Should the complaint not be resolved within 6 weeks, the applicant could refer the complaint to the FAIS Ombud where it would be resolved within 6 months calculated from the date when the complaint was lodged with the respondent. There was no reason to follow other dispute resolution processes to the exclusion of the process set out in the agreement which had the benefit of strict timelines set for the resolution of disputes.

[48] The respondent was entitled to pursue its remedies due to the applicant's breach of the agreement and the longer the respondent delayed in pursuing these remedies, the less valuable its security became. As it turned out, the respondent sold the vehicle almost two years after it had been abandoned by the applicant for almost half of its original purchase price.

[49] In view of the aforesaid, the applicant has failed to prove that it has a *bona fide* defence which *prima facie* has some prospect of success and this court finds that the applicant has failed to establish the requirements for the granting of the rescission application under the common law.

CONDONATION

[50] Condonation is not for the mere asking and sufficient cause must be shown, having regard to the various factors to be considered, to determine whether it would be in the interests of justice to grant condonation. The applicant is required to explain the entire period of the delay.[2]

[51] Delaying the finalisation of a matter has a deleterious effect on the administration of justice and is prejudicial to other litigants, particularly in the present matter where the vehicle was sold at an auction in 2017. Evidence is lost, memories fade, witnesses become unavailable and innocent third parties are unduly prejudiced when matters are not finalised promptly including applications to rescind and set aside judgments of this court.

[52] The applicant states that he learnt about the default judgment on 28 August 2019 when applying to Absa Bank for a loan. He also states that, thereafter, he sought legal assistance from his insurer and the Legal Aid Board but was refused. Upon obtaining funding from a third party, the applicant states that he was able to bring this application but that further delays were caused by trying to retrieve the court file which had already been archived.

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[2] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) para [23].

[53] The applicant makes these general statements without any supporting evidence in the form of confirmatory affidavits nor does he provide any dates to explain the entire period of the delay of some 3 months (excluding the December – January recess), when the applicant, on his version, first became aware of the default judgment on 28 August 2019.

[54] As already mentioned, when regard is had to the third complaint, it is clear that the applicant knew about the default judgment when he lodged the third complaint on 19 January 2018, as he sought therein the "*removal of the judgment against my name for the purchase of this vehicle*." This can only be a reference to the default judgment granted against the applicant on 14 December 2017 and it could also be (or include) a reference to the first default judgment granted against the applicant on 25 April 2017 which led to the issuing of the writ on 4 May 2017. Either way, the applicant knew about the default judgment for at least two years prior to bringing this application for rescission and he provides no explanation for this lengthy period of delay.

[55] Although rule 42(1) does not specify a time limit, rescission in terms of rule 42(1) is a discretionary remedy and, like all discretionary remedies, it must be sought within a reasonable time. The same applies to rescission applications brought in terms of the common law.[3] What is reasonable depends on the circumstances of each case.[4]

[56] In the present matter, there is no explanation for the lengthy delay in bringing the rescission application and for approaching the Commission, in terms of his third complaint, to have the judgment of this court "*removed*". The applicant appears to have ignored a judgment of this court in the hope of obtaining a more favourable outcome in another forum in the same way that he ignored the respondent and the agreement which he had concluded with the respondent.

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[3] *Roopnarain v Kamalapathy and Another* 1971 (3) SA 387 (D) at 391B-D.
[4] *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 421F-H.

[57] The applicant has delayed this application unnecessarily and without having recourse to the respondent and the complaint resolution mechanism set out in the agreement for resolving disputes expeditiously. He could also have attempted to re-negotiate the agreement with the respondent in order to achieve a more favourable outcome given his dissatisfaction with the vehicle which was the real reason for him walking away from the transaction as he so clearly stated in his first complaint.

[58] As it turned out, when the applicant was not satisfied with the offer made by Audi Sandton pursuant to the first complaint, he took the matter to the Ombudsman where the matter remained unresolved for two years. By the time when he lodged the third complaint with the Commission, in January 2018, the respondent had by then taken the necessary steps to recover its money and make good its security in the vehicle.

[59] It will be very difficult, if not impossible, for the applicant to substantiate its defence that the respondent caused the breakdown of the vehicle five years ago, on 5 August 2015, by delivering a defective vehicle to the applicant. The availability of the vehicle to substantiate the applicant's defence is dubious given the inordinate lapse of time and bearing in mind that memories fade, documents are lost and witnesses become unavailable.[5] Furthermore, the respondent will be unduly prejudiced if the default judgments are now rescinded and the writ of attachment set aside.

[60] For the above reasons, the prayer for condonation ought to be refused, in the exercise of this court's discretion, and the application for rescission ought not be entertained. In any event, this court finds that the rescission application lacks merit.

[61] The following order is made:

The application is dismissed with costs.

AJ LAPAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANT:	Mr M Manaka
APPLICANT'S ATTORNEYS:	AG Mulaudzi Attorneys
COUNSEL FOR THE RESPONDENT:	Mr P Marx
RESPONDENT'S ATTORNEYS:	Rossouws, Lesie Incorporated
DATE OF THE HEARING:	24 August 2020
DATE OF JUDGMENT:	25 September 2020

[5] *Brummeria Rennaissance (Pty) Ltd and Others v CSARS* 2007 (6) SA 601 (SCA) in para [26].