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IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: 623/2011

Date heard: 23-01-2024

Date delivered: 24-05-2024

Reportable: Yes/No

Circulate to Judges: Yes/No

Circulate to Magistrates: Yes/No

In the matter between:

LETLHOGONOLO LAWRENCE KHATLHANE **Applicant**

Identity No: 7[...]

And

ABSA BANK LIMITED **Respondent**

t/a ABSA VEHICLE & ASSET FINANCE

REGISTRATION No: 1986/004794/06)

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. In this application for rescission, the applicant, Mr L L Khatlane, who appeared in person seeks an order in the following terms:

1.1 That the warrant of attachment be rescinded and the agreement between the parties be referred back to the debt counsellor;

1.2 That the attached vehicle be returned to the applicant;

1.3 Condonation for the late filing of the application; and

1.4 That the respondent be ordered to pay the costs of the application.

2. The application is opposed by the respondent ABSA Bank Limited.

<u>Background</u>

3. During June 2019 the parties entered into an instalment sale agreement in terms whereof the respondent sold to the applicant a Mahindra Pik Up vehicle of which the recoverable amount was calculated at R418 626, 48 payable by way of 72 monthly instalments of R5 743, 82.

4. The applicant fell behind with the payments on the vehicle and by August 2021 the arrears amounted to R30 294, 84.

5. On 24 August 2021 the respondent notified the applicant by registered mail, in terms of s129 (1) of this National Credit Act, 34 of 2005 (the Act), of his default and proposed *inter alia* that the applicant refer the credit agreement to a debt counsellor.

6. The applicant failed to respond to the s129(1) notice and on 27 September 2021 summons was served on the applicant whereby the respondent claimed *inter alia* confirmation of the cancellation of the agreement, an order authorizing the sheriff to attach, seize and hand over the vehicle and forfeiture of all monies paid to the respondent.

7. The applicant failed to file a notice of intention to defend and on 1 November 2021 default judgment was granted in favour of the respondent, by the Registrar.

8. On 18 January 2022 the vehicle was attached and removed from the applicant's possession.

<u>Condonation</u>

9. This application was filed on 15 March 2022 and served on the respondent's attorney on the same date.

10. The application was filed out of time. In his favour, and in the absence of an averment to this effect, I will assume that the applicant would at the latest have become aware of the judgment against him when the vehicle was attached on 18 January 2022. This would mean that he was at least one month late in bringing this application.

11. The reasons given by the applicant for the delay range from psychological problems which he suffered from during 2020 as a result of a failed marriage and the subsequent divorce action, to him being infected with the Corona virus during April 2021, which further exacerbated his psychological difficulties. In any event, the applicant explains that he had consulted with a certain Mr Lucas Ruiters, after the vehicle had been attached, who indicated that he would bring an urgent application for the recovery of the vehicle. Despite having paid Ruiters R1000, 00 for his services the urgent application was not forthcoming after 30 days. The applicant then approached a certain Mr Faniki Mothibi on 2 March 2022 to assist with his legal difficulties.

12. Mothibi assisted the applicant with correspondence to Kemp de Bruyn Inc., debt counsellors, whose role in this matter I will elaborate on shortly,

and the respondent's attorney in an effort to resolve this matter. After a week passed and with no feedback from the debt counsellor and the respondent's attorney merely acknowledging receipt of the correspondence and that it would be forwarded to respondent for its records, the applicant decided to bring this application for the rescission of the judgment. Mothibi, whom I understand is not an attorney but who according to the applicant is well known within the community for his *"strong legal background in civil litigation"*, assisted in drafting the application papers, for a fee.

13. I am of the view that in these circumstances the delay in bringing this application was not intentional or in any way *mala fide*. The mistake made by the applicant was to seek legal advice from persons who are not attorneys. The respondent does not oppose the application for condonation. In the interests of justice and in order to bring finality to this matter, which has been postponed on four previous occasions, condonation is granted.

<u>Merits of the application</u>

14. In an application for rescission under Rule 31 an applicant is required to (i) give a reasonable explanation for his default; (ii) the application must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim; and (iii) he must show that he has a *bona fide* defense to the plaintiff's claim.

15. The applicant's main submissions can be summed up as follows:

    15.1 During April 2021 he found himself in financial difficulties and applied to the debt counsellor for debt review as envisaged in s86 of the Act.

15.2 On 28 April the applicant received an e-mail from the debt counsellor that the application for debt review had been accepted and that in order for it to be made an order of court he had to sign and have commissioned a confirmatory affidavit. The e-mail which is annexed to the papers specifically mentions that *"without your affidavit, your application cannot proceed to court and your creditors may proceed to take steps against you."*

15.3 Significantly the correspondence from the debt counsellor does not reflect the respondent as one of the creditors whose credit agreement with the applicant was reviewed and due to be subjected to a debt re-arrangement plan.

15.4 The applicant submitted that he had indeed included the respondent as a credit provider in his application for debt review but that for some unknown reason his obligations to the respondent did not form part of the process of debt review and re-arrangement. As a result he refused to have the confirmatory affidavit in support of the debt re-arrangement application signed and commissioned.

15.5 After he received the s129 (1) notice on 24 August 2021 he forwarded the notice to the debt counsellor by e-mail, however the debt counsellor failed to amend the creditors list or to provide the applicant with an amended confirmatory affidavit. Applicant failed to annexe a copy of this e-mail to his papers.

15.6 What is attached to the applicant's papers is an e-mail sent to the respondent's attorneys on 27 August 2021 querying the arrears as mentioned in the s 129(1) notice.

15.7 From the annexures attached to the applicant's founding affidavit, it appears that he also emailed the s129 (1) notice to Mothibi on 3

September 2021. Thereafter and on 30 September 2021 the applicant sent another e-mail to Mothibi, informing him that he will send him a copy of the summons on the following day.

15.8 No further correspondence occurred between the applicant and the relevant parties until after the attachment of the vehicle.

15.9 The applicant in essence blames the debt counsellor and the respondent's attorneys, who he claims colluded against him in order to effect the attachment of his vehicle.

15.10 He submits that he has a *bona fide* defense in that the debt counsellor and/or the respondent manipulated the debt review system and thereby denied him the legal protection afforded by s129 of the Act.

16 What is evident from the above exposition of the applicant's case is that there is no explanation as to why the applicant failed to enter an appearance to defend the action except for general averments of stress and him not being in a proper state of mind. This did not however prevent the applicant from sending the summons to Mothibi as mentioned in paragraph 15.7 above. From the lack of a reasonable explanation for his default I can come to no other conclusion but that it was deliberately done.

17 Willful default is however not necessarily a ground for the refusal of an application for rescission of judgment. In *Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA s27 (TPD)* Moseneke J as he then was, stated the following at paragraph 10 of the judgment:

"[10] A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven,

look at the adequacy or otherwise of the explanation of the default or failure in isolation.

'Instead, the explanation, be it good bad, or indifferent, must be considered in the light of the nature of the defense, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole."

De Witts Auto Repairs (Pty) Ltd v Fedgen Insurance Co Ltd (supra) at 711D."

18. It follows that the next issue which need to be discussed is whether the applicant has shown good cause in bringing this application. In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352 the Appellate Division held that good cause included the existence of a substantial defence.

19. In this regard it is significant that the applicant does not dispute that he had fallen into arrears with the payment of the instalments on the vehicle. He does therefore not dispute that he has breached the terms of the agreement entered into with the respondent. The defence raised i.e. that the debt councellor and/or the respondent colluded to deny him his rights in terms of the Act is not supported by any documentary evidence or correspondence to that effect. Conspicuous by its absence, amongst the annexed medical certificates and e-mails between the applicant and the respondent and/or its attorneys and between him and the debt counsellor, are the e-mails/correspondence relating to his application for debt review, which would according to him have included the respondent as a creditor, his alleged e-mail to the debt counsellor which would have shown that he had requested the agreement with the respondent to be subjected to debt review after receipt of the s129 (1) notice or any correspondence with the respondent's attorneys relating to him having applied for debt review within the period referred to in the s129 (1) notice.

20. In my view the applicant has failed to show that he has a *bona fide* defence. That being said, an application for the rescission of the default judgment should be refused.

21. It will be noted that the applicant, in his Notice of Motion, asks for the warrant of attachment to be set aside. I have dealt in some detail herein with the requirements for the rescission of a judgment because the applicant as a layperson (as well as his advisor) does not seem to appreciate the distinction and refer interchangeably in the founding affidavit to rescission of the judgment and rescission of the warrant. The respondent was alive to this inconsistency and wisely addressed both issues in its answering affidavit and the Heads of Argument.

22. The relief sought in the Notice of Motion, i.e. the setting aside of the warrant of attachment, would not be competent in the absence of an order rescinding the judgment. An order setting aside a warrant of attachment can be made where it can be shown for instance that the warrant is formally defective or where the judgment has been satisfied by payment, in which case the applicant bears the burden of proving such payment. No case has been made out for such an order.

23. In the event, whether the application in fact is for a rescission of the default judgment or for the setting aside of the warrant of attachment, it stands to fail.

<u>Costs</u>

24. Mr Olivier who appeared for the respondent has urged that the applicant be ordered to pay the costs of this application on a punitive scale as a result of his lack of *bona fides* and his obvious attempts at frustrating the respondent's claim. Whilst I am mindful of the delay which this application has caused and the fact that on one previous occasion on 27 October 2023 the matter was postponed with an order that the applicant pay the

costs occasioned by the postponement on the attorney and client scale, I am however not of the view that the conduct of the applicant, in relation to this application, is sufficiently reprehensible to warrant a punitive cost order.

In the circumstances the following order is made.

a) The application for rescission is dismissed with costs on the party and party scale, such costs to include the wasted costs occasioned by the postponements on 7 October 2022 and 10 February 2023.

CC WILLIAMS
JUDGE

For Applicant: In Person

Respondent: Adv. J Olivier
Van De Wall Inc.