IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 47197/2014

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

01-04-2016
DATE

SIGNATURE

1/4/2016

In the matter between:

ARISTOTLE THOMAS MATHUNZI Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LTD Respondent

REASONS FOR ORDER

MANAMELA AJ

Introduction and the order made

[1] This matter came before me on 18 August 2015 by way of an application for rescission of judgment. Mr MD Molusi appeared on behalf of the applicant and Mr P van den Ordel appeared for the respondent. Both counsel had filed heads of argument, which gratefully assisted me, in the determination of the matter. After the matter was extensively argued, I gave an *ex tempore* judgment, in terms of which, the application for rescission was dismissed with costs. I gave brief reasons for the order made, which in my view sufficed for any purpose including appeal, but these may be considered full reasons for the order made on 18 August 2015.

[2] On 27 January 2016 I received an electronic mail from the office of the Judge President. The electronic mail included correspondences received from the respondent's attorneys of record. The correspondences made reference to an application for leave to appeal lodged, as far back as, September 2015, as well as, a request for reasons for judgment or order I made. There was also a mention of reservation of judgment, which is obviously incorrect, as judgment was immediately delivered at the end of the hearing on 18 August 2015. Be that as it may, this was the first time I became aware of the appeal contemplated by the applicant. After correspondences with the office of the Judge President and efforts by that office to trace the file for this matter, I was furnished with the file on 22 March 2016 for purposes of furnishing these reasons. Clearly, a long time has passed since the impugned judgment or order was made, and no matter where the fault for the delay may lie, the delay is regrettable.

[3] As indicated above, brief reasons for the order were given contemporaneously with the order. What follows hereunder should be considered the full reasons for the order made.

Therefore, there will be no need to delay this matter any longer by transcribing the record of 18 August 2015 for the brief reasons given then for the order.

Brief relevant background

[4] The applicant and respondent concluded an instalment sale agreement on or about 08 May 2012 in terms of which the respondent loaned money to the applicant for the purchase of a BMW 335i motor vehicle (the vehicle).[1] The terms of the agreement included that the applicant will pay monthly instalments to the respondent towards settlement of his indebtedness to the respondent. The total debt was in an amount of R838 716.55, repayable in monthly instalments of R10 598.45.[2] It is common cause that the applicant was not able to make payment between January and May 2014 in compliance with the agreement with the respondent.[3]

[5] The respondent caused summons to be issued on 26 June 2014[4] and served same on the applicant on 14 July 2014.[5] The applicant did not defend the action and as a result default judgment was granted against him on 15 August 2014.[6] A warrant of attachment and delivery of the vehicle was issued on 03 September 2014.[7] On 28 October 2014 the applicant issued and served the rescission application. For, some unexplained reason, the application was only heard on 18 August 2015, when it was dismissed with costs.

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[1] See annexure "M1" to the founding affidavit on indexed pp 22-30.
[2] In terms of the agreement the applicant was to pay 59 instalments of R10 598.00 per month from 07 July 2012 onwards and a final instalment of R213 408.00 on 07 June 2017.
[3] See pars 4.3 and 4.4 of the founding affidavit on indexed p 7; par 6 of the opposing affidavit on indexed pp 39-40.
[4] See annexure "S2" to the opposing affidavit on indexed pp 53-73.
[5] In terms of the sheriff's return of service dated 16 July 2014 on indexed p 74. The applicant's disputed the validity of the service of summons. See par [8] below.
[6] See annexure "S1" to the opposing affidavit on indexed p 52.
[7] See warrant of attachment included as an unmarked annexure to the founding affidavit on indexed p 35.

Grounds for the rescission of judgment

[6] As indicated above, the applicant conceded that he did not comply with the terms of his agreement with the respondent by making regular payments between January and April 2014.[8] He submitted in terms of electronic mails exchanged with an employee of the respondent that he was granted some reprieve, or as he called it "indulgence", to settle the arrears by 15 June 2014.[9] He made payments from May to October 2014, but the respondent nevertheless obtained default judgment against him. He had settled the arrears by then in accordance with the indulgence offered by the respondent. I hasten to point out that this is untrue. As already indicated, the indulgence given was for the applicant "to settle arrears in full" by 15 June 2014 and not October 2014.[10] This is, in fact, what the applicant proposed to the respondent[11] and what the respondent accepted.[12] I will deal with this further below.

[7] The applicant also submitted that he was disappointed and shocked when he received a call from the sheriff regarding repossession of the vehicle. He contacted the respondent's employee he had communicated with when he received the indulgence. This appears to be the moment when he became aware of the legal proceedings instituted by the respondent against him.[13] However, he did not state the date when he received the call from the sheriff or made the call to the respondent or became aware of the default judgment. It is trite that the moment of becoming aware of the existence of an impugned default judgment is significant for purposes of rescission of default judgment. I will return to this later.

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[8] See par [4] and footnote 3 thereof, above.
[9] See par 5 of the founding affidavit on indexed pp 7-8; annexures "M2" and "M3" to the founding affidavit on indexed pp 31-32.
[10] See annexures "M2" and "M3" to the founding affidavit on indexed pp 31-32.
[11] In terms of annexure "M2" the applicant said to the respondent: "BY THE MIDDLE OF JUNE ALL THE ARREARS WILL BE SETTLED AS I WILL BE THROWING MONIES INTO THE VEHICLE S [sic] ACCOUNT IN THE NEXT COUPLE OF WEEKS TO ENSURE THAT ALL THE ARREARS ARE SETTLED ON OR BEFORE JUNE THE 15TH DAY [sic] 2014". See indexed p 31.
[12] In terms of annexure "M3" the following was said on behalf of the respondent to the applicant: "We have since how are [sic] account has been conducted from inception and we are able to give you time until the 15/06/2014 to settle arrears in full." See indexed p 32.
[13] See pars 15-17 of the founding affidavit on indexed p 10.

[8] Further, the applicant submitted that he did not receive personal service of the summons. The summons was served by way of affixing a copy to the principal door. It was argued on his behalf that the address reflected on the sheriff's return of service is not his "proper address". [14] He submitted that his address is as stated in the founding affidavit.[15] He denied staying at the address where summons was served.[16] He also added that, the respondent's employee he communicated with by electronic mail should have alerted him through the same medium that summons had been issued against him. He would have defended the action should the summons had been served on him personally, as he had by then paid up the arrears on his account. Therefore, according to him the default judgment was erroneously sought and erroneously granted.[17]

[9] He also denied receipt of the letter or notice in terms of section 129 of the National Credit Act 34 of 2005 from the applicant. He attributed this to the national strike of the employees of the South African Post Office, at the time. According to him there should also be proof that the notice was actually delivered to him by hand by the local post office. This submission is only to be made to be rejected. There is no such requirement in terms of section 129 of the National Credit Act and the matter of *Kubyana v Standard Bank of South Africa Limited*[18] settled this issue. The ultimate purpose of section 129 of the National Credit Act is to ensure that a consumer, like the applicant, is notified of his or her default and of the various options available to him or her.[19] A credit provider, like the current respondent, is

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[14] The address on the sheriff's return of service is: 138 House 25409 112 EXT 4 RETHABILE". See indexed p 74.
[15] In par 2 of the founding affidavit, the following is stated as the applicant's residential address: "25409/112 Nsikiti Street, Extension 4, Mamelodi East, 0122". See indexed p 6.
[16] See par 18.1 b) of the founding affidavit on indexed p 11.
[17] See par 20 of the founding affidavit on indexed pp 20-21.
[18] (CCT 65/13) [2014] ZACC 1; 2014 (3) SA 56 (CC). See also *Sebola & Another v Standard Bank of South Africa Limited & Another* (CCT 98/11) [2012] ZACC 11; 2012 (5) 4 SA 142 (CC).
[19] See the unreported decision of *Navin Naidoo v The Standard Bank of South Africa* (20595/14) [2016] ZASCA 9 (9 March 2016) at para [5].

only required to "satisfy the court from which enforcement is sought that the notice, on a balance of probabilities, reached the consumer".[20] I am satisfied under the circumstances that the section 129 notice herein reached the applicant.

[10] The applicant also made the following submissions. He said that no prejudice would be suffered by the respondent due to the rescission but, that he is the one who will suffer prejudice if the judgment is not rescinded. According to him the respondent misrepresented the facts in the certificate of balance to the summons and it was prepared about seven weeks prior to the notice in terms of section 129 of the National Credit Act. These submissions, in my view, did not really take the matter any further. I don't see how it vitiates the default judgment. On the applicant's own version his account with the respondent was at all material times in arrears.[21] Other submissions made were relating to the absence of wilful default on the applicant's part; that the respondent had repudiated the agreement; the applicant was *bona fide* in making the application and had a *bona fide* defence.

[11] At the hearing, Mr Molusi, rather incessantly submitted on behalf of the applicant that, the court should consider that if the vehicle is sold for an amount less that the outstanding amount, the respondent would revert to the applicant to recover the balance. This may well be so, but I do not see the relevance thereof to the current application. Both parties are always free to do anything within the confines of the law. Equally, any party affected by the other's conduct, if so minded or advised, may approach the court for appropriate relief.

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[20] See *Sebola* at par 74.
[21] See annexure "M4" on indexed pp 33-34.

[12] It was further submitted that section 84(1)(a) of the National Credit Act[22] finds application in this matter. This is incorrect. It is common cause that the credit agreement between the applicant and the respondent was never suspended in terms of the National Credit Act. Section 83 of the National Credit Act caters for suspension of a credit agreement where an order has been made in terms of section 80 of the same legislation. Therefore, this submission too, is meritless.

[13] There were submissions in respect of section 36(1)(e) of the Constitution of the Republic of South Africa, 1996 (the Constitution). This provision is about limitation of rights in the Bill of Rights contained in the Constitution. This was to drive home the earlier submission that the applicant must not be left destitute. The respondent ought to be ordered to refund the amount of R21 000.00 or R21 500.00[23] paid by the applicant after the respondent had already instituted these proceedings. The logic here, appears to be that, the default judgment extinguished or suspended the credit agreement and the money must be refunded. I do not find the aforementioned statutory provision relevant to the issues herein or any merit in these submissions.

Respondent's submissions

[14] As indicated above, the respondent opposed this application. The respondent submitted that the applicant failed to pay up his arrears in full by 15 June 2014 in terms of the indulgence. The respondent admitted most of the payments made by the applicant, whilst denying some of the payments, and pointed out that the applicant had to also pay the monthly

[22] Section 84(1)(a) of the National Credit Act reads as follows: "During the period that the force and effect of a credit agreement is suspended in terms of this Act- The consumer is not required to make any payment required under the agreement…".

[23] In terms of annexure "M4" (on indexed pp33-34), the applicant paid amounts of R10 500.00 on 27 August 2014 and R11 000.00 on 04 October 2014, which actually amount to R21 500.00 and not R21 000.00 as submitted by the applicant. See pars 7.5 and 7.5.3 on applicant's heads of argument on indexed p 121 and 123, respectively.

instalments. It was also submitted that when the August[24] and October 2014[25] payments were made, default judgment had already been granted against the applicant on 15 August 2014. The applicant was in arrears in an amount of R11 191.69 as at June 2014[26] and did not make any payment in September 2014.[27] Therefore, the applicant was in arrears at the time of summons and when default judgment was granted.

[15] Regarding the applicant's assertions on service of the summons, the respondent commented thereto as follows. The service by the sheriff was at the applicant's chosen *domicilium* address and in compliance with the rules of this Court.[28] There was no obligation to serve the summons personally on the applicant. I agree. The address used on the summons is clearly reflected on the agreement between the parties.[29] Even if the applicant had moved houses, he would actually have breached clause 23.3 of the agreement by not informing the respondent of the change of his address. The applicant did not say when, if at all, he changed his chosen *domicilium.*[30] I agree that the summons was properly served and in my view ought to have come to the attention of the applicant.

[16] The respondent also submitted that the section 129 notice was delivered in compliance with the provisions of the National Credit Act 34 of 2005 and in terms of the indulgence granted. The applicant did not advise the respondent of any change of address when the notice was dispatched.[31] The respondent is not required to prove that the notice

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[24] On 27 August 2014. See par 11 of the founding affidavit on indexed p 9.
[25] On 04 October 2014. See par 12 of the founding affidavit on indexed p 9.
[26] See par 9 of the opposing affidavit on indexed pp 40-41.
[27] See par 12.4 of the opposing affidavit on indexed p 42.
[28] See rule 4(1)(a)(iv) of the Uniform Rules of this Court.
[29] See annexure "M1" to founding affidavit on indexed p 22 where "House 25409 112 Extension 4 Rethabile" is indicated as the "notice address" for the applicant.
[30] See pars 18.5 and 18.6 of the opposing affidavit on indexed p 44.
[31] See pars 17.6-17.8 of the opposing affidavit on indexed p 45.

actually came to the attention of the applicant as a customer.[32] The respondent also submitted that the certificate of balance was properly prepared and therefore valid. Therefore, there was no good cause shown for the setting aside of the default judgment.

[17] The applicant filed a replying affidavit, but there is nothing therein that took the submissions above, any further.

Applicable legal principles

[18] I have already made rulings regarding the service of summons and the notice in terms of section 129 of the National Credit Act. I have expressed my satisfaction that both came to the attention of the applicant.

[19] The rescission or setting aside of judgments is possible under rule 31(2)(b) or 42 of the Uniform Rules of this Court; the common law or on appeal. It is not very clear on which of these the applicant based his application for rescission. However, there was a submission that the judgment was erroneously sought and erroneously granted. This will place the application within the confines of rule 42. However, for completeness I will deal with the submissions made as if they were so made in terms of both rule 42 and the common law.

[20] In terms of the common law, judgment may be rescinded or set aside if it was granted by default.[33] Further, an applicant for rescission of judgment is required to meet the following requirements, in no particular order. Firstly, that there must be a reasonable explanation for

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[32] See par [9] above.
[33] See p D1-563 and footnote 9 thereon of Van Loggerenberg DE *Erasmus Superior Court Practice* vol.2 2nd ed (Juta Cape Town 2015) (*Erasmus Superior Court Practice*).

the default, which led to judgment being granted by default. Secondly, the application out to be *bona fide* and not merely aimed at delaying execution of the judgment. Thirdly, the applicant has to show that he has *bona fide* defence to the claim on which the impugned judgment is based. I discuss next these legal principles under subheadings.

Reasonable explanation for the default

[21] As indicated above, the applicant does not state when he became aware of the default judgment.[34] It is therefore difficult to gauge whether he had acted within a reasonable time in this regard.

[22] Although, I have already found the applicant's challenges regarding the service of summons at the *domicilium* address to be without merit, I will expand on this issue. It is common cause that the summons was served by affixing on the *domicilium* address stated in the agreement between the parties.[35] The applicant submitted that his address has changed, but has failed to prove that he had advised the respondent of the change in address. The respondent could not have been expected to serve the summons at any other address, but the *domicilium* address on its records. The same argument or logic applies regarding the delivery of the section 129 notice.

[23] The respondent also submitted that he was under the impression that since he had made payments in terms of the indulgence after breach of his agreement with the respondent that the respondent will not take legal action against him. However, in my view, the applicant

[34] See par [7] above.
[35] See the first page of annexure "M1" to the founding affidavit on indexed p 22.

has failed to offer a reasonable explanation for his default. I will nevertheless still proceed to look at other requirements for rescission of judgment.

Application is bona fide and bona fide defence

[24] The applicant submitted that the application is *bona fide*. The respondent retorted that the applicant is using this application to delay the attachment and removal of the vehicle. The applicant further submitted that he had a substantial defence or *bona fide* defence against the respondent's claim.[36] The level of proof here is only at *prima facie* level or the existence of an issue fit for trial.[37] He admitted breach of the instalment sale agreement, but submitted that he complied with the terms of the indulgence granted him by the respondent to pay off the arrears by 15 June 2014. He was completely taken aback by the fact that the respondent took legal action and obtained judgment against him. However, on his version, when the indulgence was made on 19 May 2014, his account was in arrears in an amount of R42 245. 96.[38] The account had an arrear balance of R11 191.69 on 14 June 2014. The applicant said this was caused by "fluctuating insignificant balances", [39] but I disagree. The applicant made three payments in amounts of R20 000.00 on 24 May 2014; R11 000.00 on 07 June 2014 and R11 000.00 on 14 June 2014 which would have left a balance of R245. 96 on the arrears as at 19 May 2014, barring interest and other charges. However, he clearly did not provide for the 07 June 2014 monthly instalment in an amount of R10 516.11, which is a term of his agreement with the respondent. In other words whilst paying off the arrears to bring the account up to date, he did not keep up with the regular monthly instalments. This rendered

[36] See *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765A-C; *Harris v ABSA Bank t/a Volkskas* 2006 2006 (4) SA 527 (TPD). See generally *Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa* 5th ed (Juta Cape Town 2009) at 713-717.
[37] See *Erasmus Superior Court Practice* at D1-369 and the authorities quoted there.
[38] See annexure "M4" on indexed p 33.
[39] See par 10.1 of the replying affidavit on indexed p 82.

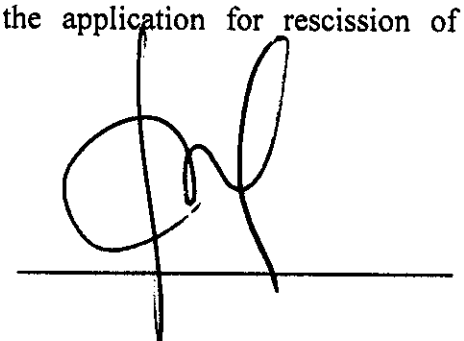
the applicant to be in breach of both the indulgence and the agreement with the respondent. Therefore, in my view, the applicant did not have a *bona fide* defence against the respondent's claim grounding the default judgment.

Conclusion

[25] Against the backdrop of all of the above, I find that the applicant did not meet either of the requirements to succeed in rescinding the default judgment granted against him. The application, in my view, appears to be an attempt by the applicant to hold on to the vehicle and avoid repossession thereof by the respondent. This kind of conduct cannot be condoned by this Court. The application was accordingly unsuccessful.

Order

[26] For the abovementioned reasons, I dismissed the application for rescission of judgment, with costs.



K. La M. Manamela

Acting Judge of the High Court

01 April 2016