IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 1227/2012

Date heard: 15 October 2015

Date delivered: 15 October 2015

In the matter between:

NONTUTUZELO FLORIDA SIJEKU Applicant

And

THE MOTOR FINANCE CORPORATION

A DIVISION OF NEDBANK LIMITED Respondent

JUDGMENT

BROOKS AJ:

[1] On 22 September 2014 the applicant issued an application for the recission of a default judgment which had been granted on 22 August 2012 against the applicant and in favour of the respondent.

[2] The application was served on the respondent's attorneys of record on 29 September 2014.

[3] On 9 October 2014 the respondent's attorneys of record filed a notice to oppose the application with the registrar.

[4] On 27 November 2014 the respondent's answering affidavit was filed with the registrar.

[5] If she wished to file a replying affidavit, in accordance with the provisions of Rule 6(5)(e) of the Uniform Rules of Court the applicant would have been obliged to do so within ten days of the service upon her of the answering affidavit.

[6] No replying affidavit has been filed.

[7] In accordance with the provisions of Rule (5)(f) of the Uniform Rules of Court, within five days of the expiry of the time period within which she was permitted to file an answering affidavit, the applicant was at liberty to apply to the registrar of this court to allocate a date for the hearing of her application. This she failed to do.

[8] Accordingly, acting within the scope of the provisions of Rule 6(5)(f) of the Uniform Rules of Court, the respondent made application to the registrar on 13 February 2015 for the allocation of a date for the hearing of this application on the opposed

motion court roll. A copy of that notice of application to the registrar was served on the applicant's attorneys of record.

[9] On 30 June 2015 the registrar issued a certificate to the effect that the matter is ripe for hearing and enrolled the matter for 15 October 2015.

[10] The respondent thereafter served a notice of set down in respect of the matter on the applicant's attorneys of record on 23 July 2015.

[11] On 7 October 2015 the respondent's attorneys of record complied with Rule 15A of the Joint Rules of Practice applicable to the various courts in this division by delivering a notice to the registrar to indicate that the matter would be argued to completion on 15 October 2015.

[12] On 7 October 2015 the respondent's attorneys of record filed heads of argument prepared by Ms WATT, counsel for the respondent.

[13] According to the applicant's founding affidavit, the applicant only became aware of the default judgment against her on 24 March 2014. On this date, a notice of acting was filed by the applicant's attorneys of record. In accordance with the provisions of

Rule 31(2)(b) of the Uniform Rules of Court, the present application should have been launched within twenty days, i.e. by 24 April 2014. This was not done. The applicant's only explanation for the fact that the application was launched five months after she became aware of the default judgment was that she needed to raise funds to pay her attorney of record. No details are given about the conduct of this process.

[14] It has been held that if in seeking condonation for the application being out of time the explanation offered is weak, this will affect the *bona fides* of the application for recission.[1] This principle would appear to be apposite to the present application.

[15] The requirements for the recission of a judgment granted by default are;

(i) the applicant must give a reasonable explanation for his or her default;

(ii) the application must be *bona fide* and not made with the intention of delaying the plaintiff's claim; and

(iii) the applicant must show that he or she has a *bona fide* defence to the plaintiff's claim, it being sufficient if a *prima facie* defence is set out.[2]

[1] CAROLUS AND ANOTHER v SAAMBOU BANK LTD
AND SMITH SAAMBOU BANK 2002 (6) SA 346 (SE) 349 B-E.
[2] GRANT v PLUMBERS (PTY) LTD 1949 (2) SA 470(O) 476-477.

[16] The applicant's reasons for default must be fully and sufficiently set out so that the court can assess the applicant's conduct and motives and the applicant must prove, not only allege, a good cause for a recission. Good cause includes but is not limited to a substantial defence.[3]

[17] The grounds of the applicant's defence must be set forth with sufficient detail to enable the court to conclude that there is in fact a *bona fide* defence and the application is not merely for the purpose of harassing the respondent.[4]

[18] In her founding affidavit, the applicant fails to explain why it took five months to collect the funds required to approach her attorney and what was specifically done during those five months. There is also no explanation for the fact that the notice of acting was filed by the applicant's attorneys of record on 24 March 2014, the same day as the applicant alleges that she became aware of the existence of the default judgment. The contradiction between the activity of the attorneys and the need for the applicant to place them in funds, leading to a delay of five months, is readily apparent. It suggests, as does the unexplained coincidence of the notice of acting emerging on the very day that the applicant became aware of the default judgment, that the applicant has been less than candid with the court in explaining the circumstances of her default and the delay in bringing her application.

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[3] SILBER v OZEN WHOLESALERS (PTY) LTD 1954(2) SA 345 (A).
[4] STANDARD BANK OF SA LTD v EL –NADDAF 1999 (4) SA 779 (W)
785I – 786 B.

[19] The applicant has also failed to set out clearly and fully the nature of the defence which she claims to rely upon to meet the respondent's claim. The action has to do with the cancellation of a vehicle finance agreement and the concomitant return of a motor vehicle. The applicant admits that she was in default of her obligation to make regular payment of the amount due under the finance agreement. She claims that she had the wrong account number and that she had spoken with "a Toyota finance lady" about the problem. She stopped paying because she expected to sign a new contract and she wanted the respondent to attend to the problem.

[20] In my view, the applicant's allegations relating to a defence are vague and insufficient to enable the court to accept that she is *bona fide* in bringing the application.

[21] The entire application is characterised by substantial delays on the part of the applicant. These combine with the applicant's failure to file a replying affidavit and her failure to apply to the registrar for the allocation of a date for the hearing of the application, to create the impression that the applicant is not *bona fide* in bringing the application and wishes simply to delay the finalisation of the respondent's claim. In these circumstances the respondent has been prejudiced by the unreasonable delays which have occurred and has been put to additional legal expenses which should have been avoided. The applicant's conduct of the application is deserving of the censure of the court.

[22] In the circumstances, the following order will issue:

"1. The application is dismissed.

2. The applicant is directed to pay the costs of the application on the scale as between attorney and client."

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RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

For the Applicant: No appearance.

For the Respondent: Adv KL Watt instructed by Smith Tabata Inc. Mthatha.