IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

Case No: 20044/2019

29/1/2020

In the matter between:

YAKHE KWINANA **Applicant**

ID [….]

and

MERCEDES-BENZ FINANCE AND INSURANCE,

A DIVISION OF MERCEDES-BENZ FINANCIAL SERVICES

SOUTH AFRICA (PTY) LIMITED **First Respondent**

THE SHERIFF CENTURION WEST **Second Respondent**

JUDGMENT

KUBUSHI J,

INTRODUCTION

[1] This is a Uniform Rule 42 (1) *(a)* application in terms of which the applicant is seeking an order rescinding the default judgment granted by the registrar of the court

on 24 July 2019. The applicant is further seeking an order setting aside the warrant of delivery of the motor vehicle concerned and that the credit agreement involved herein be reinstated.

[2] I was informed that the applicant had initially approached court by way of an urgent application. The said application was opposed by the first respondent. After having heard argument, the court found the matter not urgent and instead of striking off or dismissing the application, postponed it to the opposed roll with an order that costs be costs in the main application.

[3] The first respondent filed its answering affidavit out of time. At the hearing of the main application the applicant did not take issue with the late filing of the answering affidavit and I made an order condoning such late filing of the answering affidavit.

MATRIX

[4] On 24 April 2014 the applicant entered into a written credit agreement ("the credit agreement") with the first respondent. In terms of the credit agreement, she purchased a 2013 Mercedes Benz S400 L Hybrid (W222) ("the motor vehicle") for the sum of R1 402 677, 15 (one million four hundred and two thousand six hundred and seventy seven rand, fifteen cents).

[5] The motor vehicle was duly delivered to the applicant but ownership of the motor vehicle remained vested in the first respondent until all the amounts due to the first respondent by the applicant in terms of the credit agreement were paid in full.

[6] The applicant commenced and continued making regular monthly payments in terms of the credit agreement. However, in 2018 the applicant began experiencing financial difficulties and could no longer make the full regular monthly payments as stipulated in the credit agreement and as a result fell in arrears with her payments.

[7] The applicant alleges that towards the end of January 2019 she applied for debt counselling, with instructions to prioritise negotiations with the first respondent. A firm of debt counsellors called SA Credit Solutions agreed to assist her and she commenced paying money into their account from 1 January 2019. She was advised

to pay an amount of R8 917, 69 (eight thousand nine hundred and seventeen rand, sixty nine cents) towards the payment of the agreement with the first respondent. Unfortunately, for the applicant, the debt counsellor never informed her that they had failed to secure an agreement with the first respondent for the reduced payment of the motor vehicle. Consequently, even though the applicant made payment to the first respondent, same was less than the agreed monthly instalments. Thus, the first respondent regarded the account as being in arrears and proceeded with legal action against the applicant.

[8] When the applicant became aware that the debt review with the first respondent was not in place, she personally approached the first respondent to try and make arrangements to pay off the arrears and she was then informed that summons has already been issued and judgment granted against her. She then offered to pay a monthly instalment of R18 000 (eighteen thousand rand) without paying the arrears, which offer was rejected by the first respondent on the basis that the agreement was already cancelled and could not be reinstated.

[9] Due to the applicant's failure to make due and punctual payments to the first respondent she breached the credit agreement. When summons was issued as a result of such breach, the applicant was in arrears in the amount of R82 597, 71 (eighty two thousand five hundred and ninety seven rand, seventy-one cents) and the outstanding balance on the applicant's account was R428 535, 68 (four hundred and twenty eight thousand five hundred and thirty five hundred rand, sixty eight cents). When the applicant approached court, judgment had already been granted by the registrar and a warrant for delivery of the motor vehicle issued.

THE ISSUE

[10] The crux of the application is whether in these circumstances the judgment can properly and justifiably be rescinded in terms of Uniform Rule 42 (1) *(a).*

THE LEGISLATIVE FRAMEWORK

[11] The salient provisions of Uniform Rule 42 (1) *(a)* reads thus -

> *"(1)* *The court may, in addition ta any other* powers *it may have, mero motu* or *upon application of any party affected, rescind or vary:*
>
> (a) *an* order or *judgment erroneously sought* or *erroneously granted in the absence* of *any party affected thereby;* ... "

[12] There are two jurisdictional factors that must be satisfied before it can be said that Uniform Rule 42 (1) *(a)* has been satisfied. Firstly, the judgment must have been granted in default. Secondly, the judgment must have been erroneously sought or erroneously granted.

[13] It is not in dispute that the judgment was granted by the registrar in the absence of the applicant. What is at issue here is whether or not the judgment was erroneously sought or erroneously granted.

THE APPLICANT'S CASE

[14] From the perusal of the founding affidavit it seems that the applicant is basing her case that the judgment was erroneously sought or erroneously granted in her absence on the following grounds that:

14.1 She experienced financial difficulties and was placed under the impression that her account with the first respondent was under debt review and that a reduced payment, as *per* the debt review, was being made;

14.2 Summons was not served personally on her as alleged;

14.3 The first respondent failed to comply with the provisions of section 129 of the National Credit Act ("the Act");[1]

14.4 The court has a discretion to set aside the judgment and to reinstate the credit agreement as she is able to pay and to bring the account up to date; and

14.5 She will suffer irreparable harm if the order is not granted.

[1] Act 34 of 2005.

[15] However, during argument in court the applicant's counsel relied on two salient grounds, namely:

15.1 Failure by the first respondent to serve summons upon the applicant; and

15.2 The premature enforcement of the credit agreement by the first respondent.

I, shall hereunder, deal with each ground in turn.

Failure to serve *the Summons*

[16] Initially, the applicant raised two grounds in support of her case in this regard. Her first argument was that when granting the judgment, the registrar relied on an incorrect return of service. However, her counsel conceded in argument that the return of service used by the registrar when granting judgment was correct. The second ground, which stands to be determined, is that there was no service of the summons, in particular that the summons was not personally served upon the applicant.

[17] The parties are in agreement that the return of service which was used by the registrar when granting judgment, indicating that summons was served personally on the applicant, serves as *prima facie* proof of such service. The parties are also not in dispute that once *prima facie* evidence has been established it stands to be rebutted by furnishing the court with evidence that confirms that the return of service does not reflect the correct facts.

[18] In her replying affidavit, the applicant does not specifically provide any evidence to rebut the first respondent's evidence that the summons was personally served on her.. She, however, states as follows:

> *"I deposed to the founding affidavit and have read the answering affidavit of the First Respondent I have been advised by my attorneys of record that the bulk of its contents are unsubstantiated denials, consequently all I need* to *state in dealing with them granted the extremely short time period is that I stand by the averments made in my founding affidavit. However, there* is *one or two aspects I need answer directly and I proceed to do so hereunder.* "

[19] The evidence the applicant relies on in her founding affidavit challenges the first respondent to produce the document that she ought to have signed when the deputy sheriff served the summons on her. I was informed during argument, which information was not challenged, that when summons is served on a person, that person is made to sign a blue slip as proof of receipt of the summons. The blue slip is the document which the applicant sought the first respondent to produce as evidence that she personally received the summons.

[20] The first respondent in its answering affidavit does not address this aspect save to stress that the return of service attached to its answering affidavit serves as *prima facie* evidence and attacks the document which the applicant, incorrectly so, thought was used by the registrar when judgment was granted. As earlier stated, the applicant has conceded that the registrar used the correct return of service.

[21] The applicant had clearly in her founding papers put this aspect in dispute and it was upon the first respondent in its answering affidavit to prove that the summons was served personally on the applicant. In so doing, the first respondent should have attached both the deputy sheriff's return of service (Annexure "M2") and the blue slip which ought to have been signed by the applicant when she received the summons. In the absence of the blue slip, or proof of signature of acceptance of the summons by the applicant, I have to give her the benefit of the doubt and rule on the probabilities in her favour in this regard.

Premature Enforcement of the Credit Agreement

[22] On this aspect, the argument by the applicant's counsel is that the enforcement of the agreement by the first respondent was premature giving the fact that the applicant had already initiated the debt review process.

[23] According to the applicant's counsel, before enforcing the credit agreement, the first respondent should have, in terms of section 86 (10) of the Act, first terminated the debt review process which had already been initiated by the applicant.

[24] In support of the arguments raised on behalf of the applicant, counsel referred to the work of the authors C van Heerden and S Coetzee contained in an article

published in the 2011 Volume 14 (2) of the De Jure. I, as well, had an opportunity to read the same authors' further work titled *Perspectives on the Termination of Debt Review in terms of Section 86 (10) of the National Credit Act 34 of 2005* PER/PELJ 2011 (14) 2, which was to me, very instructive. In these articles, the authors extensively analysed a plethora of divergent judgments of this Division and other Divisions on the aspect of termination of debt review in terms of section 86 (10) of the Act.

[25] Conversely, the proposition by the first respondent's counsel is that since the proposal sent by the debt counsellor to the first respondent was not accepted, there was never a formal order to that effect. According to counsel, section 86 (10) of the Act is applicable where there is a proposal between the debt counsellor and the credit provider which is acceptable and then it must be made a formal order of court. If there is no agreement, as was the case in this instance, the debtor should have applied to court for such an order, which was not done. Therefore, because there was no formal order, and the applicant continued to be in breach of the credit agreement, the first respondent was entitled to enforce the agreement, as it did, so it was argued.

[26] In terms of section 86 (1) of the Act, the debt review process is initiated when a consumer applies to a debt counsellor to have the consumer declared over-indebted. Such an application may not be made if at the time of that application, the credit provider under that credit agreement has proceeded to take steps contemplated in section 129 of the Act to enforce the agreement.

[27] In accordance with section 86 (8) of the Act, if a debt counsellor makes a recommendation to the credit provider and the consumer and each credit provider concerned accept the proposal the debt counsellor must record the proposal in a form of an order and if both the consumer and the credit provider have consented thereto, file the order with the court as a consent order in terms of section 138 of the Act. If the recommendation is not accepted, the debt counsellor must refer the matter to the magistrate's court with the recommendation.

[28] Where a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review to the consumer, the debt

counsellor and the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.[2]

[29] The debt review can also be terminated in terms of the Act where the matter is referred to court in terms of sections 86 (7) *(c)*[3] or 86 (8) *(b)*[4] thereof. The authors C van Heerden and S Coetzee, provide the reason for such termination in their article as -

> *"Once a matter has been referred* to *the court by the debt counsellor with a recommendation regarding debt re-structuring, any further process cannot be construed as debt review in terms of section 86. The reason being that when a court considers a debt restructuring application referred to in accordance with sec 86, it* does *so by means of* a *"hearing" at which it considers information presented as a result of* a *debt review that was contemplated by a debt counsellor. The court itself does not conduct* a *debt review but merely considers the debt restructuring proposal that is the result* of *the previously conducted debt review in order to determine if the proposed method of debt restructuring is feasible and if it should exercise its discretion in favour of granting* a *debt restructuring order. Once* a *debt counsellor has referred a matter to court for purposes of section* 86 *(B) (b) or* 86 *(7) (c) it* is *thus effectively brings an end to the credit provider's opportunity to apply the provisions of section 86 (10) as it can no longer be said that the credit agreement "is being reviewed" in terms of section* 86."

[30] I am not in agreement with the argument by the first respondent's counsel that in order for the provisions of section 86 (10) of the Act to apply there must be an

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[2] Section 86 (10) of the Act.

[3] "86 (7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that –

(a) …

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders- (I) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and (ii) that one or more of the consumer's obligations be re - arranged by ... "

[4] "86 (8) If a debt counsellor makes a recommendation in terms of subsection (7)(b) and –

(a) …

(b) if paragraph *{a)* does not apply, the debt counsellor must refer the matter to the

order and/or a formal order as he puts it, in place. I am more inclined to align myself with the opinions of the two authors - C van Heerden and S Coetzee, that *'Once* a *debt counsellor has referred* a *matter to court for purposes of section 86 (8) (b) or 86 (7) (c) it* is *thus effectively brings an end to the credit provider's opportunity* to *apply the provisions of* section 86 *(10) as it can* no *longer be said that the credit agreement* "is *being reviewed" in terms of section* 86'.

[31] In terms of section 129 (1) *(b)*[5] of the Act, if a consumer is in default under a credit agreement, the credit provider may not commence any legal proceedings to enforce that credit agreement before first providing notice to the consumer, as contemplated in section 86(10) of the Act. This creates an impression that where a consumer has opted to apply for debt review, it is always a prerequisite that a section 86 (10) notice first be delivered before enforcement.

[32] Consequently, in terms of the provisions of section 86 (10} of the Act, a credit provider cannot enforce a credit agreement that is subject to a pending debt review. The debt review must be first terminated in accordance with section 86 (10) of the Act and certain other requirements in terms of that subsection must also be met. It also appears that section 86 (10) of the Act would only be applicable to a credit agreement that is being reviewed in terms of section 86 of the Act.

[33] The esteemed authors C van Heerden and S Coetzee in their abovementioned work, when constructing the provisions of section 86 (10) of the Act, opine, rightly so in my view, that in order to determine if section 86 (10) of the Act was applied correctly it should first be ascertained if it can be said that the relevant credit agreement meets the requirement of "being reviewed" in terms of section 86 of the Act before one gets to the next part of the enquiry which relates to default and the expiry of sixty business days. On this construction the emphasis should first, be on the process that is being terminated and thereafter on the · requirements for termination.

[34] In light of what is afore stated, the question that should first be determined is

Magistrate's Court with the recommendation.

[5] "129. (1) If the consumer is in default under a credit agreement, the credit provider -

(a)

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement be fore- (i) first providing notice to the consumer, as contemplated in paragraph *(a),* or in section 86(10), as the case may be; and (ii) meeting any

whether the credit agreement, in this instance, meets the requirement of being reviewed or whether it was subject to a pending debt review.

[35] The section 86 (10) notice would, as a result, be necessary only where the consumer has given notice of an application for debt review in accordance with section 86 (4) *(b)* (i) of the Act and such a debt review is still pending. That is, the debt counsellor has not yet applied to court for a debt restructuring order on the credit providers.

[36] The facts of this matter are slightly nuanced in that the recommendation of the debt counsellor was rejected by the credit provider. This situation is not specifically provided for in the Act. However, when the facts of this case are read with the provisions of section 86 (8) of the Act, it provides a sense that the credit provider must still terminate the debt review. It is my view that as long as the debt counsellor has not referred the matter to the court with the recommendations, the debt review is still pending and must be terminated by the credit provider by means of a section 86 (10) notice.

[37] In this instance, the provisions of section 86 (8) *(a)* of the Act do not apply because the first respondent did not accept the proposal. What ought to have happened thereafter, was for the debt counsellor to refer the matter to the magistrate's court with the recommendation. As already stated earlier in this judgment, my view is that until such time that the debt counsellor refers the matter to court the debt review process is still in place and should be terminated by the service on the applicant of a section 86 (10) notice. Section 86 (10) prescribes that a debt review may be terminated after the expiry of sixty days after the defaulting consumer applied for the said debt review.

[38] I rule, therefore, that the section 129 (1) notice served on the applicant was prematurely served. The circumstances of this case required the debt review process initiated by the applicant to be terminated before the credit agreement could be enforced.

[39] Where the debt enforcement is found to be incompetent, as is the case in this instance, the court is enjoined to exercise its powers in terms of section 130 (4) *(c)* of

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further requirements set out in section 130 the Act, *alternatively* in terms of section 85 of the Act.

[40] In accordance with section 85 of the Act, *"despite any provision of law or agreement to the contrary, in any court proceedings in which* a *credit agreement is being considered, if it is alleged that the consumer under* a *credit agreement is over-indebted, the court may* -

(a) *refer the matter directly to* a *debt counsellor with* a *request that the debt counsellor evaluate the consumer's circumstances and make* a *recommendation to the court in terms of section 86 (7); or*

(b) *declare that the consumer is over-indebted and make any order contemplated in section 87 to relieve the consumer's over-indebtedness."*

[41] Section 130 (4) *(c),* on the other hand, provides that *"in any proceedings contemplated in this section, if the court determines that* -

(c) *the credit agreement is subject to* a *pending debt review, the court may* -

(i) *adjourn the matter, pending* a *final determination of the debt review proceedings;*

(ii) *order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85 (b); or*

(iii) *if the credit agreement is the only credit agreement to which the consumer is* a *party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85 (b)."*

[42] This court does not have the powers referred to in section 85 of the Act. Section 85 deals with the powers in sections 86 (7)[6] and 87[7] of the Act, which are the

[6] **"Application for debt review**

(1) …

(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that -

(a) …

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following powers conferred upon the magistrate's court by the Act and can only be exercised by that court. The only power this court can exercise is in terms of section 130 (4) *(c)* (i), to adjourn the matter, pending a final determination of the debt review.

CONCLUSION

[43] In *Kgomo v Standard Bank of South Africa,* [8] the mistake that becomes apparent from the information made available in an application for rescission of judgment was held to be one of the principles governing the rescission of judgment under Uniform Rule 42 (1) *(a).*

[44] I am, therefore, of the opinion that the judgment against the applicant was erroneously sought and granted. For if the registrar could have been aware that either there was doubt that the summons was served personally on the applicant or that the credit agreement was prematurely enforced, she/he would not have granted the judgment.

[45] The relief sought by the applicant ought to be granted pending a final determination of the debt review.

ORDER

[46] As a result, J order as follows:

1. Pending a final determination of the debt review in this matter -

1.1 The default judgment granted on 24 July 2019 by the Registrar of

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orders-

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those

(ii) that one or more of the consumer's obligations be re-arranged by counsellor reasonably concludes that"

[7] **"Magistrate's Court may re-arrange consumer's obligation**

(1) If a debt counsellor makes a proposal to the Magistrate's Court in terms of section 86(8l(b), or a consumer applies to the Magistrate's Court in terms of section 15 86(9), the Magistrate's Court must conduct a hearing and, having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, ... "

[8] 2016 (2) SA 184 (GP).

this court in favour of the first respondent is set aside.

1.2 The warrant for the delivery of the motor vehicle with description 2013 Mercedes-Benz S400 L Hybrid (W222), Engine Number: 276960030550504, Chassis Number: WDD2221572A014300 is set aside.

1.3 The credit agreement concluded between the first respondent, and the applicant in respect of motor vehicle with description 2013 Mercedes-Benz S400 L Hybrid (W222), Engine Number: 276960030550504, Chassis Number: WDD2221572A014300 is reinstated.

2. The first respondent is ordered to pay the costs of this application.

3. The applicant is ordered to pay the costs of the urgent application.

E. M KUBUSHI
JUDGE OF THE GAUTENG
DIVISION, PRETORIA

Appearance:

Appellant's Attorneys : **L. Mbanjwa Incorporated**

First Respondent's Counsel : **Adv. J. Minnaar**

First Respondent's Attorneys : **Hammond Pole Majola**

Date of hearing : **22 October 2019**
Date of judgment : **29 January 2020**