IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 22543/2011

Date: 24 May 2013

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

24/5/2013
DATE SIGNATURE

In the matter between:

MAMOKGEGKGE BEN MAKOLA Plaintiff

and

ABSA BANK LIMITED Defendant

JUDGMENT

PRETORIUS J,

[1] The applicant approaches the court to rescind the default judgment granted by the registrar on 11 May 2011. The applicant relies on Rule 42 of the High Court Rules in support of the application as is set out in

the notice of motion. The applicant seeks condonation for the late filing of the application.

[2] The applicant entered into a written rent to buy agreement according to which he bought a 2004 Puegeot motor vehicle for the amount of R87,631.58. He had to pay R2,249.52 per month as an instalment on this amount.

[3] According to the applicant he only knew that default judgment had been granted on 23 July 2012 when his attorney perused the court file. Summons was issued on 12 April 2011 and affected on the applicant's wife at the chosen *domicilium et executandi.*

[4] It is further important that the applicant admits in his affidavit that he had received the summons and documents prior to 23 July 2012. There is no explanation as to why the applicant had not immediately acted when he had received the summons.

[5] The defence of the applicant, according to his affidavit is:

> *"I submit that my defence to Respondent/Plaintiff's claims is the acceptance of payment arrangement of R900.00, an impression was created that if I pay R900.00 there would not be legal action and that I must endeavour to pay more than what I was currently paying to ensure that a judgment will not be entered."*

[6] The applicant further admits that he knew that any arrangement for paying the respondent had to be confirmed by the bank, which was never done. On 30 September 2010 a notice in terms of section 86(10) of the **National Credit Act** was sent and received by the Applicant, terminating the debt review.

[7] Counsel for the applicant argued that a section 129 letter from the respondent was never received and that is the basis of the defence, in contrast to what had been forwarded as a defence by the applicant in his affidavit.

[8] On the same date that default judgment was granted, the applicant served a notice of intention to defend on the respondent's attorneys. The present application was issued on 8 August 2012 a year and four months after the summons had been served. The applicant relied on rule 42 for the application to have the default judgment rescinded but conceded that it was not applicable in the current application.

[9] Although the applicant had applied for debt counselling no court order, or restructuring of the applicant's liabilities was made. The proposed amount of payment of R400.00 would not been accepted by the respondent as it is less than a quarter of the applicant's obligation each month.

[10] The applicant had been aware that judgment had been granted in May 2011, but only issued the current application 15 months after becoming aware of the judgment. The applicant does not set out at all how, where and when an impression was created that if he paid R900.00 per month no legal action would have been taken. It is clear that he had no arrangement with the respondent in this regard at all. This cannot be a defence which would entitle him to a rescission of judgement.

[11] In any event the applicant seeks a rescission of judgment in terms of Rule 42(1)(a), which it has been conceded is not applicable in this instance.

[12] The court has entertained the application in terms of rule 31(2)(b), but due to the facts set out above cannot find that good cause has been shown to set aside the judgement. There has been no explanation for the applicant waiting 15 months to launch the current application. The only inference the court can make is that the applicant was grossly negligent.

[13] Furthermore there is no *bona fide* defence, as the applicant admits that he is in arrears. He does not set out a *bona fide* defence to the respondent's claim at all. There are no averments by the applicant,

which established at trial, would entitle him to the relief sought. In **Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) 345 AD** Schreiner JA held at 353:

> *"It is enough for present purposes to say that the defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives."*

[14] This was not done in the present matter. I have considered all the pleadings, heads of arguments and authorities. The applicant failed to prove good cause for rescission.

[15] The order:

The application is dismissed with costs.

Judge Pretorius

Case number	: 22543/2011
Heard on	: 22 May 2013
For the Plaintiff	: Adv Mthimunye

Instructed by	: Vusi Mailula
For the Defendant	: Adv Oosthuizen
Instructed by	: Delport van den Berg INC
Date of Judgment	: 24 May 2013