Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES /NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case number: 1888/2017

Date heard: 26-10-2018

Date delivered: 23-11-2018

In the matter between:-

LAETITIA HENRIËTTE SONNENBERG **APPLICANT**

AND

WESBANK, A DIVISION OF FIRSTRAND LIMITED **RESPONDENT**

JUDGMENT

GROENEWALDT AJ

INTRODUCTION

[1] The applicant, Laetitia Henriëtte Sonnenberg, brought an application for rescission of a default judgment against the respondent, Wesbank being a division of Firstrand Limited, a company with limited liability incorporated in terms of the laws governing South Africa.

[2] In the application dated 09 February 2018, the applicant moves for an order in the following terms:

2.1 Condoning the late filing of the application;

2.2 That the default judgment granted by the Registrar of the above Honourable Court on 25 October 2017 under case number 1888/2017 be set aside;

2.3 That the respondent pays the costs of the application only in the event of opposition;

2.4 Further and/or alternate relief.

[3] The applicant argued that the application was brought in terms of Rule 42 (1) (a) of the Uniform Rules of Court (where an order is granted erroneously in the absence of any party affected thereby) as well as the Common Law.

[4] The kernel of the respondent's opposition is that the judgment was not granted erroneously nor did the applicant disclose a bona fide defence.

BACKGROUND

[5] The respondent issued summons against the applicant on 16 August 2017, which action is premised on an online instalment sale agreement (hereafter referred to as "the agreement") for the financing of a Chrysler 300 SRT8 motor vehicle.

[6] Default judgment was granted in favour of the respondent on 25 October 2017 by the Registrar of this court.

[7] The applicant lodged this application on 12 February 2018 whereafter it was opposed by the respondent.

FACTUAL MATRIX

[8] It is common cause that the applicant fell in arrears with her monthly instalments in terms of the agreement.

[9] She avers that she fell into arrears after experiencing financial hardship due to adverse business- and several unforeseen personal circumstances beyond her control.

[10] According to the applicant, the summons came to her attention on 24 October 2017 by accident whilst she was surveying a chest of drawers. She states in her founding papers that the summons was placed amongst other documents by her domestic worker. The domestic worker had extracted the summons from the gate where it was attached to, presumably by the sheriff.

[11] According to the founding papers, the applicant made a payment arrangement with a certain Ms Viljoen, a temporary employee at the respondent's attorneys which entailed the payment of a R20 000.00 by the end of October 2017 and the balance of the arrears in three further monthly instalments. This was in addition to the normal monthly instalment in terms of the agreement. The payment of R20 000.00 was however only made on 02 November 2017.

[12] The applicant further contends that the said Ms Viljoen advised her that the action proceedings that were set in motion would be suspended. These contentions are denied by the respondent. Needless to say that the default judgment was granted on 25 October 2018.

[13] The applicant avers that knowledge of the default judgment came to her attention on 07 November 2017 when the Sheriff arrived at her residence to attach the vehicle which forms the subject matter of this case. Respondent's attorneys subsequently suspended the operation of the warrant of execution against the property to investigate the authenticity of the alleged payment arrangement. After concluding that no such arrangement was made, respondent's attorneys issued the sheriff with instructions on 07 December 2017 to execute upon the warrant.

[14] The applicant then instructed attorneys on 15 January 2018 pursuant to a further attempt by the sheriff to execute the writ. Correspondence ensued between the respective attorneys and on 17 January 2018 after further settlement offers were negotiated, the respondent's attorneys advised applicant's attorneys that their

client is not prepared to accept a settlement offer and that it regarded the agreement cancelled.

[15] Subsequent thereto, this application was instituted.

[16] In light of the finding that I make hereunder the question whether Rule 42(1)(a) applies, becomes superfluous.

COMMON LAW

[17] In **Promedia Drukkers and Uitgewers (Edms)Bpk v Kaimowitz and Others 1996 (4) SA 411 at p417J** Van Reenen J states:

"In terms of the common law, a court has a discretion to grant rescission of judgment where sufficient or good cause has been shown. But it is clear that in principle and in the long-standing practice of our courts, the two essential elements of sufficient cause for rescission of a judgment by default are:

26.1 That the party seeking relief must present a reasonable and acceptable explanation for his or her default.

26.2 That on the merits such party has a bona fide defence, which prima facie, carries some prospects of success".

An application under the common law should be brought within a reasonable time and what is reasonable depends upon the circumstances of a case.

WILFUL DEFAULT

[18] The applicant's intentions in bringing an application of this nature can only be determined by investigating whether the applicant would be successful if the order is granted or whether the application is a trojan horse where the real intentions are clandestinely hidden.

[19] It is also trite that there is no exhaustive definition of what constitutes good cause and the courts are enjoined with a discretion which must be exercised judicially after a proper consideration of all the relevant circumstances are made.

[20] To consider whether the applicant has a reasonable explanation for her default, I have to take into account whether it was her intention to defend the action throughout and what her conduct was when she discovered that judgment was granted against her. From the papers it is clear that the applicant did not twiddle thumbs by allowing the court process to unravel before her. She actively participated in engaging the respondent to salvage the situation albeit be it after the judgment was granted. Furthermore, I have also favourably taken into account that the application for rescission was brought within a reasonable time having due regard to the circumstances of the case. I am satisfied that the applicant has given a reasonable and acceptable explanation for her delay.

[21] It is also trite that a weak explanation for default can be cancelled out in instances where a litigant is able to put up a bona fide defence which has not merely some prospect, but a good prospect of success. [1]

BONA FIDE DEFENCE

[22] In this respect the applicant has placed reliance on the fact that the agreement was reckless as provided for in Section 80 of the National credit Act No 34 of 2005 in that the credit provider failed to conduct an assessment as required by Section 81(2) of the aforesaid Act.

[23] Section 81(2)(a)(iii) provides as follows:

"A credit provider must not enter into a credit agreement without first taking reasonable step' to assess______

a) The proposed customer's

(i) General understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;

(ii) Debt re-payment history as a consumer under credit agreements;

(iii) Existing financial means, prospects and obligations".

[24] In terms of Section 78(3)(b) of the National credit Act:

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[1] Melane v Santam Insurance Co. Ltd 1962(4) para E-F Pg 532

"The financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily-

(i) Share their respective financial means; and

(ii) Mutually bear their respective financial obligations."

[25] It is common cause that the financial means, prospects and obligations of the applicant were assessed in terms of the National Credit Act that I alluded to above. In this respect the following affordability assessment was performed to determine the applicant's financial means:

Net Income	R21 676.33
Monthly Expenses	
Rental	R16 500.00
Rates Water and Electricity	R 500.00
Total Expenses	R17000.00
Disposable Income	R4 676.33

[26] From the above disposable income, the applicant has to service her obligation in terms of the agreement to the tune of R4 552.64 leaving her with a net income of R123.69. The less said about the affordability of this transaction the better.

[27] From the above affordability assessment conducted by the respondent, it is abundantly clear that the credit provider did not factor the applicant's necessary monthly living expenses such as food, policies, clothing, transport and the like in conducting the assessment. Common sense dictates that these expenses must have been sourced from other means. The applicant contends that these necessary expenses are met by her husband who confirmed it to the credit provider when the application for credit was made.

[28] The respondent in its opposing papers submits that it had no obligation to investigate the financial affairs of the applicant's husband as the parties are

married out of community of property. In this regard I refer to paragraph 87 of the respondent's opposing affidavit which reads:

"I submit that by virtue of the Applicant's marital regime, the respondent had no obligation to investigate anyone else's financial situation".

[29] I find this submission unconvincing and without merit to say the least. Surely it is clear from the affordability assessment of the applicant that she is unable to meet her necessary monthly expenses and that those expenses must be covered by another source. In paragraph 63 of her founding papers the applicant says the following:

"Although my husband was present when I applied for vehicle finance, he was merely to confirm the household expenses which are normally paid by him. No further enquiry and/or assessment were done of my husband's financial means, prospects and obligation. I respectfully submit that the respondent did not take the required reasonable steps in its affordability assessment before entering into the agreement with me."

[30] Respondent's counsel, Advocate Olivier, quite rightly submitted that those expenses were considered on the premise of the applicant's own papers but conceded, correctly so in my view, that no assessment was done as far as the applicant's husband's financial means, prospects and obligations are concerned. The respondent should therefore have taken reasonable steps to assess the applicant's husband's financial means, obligations and prospects as envisioned by Section 78(3)(b) of the National Credit Act.

[31] There is therefore merit in the applicant's defence based on the respondent's own concession that it had failed to assess the financial means, prospects and obligations of the applicant's husband, which individual is an adult person within the consumer's immediate family and household circle. The only plausible inference that can be drawn from the facts is that the applicant and her husband share their financial obligations as envisaged by Section 78(3)(b) of the National Credit Act. It serves mention that a bald averment that an agreement is reckless is not sufficient to sustain a defence of non-compliance with Section

81(2)(a)(iii) of the National Credit Act. The defence should be corroborated by facts as is the case in this matter.

[32] I am therefore satisfied that the applicant has put up a bona fide defence which not merely has some prospect, but reasonable prospect of success. In terms of Section 83 of the National Credit Act, a Court can impose stringent measures to remedy reckless agreements. This is however for a trial court to determine.

[33] In the result the applicant has shown good cause for a rescission order under the common law.

COSTS

[34] I can find no reason why the practice of costs following the cause should not be perpetuated in this instance.

I accordingly make the following order:

1. **That the default judgment granted by the Registrar of the above Court on 25 October 2017 under the above case number be set aside.**

2. **That the Respondent pays the costs of this application.**

S J GROENEWALDT

ACTING JUDGE

Northern Cape Division, Kimberley

<u>On behalf of Applicant:</u>	Adv Nell (Instructed by Haarhoffs Inc.)
<u>On behalf of Respondent:</u>	Adv A.D Olivier (Instructed by Duncan & Rothman)