IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO.: 1798/2020

Reportable	**Yes/No**

In the matter between:

SITHEMBISO BOKLENI Applicant

and

FIRST RAND BANK LIMITED Respondent
t/a WESBANK

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] On 11 April 2023, the applicant approached this court to rescind the judgment granted in favour of the respondent on 17 November 2020. The impugned judgment reads as follows:

"1. The Agreement in respect of the vehicle stated below be and is hereby cancelled;

2. Return of the 2012 VOLKSWAGEN POLO 1.4 COMFORTLINE 5DR motor vehicle with engine number LP086228, chassis number AAVZZZ6RZCU056076 and registration number HGV226EC.

3. Costs of suit on the Magistrate's Court Tariff."

[2] The notice of motion stipulates that the application is made in terms of Rule 42 of the Uniform Rules of Court. Furthermore, the applicant applies for condonation for the late filing of the rescission application. The applicant seeks further relief in the form of an order setting aside the warrant of delivery that was issued on 25 November 2020.

The background facts

[3] On or about 9 June 2014, the applicant entered into the credit agreement (the Agreement) with the respondent for the financing and purchasing of a Volkswagen Polo 1.4 Comfortline SDR (the motor vehicle). As per the terms of the Agreement, the respondent retained the ownership of the motor vehicle until the applicant fulfilled all payment obligations. The applicant was required to make 59 monthly instalments of R2,637.61 over 60 months.

[4] In addition to these monthly instalments, the Agreement also included a balloon payment of R52,148 which was due on the sixtieth month of the Agreement term. Following the completion of the 59 monthly repayments, the

debit authorization order lapsed, and the respondent ceased to debit further amounts.

[5] Prior to the payment of the outstanding balloon payment, the applicant received a letter reflecting a settlement amount of R62,646.04 as per his request. Notwithstanding this settlement proposal, the applicant remained obligated to settle the outstanding balloon payment in accordance with the terms of the original Agreement.

The applicant's case

[6] In his founding affidavit, the applicant alleges that in 2020, without prior notice or warning, individuals arrived at his workplace intending to repossess the motor vehicle. He claims that he never received a summons or any notification in terms of section 129[1] (section 129 notice) of the National Credit Act, 34 of 2005 (the NCA) and as a result, he was unaware of the outstanding debt. Furthermore, the applicant states that since the respondent ceased debiting the monthly

[1] Section 129 of the NCA deals with the required procedures before debt enforcement. This section provides.

"(1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative 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 on a plan to bring the payments up to date;

(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph 9a) or in section 86(10), as the case maybe; and

(ii) meeting any further requirements set out in section 130……."

instalments, he assumed that there were no outstanding amounts due and payable. This assumption, so he claims, led him to believe that his obligation under the Agreement had been fulfilled. The balloon payment was never explained to him. Following this explanation, the repossession of the motor vehicle was halted.

[7] The applicant consulted with his attorneys, P.N Zide and Partners. Subsequently, a series of correspondence was exchanged between the applicant's and the respondent's attorneys. During this exchange, the applicant's attorneys discovered that a summons had been issued against the applicant. In February 2021, the applicant's attorney requested a copy of the statements of account, which they received on 10 July 2021. The applicant alleges that these statements lacked detail and only covered the period from September 2014 to December 2019.

[8] The applicant's attorneys then proposed a payment arrangement with the respondent's attorneys. Unfortunately, they were unable to reach an agreement. The respondent's proposed amount of R5 269.92 each month, exceeded the applicant's offered amount of R2,500.

[9] The applicant acknowledges that there was an inordinate delay of two years and four months between the events in question and the filing of his application for the rescission of the judgment. He attributes this delay to his genuine belief that he would be able to negotiate a mutually acceptable agreement with the respondents, wherein he would be permitted to settle the outstanding amounts

through a payment arrangement. The negotiations commenced on 15 February 2021 to 29 March 2023.

[10] Despite his efforts to negotiate a payment arrangement, the respondent repossessed the motor vehicle on 01 March 2023. At that time, the applicant lacked the necessary funds to seek legal advice and was only able to consult with his attorney after receiving his salary on 15 March 2023.

The respondent's case

[11] In its answering affidavit, the respondent vehemently denies the applicant's claims of not receiving the summons and section 129 notice. Furthermore, the respondent claims that despite the applicant's allegations that the terms and conditions of the balloon payment were not adequately explained to him, he failed to provide a satisfactory explanation for his own failure to carefully read and understand the Instalment Sale Agreement before signing it. The respondent emphasizes that the conditions of the balloon payment are explicitly and unambiguously set out in the Agreement, leaving no room for misunderstanding. By not taking time to familiarize himself with the Agreement's terms, the applicant cannot now claim that he was not aware of the balloon payment conditions.

[12] Following his failure to fulfil the terms and conditions of the balloon payment, the respondent asserts that on multiple occasions, it informed him via SMS and telephone calls that the payment was outstanding and required

settlement in full. Furthermore, on 14 August 2019, the respondent sent an automated letter of demand to the applicant, formally demanding full settlement of the outstanding balloon payment.

[13] The respondent further asserts that the applicant was fully aware that, in accordance with the terms of the Agreement, the debit order authorisation he electronically signed only facilitated the payment of the monthly instalments due under the Agreement. It did not provide for the repayment of the balloon payment, which was a separate and distinct obligation under the Agreement.

[14] The respondent further avers that the applicant had breached the terms and conditions of the Agreement, specifically by failing to make the required balloon payment. As a direct result of this breach, the respondent took action to enforce its rights under the Agreement and applied for a court order directing the return of the motor vehicle.

[15] Prior to the serving of the summons, the respondent's attorneys sent a letter, via SMS, to the applicant, informing him that his account had been handed over to Cally Gentle and Manila Brewis Attorneys for further action. The letter advised the applicant to contact the attorneys to discuss the matter and prevent further legal action from being taken against him.

[16] Regarding the inordinate delay, the respondent indicates that, in fact, efforts were made to resolve the matter amicably. Specifically on 24 March 2022, an employee of the respondent approached the applicant and requested that he

voluntarily surrender the motor vehicle, thereby avoiding the need for the sheriff to deliver a warrant of delivery. Unfortunately, this attempt at a peaceful resolution was unsuccessful, as the applicant failed to surrender the motor vehicle. Instead of cooperating with the respondent's employee, the applicant simply drove away with the motor vehicle, refusing to surrender it voluntarily forcing the respondent to pursue legal action to recover the motor vehicle.

The legal framework

[17] The rescission of the judgment under common law is a remedy that allows a party to have a judgment set aside, however, this remedy is not automatic, and the applicant must demonstrate sufficient reasons to warrant such a rescission. To succeed in his application, the applicant must fulfil two essential requirements. Firstly, he must provide a reasonable and acceptable explanation for his default. Secondly, the applicant must demonstrate that he has bona fide, which prima facie has merit and carries substance. In other words, he must demonstrate that he has a good chance of succeeding if the matter were to be brought on trial.

[18] In *De Wet and Others v Western Bank Ltd*[2] Trengove AJA, deliberated on the common law principles governing the rescission of the judgments, carefully examining the applicable provisions and precedents. Under common law, the courts of Holland had the authority to rescind judgments obtained due to the

[2] 1979 (2) SA 1031 at para-F.

defendant's default appearance, provided that sufficient grounds were present. The court exercised its discretion which went beyond the specific grounds outlined in Rules 31 and 42(1), as well as those mentioned in the case of *Chirderley Estate Stores v. Standard Bank of SA Ltd* 1924 OPD 163.

[19] In a recent decision, the Constitutional Court[3] reaffirmed and clarified the requirements for rescinding a judgment under common law, reiterating the essential principles that govern this remedy. At paragraph 71, the Court held:

> "The requirements for rescission of a default judgment are two-fold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.
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> Thus, the existing common law test is simple: both requirements must be met."

[20] Pursuant to Rule 31(1)(b) of the Uniform Rules of the Court, the defendant who has acquired knowledge of the judgment against him may, within 20 days, apply to the court on notice to the plaintiff to have the judgment set aside. Upon such application, the court may, if good cause is shown, set aside the default judgment on such terms as the court deems just and equitable.

[3] Zuma v the Secretary of the Judicial Service Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of the State and Others [2021] ZACC 28.

The court's analysis of the case

[21] The applicant expressly acknowledges that the application for rescission of the judgment was submitted substantially outside the prescribed timeframe, attributing the delay to ongoing negotiations between his legal representatives and those of the respondent. These negotiations, he asserts, were a necessary precursor to the filing of the rescission application and their protracted nature inevitably resulted in the delayed submission of the application.

[22] A thorough examination of the papers filed, reveals that the respondent does not seriously oppose the application for condonation. Considering this, it is prudent to pronounce at this juncture, that the interests of justice necessitate a full and proper ventilation of the issues between the parties. Given that no prejudice or unfair advantage will accrue to either party as a result, the court is empowered to consider the matter in its entirety, thereby allowing for a just and comprehensive resolution of the issues.

[23] Ms *Nyobole*, counsel for the applicant levelled several points of criticism regarding the respondent's handling of the debt, highlighting specific concerns and irregularities in the respondent's approach to debt collection. In addition to all other specific concerns she raised regarding the debt collection, she contended that the failure to bring the section 129 notice to the applicant's attention provides a compelling basis for rescinding the judgment. Furthermore, so she argued, the additional failure to serve summons to the applicant, serves to bolster the

applicant's prospects of success and that these factors will be pivotal in determining the outcome of the matter when it is ultimately argued at trial.

[24] Ms *Sephton*, counsel for the respondent, responded robustly to the criticisms directed at the respondent, presenting a formidable counterargument that effectively addressed each of the concerns raised.

[25] It is undisputed that the judgment was obtained in the absence of the applicant. However, the applicant's omission to specify the precise subsection upon which his application is predicated is a notable oversight, as there is a dearth of evidence suggesting that the judgment was granted because of errors, mistakes or it contains patent errors, ambiguities or omissions as it would be required under the relevant Rule 42 of the Uniform Rules of Court. With the legal framework now clearly established, the crucial issue that arises is whether the applicant has successfully made out a case for rescission of the judgment, either under the provisions of Rule 31 or in terms of the common law.

[26] The applicant candidly acknowledges his indebtedness to the respondent, specifically regarding the outstanding balloon payment as stipulated in the Agreement. He further admits that after the judgment was granted, he engaged in negotiations with the respondent to secure a reduced instalment payment. However, he concedes that he was unable to afford the amount offered by the respondent.

[27] The pivotal issue on this point is whether rescinding the judgment would be a practicable solution to the applicant's financial difficulties and effectively break the deadlock that has arisen from the unsuccessful negotiations between the parties. Can the applicant's assertion be legitimately regarded as a good cause for default and genuine and substantial defence to the applicant's claim, or does it merely serve as an unsubstantiated obstacle to his relief?

[28] To provide a comprehensive response to this question, it is essential to revisit the purpose of the NCA. As succinctly articulated in the landmark rulings of *Sebola and Another v Standard Bank of South Africa and Another*[4] and reaffirmed in *Kubyana v Standard Bank of South Africa Ltd*[5], the NCA is directed at consumer protection. It represents a deliberate legislative endeavour aimed at regulating and enhancing the dynamics between the consumers and credit providers thereby promoting a more equitable and sustainable credit marketplace.

[29] A meticulous examination of the seminal judgments[6] in this area, reveals an unblemished understanding that the NCA seeks to strike a balance between the competing interests of consumers and creditors. Specifically, it underscores that while the protection of consumer interests is paramount, the NCA also recognises that the legitimate interests of creditors warrant equal consideration

[4] (CCT)98/11 [2021] ZACC 11;2012 (5) SA 142 (CC) (07 June 2012) at para 41

[5] (CCT 65/13) [2014] ZACC 1; 2014 (3) SA 56 (CC);2014 (4) BCLR 400 (CC)[20 February 2014) at para 20.

[6] See Sebola and Kubyana at footnote 3 and 4 supra.

and safeguarding and cannot be overlooked. Thus, the NCA effectively discourages contractual defaults by consumers, promoting a culture of responsible borrowing and adherence to credit agreements.

[30] In my considered opinion, the argument that the applicant was unaware of the balloon payment is without merit. The agreement he signed is unequivocal, and its contents are not in dispute. As a responsible consumer, it was incumbent upon him to ensure that arrangements were made to settle the remaining debt after the debit order collection had lapsed. Regrettably, he failed to take the necessary steps, thereby neglecting his obligation under the Agreement. Furthermore, in a notable development, the respondent subsequently tendered an additional proposal for settling the outstanding ballon payment, even after the judgment had been obtained by the applicant. Regrettably, this overture was not reciprocated by the applicant.

[31] Prior to the issuance of section 129 notice, the respondent had sent SMS reminders to the applicant alerting him to the fact that his account was in arrears. These reminders were sent to the cellular phone number provided by the applicant when he signed the Agreement. Despite these efforts to remind him of the outstanding balloon payment, the applicant failed to take the necessary steps or make arrangements to settle the debt. Furthermore, the track and trace report confirms that the notice was brought to the applicant's attention. Notwithstanding this conclusive evidence, his founding affidavit does not deny receipt of the

section 129 notice but merely asserts a lack of recollection regarding receipt of the notification without providing any substantive evidence to counter the proposition that it was brought to his attention.

[32] Moreover, the applicant's alternative argument that the Section 129 notice was sent to an incorrect post office is entirely without merit. The inconsistency is readily apparent from a striking discrepancy between the applicant's current argument and the assertions made on page 14 of the founding affidavit, specifically regarding his claimed lack of recollection concerning whether the section 129 notice was brought to his attention or not. It is well established in our law that non-compliance with section 129 notice does not have the effect of invalidating the proceedings entirely. Rather, it merely serves to delay the finalisation of the process, thereby ensuring that due process is accurately followed and affording the consumer a meaningful opportunity to exercise his rights. In the case under consideration, the applicant fails to provide even a hint of prejudice or suggest what an alternative course of action he would have pursued had he received the section 129 notice, thereby rendering his contention highly speculative and unsubstantiated.

[33] In conclusion, the applicant concedes that the sheriff's return indeed indicates that the summons was served on him, yet he vehemently denies the receipt of the summons. He justifies this denial by asserting that he was not present at home when the summons was allegedly served. However, our courts

have consistently held that in the absence of clearest evidence to rebut the sheriff's return, the return of service constitutes conclusive proof that the papers were indeed served on the litigant, thereby establishing prima facie evidence of the service.[7]

[34] Considering the arguments presented in their entirety, it is evident that the applicant has failed to establish the crucial requirements distilled by the Constitutional Court in the matter of *Zuma v the Secretary of the Judicial Service Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of the State and Others*.[8] In the result, the application for the rescission of default judgment must fail.

[7] In Absa Bank v Mare and Others, a case that I was referred to by Ms Sephton on behalf of the respondent, the court held at para 19, a return of service, it is trite, is regarded as prima facie evidence of its content. Indeed, s 43(2) of the Superior Courts Act 10 0f 2013 expressly provides that "[t] he return of the sheriff of what has been done upon any process of the court, shall be prima facie evidence of the matters therein stated." It follows that such evidence may be challenged by adducing the clearest evidence. (see, for example, Greeff v FirstRand Bank Ltd 2012 (3) SA 157 (NCK), at para 10; Deputy Sheriff, Witwatersrand v Goldberg 1905 TS 680).

[8] See footnote 2 above.

Order

[35] The following order is issued:

1. The application for rescission of default judgment is dismissed with cost on scale "A" as contemplated under Rule 67A read with Rule 69 of the Uniform Rules of Court.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Adv EN Nyobole
Instructed by	:	P.N Zide & PARTNERS INC Mthatha c/o Yokwana Attorneys Makhanda
Counsel for the Respondent	:	Adv S Sephton
Instructed by	:	Messrs. Huxtable Attorneys Makhanda
Heard on	:	17 October 2024
Judgment Delivered on	:	17 December 2024