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

CASE NO : 18412/2019

In the matter between

JANET ALUOCH JUMA APPLICANT

AND

MERCEDES BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD RESPONDENT

Heard: 23 August 2021

JUDGMENT DELIVERED ON 15 OCTOBER 2021

THULARE, AJ

[1] This is an application for rescission of a default judgment in favour of the respondent on 12 November 2019. The terms of the order were confirmation of termination of the agreement, the return of 2013 Used Mercedes Benz C180 1.6 BE (W204) with engine number 27491030069352 and chassis number WDD2040312R302437 (the vehicle). The damages claim was postponed *sine die* and the applicant had been ordered to pay the costs on attorney and client scale to be taxed.

[2] The applicant and respondent concluded a written instalment agreement in terms whereof the respondent sold the vehicle to the applicant. The respondent delivered the vehicle to the applicant as agreed. Ownership remained vested in the respondent until the applicant had fulfilled all her obligations. The applicant paid an initial payment of R21 990-00 and was to pay R4820-49 monthly for 58 months until 30 September 2023. In the event of failure to pay as agreed, the full balance owing became immediately due and payable. The respondent would be entitled to cancel the agreement, repossess the vehicle and proceed with the enforcement or termination of the agreement.

[3] In its summons the respondent alleged that the applicant failed to pay the instalments in terms of the agreement and as at 17 September 2019 was in arrears in the amount of R15 276-86 and the full outstanding balance was R197 953-32. The respondent issued the notice as envisaged in section 129 of the National Credit Act, 2005 (Act No. 34 of 2005) (the NCA) which was served on 29 Gordon Road, Heathfield, 7945. The notice was sent by pre-paid registered mail on 26 September 2019. Thereafter the respondent issued summons on 18 October 2019 and then requested default judgment which was granted.

[4] The section 129 notice and the summons were served on the *chosen domicilium citandi executandi.* It is not in dispute that the applicant did not have knowledge of both the notice and the summons. She had left the address on 15 September 2019 and had moved to Erf 1432 Wetton where she had brought property. The transfer of the Wetton property from MR and R Taliep to her name and that of Patrick Tshibambe was registered at the deeds office on 8 October 2019.

[5] Reliance on her service was based on the formal compliance with due process in respect of both the notice and the summons. It was in fact argued that she had herself to blame for not receiving the notice and summons, as she did not inform the respondent in writing or even orally that she had changed her address. She attributes the failure to notify the respondent, in writing, of the change of address amongst others on the urgency with which she had to move houses. The other reason was that she did not yet have the supporting documents on the change, like

the municipal utility account or store accounts, as envisaged in the agreement, contemporaneous with and immediately after her change of address. The agreement provided:

"4.3 If you wish to change the address or any other details you must inform us thereof by written notice delivered either by hand, or registered mail or electronic format with the applicable supporting documents required by law."

[6] The applicant had paid the initial amount and all other monthly instalments since concluding the agreement, except for the months of June, July and September 2019. Even after September 2019 she had continued to pay and but for the arrears as explained, was up to date. When she deposed to her affidavit on the 4th of December 2019, she had just paid the instalment on 1 December 2019. She had skipped the months referred to above because of a temporary financial slump but knew that she was going to catch up with settling the instalments not paid and continue to pay the monthly instalment in terms of the agreement.

[7] The applicant only came to know about the processes already undertaken when she was called by the sheriff on 29 November 2019. That is when she came to know that the sheriff was in possession of a warrant of execution to remove the vehicle from her and to take possession thereof. The applicant called the respondent's attorneys and offered to pay the arrears in full. The applicant was informed by the attorneys that the arrears were then about R30 000-00. She was further informed that it did not matter whether she paid the arrears or not because judgment had already been obtained and that the attorneys would only accept any payment if the vehicle was returned to the respondent and that the only way to keep the vehicle was to pay the entire agreement sum of R200 000-00.

[8] The applicant alleges that it was once she became aware of the judgment, and the attitude of the respondent to her offer, that she instructed her attorneys to bring a rescission application and an urgent application to stop the removal and sale of the vehicle. The urgent court authorized the urgent removal and storage, but not the sale of the vehicle pending this rescission application. She further stated that had she been aware of the notice she would have acted upon her rights and defences

conferred upon her in terms of the NCA, which included negotiating a payment plan to deal with the unpaid arrears and other alternative mechanisms provided if needed.

[9] Section 31(2)(b) of the Uniform Rules of court provides:

"31 Judgment on confession and by default and rescission of judgment

(2)(b) A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit."

In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (AD) at 765A-C it was said:

"The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 *per* Innes JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) That the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) That on the merits such party has a *bona fide* defence which, *prima facie,* carries some prospect of success. (*De Wet's* case *supra* at 1042; *PE Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357-8.)

[10] Criticism may be levelled against the applicant as being the author of her own misfortune by not providing the respondent with her new address, once she had moved from her *domicilium citandi executandi.* The criticism notwithstanding, I am unable to conclude that her default was explained by disdain for the Uniform Rules of Court. Such a conclusion would be possible if she had knowledge of the notice or the summons or was someone who one would conclude was a person familiar with the procedure of the courts. It cannot be said that her default was informed by a sense that the notice or summons was unworthy of her consideration or respect. The explanation for her default was not general, but in specific terms.

[11] The notice is part of the required procedure before debt enforcement [section 129 of the NCA]. The applicable provisions of the notice sent to the applicant read as follows:

"In terms of section 129 read with section 89 and 130 of the National Credit Act 34 of 2005 you are at liberty to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent to resolve any dispute under the agreement or develop and agree on a plan to bring the payment under the agreement up to date.

Should you fail to exercise your rights as aforesaid within 10 (ten) business days from date hereof, legal action will be instituted against you without further notice for: …"

[12] The applicant missed two instalments in succession, that of June and July 2019. She paid the instalment of August 2019. She missed the instalment of September 2019. She paid the instalments of October and November. By the time the respondent obtained the judgment by default on 12 November 2019, the applicant alleged that respondent had received the payment of October 2019 and was aware of the applicant's offer to settle the outstanding arrears, which equaled three months of instalments, in full and had rejected the offer.

[13] In my view, having regard to the period for which the agreement had already run, the history of the monthly payments, the amount payable per month, the period in which the applicant failed to pay, the total amount outstanding in arrears and the conduct of the applicant from the time that the notice was issued to the date that the default judgment was determined, this is a matter where I find a rational connection between the arrears and the payment of arrears only as a just and fair response. If the applicant proves the facts and factors set out, they may stand as a valid answer to the claim.

[14] It will be a response proportional to the implications of the default, non- payment and breach as envisaged in the agreement between the parties. This is provided in clause 7 at 7.4 of the agreement which reads:

"You may at any time prior to cancellation of this Agreement, remedy your default by paying us all amounts that are overdue, together with our prescribed administration charges and collection costs (set out in clause 26) incurred to enforce this Agreement against you up to the date on which your default is remedied."

[15] It does not seem to me that the applicant was generally unable to meet the monthly payments. She was not unsuccessful in her undertaking in terms of the agreement for the reason that she could not meet the monthly financial watermark. The facts set out, if proved, would negate a conclusion that she was unable or unwilling to meet the standard of servicing the monthly instalments as agreed until settlement of the total outstanding amount. The facts suggested that she failed to pay in terms of the agreement punctually in a specified financial season. It was not a failure which was high enough, in terms of the amount and period, to warrant the respondent to terminate the agreement and obtain return of the vehicle without allowing the applicant an opportunity to remedy the default despite her offer. It may be found that the dispossession and sale of the vehicle was harsh and disproportionate under the circumstances.

[16] In *Absa Bank v Petersen* 2013 (1) SA 481 (WCC) at paragraph 11 it was said:

"[11] The object of the prescribed statutory notice is to afford the credit consumer the opportunity of taking advice and seeking to make arrangements to bring the arrears up to date, or failing that, to purge the default. …

A credit provider is required to react in a constructive and bona fide manner to any approach made to it by a consumer who has received a notice in terms of s 129. The notice has been described as a pivotal characteristic of the NCA's 'cost-avoidant and settlement friendly processes'. It is directed at alerting debtors to 'restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls': see *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) ([2012] ZACC 11), in paras 72 and 59 respectively."

[17] The divisions of the past, which the preamble to the Constitution of the Republic of South Africa, 1996, (Act No. 108 of 1996) (the Constitution) instruct and urge us to heal, includes the great divide between credit providers and credit consumers. Section 129 of the NCA is one provision in the greater scheme of the legislation through which the nation should navigate the deep, narrow gorge with steep sides to make it through the kloof of bargaining power in credit agreements. Unless courts are deliberate in their judicial output, a contest between chronically unequal financial beings will always result in the authority of the powerful, irrespective of the quality and state of their case.

[18] The Constitutional values of human dignity, the achievement of equality and the advancement of human rights would remain impossible to realise if credit providers continue to disregard the voice of the consumer, but not their payment, once the section 129 notice is issued until they secure a court order. This matter, in my view, demonstrates that judicial oversight of this period, especially when orders by default are considered, has become a pre-requisite for justice to prevail. Credit provider domination in this period, which domination appear selfish and maybe greedy in securing its interests whilst it is cold and aloof to that of the consumer, should be soaked in the conscience and consciousness of our constitutional values.

[19] The time has arrived where credit providers who request judgment by default should also indicate what response, if any, the section 129 notice or the summons elicited or what payments, if any, were made from the moment the section 129 was issued to the date that default judgment is requested. In circumstances like the present, where the credit provider alleged that the agreement was cancelled at the issue of the section 129 notice, but continued to receive payments, more is expected in that report to the court considering judgment by default. Consumers cannot continue to pay monthly instalments where the light of judicial oversight did not streak, for want of disclosure in the request for default judgment, with the belief that the payment is in fulfilment of the terms of an agreement, when the credit provider knew that the agreement was cancelled, and the consumer still suffered the indignity of dispossession of the assets purchased.

[20] Where the consumer made payments, believing it was payments in fulfilment of the agreement, when the agreement was cancelled and such cancellation was only known to the creditor, such receipt seems to me to be a receipt under false pretences. Mitigation of damages and transparency, especially a frank and candid disclosure to a court called upon to determine the request for default judgment, are not mutually exclusive. The vision envisaged in the NCA postured towards the protection of the consumer must translate into the lived experiences of consumers. Courts should ensure that the bad tendencies, practices and cultures in debt recovery, especially hasty and unnecessary dispossession of properties which are

subjects of credit agreements, do not remain a living stubborn heritage in the history of consumer credit, when considering especially judgment by default.

[21] For these reasons I make the following order:

(a) Judgment granted against the applicant in favour of the respondent on 12 November 2019 is rescinded.

(b) The applicant is granted leave to defend the action.

(c) No cost order is made.

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THULARE, AJ