

## REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

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

26 SEPTEMBER 2022

Case No.: 88435/2019

In the matter between:

V.J MAKHUBELA

Applicant

and

ABSA BANK LIMITED

First Respondent

SHERIFF, ALBERTON NORTH

Second Respondent

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JUDGMENT

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PILLAY AJ

1. The applicant (hereinafter referred to as the defendant) and first respondent (hereinafter referred to as "*the plaintiff*") entered into a credit agreement ("*the agreement*") in terms of which the defendant purchased from the plaintiff a Mercedes Benz motor vehicle ("*the vehicle*"). The defendant failed to make the payments undertaken by her.
2. On or about 2 December 2019, the plaintiff issued a summons in which it claimed:
  - (a) Cancellation of the agreement.
  - (b) An order authorising the Sheriff to attach the vehicle and hand it to the plaintiff.
  - (c) Leave to approach the court on the same papers, duly supplemented for the payment of the difference between the balance outstanding and the value of the vehicle in the event of a shortfall after the vehicle has been disposed of by the plaintiff.
  - (d) Costs.
3. The summons was served on 3 December 2019, by affixing to the principal door at the *domicilium citandi et executandi* chosen by the defendant in the agreement.
4. When the defendant failed to defend the action, the plaintiff applied for default judgment which was granted on 13 January 2021, in the following terms:
  - (a) The cancellation of the agreement was confirmed;
  - (b) The defendant was ordered to return the vehicle to the plaintiff;

- (c) The plaintiff was granted leave to approach the court for the payment of the shortfall, if any, between the amount due to the plaintiff and the market value of the vehicle;
  - (d) The defendant was to pay certain costs.
- 5. The vehicle was attached by the Sheriff.
  - 6. On or about 28 February 2020, the defendant issued an application seeking relief in two parts. On an urgent basis (Part A) she sought an order for the return of the vehicle and an interdict prohibiting the plaintiff from selling the vehicle. She sought, in the normal course (Part B), the rescission of the default judgment.
  - 7. The parties entered into a written settlement agreement which disposed of the urgent relief sought. The plaintiff agreed to return the vehicle to the defendant. The defendant acknowledged amongst others her indebtedness to the plaintiff in an amount of R465 991.34 as at 15 February 2020. She undertook to pay the indebtedness in monthly instalments. The parties also agreed to the consequences of a default by the defendant of the settlement agreement. The settlement agreement was made an order of court on 6 March 2020. The settlement agreement was however not available at the time of the hearing.
  - 8. The application for the rescission of the judgment served before me.
  - 9. The Applicant appeared in person.

#### **The applicant's case**

- 10. The default judgment came to the defendant's attention on 17 February 2020 when the Sheriff attached the vehicle. The defendant denies that she received

the notices in terms of section 129 and 130 of the National Credit Act 34 of 2005. She denies receiving notification from the post office to collect a letter.

11. It is established law that all that a plaintiff needs to demonstrate is that the section 129 notice was duly dispatched to the debtor. The plaintiff does not have to prove actual receipt. The section 129 (1) notice was sent per registered mail to the defendant's chosen *domicilium citandi et executandi*. The plaintiff attached to the summons proof of dispatch as well as the "track and trace" report. There is no merit to the defence based on non-receipt of the section 129 (1) notice.
12. It is common cause that the address at which service of the summons occurred was the defendant's chosen *domicilium citandi et executandi*. The defendant alleges that even though she was in the Northern Cape when the summons was served, the premises were occupied, and she was not aware that proceedings had been instituted against her. Whether she was aware of the institution of the proceedings is irrelevant. Service was effected by the Sheriff at the defendant's chosen *domicilium citandi et executandi*. I am satisfied that there was proper service of the summons.
13. The defendant did not deny in the founding affidavit that she had failed to pay the instalments due in terms of the agreement. In the replying affidavit she admitted that when the summons was issued, she was in arrears in an amount of at least R62 314.22. In fact she alleged that the arrears amounted to R64 702.39. In view of this the defendant has not shown that she has a *bona fide* defence to the

plaintiff's claim. Incidentally the plaintiff admitted that the total outstanding balance was R465 931.34.<sup>1</sup>

14. I am accordingly not satisfied that good cause has been shown for the rescission of the default judgment. There is no merit to the application for the rescission of the default judgment.
15. In view of my finding I do not consider it necessary to delve into the question whether the defendant's cause of action for the rescission of the default judgment was brought under the uniform rules of court (and which rule) or the common law.
16. I mention that the Applicant accepts that she was at material times legally represented when she concluded the settlement agreement with the Respondent; factual admissions were made in the settlement agreement. She says she was under duress and stress when the agreement was signed and there was no improper conduct by her legal representative. In the face of her legal representation, she cannot demonstrate that there was any duress.

### ***Order***

17. The application for the rescission of the default judgment granted on 13 January 2020 is dismissed with costs, which costs shall include the costs of Part A of the application.

  
L PILLAY

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<sup>1</sup> She disputed though that the total amount outstanding was R559 493.94 as alleged by the plaintiff.

Acting Judge: Gauteng Division, Pretoria

26 September 2022

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 September 2022

For the applicant/defendant: In person

For the first respondent/ plaintiff: Adv J Minnaar