

IN THE NORTH GAUTENG HIGH COURT
PRETORIA
[REPUBLIC OF SOUTH AFRICA]

Case number 52817/08

11/6/2010
NOT REPORTABLE

NOTE WHICHEVER IS NOT APPLICABLE
REPORTABLE: YES/NO.
(1) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
11/6/10

In the matter between:

LA CAMERA: CARILE MAY Applicant/Defendant

NEDBANK LIMITED (RETAIL) Respondent/Plaintiff

JUDGMENT

TOKOTA AJ

[1] On 11 March 2005 and at Benoni an instalment sale agreement was concluded between the applicant and the respondent in terms whereof the applicant purchased a motor vehicle valued at

R56 267.70 from the respondent. In terms of the agreement the applicant had an obligation to pay monthly installments of R962.55. She defaulted in her monthly payments. As at August 2008 she was in arrears in the amount of R2 051.78.

[2] As the National Credit Act No. 34 of 2005 ("the NCA") was applicable, the respondent delivered to the applicant a notice in terms of section 129 thereof. This was delivered at an address other than the address which was given by the applicant as *domicilium citandi et executandi*. This notice was apparently ignored. The applicant has given conflicting versions in regard to the receipt of the notice. In her founding affidavit she avers that the notice was delivered to her in the address given therein. In her replying affidavit she denies that she received the notice. I will deal with this aspect later in this judgment.

[3] On 18 November 2008 after returning from her work the applicant found summons attached to the door of her flat where she was residing. This is the same address at which the notice was delivered. She had ten days within which to enter appearance to defend. The ten day period expired on or about 2 December 2008.

According to her it was after the service of summons that she realized that her "financial position was in a mess". She consulted a debt counsellor with a view to apply for a debt review in terms of section 86 of the NCA. She was advised to enter appearance to defend the matter and served the respondent through its attorneys with such notice on a Friday which was the 5th of December 2008. Apparently by that time the respondent had already applied for default judgment, having done so on 3 December 2008, *dies* for entering appearance to defend having expired on 2 December 2008.

[4] On 8 December 2008 default judgment was granted by the Registrar of this court. It is this judgment that the applicant seeks to rescind. In the notice of motion she also sought an order of costs against the respondent. The application is brought in terms Rule 31(2)(b) of the Uniform Rules of this court. The respondent opposes both the rescission and the order of costs.

[5] Mr. Mollontze, who appeared for the applicant, submitted that there are two main grounds for the rescission. First, he submitted that the judgment was not supposed to have been granted in the face of

the notice of intention to defend the matter. Second, because the notice in terms of section 129 of the NCA was delivered to an address other than the chosen *domicilium citandi et executandi* by the applicant such notice was defective. He further submitted that the issuing of summons was, in view thereof, a defective step. The latter argument is based on the provisions of section 130(1) of the NCA which provides that "(1) Subject to subsection (2), 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 and has been in default under that credit agreement for at least 20 business days and-

- (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (9), or section 129 (1), as the case may be;
- (b) in the case of a notice contemplated in section 129 (1), the consumer has-
 - (i) not responded to that notice; or
 - (ii) responded to the notice by rejecting the credit provider's proposals; and

the notice of intention to defend the matter. Second, because the notice in terms of section 129 of the NCA was delivered to an address other than the chosen *domicilium citandi et executandi* by the applicant such notice was defective. He further submitted that the issuing of summons was, in view thereof, a defective step. The latter argument is based on the provisions of section 130(1) of the NCA which provides that “(1) Subject to subsection (2), 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 and has been in default under that credit agreement for at least 20 business days and-

- (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (9), or section 129 (1), as the case may be;
- (b) in the case of a notice contemplated in section 129 (1), the consumer has-
 - (i) not responded to that notice; or
 - (ii) responded to the notice by rejecting the credit provider's proposals; and

(c) *in the case of an installment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127."*

[6] It was not canvassed in the papers as to whether or not at the time when the judgment was granted, the Registrar was aware of the notice of intention to defend. I am not sure as to whether had the Registrar been aware of the notice he would have still granted the default judgment. In the absence of any evidence that he was aware or that the notice was in the court file, I am constrained to find that he was not aware that the notice of intention to defend had been delivered.

[7] Rule 31(2) of the Uniform rules of court provides

"(2) (a) *"Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the*

action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.

(b)A defendant may within 20 days after he has 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 to it seems meet."

In Colyn v Tiger Food Industries Ltd t/a Meadow Food Mills (Cape) 2003 (6) SA 1 (SCA) at 9C-F it was stated that:

"(i)n order to succeed an applicant for rescission of a judgment taken against him by default must show good cause (De Wet and Others v Western Bank Ltd (supra)). 18 The authorities emphasise that it is unwise to give a precise meaning to the term 'good cause'. As Smalberger J put it in HDS Construction (Pty) Ltd v Wait:

"When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide

discretion implied by these words (Cairns' Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352 - 3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'

With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success (Grant v Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal)"(footnotes omitted).

[8] In order to determine whether or not the applicant has satisfied the requirements referred to in the **Colyn's** case above it is necessary first to refer to the notice in terms of section 129. That notice was delivered to the same address as the summons. I find therefore that, despite the denial of receipt thereof, the applicant did receive it. Accordingly the respondent was entitled to approach the

court after the lapse of ten days of delivery of the notice. After receipt of the notice the applicant did nothing until she received summons and only then did she take steps. No explanation has been proffered as to why the notice was ignored.

[9] The above finding disposes of the argument of Mr. Mollentze that the issuing of summons was a defective step.

[10] Has the applicant shown that she has a bona fide defence to the respondent's claim which *prima facie* has some prospect of success? Mr. Groenewald, who appeared for the respondent argued that the rescission application is brought solely to delay the respondent's claim and that the applicant has no bona fide defence. In my view the applicant has not shown that she has a *bona fide* defence to the claim. She breached the contract by defaulting to make monthly payments. Her explanation for the default is that her financial position is in a "mess". Her technical defence of failure to comply with the provisions of section 129 cannot be sustained. The argument that because the notice was sent to an address other the one chosen as her *domicilium* address is untenable. In my view when

interpreting the provisions of section 129 one must bear in mind that the rationale behind it is to *"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 under the agreement up to date"*. The object of the section is not to permit technical objections which would make it impossible to enforce the rights of the credit provider as embodied both in the NCA and the sale agreement.

[11] In terms of section 97(2) the applicant was obliged to advise the respondent of her change of residence and where the motor vehicle was kept. The section provides that *"until the termination of an agreement to which this section applies, the consumer must inform the credit provider, in the prescribed time, manner and form, of any change concerning-*

- (a) the consumer's residential or business address;*
- (b) the address of the premises in which any goods that are subject to the agreement are ordinarily kept; and*

(c) *the name and address of any other person to whom possession of the goods has been transferred.*" The applicant failed to comply with this section. Mr. Mollentze referred me to the case of **Munien v BMW Financial Services (SA) (Pty) Ltd and Another 2010 (1) SA 549 (KZD)** as the authority for the proposition that if the credit provider does not deliver the notice to the chosen *domicilium* the notice is defective.

[12] In **Munien's** case Wallis J held that regard being had to the manner of delivery of the notice as prescribed in the regulations published under the NCA it is not necessary that the notice must have been received by the consumer. It is the sending of the notice that is decisive. In his view if the credit provider has used the methods of delivery prescribed in the regulations it suffices for compliance with section 129 as long as the notice has been sent to the chosen *domicilium* address. This reasoning was based on the premise that the credit provider has no way of knowing whether or not the notice was received by the consumer. In his view it is irrelevant whether or not the consumer had received the notice.

[13] In my view where the consumer, as in this case, fails to advise the credit provider of the change of address, the credit provider is entitled to deliver the notice wherever the consumer is to be found, where this is possible. One must bear in mind that the credit provider is entitled to repossess the goods upon default of monthly payments. To argue that repossession of the goods at an address other than the chosen *domicilium* is unlawful would be untenable and unrealistic. This would open a gate for unscrupulous consumers to choose a non-existent address as a chosen *domicilium* address so as to defeat the objects of the NCA. If it was the intention of Wallis J in *Munien's* case that if the notice is delivered and received by the consumer at an address other than the chosen *domicilium* (notwithstanding that the consumer resides at that address) such notice is defective I see things differently. In my opinion the applicant's defence in this regard is flimsy and must be rejected.

[14] With regard to argument that the judgment was granted in error because the notice of intention to defend was delivered before the date on which the judgment was granted I find that the notice was filed after the horse had bolted and therefore no error was committed.

If a litigant slumber and the prescribed procedural steps are followed by the other party such litigant must suffer the consequences. Even if I am wrong on the finding that there was no error (regard being had to the provisions of Rule 19(5) of the Uniform Rules of court) in my opinion the applicant has not shown a *bone fide* defence to respondent's claim, bearing in mind my finding that section 129 of the NCA has been complied with. Consequently the second defence must also fail. Accordingly I find that the applicant has failed to establish the requirements as formulated in **Colyn's** case *supra* and in the result I make the following order.

The application is dismissed with costs.



B R TOKOTA

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 7 June 2010

Date of Judgment: 11 June 2010.

Appearances:

Mr. J H Mollentze for the applicant instructed by CMM Incorporated