IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 63062/2013
In the matter between:

JOSE ANTONIA PESTANA FELIX **APPLICANT**

And

FIRSTRAND BANK LIMITED **RESPONDENT**

JUDGMENT
COLLIS AJ:
INTRODUCTION

[1] In the present application the Applicant seeks an order for the rescission of a summary judgment taken against him on 5 February 2014. The application is brought in terms of the provisions of Uniform Rule 31(2) (b) and was opposed by the Respondent.

BACKGROUND

[2] On or about 19 September 2012 the parties entered into a written instalment sale agreement in terms whereof the Applicant obtained finance from the Respondent in respect of a 2012 Volkswagen Polo GTI 1.4 TSI DSG motor vehicle with engine

number [C…………] and chassis number [W…………].

[3] In terms of the agreement the total amount payable by the Applicant to the Respondent was an amount of R 384 914.10 of which the first instalment was payable on 20 October 2012 and thereafter 58 monthly instalments of R 5319.89 were to be made on each successive month, with the final instalment of R 81 660.00 to be made on 20 September 2017.

[4] The agreement further provided, at all material times, that the Respondent would remain the owner of the motor vehicle until the Applicant had paid all amounts due under the agreement and in the event of the Applicant failing to comply with any of the terms and conditions provided for in the agreement, or failing to pay any amount due under the agreement, the Respondent would be entitled, at its election and without prejudice to obtain an order for the return of the motor vehicle; to retain all payments already made; and to claim as liquidated damages if necessary any shortfall due to it in terms of the agreement.

[5] In breach of the agreement, the Applicant failed to make due and punctual payments of the monthly instalments payable in terms of the agreement, and as at 19 September 2013, was in arrears in the amount of R 24 659.42.

UNIFORM RULE 31(2)(b)

[6] Rule 31(2) (b) provides as follows:

"A defendant may within twenty (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"

[7] In order to meet the requirements for an application for rescission of judgment under Rule 31(2) (b) an applicant must show the following:

(a) He (the Applicant) must give a reasonable explanation for his default. If it appears that his default was willful or that it was due to gross negligence the Court should not come to his assistance.

(b) His application must be *bona fide* and not made merely with the intention to delay the Plaintiffs claim;

(c) He must show that he has a *bona fide* defence to the Plaintiff's claim. It is sufficient if he makes out a *prim i facie* defence in the sense of setting out averments which, if established at trial, would entitle him to the relief he asked for.[1] He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

[8] A court must therefore in this application for rescission decide whether *'sufficient cause'* has been shown to rescind the judgment. In Chetty v Law Society Transvaal 1985 (2) SA 756 (A) the requirements of this concept were considered by Miller JA as follows at 756A-C:

'The term <u>sufficient cause</u> (or good cause) defies precise or comprehensive definition, for many and various factors require to be considered. But it is clear that in principle and in the long standing practice of our Courts two essential elements of 'sufficient cause' for rescission of judgment by default are:

(i) that the party seeking relief must present a <u>reasonable and acceptable explanation for his default:</u> and

(ii) that on the merits such party has a <u>bona fide defence which ptima facie, carries some orosoect of success.</u>"

[9] I will proceed to deal succinctly with the requirements as mentioned above.

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[1] **Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)**

ABSENCE OF WILFULNESS

[10] The wilful or **negligent** nature of the defendant's default is one of the considerations which the court takes into account in the exercise of its discretion to determine whether or not good cause is shown.[2] It then follows that the reasons for the Applicants' absence of default must be fully set **out,** because it is relevant **to the** question whether or not, his or her default was wilful. In Silber v Ozen Wholesalers (Pty) Ltd[3] it was held that the explanation for the default must be sufficiently full to enable the court to understand how it came about and to assess the applicant's conduct and motives.

[11] Before a person can therefore be said to be in wilful default, the following elements must be shown:

(a) knowledge that the action is being brought against him or her;

(b) a deliberate refraining from entering an appearance, though free to do so; and

(c) a certain mental attitude towards the consequence of default.

[12] In his Founding affidavit[4] the Applicant sets out that although he had filed a notice of intention to defend on 1 November 2013, his failure to have filed an opposing affidavit to the summary judgment application, was due to his attorney's practice, C L Gordon Attorneys, having been closed for the Jewish holidays. The application for summary judgment wherein judgment was granted against him was served on his attorney on 19 November 2013 and filed with the registrar of the court the following day for hearing on -he 5th February 2014.

[13] The applicant's affidavit is silent as to the period for which his attorneys practice

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[2] **Harris v Absa Bank Ltd t/a Volkska6 2006 (4) SA 527 (T) at 530B-531B**
[3] 1954 (2) SA 345 (A) at 353A
[4] Founding Affidavit paragraphs 5 to 9

was closed and as to when his attorney’s practice eventually reopened.

[14] Furthermore, even if the court were to accept that the Applicant’s attorneys practice was closed for the holidays, in terms of Rule 32, the Applicant had until 12h00 on 3 February 2014, to file an opposing affidavit and the *dies* for him to have opposed the application would not have expired until then. The Applicant failed to file any affidavit resisting summary judgment.

[15] In addition hereto, the Applicant’s allegations in the founding affidavit are not supported by a confirmatory affidavit deposed to by his erstwhile attorney, confirming the closure of his practice for the period in question. Furthermore there is no explanation from the Applicant’s erstwhile attorney as why the attorney failed to resist the summary judgment application.

[16] In the absence of a sufficiently full explanation concerning the Applicant’s default, this Court is not placed in a position to assess the absence of wilfulness on his part and as a consequence I cannot find that the Applicant has met the first requirement of absence of wilfulness.

BONA FIDE DEFENCE

[17] The first defence raised by the Applicant appears in paragraph 13 to the founding affidavit. Therein the Applicant disputes that the **Respondent** has a valid and binding agreement with him, as no representative of the Respondent ever signed the terms and conditions.

[18] *Ex facie* the terms and conditions attached to the agreement; the signature of the Applicant appears on each and every page. Furthermore, in paragraphs 25 and 26 to the founding affidavit, the Applicant alleges that the dispute between himself and the Respondent commenced during September 2013. Further that around that time he approached the Respondent in order to make arrangements to settle his arrears. The Applicant now alleges that the failure on the part of the Respondent to

append a signature to the terms and conditions renders the agreement invalid. The Applicant's contention in this regard is contradictory as it begs the question as to why he would enter into negotiations with the Respondent in order to settle his arrears, in circumstances where no valid agreement was in **existence.**

[11] The denial that a valid and binding agreement was concluded at best can be described as opportunistic as all objective facts point thereto that indeed the parties had a meeting of minds which resulted in a written agreement

[12] The second defence raised by the Applicant relates to his election to refer the matter for dispute resolution upon receipt of the section 129 notice. As per paragraphs 30 to 34 of his founding affidavit, he conveyed this election to a representative of the Respondent and to date he has not received *a* reply from them.

[13] The referral of the matter for dispute resolution flies in the face of what is stated by the applicant in paragraph 26 to his founding affidavit, which reads as follows:

"During or about that period of time I approached a representative of the Plaintiff in order to make arrangements with regard to the arrears on the said vehicle but was advised that they require the full outstanding amount in this regard or nothing. "

[22] The Applicant's election to make a referral was only made after his proposal to settle the arrears was rejected by the Respondent- The referral was merely a guise and not for the resolution of a genuine dispute that required intervention.

[23] Furthermore, even if this Court is to accept on his contention that indeed a real *dispute* existed, the Applicant has been less than candid in explaining what steps he had taken, to refer such *dispute.*

[24] The last defence raised by the Applicant is that the Respondent's claim is illiquid and as such summary judgment ought not to have been granted on this basis.

[25] On 5 February 2014, summary judgment was granted against the Applicant for

the return of the motor vehicle. In terms the summary judgment granted, the Respondent was authorised, in the event of a shortfall, to apply on the same papers for any damages due to it.

[26] In this regard, the provisions of Uniform Rule 32(1)(c) reads as follows:

'(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-

(a) ....;
(b) ....;
(c) for delivery of specified movable property; or
(d) for ejectment;
together with any claim for interest and costs.'

[27] From the above, it is apparent that the Respondent obtained summary judgment for the return of the motor vehicle (*delivery of specified movable property),* which the provisions of Rule 32(1) (c) dearly permits. This defence at best is therefore ill- conceived and the legal representative who argued the matter on behalf of the Applicant, conceded as much.

[28] For the reasons as set out above, I conclude that the Applicant has failed to present a reasonable explanation for his default and that he has a *bona fide* defence, which *prima facie* carries some prospect of success.

[29] In the result I make the following order:

29.1 The application is dismissed with costs on a Party and Party scale.

C. J COLLIS

ACTING JUDGE GAUTENG DIVISION PRETORIA APPEARANCES:

FOR APPLICANT: ATTORNEY M FEHLER INSTRUCTED BY: MERVYN FEHLER ATTORNEYS

FOR RESPONDENT. ADVI OSCHMAN

INSTRUCTED BY: BEZUIDENHOUT VAN ZYL & ASSOCIATES INC. DATE OF

HEARING: 2 JUNE 2015 DATE OF JUDGMENT JUNE 2015