

Case number 690/11

20/8/2012

Applicant

(1) WHICH EVER IS NOT APPLICABLE
 (2) UNUSABLE METHOD
 (3) OF INTEREST TO OTHERS (AND OTHERS)
 (4) REVENUE
 (5) (PTY) LTD
 DATE 17/08/2012

Respondent

BAM AJ

1. On 6 January 2011 the respondent issued summons against the applicant, claiming the return of a motor vehicle, a 2008 Toyota Quantum Sesfikile mini bus. On 10 May 2011 default judgement was granted in this Court against the applicant. Subsequently, on 25 November 2011, the vehicle was attached by the Sheriff on behalf of the respondent.
2. The applicant now applies for the rescission of the said default judgment and the warrant for the attachment of the vehicle. This application is linked to an application for condonation of the late filing thereof as a result of the situation that the applicant did not lodge the application for the rescission within the prescribed time of 20 days, as provided by Rule 31(2)(b) of the Rules of Court, after becoming aware of the judgment. The applicant averred that he became aware of the judgment when the vehicle was attached by the Sheriff on 5 December 2012. The application for rescission was issued on 6 January 2012. The applicant blamed his legal representatives for the delay.

3. During November 2008 the applicant purchased the motor vehicle in question from a business trading as *DEMO CARS*. The vehicle, save for a deposit of R50 000 00 by the applicant, was financed by the respondent. The applicant stated in paragraph 10.1 of his founding affidavit that he duly signed the credit application "*after having satisfied myself of the contents thereof*". The applicant later on in his affidavit, amongst others, disputed that he knew what the contents of the credit agreement were, claiming that it was not explained to him, that he did not read it, and that blank spaces have been filled in subsequent to his signing of the agreement. This latter statement by the applicant is contradictory to the contents of par 10.1. Mr Mahlangu, appearing for the applicant, was unable to advance any explanation for this discrepancy.
4. It was further stated by the applicant, apparently a taxi owner, that he duly paid the installments until the middle of 2010 when he started to experience financial problems. During July 2010 he approached a debt counsellor. Due notice of this application was forwarded to the applicant. The applicant alleges that the respondent did not respond to the said notice. On 13 December 2010 the applicant received a notice in terms of the provisions of section 86(10) of the National Credit Act, no 34 of 2005 ("*NCA*"), addressed to him by the respondent. The notice (page 168), informed the applicant that his debt review, which commenced on 15 September 2010, was terminated in terms of section 86(10) of the NCA. It was also stated that the applicant was in arrears with his payments in the amount of R36 186 53. The applicant further declared that his debt counsellor instituted an application in terms of section 86(8)(b) of the NCA at the magistrate's office, Witbank. This application came before the magistrate's court on 29 September 2011 but was on that date postponed to 14 October 2011. On the latter date the matter was removed from the roll. No information exists as to what subsequently happened to the said application.
5. According to the applicant he paid the amount of R4779 00 to his debt counsellor for distribution to his creditors. In December 2011, this amount was increased to R6000 00 per month, upon request by his debt counsellor, which amount the applicant said he duly paid.

6. In an application of this nature the applicant has to advance good reason for his default. See **Harris v ABSA Bank Ltd t/a Volkskas 2006(4) SA 527 TPD**.

The applicant does not deny that the summons was served by having been affixed to the main door of his residence as reported by the sheriff in his return of service. The applicant however denies having ever laid hands on the summons. According to the applicant the summons must have been removed from where it was attached, either by an unknown person or blown away by the wind. Although this explanation is not entirely convincing, it cannot be rejected as untrue.

7. Turning to the question whether the applicant has a *bona fide* defense, the applicant relies on the following:

(i) That the respondent, the credit provider, contravened various provisions of the NCA by charging amounts not justified in law. The applicant indicated that he experienced difficulty regarding the computation and calculation of the amounts eventually claimed by the respondent. Pertaining to this issue it appears that the applicant not only had the opportunity to avail himself of the contents of the documents he signed, but that he in fact *satisfied* himself in that regard. The applicant's contention regarding the problem with the calculation and computation of the amount owed by him is without substance. The amounts complained about by the applicant are amounts that can be expected to be added to the capital amount of the purchase price of the vehicle in question. It includes amounts regarding value added tax, *on road charge*, number plates, a tracking device and a *vehicle sourcing fee*.

(ii) The applicant's reliance on the fact that he applied for debt review does not avail him. No proof exists regarding any payments to the respondent after the debt review application was lodged. It appears, in any event, that the applicant, without more, stopped paying any amount to the respondent. The applicant's claim that he paid an amount to the debt counsellor for distribution to his creditors do not relieve him from the *onus* to ensure that the money was in fact paid to his creditors, especially in view of the fact that the applicant apparently

did not react to the section 86(10) of the NCA notice received by him. The applicant was obliged to keep track of the situation regarding any payments allegedly made by him, especially in view of the contents of the section 86(10) notice. It is further clear that the applicant did not do anything about the debt review proceedings before the magistrate's court after the matter was removed from the roll on 14 October 2011.

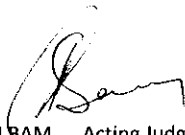
(iii) That the respondent failed to send a notice to the applicant in terms of the provisions of section 129 of the Act. In my opinion a notice in terms of section 129 is not required in circumstances where section 86(10) is applicable.

(iv) The contention that the respondent's particulars of claim are fatally flawed in that no allegation is made that sect 129(1)(a) of the Act has been complied with, is moot and need no further comment.

8. Accordingly, to my mind, the applicant does not have a *bona fide* defense to the applicant's claim and should therefore not succeed with the application for rescission of the default judgment in question.

ORDER

The applicant's application for the rescission of the default judgment dated 10 May 2011 is dismissed with costs.



A J BAM Acting Judge of the High Court

14 August 2012