5/3/09

NOT REPORTABLE

HAAL DEUR WAT NIE VAN TOEPASSING IS NIE

(1) RAPPORTEERBAAR: ~~JA~~/NEE.

(2) VAN BELANG VIR ANDER REGTERS: ~~JA~~/NEE.

(3) HERSIEN.

5 March 2009
DATUM

HANDTEKENING

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 45595/2007

In the matter between:

MANDA WEBSTER CHARLES Applicant

And

BMW FINANCIAL SERVICES (SA) (PTY) LTD Respondent

JUDGMENT

LEDWABA, J

[1] This is an application for the rescission of the judgement granted against the applicant in the amount of R 444 642, 68 and R 507 629, 46 plus interest. Applicant was ordered to pay costs on attorney and client scale.

[2] The applicant alleged that he has *bona fide* defences to the respondent's (plaintiff's) claims. The alleged defences are that the provisions of the **National Credit Act 34 of 2005**

(NCA), are applicable to the claims and that there was non-compliance with the provisions of the NCA.

[3] Applicant further alleged that he did not receive summons and he only knew about the claim for the first time on 2nd April 2008 when the sheriff attached his moveable properties at his house, house number 29 Bracelet Crescent, Sonheuwel, Nelspruit, his chosen *domicilium citandi ex executand.* Summons was served by affixing on 15th October 2007. He alleged that he knew about the summons, he would have defended the action. He therefore, did not wilfully fail to defend the action.

[4] He said immediately after the attachment, he consulted his attorneys in Nelspruit who informed him that they cannot assist him and would arrange another firm of attorneys to assist him. He waited for about two months for the particulars of the new attorneys who he consulted with on the 4th June 2008, the day on which the sheriff came to demand the goods but held the removal in abeyance.

[5] To prove his *bona fide* defence, he alleged in his affidavit that he sold his members interest in the first defendant to the fourth defendant on the 30th January 2007. In terms of clause 3.1.2 of the said sale agreement all risk and benefits were passed to the fourth defendant in the main action.

[6] He now wanted the judgement rescinded so that the first and fourth defendants who filed notices to defend the action

proceedings should indemnify him against the claim of the respondent herein (plaintiff in the action proceedings) and he also wanted to file a counterclaim against the said defendants.

[7] According to the particulars of claim, the instalment sale agreement between the respondent and first defendant was entered into on 25th January 2006 and 7th June 2006. The respondent further alleged in the particulars of claim that on 7th December 2006 first defendant signed a voluntary surrender cancelling the above instalment sale agreement been attached to the particulars of claim marked 'C'.

[8] The respondent recovered the vehicle, caused it to be valued and to be sold. Respondent claimed damages in the amount of R 444 642, 68 as calculated as per the statement of account annexed to the particulars of claim marked 'D'.

[9] In terms of annexure 'M' to the particulars of claim applicant signed as surety and co-principal debtor on 25th January 2006.

[10] The applicant challenged the *locus standi* of the respondent to sue, the lawfulness of the instalment sale agreement, the validity of the surrender document since the contents were not explained to him and that the accounts were not properly calculated.

[11] After perusing the parties affidavits and the supporting documents, noting that applicant did not file any replying affidavit, I am satisfied and convinced that there is no merit in the issues raised by the applicant mentioned in the above paragraph.

[12] The summons was properly served. Applicant's explanation on the delay of two months before filing this application is not satisfactory and it weakens applicant's case.

[13] The issues raised by the applicant are too technical and cannot, in my view, pass the test of qualifying or constituting a *bona fide* defence.

[14] There is no merit on the issue concerning the sale of the applicant's members interest. The agreement cannot and should not prejudice the respondent's right to claim.

[15] On the papers before me, I am satisfied that there was a valid Instalment Sale Agreement between the respondent and the first defendant. The Personal Surety agreement is a valid and binding agreement. The Instalment Sale Agreement was legally cancelled. The respondent was therefore legally entitled to sell the vehicle.

[16] The parties further argued on the applicability of the **NCA**. After thoroughly considering the provisions of the **NCA** and the submissions made by the respondent's counsel, I am convinced that the provisions of the **NCA** are not applicable

since the credit agreement was lawfully cancelled, the vehicle was recovered and sold before the provisions of the **NCA** dealing with termination of agreement as set out in **sections 123, 129 and 130** came into force and effect.

[17] In exercising my judicial discretion the facts and circumstances of this case applicant has not proved that there is sufficient cause justifying the rescission of the judgement.

[18] **I therefore make the following order:**

(i) Applicant's application for the rescission of the judgement is dismissed with costs.

A. P. LEDWABA

JUDGE OF THE HIGH COURT

Date of hearing: 8 December 2008

Counsel for Applicants': Advocate J. P. F. De Klerk

Instructed by: Smit Jones & Pratt %: Hack Stupel & Ross Attorneys

Counsel for Respondent: Advocate B. K. Neveling

Instructed by: Du Preez's Attorneys %: Venter, Dupper & Smalman