FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

CASE NO. 4217/2011

In the matter between:

BUSISIWE MKENTANE	**APPLICANT**
and	
THE MOTOR FINANCE CORPORATION (PTY) LTD t/a MFC	**RESPONDENT**
IN RE	
THE MOTOR FINANCE CORPORATION (PTY) LTD t/a MFC	**PLAINTIFF**
and	
BUSISIWE MKENTANE	**DEFENDANT**

CORAM:	NAIDOO, AJ
HEARD ON:	2 FEBRUARY 2012
DELIVERED ON:	16 MARCH 2012

NAIDOO AJ

[1] This is an application for rescission of a default judgment granted against the applicant on 27 October 2011. The applicant also seeks the setting aside of a warrant for

the delivery of goods, issued on 3 November 2011 and a costs order against the respondent.

[2] The applicant entered into an instalment sale agreement (the agreement) with the respondent in terms of which she purchased a motor vehicle, which was delivered into her possession. The applicant failed to make due and punctual monthly payments in accordance with the agreement. The applicant applied for debt review in terms of the National Credit Act 34 of 2005 (the NCA), but after effluxion of the time periods allowed in the NCA, the respondent terminated the debt review process in terms of section 86(10) of the NCA, and instituted action against the applicant for, amongst other things, confirmation of the cancellation of the agreement, the attachment of the motor vehicle and leave to apply for damages, if necessary.

[3] Default judgment was granted against the applicant in this Division, and a warrant for delivery of goods was issued as indicated in paragraph [1] above, causing the applicant to launch this application.

[4] It is common cause that the agreement cites the respondent as indicated above. It is also common cause that the heading of the summons cites the respondent in the same way, namely *"The Motor Finance Corporation (Pty) Ltd t/a MFC"*, whereas in the body of the summons and particulars of claim, the respondent is cited as *"The Motor Finance Corporation (Pty) Ltd t/a MFC, a division of Nedbank Limited"* . It is furthermore not disputed that the notice in terms of Section 86(10) of the NCA also cites the respondent as a division of Nedbank Limited.

[5] The applicant contends that in view of the respondent and Nedbank Limited (Nedbank) being separate legal entities with "separate and distinguishable legal personae", the respondent cannot be a division of Nedbank. She consequently contends that she did not enter into the agreement with the entity described as "*Motor Finance Corporation t/a as MFC, a division of Nedbank Limited*". It is also the applicant's case that the agreement is subject to the NCA and that the respondent, prior to instituting action against her, did not

comply with section 129 of the NCA after delivery of the notice in terms of section 86(10) of the NCA. In the circumstances, the applicant contends that the default judgment ought not to have been granted against her. The applicant, furthermore, raised a point *in limine*, disputing the authority of the deponent to the respondent's opposing affidavit to depose to such affidavit. She contended that there is no resolution of the respondent company granting such authority to the deponent, Mr Van Rooyen, to oppose the application.

[6] The respondent's answer to the applicant's contentions is that Nedbank acquired the assets of Imperial Bank which had previously entered into a Master Discounting Agreement (MDA) with Motor Finance Corporation (Pty) Ltd t/a MFC (MFC). Thereafter Nedbank, Imperial Bank and MFC entered into an Addendum to the MDA, in terms of which Nedbank became a party to the MDA, acquiring the rights and obligations that Imperial Bank had in respect of MFC, and which were ceded to Nedbank by Imperial Bank. Nedbank successfully applied to the Registrar of Banks for

- transfer of the assets and liabilities of Imperial Bank to Nedbank,in terms of section 54(1) of the Banks Act 94 of 1990
- use of the names and brands currently used by Imperial Bank, in terms of section 22 of the Banks Act, which Nedbank was permitted to use in conjunction with its registered name, pending full implementation of Nedbank's revised brand strategy. These names include "Imperial Bank", "Motor Finance Corporation" and "MFC"
- restructuring of the companies within the Nedbank group, in terms of section 55 of the Banks Act.

In the circumstances the Respondent contends that it has *locus standi* to pursue this action against the applicant.

[7] The respondent also raised as a point *in limine* that the applicant's founding affidavit was not signed by the applicant or commissioned in terms of the provisions of Government Gazette No. R 1258 of 21 July 1972. In her answering affidavit, the applicant explained that due to an oversight by a first year law student who was

temporarily employed by the applicant's legal representatives, an unsigned copy of the papers was served on the respondent's legal representatives. The papers in the court file were properly signed and commissioned. This point was not pursued by the respondent and it need not detain us further.

[8] In answer to the applicant's contention that Mr Van Rooyen lacked authority to oppose the application, a confirmatory affidavit was handed up at the commencement of the hearing of this matter. Mr Van Rooyen alleges that as Legal Manager of the Respondent, he is mandated to authorise High Court applications and to sign affidavits on behalf of the respondent. He is therefore authorised to oppose this application. Mr Van Rooyen further alleges that his mandate is contained in a document titled "Collections and Recoveries Mandates" dated 22 February 2011. Attached to his confirmatory affidavit was one page titled "Collection and Recoveries Mandates, Legal, Asset Disposal, BDWO, OPS, NCA. Beneath that is a grid reflecting various job titles, with signatures and

dates under each job title. The identities of the various signatories do not appear on this document.

[9] Not surprisingly, the applicant objected to this annexure to the confirmatory affidavit, arguing that it gives no insight into what it purports to be and that the grid, with the information I have alluded to, is meaningless. It cannot therefore, be regarded as authority for Mr Van Rooyen to oppose this application.

[10] I will deal with this aspect first. A similar point was raised in the matter of **Unlawful Occupiers, School Site v City of Johannesburg 2005(4) SA 199 (SCA),** where it was contended that the municipality had failed to prove that the deponent to its founding affidavit had the necessary authority to institute the application on its behalf. The learned judge, Brand JA, in holding that this issue had been decided conclusively in the case of **Eskom v Soweto City Council 1992(2) SA 703 (W),** cited with approval the dicta of Fleming DJP (as he then was) at page 705 D-H:

"The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried out in his name. His signature to the process, or when that does eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney....

The developed view, adopted in court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1)"

The learned judge Fleming DJP continues at page 706 B-D:

"If the applicant had qualms about whether the "interlocutory application" is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority".

[11] The **Eskom** case was also referred to in **Ganes and another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA)**, which Mr Tsangarakis, for the applicant, referred me to. In **Ganes**, the learned judge Streicher JA said at page 624 I-J, and 625 A

"In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so followed".

I also align myself with the dicta in the Eskom case. If the applicant in this matter wished to challenge the authority to oppose this application, she ought to have availed herself of the procedure prescribed in Rule 7 of the Uniform Rules of Court. In my view, it does not assist her to attack the authority of the deponent, Mr Van Rooyen, to oppose this application

[12] I turn now to the issue of whether the citation of the respondent in the summons relevant to this matter is fatal to its case. The respondent did indeed attach a number of what appear to be complicated contracts and documents to its opposing affidavit. To my mind

the purpose of these documents is to draw the court's attention to the fact that there has been a transfer of assets and liabilities as well as rights and obligations from Imperial Bank and MFC on the one hand to Nedbank on the other. The respondent says, in so many words, that this is in fact what transpired. The court is, furthermore, indebted to Ms De Kock for her heads of argument in which she gives a useful exposition of the provisions of the Banks Act, which regulates the transactions between Nedbank, Imperial Bank and MFC. It is common cause that MFC and Nedbank are two different entities with separate legal personae. Once Nedbank became a party to the MDA, it took the place of Imperial Bank and therefore acquired the rights of MFC, effectively divesting MFC of such rights.

[13] While Nedbank may have been granted authority, in terms of the Banks Act, to "use the names and brands currently used by Imperial Bank, in conjunction with its registered name, pending the full implementation of Nedbank's revised brand strategy", it is not clear

whether "use" can be interpreted to include instituting legal action for the enforcement of its rights. My view is that it is doubtful that the meaning of "use" can be extended that far, as "brand strategy" would seem to suggest marketing and strategically positioning the Nedbank brand in the relevant market. It is, however, not for this court to traverse this issue.

[14] It would appear to me that Nedbank's acquisition of MFC's rights would require it to institute any legal action to enforce such rights in its own name, and not in MFC's name. While it has not been specifically raised in the papers before court that the contract which MFC entered into with the applicant, and in terms of which it acquired certain rights and obligations, is subject to the MDA, it would appear that this is in fact the case. In the circumstances, Nedbank would have acquired those rights and obligations, and the summons in this matter may well have had to be issued in Nedbank's name.

[15] The requirements of Uniform Rule 31(2)(a) are:

(a) The applicant must give a reasonable explanation of his default and if it appears that his default was wilful or that it was due to gross negligence, the court should not come to his rescue.

(b) The applicant must be bona fide in bringing the application for rescission and must not make it with the intention of merely delaying the plaintiff's claim.

(c) The applicant must, set out a prima facie defence, which if established at the trial, would entitle him to the relief he seeks. The applicant is not required to deal fully with the merits of his defence, but should provide sufficient detail to convince the court that the probabilities favour his case. (See **Grant Plumbers (Pty) Ltd 1949(2) SA 470 (O); Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003(6) SA 1 (SCA) at 9 D-E).**

[16] The applicant has tendered an explanation for her default in this matter and I am satisfied that her default was not wilful or due to gross negligence. Apart from

putting the applicant to the proof of her averments in this regard, the respondent does not seriously take issue with the explanation tendered by the applicant. The issues raised by the applicant require ventilation and tend to indicate that her intention is not to delay the claim of the respondent. With regard to the defences raised by the applicant, it is noteworthy that she is of the view that Nedbank does not have *locus standi* in this matter. It must be remembered that the agreements and contracts attached to the respondent's opposing affidavit were not within the applicant's knowledge at the time she deposed to the founding affidavit, and were not brought to her attention prior to the filing of the opposing affidavit. In view of Nedbank's status as a result of the agreements between it and Imperial Bank, and in view of what I have said in paragraphs [12], [13] and [14] above, I am satisfied that the applicant has an arguable case and that if she is able to establish that the plaintiff as cited in the summons has no *locus standi*, she will be entitled to the relief she seeks.

[17] In view of what has been said, it is not necessary for me to deal with the applicant's contentions with regard to the respondent's non-compliance with the NCA.

[18] I, accordingly, make the following order:

1. The default judgment granted by this court on 27 October 2011 is hereby rescinded;
2. The warrant for delivery of goods issued on 3 November 2011 against the movable property, namely a 2005 Volkswagen City Life 1.6 with engine number AFX077220 and chassis number AAVZZZ17Z5U024221 is set aside;
3. The respondent is ordered to pay the costs of this application on a party and party scale.

NAIDOO, AJ

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