IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 763/2014

In the matter between:

HENDRICK JOHANNES MOLLER Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LTD Respondent

HEARD ON: 12 MAY 2016

JUDGMENT BY: MOCUMIE, J

DELIVERED ON: 24 MAY 2016

MOCUMIE, J

[1] This is an application in terms of Rule 31(2)(b) of the Uniform Rules of Court for rescission of a judgment by the applicant/defendant granted in favour of the plaintiff/ respondent (respondent) under Case No:763/2014, which judgment was obtained on 17 June 2014. The application is opposed by the respondent.

[2] The applicant is a resident of Bloemfontein and the defendant in the main action wherein the default judgment was granted. The respondent is the Standard Bank of South Africa (Ltd) Pty (the bank) a company duly registered and incorporated according to the laws of the Republic of South Africa,with its registered business adress in Johannesburg, Gauteng Province.

[3] The applicant sets out the background of the application in his founding affidavit as follows. On 9 April 2010 he entered into an instalment sale agreement with the bank in terms of which the latter sold him a motor vehicle, 2009 Cherry QQ3 0.8 TX with engine number SQRS72FGBF00 527 and Chasis number LVVDB12A58D196731 for an amount of R53 385.11 (fifty three thousand three hundred and eighty five rand and eleven cents).

[4] He alleges that some time in 2012 he approached a debt counsellor and pursuant to that, the latter approached the magistrate court, Bloemfontein for an application in terms of s88 (6) of the National Credit Act 34 of 2005 (the NCA) for a restructuring of his debts. The application was approved and an order in his favour was granted by the magistrate court on 1 March 2013. *Inter alia* this order which can be found on page 35 of the paginated papers stipulates '(d) Payment of R3000.00 will be made on a monthly basis as from 29 April 2012 and will be paid to the appointed National Payment Distribution Agency'

[5] The applicant alleges further in his founding affidavit read with the annexures appended thereto (annexures H1-H10) he complied with the order of March 2013 that it was the Payment Distribution Agency (PDA) that defaulted in distributing the instalments to the bank from the date of effect. He was not aware that the PDA was not distributing payments to the bank. He admitted that there were short payments for the month January until April. But intimated that he complied with the March 2013 order. If given an opportunity by this court,through rescinding the default judgment against him,he will be

able to prove that defence in court.In other words, the defence he is raising is *prima facie bona fide* and has prospects of succeeding in the main trial.

[6] In its opposition of the application, the bank raises a point *in limine*:Non-joinder of interested parties.It avers that the applicant's purported *bona fide* defence is simply that he has never defaulted on his payments in terms of the Restructrung of Debt order. He then alleges that he was not aware that no payments were distributed by the PGA until such time that his debt counsellor was called by the bank informing her,the debt counsellor, in February 2016, of an attachment order already granted against him under Case No 763/201 in order to satisfy the judgment debt.

[7] Mr Tsangirakis,for the bank,submitted that because the basis of the applicant's purported *bona fide* defence is based on the verification and or confirmation of such purported defence by the PGA;the applicant was duty bound to cite the PGA or even both the PGA as well as the debt counsellor. These are parties who have a substantial interest in the subject matter. He submitted that,even in the event that this court may exercise it discretion in favour of the applicant by not upholding the point *in limine* in its entirety, the applicant has also not appended any confirmatory affidavits from the PGA and or the debt counsellor. To that extent, all the blame that he attributes to them , is hearsay evidence which is not admissible in terms of the Law of Evidence Amended Act.[1] Mr Tsangirakis, argued that on this basis alone, the application ought to be dismissed with costs.

[8] The requirements that an applicant must satisfy in a application for rescission of a default judgment are set out in the seminal decision of *Grant v Plumbers*[2] where the court stated:

'An applicant who applies under Rule of Court 43(Orange Free State)[3] to seet aside a judgment granted in default of appearance should with the following requirements: (a) He

[1] Law of Evidence Amendment Act, 45 of 1998.
[2] *Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)*. See also *Morkel v Absa Ltd and Another* 1996 (1) SA 899 at 903E.
[3] Now Rule 31(1)(b) of the Uniform Rules of Court.

must give s reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Courtshould not come to his assistance. (b) His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim. (c) He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial. Would entitle him to the relief asked for. He need not deal with the merits of the case and produce evidence that the probabilities are actually in his favour.'

[9] As a general rule, any person who has a substantial and material interest in the subject matter should be joined in the proceedings.[4] Particularly , as in this case, the applicant's purported *bona fide* defence hinges entirely on the other parties not before the court. Surely, the decision that will be made by any court on the basis of the applicant's alleged *bona fide* defence will have a direct impact on them in that they may be held responsible for this default to a large or small degree. Thus the matter cannot be disposed of without them before the court to either confirm the applicant's alleged *bona fide* defence or deny it. This general rule has been cristalised in Rule 10 (1) of the Uniform Rules of Court.[5] In their absence at least confirmatory affidavits from them should have been appended and put before this court.

[10] There are divergent schools of thought on whether a court has a discretion in a matter of this nature i.e whether it can decide to do without interested party not joined by one of the parties before the court. Older authorities[6] support the notion that a court has no such discretion. The other school of thought – later authorities indicate that a court has a discretion based on the values underpining the NCA. I am inclined to hold that the failure to cite or join the PGA and or debt counsellor is not fatal to this application. The actual persons/parties in the agreement are the applicant and the bank, and both

[4] *Vitorakis v Wolf* 1973 (3) SA 928 (W) at 930D-H.

[5] Rule 10(1) provides: "Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiff in one action agains the same defendant or defendants against whom any or more persons proposing to join as plantiff would, if he brought a separate action, he entitled to bring such action provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if seperte actions were instituted, would arise on such action and provided that there my be a joinder conditionally upon the clai of any other plaintiff failing."

[6] *Harding v Basson 1995 (4) SA 499 (C) at 501H-I*; *Marais v Pongola Sugar Milling Co Ltd* 1961 (2) SA 698 (N) at 702F-I, *Khumalo v Wilkins* 1972 (2) SA 470 (N); *Wholesale Provision Supplies CC v Exim* 1995 (1) SA 150 (T) at 158D.

are before the court now. Not to allow the applicant to present its case now would amount to this court shutting its door for him, which will fly in the face of his enshrined right to access this court as encapsulated in s34 of the Constitution of this country. [7]

[11] An issue linked to the exercise of the discretion of this court in the determination of the point *in limine* is the role and responsibility of the PGA in the scheme of things under the NCA. And in particular, in a case where the consumer's default to pay in terms of the Restribution of Debt order is in question. Judging from the number of judgments in this respect, clearly, ther are divergent schools of thought on the matter. As Ms Collins contended with reliance on *Absa Bank Ltd v Hanekom and Another*,[9] '[a] PDA distributes funds to the creditors such as the applicants on behalf of the respondent in line with the order and the PDA, is as such, the consumer's agent for that purpose. Failure by the PDA to fulfil its mandate, cannot, in law and based on equity, be visited upon the creditor in the position of the applicant. To the extent that the PDA is a statutory entity created under the NCA to facilitate process under the NCA any express provision to that effect, no one can be expect the legislation putting any burden on a consumer such as monitoring whether the PGA/debt counsellor is distributing the instalments in accordance with the court order in place at any time'. Mr Tsangarakis contended for the other school of thought with reference to *Firstrand Bank Limited v Leonard Peter Ortell & 1 Other*[10] which espouses that a PGA/debt counsellor identified and appointed by a consumer is an agent of the consumer. His or her failure to pay in accordance with a court order is imputed to the consumer. In other words the consumer bears the responsibility to ensure that there is compliance with the restruction of his or her debt order. S(he) cannot be heard to put the blame at the door step of he PGA/debt counsellor in the event that the latter defaults on distributing the payments to the debtor(s).

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[7] S34 of the Constitution of the Republic of South Africa, Act 108 of 1996 provides that: "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before the court or, where appropriate, another independent and impartial tribunal or forum."

[9] *Absa Bank Ltd v Hanekom and Another Case No: 1487/2011 (unreported judgment delivered on 31 July 2014).*

[10] *Firstrand Bank Limited v Leonard Peter Ortell & 1 Other*

[12] In the light of the Preamble of the NCA[11] which aims: 'to ….. prohibit certain unfair credit and credit-marketing practices….,coupled with a measure of fairness and equity', I am inclined to associate myself with the thinking espoused by the court in *Nedbank Limited v Thompson*[12] (2014) to the effect that a consumer cannot be burdened with any responsibility of monitoring a aprty/institution(s)he has no control over for purposes of the implementation of the court order(s) in terms of the NCA. Otherwise the underlying purpose of the NCA is negated.

[13] Even if I so hold,the applicant's failure to file confirmatory affidavits of the PGA or debt counsellor renders his evidence with reference to them as hearsay evidence which cannot be admitted in terms of the Law of Evidence Amended Act.[13] The point is, if I set aside a court order which was properly granted in this court and the parties on whose evidence the purported defence above ependent are not before the court to verify such purported *bona fide* defence,I would not be acting fairly or even prudently towards the bank. Equality before the law refers equality and protection of all parties or litigants before the court. Its a two way street. Not only to benefit the consumer in all cases regardless of non-compliance with the law on his or her part.In any event,it is not as if the applicant can never approach the court on the basis of an improved application. As the application for rescission stands now, it is defective and not compliant with Rule 31(2) (b).[15]

[11] The Preamble of the National Credit Act 34, 2005 states that it aims: "to promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and crdit-marketing practices; to promote responsible credit grating and use and for that purpose to prohibit reckless credit granting; to provide for re-organisation in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980; and to provide for related incidental matters."

[12] *Nedbank Limited v Thompson (2014) ZAGP JHC 88 and cases cited therein.*

[13] See footnote 1.

[15] Rule 31(2)(b) provides that: "a defendant may within 20 days after he or she 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."

[14] Lastly the issue of costs. The general rule on costs[16] is applicable. I was not addressed to the contrary.

[15] In the result, the following order is granted.

ORDER

‘1. The application for rescission of judgment under : Case No 763/2012 is dismissed with costs.

2. Costs to be costs on party and party scale.’

B.C. MOCUMIE, J

On behalf of applicant:	Adv L Collins
Instructed by:	P.S. Du Plessis M.C. Rijkheer Inc t/a Jordaans Rijkheer & Partners Bloemfontein
On behalf of respondent:	Adv S Tsangarakis
Instructed by:	HILL, McHARDY & HERBST INC 7 COLLINS ROAD ARBORETUM Bloemfontein

/PC

[16] The general rule of costs is to the effect that the party that loses must be the costs of the winning party unless exceptional circumstances dictate otherwise.