IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION , PRETORIA

CASE NO: A695/2012

DATE: 25 April 2014

Not Reportable

In the matter between:

PAUL JOHANNES VAN DER MERWE **Appellant**

and

TOYOTA FINANCIAL SERVICES (PTY) LIMITED **Respondent**

JUDGMENT

Ismail J:

Background:

[1] This is an appeal against the judgment granted by Mngqibisa- Thusi J which was granted in this court against the refusal of an application for recission of judgment. The matter came before this court with the leave of the presiding judge.

[2] The appellant was a purchaser of a motor vehicle which the respondent financed in terms of an credit sale agreement. The agreement between the parties is contained in the papers before us at pages 34-38 of the record of proceedings.

[3] At the outset of the appeal the appellant sought condonation for the late filing of volume 3 of the record which was not served timeously. Counsel for the appellant, Mr Strydom SC, submitted that there was no prejudice to the respondent and that the court should permit the late filing of that portion of the record. There

was no objection from the respondent's counsel, Miss Lottering. Condonation for the late service and filing of volume 3 of the record was granted.

[4] The respondent instituted proceedings against the appellant by way Summons under case number 25755/2010

[5] In the particulars of claim the respondent averred that the section 129 notice was served on the defendant, (the appellant) at farm C[...], R[...] 0[...] and not at the appellant's postal address namely P O Box 1[...] N[...] 0[...]. This summons was dated 29 April 2010.

[6] The respondent prayed for judgment against the appellant in the following terms:

A. Confirmation of Cancellation of the agreement;

B. Repossession of the goods;

C. Damages postponed sine die;

D.....

E.

F. Further and/or alternative relief.

[7] In the plea the appellant stated at paragraph 6.1 the following:

" Dit word ontken dat Eiser voldoen het aan die bepalings van Art. 129 (1) gelees met

Art. 130 van die Nasionale Kredietwet, 34 van 2005 en/of die tersaaklike ooreenkoms"

At paragraph 6.2 of the plea the following was stated:

" Verweerder dra nie kennis van die beweerde versending per geregistreerde pos nie, ontken dit gevolglik en plaas Eiser tot bewys daarvan."

At para 6.6 of the plea the defendant pleaded as follows:

" 6.6 Verweerder voer aan:

6.6.1 dat Eiser se optrede deur die ooreenkoms te kanselleer en/of terrugawe van die voertuig te eis, 'n repudiasie van die ooreenkoms daarstel;

6.6.2 dat voormelde repudiasie deur verweerder aanvaar word en tree Verweerder gevolglik terrug uit die tersaklike ooreenkoms;

6.6.3 dat Verweerder terrugbetaling eis van alle reedsbetaalde gelde;

6.6.4 dat Verweerder terruglewering tender van die tersaaklike voertuig teen terrugbetaling van alle reedsbetalde gelde ten einde restitusie te bewerkstellig.

[9] The action instituted by the plaintiff (respondent in this matter) was

[10] Pursuant thereto the respondent had a new section 129 notice served on the appellant which was personally served on the latter.

After the lapse of the requisite period of the notice in terms of section 129 of the National Credit Act another summons was served on the applicant under case number 59378/11.

[11] The summons was served personally upon the appellant on the 15 November 2011.

[12] Having received the summons he attended the offices of his attorney Joop Lewies in Mokopane. The summons was left with a secretary of the attorney Miss Cunningham Scott who assured him that she would instruct their correspondents in Pretoria to enter an appearance to defend.

[13] No appearance to defend was entered. The respondent on the 9 December 2011 obtained judgment by default. The appellant only became aware of the judgment on the 27 January 2012 when the sheriff came with a warrant to attach the motor vehicle.

[14] The appellant brought the application within the 20 day period prescribed from the date he became aware of the default judgment. See *Du Plessis v Tager* 1953 (2) SA 270 (O) at 277C - 278B.

[15] An application for recission of judgment was sought before her Ladyship Mngqibisa-Thusi J which was dismissed with costs on the 16 July 2012**.**

The Law:

[16] In terms of Rule 31(2) (b) of the Uniform rules of court -

> " *(b) A defendant may within 20 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, "*

The party seeking recission should demonstrate and show that it has good cause for his default and that he/she has a *bona fide* defence.

See ; *Grant v Plumbers (Pty) Ltd* 1949(2) SA 470 (O) at 476/477 and *Silber \/ Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353 A

Where Schreiner J.A *stated:*

> " *It is enough for the present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives"*

[17] Where a party has been in wilful default to enter an appearance to defend an action and judgment is given a court is unlikely to grant recission or set aside the judgment

[18] In this matter the appellant defended the first summons which *was* served on him. When the second summons was served on him on the 15 November 2011 and he approached his attorney's on the 16 November with the instruction to defend the matter. Due to an administrative bungle up at the attorney's offices the summons was not defended.

It was submitted on behalf of the respondent who relied upon the matter of *Saloojee and Another, NNO V Minister of Community Development* 1965(2) SA 135 (A) Where the court found that there was a limit beyond which a litigant could not escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. It was submitted that this decision dealt with condonation for the non-adherence of the Rules of the Appellate division (as it was then).

Whilst I agree with the principle set out in the matter referred to the facts of this case clearly indicate that the appellant had been of the firm mind to defend the matter. The first summons was defended timeously and the plea and counter claim was delivered, causing the respondent to withdraw the action.

The second summons was issued as a concomitant of the appellant raising the section 129 notice in its plea. The appellant received it and he diligently went to his attorneys the next day to defend the action. The appellant's action if anything clearly demonstrates that he was firmly resolved in defending the action instituted against him. In my view it could never be argued that the appellant acted wilfully. His behaviour and conduct clearly reflected the contrary.

In *Regal v African Superslate (Pty) Ltd 1*962 (3) SA 18 AD it was stated that the attorneys' neglect should not, under the circumstances, bar the applicant who was himself not to blame, from relief, is approved.

[19] I do not propose in the course of this judgment to deal with the issue of wilful default as in our view the appellant did not act wilfully, however, the issue of wilful default is dealt with in *Erasmus: Superior Court Practice (Main Volume) Van Loggerenberg Farlam* B1-202.

[20] Mr Strydom addressed us at length on the question of a *bona fide* defence. The gravamen of his argument was premised on the issue of repudiation which the appellant pleaded in its original plea [see para 7 *supra]*. He submitted that the respondent sought the return of the vehicle without complying with the conditions of the agreement. His argument was premised on clause 11 of the agreement which set out the procedure which ought to have been followed when a party is in beach of the agreement. Clause 11.3 of the agreement states:

> "*11. 3 Should we elect to cancel the agreement in ters of section 123 of the Act, the same procedure set out in paragraph 11.2 above will be followed prior thereto. "*

Section 11.2 of the agreement stipulated that legal proceedings would not be instituted unless certain defined aspects of the National Credit Act have been complied with which are stipulated in the agreement

Mr Strydom submitted that clause 11.3 of the agreement was specifically inserted into the agreement if the respondent intended to cancel the agreement.

[21] Finally Mr Strydom submitted that the agreement was cancelled by virtue of the first summons and that the respondent by sending a proper section 129 letter and issuing a new summons could not revive the agreement it already cancelled.

[22] He referred to the matter of *Volkskas Bank v Noel Pieter Lotter* a judgment of Mynhardt J in this division under case number 17526/90 (delivered on the 19 Feb 1992).

In this matter the Court found that the letter sent to the defendant at an address other than the defendant's chosen *domicilium* amounted to a cancellation of the agreement without complying with the statutory requirements rendered the plaintiff's conduct a repudiation.

In the judgment the learned judge at page 12 stated:

> " In die teeneis word die standpunt dan ingeneem ,om saam te vat, dat die verweerder die twee ooreenkomste gekanselleer het weens die eiser se repudiasie; da thy geregtig was om die ooreenkomste te kanselleer, en restitusie van die twee voertuie word getender teen betaling van bedrae wat reeds betaal is deur die verweereder ten aansien van elk van die twee voertuie. Oor die bedrae wat betaal is, is daar nie enige dispuut nie."

The principle that an unwarranted cancellation and claim for repossession will objectively be a repudiation has been confirmed in *Waikerv Minier et Cie (Pty) Ltd* 1979 (2) SA 474 (W).

[23] Clause 20.1 of the agreement reads as follows:

> " *20.1 You agree that the postal address / e mail address that you have provided on the Quotation is the address where we must send ail post and other communications to you and that such communications shall be binding on you. "*

The original s 129 Notice was not sent to the postal address but rather to the farm Ceres Roedtan which the appellant claimed he did not receive. The notice was clearly not sent to the address agreed upon by the appellant.

[24] Miss Lottering submitted that the election on the part of the respondent to cancel the agreement which equated to a repudiation was a legal point raised and for that reason recission should not be granted and the appeal should therefore be dismissed with costs.

[25] Whilst it could be argued that it is a legal point, the application is not only based on that point but is premised by other facts which assist the appellant. The legal point raised by the appellant is not one which we should determine and make a finding on. We should consider whether the defence raised is a bona fide one or to put it differently whether the defence raised creates a triable issue for the determination of a trial court.

[26] We are accordingly of the belief that the applicant had made out a case for recission and that the court a quo's finding that [11] the applicant had not shown that he has a bona fide defence" was wrong and therefore calls for interference.

[26] Accordingly we make the following order:

The appeal succeeds with costs.

M H E Ismail

Judge of the High Court

I agree

L Vorster

Acting judge of the High Court

I agree

J Mojuto

Acting Judge of the High Court

APPEARANCES:

For Appellant: Adv T Strydom SC instructed by Joop Lewies Ing

c/o Lewies Marais lnc$_y$ Hazeldean, Pretoria

For the Respondent: Adv U Lottering instructed by Hack Stupel & Ross Pretoria Date of hearing: 16 April 2014

Date of Judgment: 25 April 2014