

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO. 2019 / 23591

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO

In the matter between:

XOLANI ALBERT QUBEKA
(Identity Number: [...])

Applicant

and

FIRST RAND BANK LIMITED T/A WESBANK

Respondent

In re:

FIRST RAND BANK LIMITED T/A WESBANK

Plaintiff

and

XOLANI ALBERT QUBEKA

Defendant

JUDGMENT

ALI AJ

[1] This is a rescission application brought in terms of Rule 42(1)(a), alternatively Rule 31(2)(b) of the Uniform Rules of Court, alternatively the common law. The respondent was the plaintiff in the action.

[2] In its combined summons respondent claimed that the applicant is in arrears in an amount of R462 978.62. The applicant purchased a motor vehicle by obtaining credit from the respondent which was granted on 24 January 2014. The credit agreement specified that monthly payments were required to be made in not less than 59 months. Payment for the 60th month is referred to as a balloon payment which required an upfront payment, alternatively the applicant was required to apply to the respondent for further credit to service the balloon payment.

[3] The applicant applied for credit facilities to settle the balloon payment. The application was rejected. It is the non-payment of the balloon payment which had led to the respondents' issuing a letter of demand on the applicant on 10 June 2019, in terms of section 129 of the National Credit Act, 34 of 2005 and subsequently the issuance of the summons. Such letter was sent by registered post to the applicant's *domicilium citandi* which is his chosen address. ("*domicilium*").

[4] The summons was served on the applicant's *domicilium* on 12 July 2019. The applicant contends that he only became aware of legal proceedings being instituted against him when the sheriff arrived to repossess the motor vehicle on 20 October 2020.

[5] The applicant has raised two defences in support of his application for rescission. The first is that he was unaware of court proceedings instituted against him as the respondent served such documents at his incorrect residential address. The second defence is that he was not in arrears with any of his payments. Yet on his own version, applicant contends that there was an amount outstanding in respect of the balloon payment.

[6] For rescission to be granted in terms of rule 31(2)(b) the applicant is required to establish "good cause".

[7] The courts have held that there is no precise definition of “good cause.”¹ The court in *Brangus v Ranching (Pty) Ltd v Plaaskem (Pty) Ltd*² held that “good cause” cannot be satisfied unless there is evidence that a substantial defence exists and that the applicant has a *bona fide* desire to raise the defence if the application is granted. The full bench in the *Brangus* case, *supra* did not interfere with the decision of the lower court on the ground that it would itself have made a different order. The full bench upheld the decision of the lower court on the grounds that the appellant had not demonstrated a defence which was fit for trial and secondly, the appellant had failed to establish a bona fide defence. (at para 32).

Bona Fide Defence

[8] The applicant contends that he did not receive any documents including court proceedings from the respondent as the respondent had his old *domicilium* on file. The applicant further contends that he had notified the respondents of his change of address by way of an email dated 12 November 2018 when he applied for further credit to finance his balloon payment. The email reads:

“Good morning

Please find copies of requested documents relating to the re-financing of Balloon Payment application for registration number CV78KFGP. The following documents have been submitted: ID copy; 3 months’ payslips; recent proof of residence; bank statement. Please note I do not have insurance but willing to be provided with one.”

[9] To corroborate his version, that he notified the respondent of change of address, he refers this court to an email dated 19 October 2020, where the applicant had addressed a letter to his legal representative wherein is stated:

“Good evening, just to provide information when I contacted WESBANK to re-finance the Balloon (sic) payment, and you will see that I also sent them proof of residents (sic).”

¹ See *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-77; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352

² 2011 (3) SA 477 (KZP).

[10] The contents of the aforesaid email do not constitute a notice of change of address as provided for in clause 18.3 of the credit agreement which reads:

“You must let us know, in writing, by hand, or registered mail, of any change to either of your addresses or email address, telephone or cellular phone numbers. If you fail to give notice of a change, we may use the last address we have for you.”

[11] The applicant claims that he no longer has the email dated 12 November 2018 in his possession. No other evidence has been provided which will inform the court, such as, the date the applicant re-located to the new address, no proof of municipal account of his present residence, whether applicant is living on his own, if not, an affidavit from a person living with the applicant to verify that applicant is indeed living at the aforesaid premises. The attachment of annexure ‘L’ to the applicant’s replying affidavit, is in my view, not evidence which is relevant to this application.

[12] In the circumstances, the court cannot accept that the applicant notified the respondent of any change in his address and has failed to satisfy this court that he is living at the new address. The defence is not bona fide and the evidence presented to this court does not constitute a defence at trial.³

[13] Applicant’s second defence is that he does not have an outstanding balance. Yet, at the same time, the applicant contends that he is in arrears on the balloon payment. An application to re-finance the outstanding balloon payment was rejected by the respondent. It is my view that the applicant has failed to raise a bona fide defence. It is the arrear amount on the balloon payment which is the causa for the respondent’s action.

[14] Applicant’s third ground of defence relates to the interest charged by the respondent which was charged at double the agreed rate as per the agreement. The terms of the agreement were agreed upon at the commencement of the agreement,

³ See *Nathan (Pty) Ltd v All Metals (Pty) Ltd* 1961 (1) SA 297 (D) at 300F; *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 570 (W) at 575-6

the applicant was therefore fully aware of the implications of the balloon payment coming into effect. This cannot be a bona fide defence raised by the applicant, as applicant had full knowledge of the terms of the agreement.

[15] Reckless lending is not ordinarily raised as a defence in a rescission application. This defence has no merit as applicant was successful in his application for obtaining credit and consequently paid all 59 instalments timeously.

[16] It is my view that no “good cause” exists as the applicant has failed to satisfy the court that a substantial defence exists and applicant has not demonstrated a defence which is fit for trial. My reasons, for arriving at this decision are twofold, namely the applicant insists that he had notified the respondent of a change in his residential address. This contention cannot stand as the applicant has failed to provide proof that he had, indeed, notified the respondent of the change in his domicilium address. Secondly, the applicant’s initial defence is that his account is not in arrears, however, he subsequently admits that he is in arrears in respect of the balloon payment.

[17] The applicant contends that the respondent was required to finance his balloon payment and that the respondent charged interest at double the agreed rate and if it was calculated correctly there would be no overdue amounts under the agreement. The respondent was under no obligation to re-finance the balloon payment. The applicant did not qualify for further financing. The interest to be charged and the implications of the balloon payment was decided between the parties at the beginning of the credit agreement. No proof is tendered for the allegation that the interest charged was at double the agreed rate.

[18] Rule 31(2)(b) provides the court with a wide discretion in evaluating “good cause” in order to ensure that justice is done per *Wahl v Prinswil Beleggings (Edms) Bpk*⁴. The onus is upon the applicant for rescission to establish that such god cause

⁴ 1984 (1) SA 457 (T)

exists in the circumstances of each case per Silber v Ozen Wholesalers (Pty) Ltd⁵ *supra*. The applicant has failed to do so.

[19] The courts have generally accepted and have held that “good cause” cannot be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, of a bona fide desire by the applicant, to raise the defence if the application is granted.⁶ The court in Kritzinger, *supra*, further held that each case must stand on its own facts.⁷

[20] In exercising my discretion, after a proper consideration of all the relevant circumstances, I find that the applicant has not demonstrated a defence which is fit for trial and has failed to establish a bona fide defence which amounts to “good cause” for setting aside the judgment as granted by default.

Service of the Summons

[21] The applicant contends that the summons and other correspondences from the respondent was not served on him as it was served on his old address.

[22] The return of service attached to the summons commencing action contained details relevant to the applicant and in particular, reflected applicant’s domicile as *“74 Loft Carlswald North Estate, corner Tamboti and Garden Road, Carlswald as the chosen domicile of the applicant. The return of service states that the summons was duly served by affixing copies to the outer or principal door at the given address.”*

[23] Rule 4(1)(a)(iv) provides that *“if a person so to be served has chosen a domicile citandi, by delivering or leaving a copy thereof at the domicile so chosen.”* Lamont J in Prism Payment Technologies (Pty) Ltd v ...lons and Others⁸ held that:

⁵ 1954 (2) SA 345 (A)

⁶ Kritzinger v Northern Natal Implement Co Ltd 1973 (4) SA (542) N at 546 A-C

⁷ Kritzinger *supra*, at 546 A-C

⁸ 2012 (5) SA 267 (GSJ) at para 21

“The purpose of Rule 4 is to provide for a mechanism by which relative certainty can be obtained that service has been effected upon a defendant. If certain minimum standards are complied with as set out in the rule, then the assumption is made that the service was sufficient to reach the defendant’s attention and his failure to take steps is not due to the fact that he does not have knowledge of the summons.”

[24] In the circumstances, proper service was effected upon the applicant in accordance with rule 4(1)(iv).

[25] In the circumstances, I make the following order:

1. The rescission application is dismissed with costs.

N. ALI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

This judgment was prepared and authored by Acting Judge Ali. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines.

DATE OF HEARING: 29 JULY 2021

DATE OF JUDGMENT: 16 AUGUST 2021

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