REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 59529/19

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

[redacted]

15 January 2021
DATE SIGNATURE

In the matter between:

DANIEL LOUWRENS GRUNDLINGH Applicant

and

MFC A DIVISION OF NEDBANK Respondent

J U D G M E N T

This matter was enrolled for hearing on 19 October 2020. It was dealt with or determined on the papers in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020, 11 May 2020 and 18 September 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 10:00 on 15 January 2021.

TEFFO, J

Introduction

[1] This is an application for the rescission of a default judgment granted against the applicant on 13 September 2019.

[2] The application is opposed.

The parties

[3] The applicant, Mr Daniel Louwrens Grundlingh, is an adult male businessman and attorney. The respondent is MFC, a division of Nedbank Ltd and a credit provider duly registered as such in terms of Act 34 of 2005 ("*the National Credit Act*").

Background

[4] On or about 12 October 2016, the parties entered into a written credit agreement ("*the agreement*") in terms of which the applicant purchased from the respondent a 2016 Toyota Hilux 2.8 GD-6 Raider 4x4 P/U A/Chassis Number: AHTHA3CD903414508, Engine Number: 1GD0180317 ("*the vehicle*") for the sum of R631 428,07.

[5] The material terms of the agreement were, *inter alia*, that the ownership of the vehicle would remain vested in the respondent until all the amounts due to it by the applicant in terms of the agreement have been paid in full. The respondent would be entitled to recover from the applicant collection costs and default administration charges incurred in enforcing the agreement. Should the applicant commit any breach of the agreement, then

the respondent would be entitled, after due demand and without prejudice to any other rights it may have against the applicant to cancel the agreement, take repossession of the vehicle, retain all payments already made in terms of the agreement by the applicant and claim payment of the difference between the balance outstanding and the amount realised from the sale of the vehicle.

[6] The respondent duly complied with all its obligations in terms of the agreement and delivered the vehicle to the applicant.

[7] The applicant breached the terms and conditions of the agreement by failing to make due and punctual payments to the respondent in terms of the agreement. As a result, the respondent delivered a breach notice and a notice in terms of section 129(1)(a) of the NCA on 22 July 2019. Subsequent thereto and on or about 13 August 2019, the respondent issued summons against the applicant. Summons was served on 19 August 2019 at the applicant's chosen *domicilium* address and the respondent failed to deliver a notice of intention to defend. On 3 September 2019, the respondent filed an application for default judgment with the Registrar of this Court. On 13 September 2019, default judgment was granted against the applicant.

[8] It is this default judgment that the applicant seeks to rescind.

The applicant's case

[9] The applicant alleges that on or about 16 September 2018, he communicated with the respondent directly trying to make arrangements to settle the outstanding amounts. He was informed that summons was issued, however, the person he spoke to did not know the exact status of the matter.

He then informed the representative of the respondent, whose name has not been disclosed, that he can make a payment of R35 000,00 by 20 September 2019, another payment of R35 000,00 on 20 November 2019 and the remainder of the arrears on 20 December 2019. The offer was accepted by the respondent and he was advised to contact the respondent's attorneys and inform them of the arrangement.

[10] He contacted the respondent's attorneys on the same day. He spoke to a certain Mrs Qaga and informed her about the arrangement he had made with the respondent. Mrs Qaga could not indicate to him what the status of the matter was. Instead, she sent him an email stating that there was no default judgment on her file. She also emailed him a copy of the summons. He subsequently emailed her a notice of intention to defend the matter.

[11] He has never received the summons prior to it being emailed to him and had no knowledge of same. He does no longer reside at 122 Old Kent Drive. His details were amended on the respondent's system. He was advised that the respondent's calls are recorded. The respondent can therefore easily verify his discussion with them.

[12] On or about 19 September 2019, he contacted the respondent's attorneys in order to ascertain whether they had received his notice of intention to defend the action against him. They acknowledged receipt of same and advised that they were awaiting instructions from the respondent. On 20 September 2019, he received correspondence from the respondent's attorneys stating that the notice of intention to defend was out of time and will not be condoned.

[13] Pursuant thereto, he contacted the respondent and their legal representatives and requested them to send him the order. On 2 October 2019, he attended court. He could not locate the file or the order. He sent an email to the respondent's attorneys advising them of the developments and also tried to resolve the matter.

[14] On 16 October 2019, the respondent's attorneys emailed the order to him. He requested the respondent's attorneys on numerous occasions that they should get together and resolve the matter. They promised to come back to him but they did not.

[15] At all relevant times he had the intention of defending the matter. The service address on the respondent's system is different to the one they utilized. He contacted the respondent not knowing that summons was issued against him and made an arrangement which is now denied because of a judgment the respondent did not know it existed at the time. He was not in wilful default of entering appearance to defend.

[16] With regard to alleged arrangement made between the parties, the applicant further contends that the respondent can easily prove the recording of the conversation between him and its representative. He also contends that he did not receive the section 129 notice. He never had the opportunity in terms of the NCA to exercise his rights. The agreement attached to the particulars of claim was never concluded as it was not countersigned. The certificate of balance was also not attached to the particulars of claim.

The respondent's case

[17] The respondent denies that the applicant is entitled to the rescission of the default judgment. It contends that when the applicant communicated with its representative on 16 September 2019, default judgment had already been granted against him.

[18] The respondent further denies that an agreement was ever reached between it and the applicant. It clearly submitted that the applicant was informed on 20 September 2019 that it had obtained default judgment against him on 13 September 2019.

[19] The respondent also deny that the applicant's details were amended on its system. It contends that it was a term of the agreement between the parties that the applicant would notify it in writing of any change of his *domicilium* address. According to it the applicant did not at any stage, inform it of any change of his *domicilium* address that was provided by him in the agreement.

[20] The respondent contends that the section 129 notice was sent to the *domicilium* address provided by the applicant in the agreement. It submitted that the credit agreement does not need to be countersigned in order for it to be valid and binding. With regard to the issue pertaining to non-attachment of the certificate of balance to the summons, it was contended that it does not mean that the respondent's cause of action was not established.

[21] According to the respondent, the applicant failed to make allegations which satisfy the requirements of either Rule 31(2) or Rule 42(1) to entitle him to the rescission of the judgment.

The issue

[22] Have the requirements for rescission of judgment been met?

Applicable legal principles

[23] The application was brought in terms of Rule 31, alternatively Rule 42 of the Uniform Rules of Court.

[24] In terms of Rule 31(2)(b) of the Uniform Rules of Court, a defendant may, within 20 days after he has knowledge of a default judgment, apply to court to set aside such judgment.

[25] The applicant for rescission has to show "*good cause*" by: (a) giving a reasonable explanation for his default; (b) showing that his application is made *bona fide* and not made with the intention to delay the plaintiff's claim; and (c) showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospects of success[1]. The court may also take into account the prejudice to the parties. The *bona fide* defence needs to be established *prima facie* only. It is not necessary to deal fully with the merits of the case or to prove the case[2]. It is sufficient to set out the facts, which if established at the trial, would constitute a good defence[3] and such defence

[1] *Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills* 2003 (6) SA 1 (SCA) par 11
[2] *Standard Bank of South Africa Ltd v El-Naddaf* 1999 (4) SA 779 (W) 784
[3] *PLJ van Rensburg & Vennote v Den Dulk* 1971 (1) SA 112 (W); *Sanderson Technitool (Pty) Ltd v Intermemal (Pty) Ltd* 1980 (4) SA 573 (W)

must have existed at the time of the judgment[4]. The court has a wide discretion in evaluating "*good cause*" in order to ensure that justice is done between the parties[5].

[26] The judge considering the application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation. The explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, and in the light of all of the facts and circumstances of the case as a whole. The presence of wilful default does not necessarily negative the establishment of a just or sufficient cause. Even when finding a wilful default, the court is enjoined to exercise whether the defence raised by the person who seeks relief shows the existence of an issue which is fit for trial[6].

[27] Rule 42(1) reads:

> "*(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) an order or judgment in which there is an ambiguity or a patent error or omission;*

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[4] *Swadif (Pty) Ltd v Dyka* 1978 (1) SA 928 (A) at 939
[5] *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T)
[6] *Harris v Absa t/a Volkskas* 2006 (4) SA 527 (T)

(c) an order or judgment granted as the result of a mistake common to the parties."

Discussion

[28] The applicant did not file a replying affidavit. In the absence of the replying affidavit, the version of the respondent as outlined in the answering affidavit remains uncontested[7].

Explanation of the default

[29] The applicant alleges that he never received the summons. He did not know anything about the summons until he, on his own accord, contacted the respondent directly in order to try and resolve the matter. He further alleges that the *domicilium* address that he initially provided to the respondent which is contained in the credit agreement has been changed on the respondent's system. The allegations have been denied by the respondent. The applicant does not give details as to when and how he had notified the respondent about his change of the *domicilium* address. He does not attach any proof thereof. He does not state the new address in his affidavit.

[30] Summons was served on the applicant on 19 August 2019 at 122 Old Kent Drive, Midstream by affixing to the principal door. The address is the chosen *domicilium citandi et executandi* of the applicant. Clause 22 of the agreement provides that:

"*(1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the*

[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at –

(a) the address of that other party as set out in the agreement, unless paragraph (b) applies or

(b) the address most recently provided by the recipient in accordance with subsection (2).

(2) A party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an email address."

[31] Without any proof and/or details of how and when the applicant notified the respondent of his change of the address he chose as his *domicilium* address as recorded in the credit agreement concluded between the parties, I am not persuaded the applicant has indeed informed the respondent of his change of his *domicilium* address.

[32] The version of the applicant regarding the fact that he voluntarily approached the respondent directly in order to resolve the matter also does not add up when one takes into consideration that he alleges that he did not receive summons. Summons was served at his *domicilium* address on 19 August 2019. On 16 September 2019 (not 2018) he communicated with the respondent directly in order to resolve the matter. Could this have been a coincidence that at the time when the default judgment had been applied for and then granted on 13 September 2019, suddenly the applicant who was not

aware that summons has been issued against him, contacted the respondent directly on 16 September 2019 to try and resolve the matter? Having regard to the above, I conclude that the explanation given is not cogent and reasonable. The respondent cannot be faulted for serving the summons at the *domicilium* address provided by the applicant in the credit agreement. The applicant should have ensured that the change of address, if ever it happened, has been communicated properly as per the agreement to the respondent.

Is the application made *bona fide*?

[33] The default judgment was already granted on 16 September 2019 when the applicant communicated with the respondent. The respondent's attorneys sent an email to the applicant on 20 September 2019 notifying him that the default judgment was granted on 13 September 2019. I agree with the respondent that whatever discussions that allegedly took place between the applicant and the respondent on 16 September 2019 are irrelevant for the purposes of this application. It is clear from the applicant's version that as at the date he communicated with the respondent (16 September 2019), there were amounts due and owing in terms of the credit agreement. As at the time when the summons was issued, there were arrears on the account of the applicant.

[34] The applicant does not deny that he owed the money on the account. He clearly explains that he contacted the respondent directly and tried to make arrangements for payment. It cannot therefore be said that as at the

time when the respondent applied for default judgment, it was not entitled to it. I find that the application is not made *bona fide*.

Does the applicant have a *bona fide* defence to the respondent's claim?

[35] The applicant consistently submits that an arrangement was made between the parties regarding how he was to pay the outstanding amount. It was argued that a compromise was reached between the parties to try and avoid litigation. Relying on the decision of *Gollach & Gompert (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd*[8], it was submitted in the applicant's heads of argument that if it is found that a compromise had been reached, that is an absolute defence against the action of the respondent and the application should succeed.

[36] Default judgment was already granted on 13 September 2019. When the applicant communicated with the respondent on 16 September 2019 (the day he alleges a compromise was reached), default judgment was already granted. No arrangement or compromise could have been reached between the parties. The applicant also failed to produce the arrangement that has been concluded between the parties. The principles outlined in the decision of *Gollach & Gomperts*[9] are therefore not applicable in the present matter.

Section 129 notice

[37] The applicant contended that he did not receive the section 129 notice before the summons was issued. The respondent contended that the section 129 notice was sent to the applicant's *domicilium* address and proof thereof

[8] 1978 (1) SA 914 (SCA)
[9] *Supra*

has been attached to the answering affidavit. The allegation has not been contested as no replying affidavit had been filed. In the absence of proof of a written notification to the respondent regarding the applicant's change of the *domicilium* address, I find that the section 129 notice was sent to the correct *domicilium* address as provided for in the credit agreement.

[38] In *Kubyana v Standard Bank of South Africa Limited*[10], the Constitutional Court held that section 129 of the National Credit Act does not require a credit provider to prove that a notice by registered post actually came to the attention of the consumer. If a consumer has elected to receive notices by post, a credit provider must prove: (a) the sending of the notice by registered mail; (b) that the notice reached the correct post office; and (c) that the post office sent a notice to the correct address of the consumer to collect the section 129 notice. Once these steps have been proved, the credit provider would have discharged its obligations in terms of section 129. The burden then shifts to the consumer to explain why the notice still did not reach him. Unless there is a good reason from the consumer why the notice was not collected from the post office, a court will allow the credit provider to enforce the credit agreement and seek judgment.

[39] Having considered the matter, I find that the respondent has discharged its obligations in terms of section 129 by establishing that the notice was sent by registered mail to the correct address, it reached the correct post office and the post office sent a notice to the correct address of the consumer to collect the section 129 notice. I have already concluded that the section 129 notice was sent to the applicant's correct *domicilium* provided

[10] 2014 (3) SA 56 (CC)

in the credit agreement. Under the circumstances, I am not persuaded that there is a good reason from the consumer why the notice was not collected from the post office.

The agreement

[40] The applicant contends that the agreement attached to the summons was never concluded as it was not countersigned. The respondent correctly submitted that the credit agreement does not need to be countersigned in order for it to be valid and binding.

Non-attachment of the certificate of balance

[41] One of the defences raised by the applicant is that the certificate of balance was not attached to the summons. Strange enough from his own version, the applicant agrees that there were amounts due and payable to the respondent on his account which prompted him to contact the respondent directly and try to make an arrangement for payment. He concedes that he breached the agreement by failing to make due and punctual payments as he was obliged to. This defence, in my view, is immaterial. It does not assist the applicant.

[42] Under the circumstances I conclude that the applicant has no *bona fide* defence to the respondent's action. The applicant was in arrears in the amount of R56 473,31 at the time the summons was issued.

Rule 42(1)

[43] No allegations have been made regarding the provisions of Rule 42(1) of the Uniform Rules of Court. The Rule is therefore not applicable in this matter.

[44] I am persuaded that the respondent was entitled to the default judgment at the time it was applied for. The application for rescission of judgment should accordingly fail.

[45] In the result the following order is made:

1. The application for the rescission of the default judgment granted against the applicant on 13 September 2019 is dismissed.

2. The applicant is ordered to pay the costs of the application.

M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the applicant	C L H Harms
Instructed by	Grundlingh Attorneys
For the respondent	J Minnaar
Instructed by	Hammond Pole Majola
Date of hearing	19 October 2020
Date handed down	15 January 2021