HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

29/7/16 .....
DATE

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SIGNATURE

29/7/16.

Case no. 19879/2014

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA **Applicant**

and

B.J. MAHLANGU **Respondent**

JUDGMENT

RABIE J

Background:

1. The applicant instituted action against the respondent claiming the return of a certain motor vehicle purchased from the applicant in terms of a written instalment sale agreement together with damages, interest and costs. The

respondent failed to give notice of his intention to defend the action and the applicant obtained default judgement against him on 24 April 2014.

2. The respondent served an application for the rescission of the aforesaid default judgement on the applicant on 6 June 2014. According to the Notice of Motion the application was to be heard on 28 July 2014. The applicant, as the respondent in that application, did not give notice of its intention to defend the application for rescission but entered into negotiations with the respondent. On 28 July 2014 the respondent obtained a judgement by default rescinding the judgement for rescission obtained by the applicant on 24 April 2014.

3. In the present application by the applicant, the applicant seeks to set aside the aforesaid order obtained by the respondent by default on 28 July 2014. Should the present application succeed, the respondent's application for rescission served on 6 June 2014 would become alive and would be heard on an opposed basis in due course.

The Present Application:

4. According to the applicant the respondent was not entitled to move for a default judgement on 28 July 2014 and, accordingly, that the present application should succeed. In this regard the applicant submitted, inter alia, that the applicant was entitled to obtain judgement against the respondent on 24 April 2014 and, in respect of the respondent's application for rescission, that although the applicant had not filed a formal notice of intention to defend that application, the parties were in bona fide settlement negotiations which did not allow for the respondent

to proceed to obtain default judgement against the applicant behind its back and without notice to it.

5. In order to put to the applicant's case in perspective, it is necessary to refer to the chronology of events and the correspondence between the parties.

6. Subsequent to the initial default judgement obtained by the applicant on 24 April 2014 the respondent's attorney wrote a letter to the applicant's attorney dated 23 May 2014. In this letter reference was made to the judgement obtained against the respondent and it was stated that the arrears in the account of the respondent was caused by the fact that the respondent had erred by using the incorrect reference number with his payments. It was further stated that the respondent had approached the applicant and the applicant was requested to withhold further proceedings pending an application by the respondent for the rescission of the judgement.

7. On 26 May 2014 the applicant's attorney responded to the aforesaid letter and stated, inter alia, the following:

"We confirm our client will only accept the full settlement of the balance being R158 602, 59 in order to stop legal action.

Should your client not settle the full outstanding balance immediately we hold instruction to proceed executing the warrant.

In the premise any application for rescission of judgement brought by your client will be opposed accordingly.

Our client's rights and or remedies remain strictly reserved."

8. On 6 June 2014 the respondent's application for rescission of the applicant's default judgement was served on the applicant's attorneys. Subsequent thereto, on 18 June 2014, the applicant's attorney wrote a letter to respondent's attorney acknowledging the respondent's application for rescission which was served on 6 June 2014 and then stated the following:

"We have discussed the above matted with our client. Should your client be willing to settle the arrears and legal costs occasioned herein, our client is willing to enter into a Settlement Agreement on these terms and your client can continue as per the Instalment Sale Agreement.

Should your client accept the above, our offices will furnish your offices with a Settlement Agreement on the above terms, and our client will agree to the Rescission of the Default Judgement.

We await your response."

9. Two days later, in a letter dated 20 June 2014, the respondent's attorney responded as follows to the aforesaid letter:

"We refer to the above matter and in particular your letter dated 18 June 2014.

We have noted the contents of your letter and we appreciate that you are willing to have the matter amicably settled.

However there is confusion on the issue of outstanding arrears referred to in your letter. Our instructions are that your client has updated and credited all payments made by our client to his correct account.

We therefore request that you clarify as to how much is the amount of the arrears.

As to the rest of the issues our client is willing to settle costs occasioned as ordered by the court.

Kind regards."

10. According to the applicant's attorney his letter dated 18 June 2014 was clearly an invitation to settle the matter amicably and without the need for unnecessary legal procedures and costs. The respondent's letter dated 20 June 2014 was similarly a clear indication that the respondent appreciated that the applicant was willing to settle the matter amicably and was himself willing to do so. As much was specifically stated in the letter and for that reason clarification was requested as to the amount of the arrears. The issue of costs was not in dispute as the respondent had acknowledged his obligation to pay the costs of the applicant as ordered by the court.

11. In the founding affidavit to the present application the applicant's attorney stated that at this point, she and the applicant accepted that the respondent would not proceed with its application for Rescission of Judgement pending finalisation of the settlement negotiations. Consequently, in an attempt to save legal costs for the respondent and since they accepted that the respondent would prefer to settle the matter amicably rather than in court, a notice of intention to Oppose was not filed. This was done in good faith and in the spirit of collegiality that, when there are pending settlement negotiations, and especially in the light of the offer made by the applicant to the respondent, and the respondent's acceptance thereof, the application for rescission of judgement would not be proceeded with unless the applicant was afforded the opportunity to file a notice of intention to oppose.

12. However, unbeknown to the plaintiff or its attorney, the respondent moved for and obtained judgement by default against the plaintiff on 28 July 2014.

13. Still being under the impression that the parties were negotiating in good faith and that the respondent would not proceed with his application for rescission, the

applicant's attorney wrote an email to the respondent's attorney dated 9 October 2014. This letter, inter alia, stated the following:

"The above matter bears reference.

Kindly take notice that our client has confirmed that, as on 26 August 2014, the arrears is the amount of R 18 822, 33 excluding legal costs and interest.

As soon as all payments have been made in this account and the contract terms have ended, your client is welcome to rescind the Application at his own cost.

We urgently await your response.

Kind Regards."

14. The respondent's attorney did not respond to the aforesaid email and subsequent attempts by the applicant's attorney to contact the respondent's attorney were unsuccessful. Thereupon the applicant's attorney had the court file drawn from the Registrar's Office and established for the first time that the respondent had proceeded to obtain an order for rescission by default on 28 July 2014. The applicant thereupon immediately proceeded with the present application to have that order rescinded and set aside.

15. As far as the applicant's right to obtain the original order against the respondent on an unopposed basis on 24 April 2014 is concerned, the applicant, firstly, referred to the requirements of the provisions of the National Credit Act which had been complied with and which entitled the applicant to proceed against the respondent. Secondly, reference was made to the Payment History of the respondent's account which shows arrears since May 2013. The payments referred to by the respondent, although not sufficient to satisfy all the arrears, were in any event made subsequent to the judgement against him. On the

respondent's own version he was therefore in arrears at the time judgement was entered against him.

16. In his answering affidavit the respondent submitted that there was never an agreement to hold the application in abeyance and that the applicant only indicated an intention to negotiate once it realised that it was out of time in filing a Notice of Intention to Defend. It is correct that the respondent's attorney never in so many words stated that the application would not be proceeded with pending finalisation of the settlement negotiations but in my view that fact is not conclusive. According to the correspondence referred to above the parties were clearly involved in bona fide settlement negotiations which had all probability of being successful and which would have prevented the matter proceeding to a full-blown opposed application. Firstly, the respondent had accepted the liability to pay the applicant's costs and, secondly, he was awaiting the final figure of the arrears which he had indicated he was prepared to pay. That would have been the end of the matter. The respondent also knew that the applicant never intended to abandon its judgement obtained against the respondent but was merely willing to avoid further costly legal procedures. In these circumstances I agree with the submission that the applicant's attorney was entitled to accept that the respondent's attorney would notify her if the respondent nevertheless intended to proceed with the application on 28 July 2014. I also agree with the submission on behalf of the applicant that if the court had been made aware of this state of affairs prior to making the order on 28 July 2014, that order would not have been made by default against the applicant. The applicant was clearly not in wilful default.

17. The respondent's statement that the applicant indicated an intention to negotiate only when it realised that it was out of time with a Notice of Intention to Defend, is clearly wrong. The negotiations already commenced during May 2014 and proceeded on 18 June 2014, which is prior to the launching of the application for rescission by the respondent and/or the obligation to file a Notice of Intention to Defend. In any event, the applicant could have opposed that application at any time up and until the date of the order made therein.

18. As far as the arrears are concerned the respondent stated in his answering affidavit that he continued with the rescission application "on the understanding that the applicant has checked its record and realised that there was no outstanding amount due in arrears, therefore, consented to rescission." I can find no basis for this alleged understanding. As stated before, the respondent accepted that his account was in arrears at the time the applicant originally obtained judgement against him. In any event, if the respondent really believed that he was not in arrears, one would have expected confirmation to the applicant's attorney that no amounts were due to the applicant. Furthermore, the respondent did not address the fact that he had already admitted liability for the applicant's costs.

19. It is not necessary to analyse in detail the respondent's allegation that he never received the summons nor the section 129 notice. Those issues in my view had been adequately addressed by the applicant for purposes of the present application.

20. Consequently and having regard to the aforesaid, I am satisfied that the applicant has adequately explained the reasons why the matter went against him by default

and similarly that he has a bona fide defence against the application of the respondent.

21. As far as costs are concerned there is no reason why the costs of this application should not follow the event.

22. In the result the following order is made:

1. The default judgement granted by this court in favour of the respondent on 28 July 2014 is hereby rescinded and set aside.

2. The respondent is ordered to pay the applicant's costs of this application.

C.P. RABIE

JUDGE OF THE HIGH COURT