IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 10589/16

In the matter between:

MICHAEL ANDREW VAN AS Applicant

And

NEDBANK LIMITED Respondent

JUDGMENT DELIVERED ON 26 AUGUST 2016

VAN ROOYEN AJ

[1] On 11 March 2010 the applicant purchased a motor vehicle ("*the vehicle")* which was financed by the respondent in terms of a written credit agreement ("*the credit agreement")*. On 18 July 2012 the respondent issued summons against the applicant, claiming that the applicant was in breach of the credit agreement because the applicant was in arrears with the instalments payable in terms thereof. The respondent applied for default judgment which was granted by the Registrar of this court on 24 October 2012. In terms of the judgment the credit agreement was cancelled and the Sheriff was authorised to attach and hand over to the respondent the vehicle. Consequently, the vehicle was repossessed on 6 December 2012.

However, on 10 December 2012 it was agreed orally that the vehicle be released. On 21 October 2013 the respondent repossessed the vehicle again, claiming that the applicant was in arrears and the vehicle was sold by the respondent.

[2] During February 2014 the applicant launched this application, seeking rescission of the default judgment and a declaratory order that:

2.1 a settlement agreement was concluded between the applicant and the respondent on 10 December 2012, alternatively 11 December 2012;

2.2 the credit agreement was reinstated by the settlement agreement (if it had been cancelled at all);

2.3 the respondent was not entitled to rely on the default judgment for the purposes of moving the vehicle from the applicant's possession and/or selling the vehicle;

2.4 the respondent acted in unlawful breach of the terms of the credit agreement when it took the steps referred to in sub-paragraph 3 above;

2.5 the credit agreement has been cancelled;

2.6 the applicant is entitled to restitution of all of the performance which he has made in terms of the credit agreement.

[3] The applicant further seeks leave to sue the respondent for such damages, if any, as he may have suffered arising out of the alleged breach of the credit agreement by the respondent.

Rescission

[4] The applicant seeks rescission of the default judgment in terms of Uniform Rule 42, alternatively Rule 31, further alternatively the common law.

[5] In terms of Rule 42(1)(a) a court may rescind an order erroneously sought or erroneously granted in the absence of any party affected thereby. Once a court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order [1] and it is not necessary for a party to show good cause for the sub-rule to apply. In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of a judgment and which would have induced a court, if aware of it, not to grant the judgment [2]. If material facts are not disclosed in an *ex parte* application or the facts are deliberately misrepresented to the court, the order will be erroneously granted. [3]

Agreement to hold over legal proceedings:

[6] According to the applicant he was not in arrears and as he did not have the means or knowledge to defend the action he approached his neighbour, Mr

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1 *Rossitter and Others v Nedbank Ltd* (96/2014) ZASCA 196 (1 December 2015) at para [16]
2 *Rossiter*, *supra*
3 *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP) at 153 C-E

Stowe ("Stowe"), an advocate, for assistance and Stowe agreed to assist him on a *pro amico* basis. Stowe communicated with the respondent's then attorneys. In the founding affidavit, a detailed account was given of telephonic conversations between Stowe and identified representatives of the respondent's attorneys and letters emanating from Stowe to the respondent's attorneys were attached to the founding affidavit. Stowe deposed to a confirmatory affidavit. The respondent denied such communication but failed to file affidavits deposed to by any of the identified representatives of the respondent. Consequently, these are unsubstantiated denials which fail to create a "*real, genuine and bona fide dispute of fact*" [4] and the applicant's version in this regard must be accepted.

[7] On 13 August 2012, Stowe telephoned the respondent's then attorneys and spoke to the attorney attending to the matter, one Candice. Stowe advised her that the applicant was not in arrears, that he had made several payments since 1 March 2012 and requested that she obtain from the respondent an updated account of the amounts allegedly due. It was agreed between Stowe and Candice that she would hold the matter in abeyance and that the applicant did not have to enter appearance to defend the action. Stowe confirmed the agreement by way of a letter dated 13 August 2012. In that letter it was expressly recorded that, according to the applicant, his payments were up to date. It was also recorded that the respondent's attorneys would check this with their client so that the matter can be resolved. The respondent's legal representatives never addressed a

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[4] *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) at para [13]

letter to either Stowe or the applicant in which they took issue with the contents of Stowe's letter.

[8] On 23 August 2012, Stowe addressed a further letter to the respondent's attorneys, once again requesting a statement of account as same had not yet been furnished.

[9] On 14 September 2012 the respondent's attorneys provided Stowe with an account reflecting an amount of R19,226.66 to be due and owing as at 1 January 2012. The applicant was unable to understand the lengthy account and maintained that he was not in arrears. He communicated it to Stowe who, in turn, telephoned the respondent's attorneys and spoke to one Tasneem Ebrahim ("*Ebrahim")* who was dealing with the matter at the time. Stowe informed Ebrahim that the applicant was endeavouring to ascertain the exact amount which was due but that he was having difficulty procuring an up-to-date and accurate account from the respondent. Ebrahim undertook on behalf of the respondent that she would continue to hold over legal proceedings until such time as certainty regarding the outstanding amount was obtained.

[10] The applicant's spouse thereafter telephoned the respondent on "*innumerable*" occasions but was unable to determine how much was owing and why. On occasion she was informed that the account was in arrears in an amount of R8,000.00 but the official concerned could not explain why. The official undertook to revert to the applicant's spouse.

[11] On 20 September 2012, the respondent provided Stowe with a further shortened statement indicating that an amount of R14,327.51 was due.

Stowe telephoned the respondent's attorneys and spoke to Ebrahim who advised that she did not have knowledge as to the arrears due, that she would contact the respondent and would revert to Stowe.

[12] On 27 September 2012, without any further communication from the respondent or its attorneys to the applicant or Stowe, the respondent applied to the Registrar for default judgment which was granted on 24 October 2012.

[13] An attorney employed by the respondent's then attorneys of record (who were not the attorneys representing the respondent at the time of the hearing of this application) deposed to an affidavit "*Confirming Compliance in terms of s129(1) of the NCA [5], No 34 of 2005*" in support of the application for default judgment. In paragraph 2 of that affidavit he stated that the facts contained in the affidavit "*are within my personal knowledge and belief and to the best of my knowledge both true and correct"*. He continued to state in paragraph 11 that:

"*No dispute exists in respect of entries made as contemplated in Section 111 of the Act, alternatively, if a dispute existed the Bank complied with Section 111(2)(b)(i) of the Act. The Bank explained and/reversed (sic) the entry. No dispute is under alternative dispute resolution procedures before the tribunal.*"

[14] The general tenor of the aforequoted paragraph 11 leaves the impression that it was taken from a template without considering the facts relevant to this matter. The deponent, an attorney employed by the respondent's then attorneys of record, stated that the facts contained in his affidavit were

[5] National Credit Act, 34 of 2005 ("*the Act")*

within his personal knowledge and it must therefore be assumed that he had access to the file relating to the respondent's claim against the applicant. He would therefore have had access to not only Stowe's correspondence but also to notes that probably would have been made of telephonic conversations between Stowe and representatives of the respondent's attorneys.

[15] Quite apart from the provisions of the Act (which will be considered later herein), the communication between Stowe and representatives of the respondent's attorneys was material information that should have been divulged to the Registrar when application was made for the default judgment. It is alarming that the respondent's then attorneys failed to do so. At best, the attorney who deposed to the affidavit for purposes of default judgment, failed in his duty to establish the relevant facts (which he would have found in the records of the respondent's attorneys of record).

[16] The Registrar would not have granted the default judgment if he were alerted to the dispute concerning the alleged arrears, the confirmation in Stowe's letter of 13 August 2012 that *"(a)s agreed, an Appearance to Defend will not be entered pending your reply"* and the telephonic undertaking by Ebrahim on 14 September 2012 that she would continue to hold over legal proceedings until such time as certainty regarding the outstanding amount was obtained.

Sections 129 and 130 of the Act:

[17] The duty to divulge facts such as those referred to above, is particularly required in the context of the Act. It must always (also when application for default judgment is made) be borne in mind that "*one of the statute's core innovations is significantly consumer-friendly and court-avoidant procedures*" and that "*(t)hese procedures are designed to help debtors to restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls*". [6]

[18] In terms of s 129(3) "*a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue …*". It stands to reason that, in order to give effect to s 129(3), read in the context of the aforequoted passage from *Sebola*, a consumer must know what the overdue amount is. If all the relevant facts were divulged by the respondent, the Registrar would have realised that effect was not given to s129(3) because it was disputed that the applicant was in arrears. In any event, it was impossible for the applicant to determine what, according to the respondent, the overdue amount was because the respondent gave conflicting accounts of the outstanding amount.

[19] In terms of s 130(1) a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default. In terms of s 130(3)(c), the court may determine the matter only if the court "*is satisfied*" that the credit provider has not approached the court despite the consumer having brought the payments under the credit agreement up to date. The court can only be "*satisfied*" that those jurisdictional

[6] *Sebola & Another v Standard Bank of South Africa Ltd & Another* 2012 (5) SA 142 (CC) at para [59]

requirements exist if it applies its mind to the relevant facts and to that end all such facts must be divulged. If all the relevant facts were divulged in this matter, the Registrar probably would not have been satisfied that the applicant was in default.

[20] In this legislative context, it is incumbent on a credit provider, when application is made for default judgment, to divulge all facts that may be relevant in the process of establishing whether the requirements of s129 and 130 have been met. The respondent fell far short of fulfilling this duty by mechanically contenting itself with general statements in its motivation for default judgment instead of divulging all material facts.

Section 111:

[21] By virtue of the facts dealt with above, it was argued on behalf of the applicant that s 111 of the Act prohibited the respondent from obtaining default judgment because there was a dispute and in terms of s 111(2) the respondent was not entitled to commence with enforcement proceedings [7].

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[7] Section 111 provides as follows:

"***Disputed entries in accounts –***

(1) A consumer may dispute all or part of any particular credit or debit entered under a credit agreement, by delivering a written notice to the credit provider.

(2) A credit provider who receives a notice of dispute in terms of subsection (1)-

(a) must give the consumer a written notice either:

(i) explaining the entry in reasonable detail; or

(ii) confirming that the statement was in error either in whole or in part, and setting out the revised entry; and

(b) must not begin enforcement proceedings on the basis of a default arising from the disputed entry-

(i) until the credit provider has complied with paragraph (a); or

According to the respondent, s 111 does not apply as the applicant never challenged a particular debit or credit entry and the applicant simply denied being in arrears.

[22] The applicant, represented by Stowe, notified the respondent in writing that, according to the applicant, he was not in arrears and he specifically pointed out that he had "*proof of all his payments*". The applicant was unable to "*make head or tail*" of an account received from the respondent and to compound matters, the respondent furnished the applicant with conflicting versions of the amount that, according to the respondent, was overdue. The respondent undertook to revert to the applicant but failed to do so before obtaining default judgment.

[23] Section 111 must be interpreted purposively [8] and bearing in mind that the main object of the Act is to protect consumers whilst safeguarding the interests of creditors [9]. It may be argued that those principles dictate that s111 should be interpreted broadly to cover facts such as those set out above, otherwise it will undermine the purpose of the Act [10]. However, in view of my findings under the previous headings, it is not necessary to decide this issue.

Section 129(1)(a):

(ii) at any time that the matter is under alternative dispute resolution procedures, or before the Tribunal in terms of section 115."

[8] *ABSA Bank v de Villiers* 2009 (5) SA 40 (C) at para [27]
[9] *Sebola* at para [40]
[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]

[24] It is necessary to deal with a further ground on which the default judgment was granted erroneously, as it reflects unacceptable conduct on the part of the attorneys who represented the respondent at the time of the default judgment being granted and it may have a bearing on the costs order that will be made in this matter.

[25] In the particulars of claim attached to the summons and signed during June 2012 by the same attorney who deposed to the affidavit confirming compliance with the Act, it was stated that:

> "*10 On the 20/06/2012 the Plaintiff delivered a Notice in terms of Sect 129(1)(a), read with Sect 123 to the Defendant.*
>
> *11 In terms of the aforesaid notice, the Plaintiff has drawn the default to the notice of the Defendant and proposed that the Defendant refer the agreement to a debt counsellor, alternatively a dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the agreement or develop and agree a plan to bring the payments under the agreement up to date.*
>
> *12 A copy of said letter and proof of posting are annexed hereto marked as Annexure "B".*
>
> *13 A period in excess of ten business days has lapsed since the delivery of the notice and notwithstanding the aforesaid notice, the Defendant has not responded to the notice.*"

[26] At the time when the particulars of claim were signed, not a word of the aforequoted passages from the particulars of claim was true. It was made worse by the attorney's failure in his affidavit, confirming compliance with the Act, to explain this falsehood.

[27] It does not assist the respondent to argue that, courtesy of *Sebola* [11], the action is not void because a notice in terms of s 129(1)(a) was sent by registered mail on 10 July 2012. Whilst instituting action without prior notice does not mean that the action is void, it is inexcusable to mislead the court by stating in particulars of claim that a notice was delivered whilst, at the time of the particulars of claim being signed, it is not true. If, what is referred to as annexure "B" in the particulars of claim, was the letter dated 3 July 2012 sent by registered mail on 10 July 2012, it makes matters worse because it is not the notice relied on in the particulars of claim.

[28] In the absence of an amendment of the particulars of claim, the respondent therefore sought, and was granted, default judgment based on particulars of claim referring to a notice delivered on 20 June 2012 whilst such a notice did not exist and no delivery was effected prior to 10 July 2012. Consequently, the Registrar could not have satisfied himself that there was compliance with the provisions of s 129 as alleged in the particulars of claim (with reference to a notice delivered on 20 June 2012). The Registrar therefore did not comply with the requirements of s 130 (3)(a) and erred in granting default judgment.

Conclusion iro rescission:

[29] In these circumstances, the default judgment was granted erroneously because there existed at the time of its issue facts of which the Registrar was unaware, which would have precluded the granting of the judgment and which would have induced the Registrar, if aware of it, not to grant the

[11] at para [53]

default judgment. Moreover, it was an error to grant the default judgment whilst there was an evident discrepancy between the notice relied on in the particulars of claim and the notice before the Registrar when the default judgment was granted.

[30] The respondent argued that an unreasonable time had lapsed before the applicant applied for rescission. What is a reasonable time depends upon the facts of each case [12]. The applicant explained in detail how he attempted to resolve the matter in communication with the respondent. It *inter alia* led to the release of the vehicle. It was only repossessed again in October 2013 and then further communication between the parties followed. This application was launched in February 2014. Considering the facts of this matter, the application for rescission was brought within a reasonable time.

[31] The respondent's counsel further argued that the question of rescission is academic as the vehicle was sold in execution. However, I agree with the submission of counsel for the applicant that the issue is not academic because the judgment will reflect negatively on the applicant's credit record.

[32] The default judgment should therefore be rescinded.

Declaratory relief

[33] The declaratory relief sought by the applicant depends on the applicant's contention that a settlement agreement was concluded between the

[12] *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 421 G

applicant and the respondent on 10 December 2012, alternatively 11 December 2012.

[34] For his reliance on a settlement agreement concluded on 10 December 2012, the applicant contends that Stowe telephoned the respondent's chief executive officer, Mr Brown, on that date and explained the full history of the matter to him. Brown indicated that there had been a mistake on the part of the respondent and he undertook to release the vehicle. According to the applicant the intention was to bring an end to the litigation and to secure the release of the vehicle. The effect was to settle the action. Shortly thereafter, the respondent sent the applicant an e-mail authorising him to collect the vehicle, which he did.

[35] The applicant relies on a letter dated 11 December 2012 from the respondent's attorneys to the applicant, for the alternative contention that an agreement was concluded on that date. The applicant contends that it was indicated in the letter that the respondent was willing to settle the matter in an endeavour to amicably resolve the matter and proposed that a payment of alleged arrears in an amount of R5,778.60 be made by the applicant. The applicant accepted the settlement offer which had the effect to finally settle the dispute between the parties. The applicant made payments accordingly.

[36] According to the respondent, the conversation between Stowe and Brown on 10 December 2012 and the return of the vehicle were nothing more than an indulgence. The judgment remained.

[37] As far as the letter of 11 December 2012 is concerned, the respondent pointed out that it was stated in the letter that "*the above in no way cancels or deviates from the original agreement but is merely an attempt to settle the current dispute in an amicable manner*". The letter also records that "*we reiterate that the above proposal is made on a without prejudice basis and without any admission of liability on the part of our client or our offices. We further advise that all our client's rights remain strictly reserved*".

[38] If a settlement agreement were concluded orally on 10 December 2012, one would have expected reference thereto in the letter of 11 December 2012. Whilst that letter refers to a letter from the applicant to the respondent dated 10 December 2012 and a telephone conversation between the applicant and Mr Mohamed, a representative of the respondent's attorneys, on that date, there is no reference to a telephone conversation between Stowe and Brown, let alone an oral agreement concluded between them.

[39] The aforequoted passages from the letter dated 11 December 2012 dictate against an intention on the part of the respondent to settle the entire matter.

[40] Even if there were an intention to settle the matter, the terms of such a settlement are not at all clear from the papers. For example, there is no reference to the status of the default judgment or any undertaking that no execution steps will be taken in future in terms of that judgment.

[41] In the circumstances, a material dispute exists as to the existence or not of the alleged settlement agreements. The respondent raised a real, genuine

and *bona fide* dispute of fact and its version is not so far-fetched or clearly untenable that it will be justified to dismiss it merely on the papers. [13]

[42] The applicant, therefore, has not made out a case for the declaratory relief sought in the notice of motion.

Leave to sue

[43] The applicant seeks leave to sue the respondent for such damages, if any, as he may have suffered arising out of the breach of the credit agreement by the respondent. This relief too is dependent on the existence of the settlement agreement alleged by the respondent. In view of my findings above, the applicant is not entitled to this relief.

[44] Moreover, after the application had been launched, the applicant instituted an action contemplated in this part of the relief sought. Consequently, the leave sought in this application became academic and for this reason too the applicant is not entitled to such an order.

Costs

[45] In the process of considering an appropriate costs order, regard must be had to the following. The applicant is successful with his application for rescission but unsuccessful with his application for declaratory relief and leave to sue the respondent. The respondent's conduct when it sought

[13] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 H – 635 C

default judgment, left a lot to be desired and a costs order ought to reflect disapproval. The fact that the respondent tendered to agree to the rescission on condition that the declaratory relief be sought in an action, does not assist the respondent. It could have made an unconditional offer. In any event, whilst the respondent stated that it was left to the court's discretion, vigorous oral argument was presented on behalf of the respondent to motivate why this court's discretion should be exercised against rescission.

[46] In these circumstances considered as a whole, it will be just to order that the costs of this application be paid by the respondent on a scale as between party and party and not on attorney and client scale as sought by the applicant in the notice of motion. In coming to this conclusion, I consider the applicant's failure to make out a case for a part of the relief sought, to be balanced out by the conduct of the respondent dealt with earlier herein. If it were not for the applicant's failure to make out a case for a part of the relief sought, I would have granted an order as to costs on a punitive scale without any hesitation.

Order

[47] It is ordered that:

47.1 the default judgment which was granted in favour of the respondent (as the plaintiff) against the applicant (as the defendant) on 24 October 2012 be rescinded;

47.2 the applicant's application for the relief sought in paragraphs 2 and 3 of the notice of motion be dismissed;

47.3 the costs of this application be paid by the respondent.

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VAN ROOYEN, AJ