



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 HIGH COURT KIMBERLEY)**

Case number: **1299/16**
Date heard: **24/03/2017**
Date delivered: **28/04/2017**

In the matter of:

ANGUS HATTINGH

APPLICANT

and

FIRSTRAND BANK LTD

RESPONDENT

Coram: Snyders AJ

JUDGMENT

SNYDERS, AJ

1. This application was for the rescission of the default judgment granted against applicant on 31 August 2016. Applicant also prayed for the setting aside for the resultant warrant of execution.

2. The opposition by the respondent is based on applicant's failure to pass the criteria set out in r 31(2)(b) of the Uniform Rules of Court. In order for the rescission of judgment application to pass muster, the applicant must show good cause for the rescission by:

- 2.1. giving a reasonable explanation for the default;
- 2.2. showing that the application is made *bona fide*;
- 2.3. showing that he had a *bona fide* defence to the respondent's claim which *prima facie* has some prospects of success.

3. The applicant purchased a Nissan X Trail motor vehicle (the vehicle) under financing from the respondent in terms of an agreement dated 17 October 2014 ("the credit agreement"). During February 2016, the applicant approached JJM debt consellers (JJM) to assist him with his overindebtedness as he was having difficulty in meeting his financial obligations. To start the debt review process, JJM sent a notice in terms of s 86 of the National Credit Act, 2005 ("the NCA") to the applicant's creditors, including the respondent. This s 86 notice informed the respondent that the applicant had approached JJM to apply for debt review in terms of s 86 of the NCA.

4. On 08 March 2016, JJM sent an e-mail to the respondent with a proposal to re-pay the debt in lower monthly installments. In said e-

mail, JJM noted that the applicant could not afford to make any higher re-payment offers and that any counter proposals will be declined.

5. On 09 March 2016, the respondent replied to JJM's proposal and intimated that the debt did not solve. This meant that the monthly payments proposed over the period set out would not result in the debt being extinguished. The respondent then rejected the applicant's proposal to re-pay the debt in monthly installments of R3 100.00 over 89 months at 8.75% per annum. The respondent made a counter proposal for the payment of 84 monthly installments of R3 311.28 at an interest rate of 8.75%.
6. On the same day, JJM notified the respondent that the account did solve and the counter proposal could thus not be accepted. The applicant and the respondent exchanged two more e-mails during April and May 2016 with largely the same content as hereinbefore.
7. On 02 May 2016, the respondent sent a s 86(10) notice in terms of the NCA to JJM. Herein, the respondent intimated that 60 business days had expired since the applicant had applied for debt counselling and that they were consequently terminating the debt review process regarding the applicant's indebtedness to the respondent.

8. On 22 June 2016, the respondent informed the applicant by way of e-mail that they would pursue legal action for the recovery of the vehicle. On 24 June 2016, the respondent re-sent the counter-proposal of 09 March 2016 to the applicant. On 13 July 2016, JJM provided a further counter-proposal for 72 monthly payments of R3 400.00 at an interest rate of 8.75%. The respondent rejected this counter-proposal, stating that the account did not solve.
9. On 18 July 2016, JJM persisted that the account did solve and that they would file a notice to defend the summons that was served on 06 July 2016 and requested a copy thereof. The applicant did not defend the action and default judgment was granted against the applicant in favour of the respondent on 31 August 2016 and a warrant for delivery issued for the vehicle.
10. On 19 September 2016, the respondent's field agent contacted the applicant and informed the applicant that he had an order for the return of the vehicle. On 26 September 2016, the applicant lodged a debt review application at the Swellendam Magistrate's Court, which application was served on the respondent on 19 October 2016. The applicant confirmed that the respondent's field agent contacted him on 26 October 2016 regarding the default judgment that was granted against him and warrant for delivery.

11. The issues to be decided are whether the applicant has filed this application within the prescribed time periods and whether the applicant meets the requirements of r 31(2)(b) of the Uniform Rules of Court.
12. The respondent raises the point that this application was filed outside of the time period set out in R 31(2). The rule states that the application for rescission of judgment must be made within 20 days after the applicant became aware of the judgment. The respondent avers that the applicant became aware of the judgment on one of the following two dates:
 - 12.1. On 18 July 2016, when JJM was informed by the respondent via e-mail that the summons was served on 6 July 2016;
 - 12.2. Alternatively, on 19 September 2016, when the respondent's field agent advised the applicant that an order was granted by the court for the return of the motor vehicle.
13. The applicant alleges that JJM never informed him of the e-mail from respondent dated 18 July 2016. To exasperate matters, the applicant left his *domicilium* address as set out in the credit agreement and re-located to Swellendam without notifying the respondent of his change of address. Paragraph 18 of the credit agreement places a burden on the applicant to notify the respondent of a change in the *domicilium*

address. As it is, the summons was served on 6 July 2016 at the address that applicant no longer resided at.

14. The respondent's first ground stands to fail as the test is not when the applicant became aware of the service of the summons but when the applicant became aware of the default judgment. The field agent merely notified the applicant on 19 September 2016 that an order had been granted for the return of the vehicle. I am not satisfied that his words adequately conveyed the fact that default judgment had been granted. The applicant became aware of the default judgment on 21 October 2016 when he was contacted by the 2nd field agent. I am of the view that this application was filed within the 20 day time period prescribed in r 31(2).

15. In *Colyn v Tiger Food Industries*¹, the SCA dealt with the default of an attorney to timeously respond to proceedings on behalf of an applicant. In that matter, the applicant too sought the rescission of default judgment granted against him. The court held that the default by an attorney will only assist an applicant to a point.

16. I am of the view that the appointment of a debt counsellor is analogous to the appointment of an attorney. Both represent the consumer/client as an agent. A debt counsellor is specifically appointed

¹*Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)* at para 12

to offer professional advice on a consumer's methods of debt repayment. The debt counsellor consults with the consumer, negotiates with creditors on his behalf, sends out prescribed notices in terms of the NCA, institutes debt proceedings on behalf of the consumer and appears in court to take such orders on behalf of the consumer. In *causa* the applicant further explained his default with reference to his belief that the negotiations between the debt counsellor and the respondent were ongoing.

17. The applicant in showing good cause for the default must have, by necessity, included an explanation from JJM. Said debt counsellor was available in these proceedings but merely deposed to a confirmatory affidavit without providing any further explanation in either the founding or confirmatory affidavit. In the *Colyn v Tiger Foods* matter, it was held as follows:

"I have reservations about accepting that the defendant's explanation of the default as satisfactory. I have no doubt that he wanted to defend the action throughout and that it was not his fault that the summary judgment application was not brought to his attention. But the reason why it was not brought to his attention is not explained at all. The documents were swallowed up somehow in the offices of his attorneys as a result of what appears to be inexcusable inefficiency on their part. It is difficult to regard this as a reasonable explanation. While the courts are slow to penalize a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (Saloojee and Another NNO v Minister of Community Development)."

Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success (Melane v Santam Insurance Co Ltd).²

18. I find the applicant's explanation for the default herein unsatisfactory, bordering on non-existent.

19. The applicant's failure to provide a satisfactory explanation for the default may be ameliorated by a *bona fide* defence which has not merely some prospects, but a good prospect of success³.

20. The applicant's defence was based on the respondent's failure to comply with s 86(10) of the NCA when terminating the debt review. Applicant, correctly so, conceded that the respondent had correctly and validly terminated the debt review in compliance with s 86(10).

21. The second leg of the defence was that the respondent had not negotiated in good faith as required by s 86(5) of the NCA. This section is mandatory on both the applicant and respondent who:

21.1 must comply with all reasonable requests to facilitate the evaluation of the applicants indebtedness and the prospect of possible debt re-arrangement (s 86(5)(a));

² At para 12

³ *Colyn v Tiger Foods Industries* at para 12

21.2 negotiate in good faith regarding applicant's debt re-arrangement (s 86(5)(b));

22. The applicant made an offer to the respondent to re-arrange the debt on 8 March 2016. It is common cause that on such proposal, there was a disclaimer indicating that no counter proposal can be entertained. Nevertheless, the respondent provided a counter-proposal to which the applicant made a further proposal. The applicant's defence was that the further proposal made by applicant was more advantageous than respondent's counter-proposal. Thus the respondent's failure to accept same was a breach of s 86(5) (b). The respondent did not accept the counter-proposal as the debt did not solve. The applicant tried, without success, to prove that the debt did solve and provided the respondent with the calculation to substantiate this. The respondent's failure to accept or understand such calculation cannot be seen as a failure to negotiate in good faith.

23. The respondent continued to attempt negotiations after the s 86 (10) termination. I cannot find, as argued by applicant, on a plain reading of s 86 that this continued negotiation by the respondent had revived the debt review process between the parties. Before the s 86(10) termination, the respondent was under an obligation to negotiate in good faith. After the s 86(10) termination, the respondent was under no obligation but had a discretion to negotiate with the applicant. The

respondent's conduct after the termination notice was sent was merely to re-send the counter-proposal dated 9 March 2016. This did not show an intention on the part of the respondent to distance itself from the termination notice nor to have waived its rights in terms of said notice.

24. On the facts, the applicant was unable to put up a defence that had good prospects of success. His prospects were, in fact, so remote that it cannot be said he had a *bona fide* defence. Accordingly the applicant has not shown good cause for the rescission.
25. Section 130(4)(c) of the NCA stipulates that if a court determines that a credit agreement is subject to pending debt review, it may adjourn proceedings sought to enforce the agreement until final determination of the debt review. A pending debt review is as defined in part D Chapter 4 of the NCA. Therein, s 86 makes provision for a debt review process, which the respondent herein had validly terminated. The legal framework creates a right for the respondent to proceed with the enforcement of the credit agreement and having validly done so, I can find no reason to interfere.
26. There is no reason why costs should not follow the result. I am mindful of the applicant's financial position but can find no justification why costs should not be awarded against the applicant.

WHEREFORE THE FOLLOWING ORDER IS MADE:

- 1. The application is dismissed with costs.**



J.A SNYDERS
ACTING JUDGE

<u>On behalf of Applicant:</u>	Adv J Els (Hugo Mathweson & Oosthuizen Inc)
<u>On behalf of Respondent:</u>	Adv Stanton (Mervyn Joel Smith)