

REPUBLIC OF SOUTH AFRICA



NORTH GAUTENG HIGH COURT

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

7/11/13

Case no:A196/13

In the matter between:

CHC ADMINISTRATORS (PTY) LTD

APPELLANT

AND

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

07/11/2013

ABSA BANK LIMITED

RESPONDENT

JUDGMENT

BAQWA J; MANAMELA AJ

- [1] This is an appeal against the judgment of the learned Magistrate Windell delivered on 17 January 2013 in terms of which the honourable Magistrate

dismissed the appellant's application for rescission of the interim attachment order, final order and default judgment with costs.

- [2] The grounds of appeal are outlined in the Notice of Appeal dated 8 February 2013.

Background

- [3] The appellant and the respondent entered into a credit agreement on 5 December 2008 in terms of which the respondent sold or leased to the appellant an aircraft, a 1982 Piper PA34-220T.
- [4] The aircraft was duly delivered to the appellant as per the agreement.
- [5] According to the respondent, the applicant fell into arrears with the monthly instalment paid terms of the agreement. As at 5 April 2011 appellant was in arrears to the tune of R97, 224.68.
- [6] According to respondent's calculations, as at June 2012 the appellant was in arrears with payments in the amount of R192,328.88 and the total indebtedness to the respondent amounted to R619,458.18.
- [7] A further calculation indicates that appellant effected subsequent payments and reflects arrears as R233,387.45 and the total outstanding balance as R534,751.27 as at 12 October 2012.

- [8] Respondent instituted litigation as a result of appellant's breach and on 4 May 2011 was granted an order by Magistrate's Court Potchefstroom, a **rule nisi** returnable on 18 July 2011 on which date appellant was afforded an opportunity to submit reasons why an interim order for the return of the aircraft to the respondent should not be made final.
- [9] On 18 July 2011 and in the absence of an appearance for the applicant a final order was granted by the Magistrate's Court. The order was served at the appellant's registered address being 12 Strydom Street, Bailey Park, Potchefstroom, by the Sheriff on 9 May 2011.
- [10] Further respondent issued summons out of the Magistrate's Court on 4 May 2011 in order to quantify its damages. This was done subsequent to the repossession of the aircraft by respondent.
- [11] Despite proper service, appellant did not enter appearance to defend and default judgment was granted on 10 October 2011.
- [12] Rule 49(1) provides as follows:
- "A party in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings for the rescission or variation of the judgment and the court may upon good cause shown, or if it is satisfied and there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that 20 days' period shall not be applicable to a request for decision or variation of judgment brought in terms of subrule (5)."*

[13] It is also essential to take cognisance of the provisions of Rule 49(3):

"Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim."

[14] The process issued by respondent, served by the Sherriff, was served at 12 Strydom Street Bailey Park, Potchefstroom being the registered address of the appellant.

[15] One of the appellant's directors, Joubert contends that approximately two years prior to the disposing to the founding affidavit the appellant's bookkeeper, who was not named in the said affidavit relocated to 10 Du Plooy Street, Potchefstroom. No confirmatory affidavit however was annexed in this regard to appellant's founding papers. Appellant states that the said bookkeeper neglected to amend the appellant's registered address.

[16] This averment by Joubert however contradicts the portion of her affidavit which she refers to the appellant's registered address as 12 Strydom Street, Bailey Park, Potchefstroom. This affidavit was deposed to by Joubert on 18 September 2012.

[17] This is a significant contradiction on Joubert's part because it leads to the inference that the registered address of the appellant had not changed. This is exacerbated by the fact that no CIPRO documents were annexed by appellant to its founding papers to clarify the change of address.

- [18] In **Pountas Trustee v Lahannes 1924 WLD 67 at 68** the law in this regard was stated as follows:

"An applicant must stand or fall by his petition and the facts alleged therein and though sometimes it is permissible to supplement the allegations contained in the petition still the main foundation of the application is the allegation of the facts stated therein because those are the facts which the respondent is called upon either to affirm or deny."

Given the fact that the averments by Joubert were made in appellant's founding papers, under oath, the contradiction cannot but weaken appellant's case regarding proof that appellant was not in wilful default.

- [19] Further, in this regard, Joubert states in her affidavit:

"4.10.2 The applicant only became aware of the existence of the respondent's action and application under discussion on 27 August 2012, being the date on which I consulted with the applicant's attorney..."

- [20] This is directly contradicted by an email sent by Freda Uys, a representative of the attorneys of the respondent on 17 June 2011 stating that the Sheriff was going to attach and remove the aircraft. Yet, despite that knowledge no action was taken by the appellant and its directors. This is yet another indication of wilful default by the appellant.

- [21] Another requirement which appellant had to meet is to prove the existence of a **bona fide** defence.

- [22] Even though appellant states that she is not in arrears with payments, Joubert had made an admission to the contrary to a representative of the respondent.

She had admitted to N. Zondo on 19 July 2011 that the arrears amounted to R173,379.00.

[23] As a result an offer to pay an extra R17,000.00 a month equating to a total payment of R40,000.00 a month which would have the result that the arrears would be caught up in nine months.

[24] Appellant avers that she has already paid a total amount of R509,088.72 but annexes no documentary proof of payments that were made in order to substantiate that averment.

[25] In **Standard Bank of South Africa Ltd v Roestof 2004(2)SA 492(W)** the defendant was confronted with an application for summary judgment based upon a mortgage bond. After considering the defendant's affidavit resisting summary judgment, the court held that the defence deposed to by the defendant was one of compliance with his obligations, which would be a good defence to the plaintiff's claim, if it were properly substantiated at (499A). The court went on to say the following:

However, no details are furnished relating to:

- (i) What were the bond payments which the defendant alleges were made by him and how were they made up i.e to whom and what manner was payment made ?
- (ii) When and where and in what form were such payments made ?
- (iii) When and where and with whom on behalf of the plaintiff bank were the arrangements referred to by the defendant made and the agreement arrived at (499B-C).

[26] The learned authors Jones and Buckle in **The Civil Practice on the Magistrate's Courts in South Africa**. 10th edition, volume 2, the Rules at page 49-6 state the following:

"The sub-rule imposes on the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for rescission."

[27] Joubert's averments on behalf of the appellant flies in the face of documented averments by respondent setting out the chronology of payments and history of non-payments and finance charges applicable to the repayment of the principal debt from December 2008 to June 2012. She also fails to address the issue 18 payment rejections which date back to February 2009.

[28] Having considered the facts, the requirements of Rule 49, the law as stated in the decided cases I have come to the conclusion that the appellant failed to make out a case for rescission as prayed in the Notice of Motion. More particularly, appellant failed to prove a **bona fide** defence to respondent's claim.

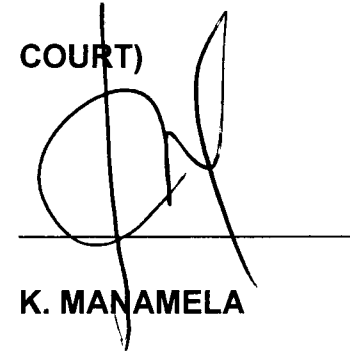
[29] In the result, I propose that the following order be made:

The appeal is dismissed with costs.



S.A.M BAQWA

(JUDGE OF THE HIGH
COURT)



K. MANAMELA

(ACTING JUDGE OF
THE HIGH COURT)

I agree.