IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION – MAKHANDA]

CASE NO.: 3986/2023

MATTER HEARD ON: 20 FEBRUARY 2025

JUDGMENT DELIVERED ON: 27 FEBRUARY 2025

In the matter between:-

ZANOKHANYO TRADING CC

REGISTRATION NO.: 2004/006911/2 **1ST APPLICANT**

SLIER ELLIS ZUKILE MBELANI **2ND APPLICANT**

and

ABSA BANK LIMITED **RESPONDENT**

JUDGMENT

ROBERSON J:

Introduction and background

[1] The applicants have applied for two-fold relief: an order staying the execution of a warrant of delivery, and rescission of a default judgment granted by Beshe J on

16 January 2024. The action arose from an alleged breach of an instalment sale agreement concluded between the first applicant and the respondent on 4 February 2021, in terms of which the respondent sold to the first respondent a Mercedes Benz motor vehicle (the motor vehicle). The purchase price was to be paid in sixty monthly instalments. The second applicant, the sole director of the first applicant, bound himself as surety and co-principal debtor for the obligations of the first applicant. The first applicant failed to pay certain instalments due and the respondent duly complied with s 129 of the National Credit Act 34 of 2005, notifying the applicants of the amount of the arrears, the consequences of their failure to rectify the breach, and their right to refer the instalment agreement to a debt counsellor. It was alleged that notwithstanding this opportunity, the applicants failed to remedy the breach. The agreement was accordingly cancelled and the respondent was entitled, in terms of the agreement, to claim delivery of the vehicle and later claim damages.

[2] The summons was issued on 8 November 2023 and the amount of the alleged arrears at that point was R87 528.66.

[3] In terms of the judgment granted by Beshe J cancellation of the agreement was confirmed, the first applicant was to deliver the vehicle to the respondent, the respondent was to retain all monies paid, leave was granted to claim damages and interest thereon, and the applicants were to pay the costs.

[4] The application was brought in terms of rule 42 (1) (a) or the common law.

Rule 42 (1) (a)

[5] This sub-rule provides:

> **"42. Variation and rescission of orders**
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> (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 without notice to any party affected thereby;"

[6] In *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP) Southwood J stated the following at paragraph [6]:

> "In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment ……."

And in *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC) at paragraph [22] it was stated that:

> "An order is erroneously granted where there was no procedural entitlement to it."

[7] In the founding affidavit, deposed to by the second applicant, he maintained that the applicants never received the summons, nor was there a notice of set down served on them. Thus, so it was stated, the judgment was erroneously granted.

[8] The respondent was not required to serve a notice of set down, the matter being undefended.

[9] In the papers before Beshe J were two returns of service which indicated that the summons was served at the applicants' chosen *domicilium citandi et executandi.* In the case of the first applicant it was affixed to the principal door, and in the case of the second applicant it was affixed to the main gate (a different address from that of the first applicant). In both returns it was stated that there was no other service possible after performing a diligent search.

[10] In my view, in the light of the returns of service, this was a judgment to which the respondent was procedurally entitled. Rule 42 (1) (a) does not find application.

Common law application for rescission

[11] An applicant is required to show sufficient cause in order to succeed. In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (AD) the following was stated at 765A-D:

> "The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors are required 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:
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> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
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> (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 Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 799 (A); *Smith N O v Brummer N O and Another; Smith N O v Brummer* 1954 (3) SA 352 (O) at 357-8)."

[12] In my view the explanation for not defending the action is deficient. The applicants were faced with returns of service stating how and when the summons was served, but failed to engage with those returns. It was initially merely stated that the summons was not served, and later stated that it was not received. There was no explanation of why the summons would not have been seen on the principal door and main gate, for example that the door and gate were not used to enter the respective premises, or there was no use of the respective premises at that particular time.

[13] One can however, if there is a *bona fide* defence with a good prospect of success, not place too much emphasis on an unsatisfactory explanation for the default. The defence of the applicants is that the arrears alleged in the summons had been paid by the time summons was issued and the cause of action therefore did not exist at this time. In his affidavit the second applicant acknowledged receiving the s 129 notice, dated 29 June 2023, in which the arears were stated to be R87 528.66. Following negotiations with the respondent's attorneys, he paid the arrears on 1 September 2023 and did not concern himself any further about arrears. While he admitted that there were arrears during June 2023, he thereafter, so he stated, continued paying "religiously". I assume by this statement he meant that he paid the required instalments on due date. He annexed proof of payment of R90 000.00 on 1 September 2023.

[14] The second applicant further annexed an audit/tax certificate from the respondent dated 1 March 2024 (after judgment was granted) for the period ending 29 February 2024, setting out the outstanding capital as at 1 March 2023 and 29 February 2024. He said that this certificate was an indication that he had continued with his payments. The arrears reflected in this certificate were R14 417.97.

[15] The answering affidavit was deposed to by Ms Chamano Mntungwa, a legal manager of the respondent. She referred to an email dated 17 August 2023 sent to the second applicant by the respondent's attorneys, in which it was stated that the arrears were R116 953.66 and the second applicant was reminded of the monthly instalment of R13 073.84. The second applicant responded by offering to pay R40 000.00 by 31 August 2023 and the balance by 25 September 2023. The respondent accepted this proposal.

[16] Following the applicants' payment of R90 000.00, on 12 September 2023 the respondent's attorneys sent an email to the second applicant pointing out that the arrears plus interest now amounted to R42 081.31 and he was asked to advise how he was going to settle these arrears. Reminders were sent and on 5 October 2023 the attorneys sent an email to the second applicant advising him that the arrears were now R55 916.67.

[17] Ms Mntungwa pointed out that the payment of R90 000,00 did not satisfy the arrears and moreover the applicants did not meet the monthly instalments.

[18] In his replying affidavit, the second applicant stated he had made the following payments to the respondent: R25 000.00 on 17 October 2023, R13 000.00 on 6 November 2023, R30 000.00 on 20 February 2024, and R30 000.00 on 21 February 2024.

[19] In my view it was somewhat disingenuous for the second applicant to maintain that the arrears had been settled and he did not concern himself further about arrears. He failed to disclose fully the email correspondence with the respondent's attorneys in which he offered to settle arrears of R116 953.66. His payment of R90 000.00 did not extinguish these arrears, nor did the further payments before judgment was granted extinguish the mounting arrears. Thus when judgment was granted there were arrears justifying the cancellation of the agreement and delivery of the vehicle. The fact that a certain amount of arrears was mentioned in the summons is irrelevant. The claim at the time of judgment was not for payment of a monetary amount, but for cancellation and delivery of the vehicle.

[20] The applicants therefore did not disclose a *bona fide* defence to the action.

[21] The following order will issue:

1. **The application is dismissed with costs on Scale A.**

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J.M ROBERSON

JUDGE OF THE HIGH COURT

APPEARANCES:

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