REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

17/2/2016

CASE NO: 84182/2014

17/2/2016

In the matter between:

NONKULULEKO MADALANI **APPLICANT**

and

BMW FINANCIAL SERVICES SOUTH AFRICA

(PTY) LIMITED **FIRST RESPONDENT**

SHERIFF (SOWETO EAST) **SECOND RESPONDENT**

JUDGMENT

FOURIE CP, AJ

[1] The Applicant (the Defendant in the action), an admitted attorney, brought an application for the rescission of a default judgment granted by the registrar of this Court on 9 February 2015. The First Respondent (the Plaintiff in the action) opposes the application. For the sake of convenience the parties will be referred to as in the action. The Defendant does not seek any relief against the Second Respondent.

[2] The application for rescission is brought in terms of Uniform Rule 31(2)(b). There appears to be some uncertainty as to whether a Defendant who is dissatisfied with a judgment by the registrar should utilise the provisions of Uniform Rule 31(5)(b) for reconsideration by the court, as opposed to applying for a rescission in terms of Uniform Rule 31(2)(b). The argument seems to be that the use of the word "such" in Uniform Rule 31(2)(b), read with the provisions of Uniform Rule 31(2)(a), probably disentitles the Defendant from using it where the registrar gave judgment.[1] Section 23 of the Superior Courts Act, 10 of 2013 provides that a judgment by default may be granted and entered by the registrar of a division in the manner and in the circumstances prescribed and that a judgment so entered is deemed to be a judgment of that division.

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1. *Harms, Civil Procedure in the Superior Courts, at B31.21 on page B- 210;*

In view of these provisions, I am satisfied that the application for rescission of default judgment may be brought in terms of Uniform Rules 31(2)(b). The Plaintiff did not raise this in its opposition to this application and in any event, I am of the view that not much would have turned hereon, as even in reconsidering the default judgment granted by the registrar in terms of Uniform Rule 31(5)(d), the requirement of "good cause" would in my view still have to be satisfied. I agree that Uniform Rule 31(5)(d) is primarily intended for use by a Plaintiff who is unable to obtain judgment or who has obtained judgment for less than applied for. [2]

[3] The requirements for rescission of judgment in terms of Uniform Rule 31(2)(b) that must be satisfied, are well established. Good cause must be shown and that entails:

(a) Giving a reasonable explanation for 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.

[4] The Plaintiff instituted action against the Defendant based on the provisions of a written instalment sale agreement, claiming the following relief:

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2. *Harms, supra.*

"(1) Delivery of the BMW 118i 5 DR A/T(F20) motor vehicle with engine number A200J549 and chassis number OVY67311 to the Plaintiff;

(2) An order confirming the cancellation of the agreement;

(3) As pre-estimated liquidated damages, the total amount of payables not yet paid by the Defendant whether same are due for payment or not, less the proceeds of the sale of the goods or the proceeds of any insurance policy paid to the Plaintiff in respect of the goods to be calculated at a later stage, thus postponed *sine die;*

(4) Interest at the rate of 9.00% from date of Section 129(1), being 9 October 2014 to date of final payment; and

(5) Cost of suit on the scale as between an attorney and client as provided for clause 14.2 of the Agreement;

(6) Further and / or alternative relief."

[5] Summons was served at the Defendant's chosen *domicilium citandi* address on 12 December 2014 at 14:40, by affixing a copy thereof to the outer principal door. The address of service corresponds with the chosen *domicilium* address as reflected on the face of the agreement.

[6] No appearance to defend was entered into and the Plaintiff applied for default judgment. On 9 February 2015 the registrar granted default judgment in accordance with prayers 1, 2 and 5, with the relief claimed in prayer 3 being postponed *sine die.*

[7] On 23 February 2015 the Defendant served her application for rescission of judgment on the Plaintiff's attorneys of record. In her application the Defendant *inter alia* raised certain arguments, apparently in *limine,* but during argument abandoned same and it is therefore not necessary to further deal therewith.

[8] Although the Defendant does not deny that service was effected at her chosen *domicilium* address, she alleges that she was not in wilful default of entering an appearance to defend as she did not receive the summons, nor did she have knowledge of the default judgment prior to 19 February 2015. The Plaintiff accepted that the Defendant was not in wilful default to defend the action and the Defendant thus satisfied the first requirement for an application for rescission of judgment in terms of Uniform Rule 31(2)(b).

[9] The Defendant however does not dispute:

(a) That the Plaintiff and herself entered into the written instalment sale agreement;

(b) Being in possession of the motor vehicle;

(c) Falling into arrears with the monthly instalments payable to the Plaintiff and as such, the Defendant does not dispute a breach of the terms of the agreement on her part;

(d) That the Plaintiff complied with the provisions of Section 129 of the National Credit Act, 34 of 2005 ("NCA"); and

(e) That the Plaintiff was entitled to cancel the agreement and that it in fact elected to do so.

[10] The Defendant in her founding affidavit states that she was involved in proceedings before the Commission for Conciliation, Mediation and Arbitration ("CCMA") based on constructive dismissal. The Defendant appears to allege that, in the event that she might be successful in the proceedings before the CCMA, the award will be sufficient to settle the arrears owing to the Plaintiff. In her heads of argument delivered on 7 December 2015 and without having filed a replying affidavit, she alleges that she was successful before the CCMA, as it was found that her employer constructively dismissed her and that the dismissal was unfair. The employer then launched a review application to set aside the arbitration award and she in turn on 23 November 2015, launched an application to the Labour Court to make the arbitration award an order of court to enable her to *inter alia* attach and execute on the proceeds found in the bank account of her former employer;

[11] The Defendant furthermore states:

(a) Her intention to effect payment of the arrears and to continue with her monthly obligations in terms of the instalment sale agreement;

(b) That she considers it unreasonable for judgment to have been granted in favour of the Plaintiff where approximately only ten percent of the initial total amount repayable, was in arrears at the date of instituting action;

(c) That she has a proper defence to the Plaintiff's claim and that she believes that the Plaintiff was hasty in seeking the relief claimed and that since the launching of her application for rescission, the Plaintiff progressively acted in an unconscionable manner, and

(d) That it is within the powers of this Court to develop the law to ensure that justice is met and in particular, that it is incumbent upon this Court to come to the aid and rescue of consumers who are unlawfully and unfairly dismissed and where reinstatement of the employment contract is not possible. In developing the law in this regard, it will further assist all stakeholders in the credit market to meet the purposes of the NCA.

[12] The unconscionable actions by the Plaintiff, referred to by the Defendant, can be summarized as follows:

(a) That after she launched the application for rescission of judgment, the Plaintiff repossessed the motor vehicle and despite an undertaking from the Plaintiff that the motor vehicle will not be sold until the application for rescission of judgment has been dealt with , the Plaintiff proceeded to sell the motor vehicle; and

(b) The motor vehicle was allegedly sold by public auction for an amount of only R242 250.00 on or about 27 August 2015, which is half of what the motor vehicle was valued at 12 months prior; and

(c) The Plaintiff continued to endeavour to enforce the debit order in terms of the instalment sale agreement.

[13] In its answering affidavit the Plaintiff admits the attempts to continue to run the debit order, but endeavour to justify same by stating that the Defendant's liability toward the Plaintiff did not cease on the day the agreement was cancelled, I find it difficult to accept. As far as the sale of the repossessed motor vehicle in execution is concerned, the Plaintiff in a supplementary affidavit admits that the vehicle was sold in error, due to a miscommunication between the Respondent's legal and remarketing department. The Defendant can feel rightfully aggrieved.

[14] The question to be determined however is whether such conduct assists the Defendant in any way to satisfy the remaining requirements that must be satisfied for rescission of the default judgment. As the defence must have existed at the time of the judgment, the answer must be in the negative. Unless it is found that the Defendant has disclosed a *bona fide* defence to the Plaintiff's claim for confirmation of the cancellation of the agreement and return of the motor vehicle, which *prima facie* has some prospect of success and accordingly the judgment is rescinded, the fact that the motor vehicle has been sold becomes irrelevant. Furthermore no monetary judgment has been granted against the Defendant and as such all defences relating to the quantum of damages suffered by the Plaintiff, are still available to the Defendant.

[15] Whilst I am prepared to accept that the application was made *bona fide*, I am in agreement with the Plaintiff that all the elements of the Plaintiff's cause of action are common cause and that the Defendant has failed to show that there is a *bona fide*

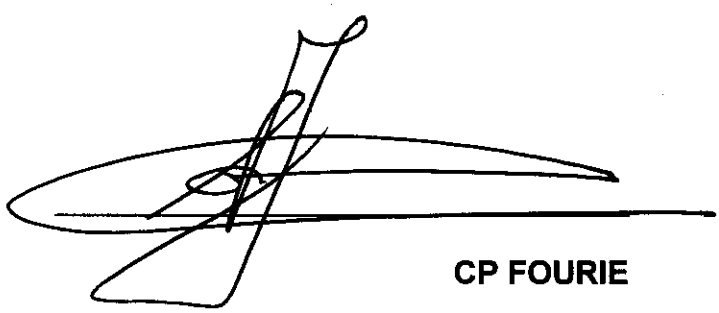
defence to the Plaintiff's claim which *prima facie* has some prospect of success. The issues raised by the Defendant as set out in paragraphs [10] and [11] above, do not in my view satisfy the requirements to show a *bona fide* defence. Accordingly, the application must fail.

[16] The Plaintiff argued that costs should be on the scale as between attorney and client. I am not satisfied that a punitive cost order is warranted. I am however satisfied that the costs should follow the outcome.

[17] In the result, I make the following order:

1) The application for rescission of judgment is dismissed;

2) The Applicant is to pay the First Respondent's costs of the application.



CP FOURIE

ACTING JUDGE OF GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

For the Applicant:	In person
For the First Respondent:	Adv. LW De Beer Instructed by: Nel & Richter Incorporated Pretoria

DATE OF HEARING: 9 FEBRUARY 2016.

DATE OF JUDGMENT: 17 FEBRUARY 2016.