IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11897/2017

Date of Hearing: 04 September 2018

Date of Judgment: 11 October 2018

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

11-10-2018 .....

In the matter between:

BUSISIWE PORTIA MOLEFE **First Applicant**

REUBEN MOLEFE **Second Applicant**

And

FIRSTRAND BANK LIMITED t/a WESBANK **Respondent**

JUDGMENT

MASHILE J:

INTRODUCTION

[1] The applicants are husband and wife and are married in community of property. The First Applicant and the Respondent concluded an instalment sale agreement in terms of which the latter financed the First Applicant to purchase a Mercedes Benz A180 Elegance A/T motor vehicle ('the Motor vehicle'). Following the First Applicant's breach of the terms of the instalment sale agreement, the Respondent obtained judgment against the Applicants on 27 July 2017 and thereafter a warrant for the delivery of the Mercedes Benz motor vehicle on 10 August 2017.

[2] It is the default judgment that the Applicants now seek to rescind on the basis that it was granted in error. Had the Respondent put all facts at the disposal of the Court, contend the Applicants, at the time of the hearing of the default judgment application, it would not have approved it. The application is thus brought in terms of the provisions of Rule 42(1)(a) of the Uniform Rules of Court. With the exception of the allegation that the Court granted judgment in error, the facts are largely common cause.

FACTUAL BACKGROUND

[3] On 27 April 2013, the First Applicant and the Respondent entered into the instalment sale agreement in terms of which the Respondent financed a transaction for the purchase of the motor vehicle by the First Respondent. The purchase price, monthly instalments and the arrears at the time when judgment was obtained by the

Respondent are not in dispute. The Applicants are also not denying that the First Applicant completed the different annexures mentioned in the answering affidavit of the Respondent.

ISSUES

[4] The issue for determination is whether or not in terms of the provisions of Rule 42(1)(a) or at common law, the Applicants have made a case for the rescission of the order.

THE RESPONDENT'S ASSERTION

[5] The forms were meant to elicit information from the First Applicant which, had they been answered correctly and honestly, would have assisted the Respondent to decide whether to finance the transaction or not . The respondent seeks the dismissal of the rescission application with costs. It asserts that the Applicants have not furnished satisfactory reasons why they could not enter an appearance to defend the action promptly.

[6] Furthermore, the order for the warrant of delivery and return of the motor vehicle were not erroneously sought or erroneously obtained. In addition, the Applicants have failed to make out a case for the rescission of the default judgment and the setting aside of the warrant for delivery. Moreover, the Applicants have failed to demonstrate that they have a defence to the Respondent's claims brought about by her breach of the instalment sale agreement.

[7] The Respondent believes that the launching of this application to rescind was enthused by a desire to thwart the execution of the relief granted to it by this Court. Prevention of the carrying out of the relief obtained means that the motor vehicle would not be sold and the whole process would, as such, be delayed. That conclusion is inescapable in view of the fact that the Respondent delivered its answering affidavit in February 2018 yet the Applicants would not set the matter down notwithstanding that the matter is before this Court at their instigation, concludes the Respondent.

APPLICANTS' ASSERTION

[8] The Applicants on the other hand have raised a few issues in an endeavour to show that they are entitled to a rescission of the judgment. The Applicants argue that the judgment was granted in error as the Court laboured under the impression that the Applicants had been properly notified of the application for judgment before the matter came to Court. For that reason, they claim that the judgment should be rescinded and set aside in terms of Rule 42(1)(a). In an attempt to show a bona fide defence, the Applicants contend that the Respondent advanced reckless credit to the First Applicant. In consequence, the Applicants should not have been held liable under the instalment sale agreement.

LEGAL POSITION

[9] Rule 42 provides that:

> '(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;.'

[10] The Applicant's reliance on Rule 42(1)(a) is premised on the contention that the order was erroneously sought and granted because service of the notice of application for default judgment was not effected on them. In this regard, this Court has been referred to the case of *Lodhi 2 Properties Investments CC v Bondev Development (Pty) Ltd* 2007 (6) SA 87 (SCA), where Streicher JA held that if notice of proceedings to a party was required but was lacking and judgment was given against that party such judgment would have been erroneously granted.

[11] Section 81(3) of the National Credit Act 34 of 2005 provides that 'a credit provider must not enter into a reckless credit agreement with a prospective consumer.'

[12] For a litigant to succeed with an application for rescission of judgment whether or not in terms of Rule 42(1)(a) or common law the following requirements must be satisfied:

12.1 Show good cause why the order should be rescinded;

12.2 Existence of a bona fide defence; and

12.3 The application must be bona fide and brought within a reasonable period.

[13] The approach that when an application is brought in terms of Rule 42 an applicant need not show good cause in order to succeed is not without qualification and this is evident from the attitude that the Supreme Court of Appeal adopted in *Colyn v Tiger Food Industries Ltd T/A Meadow Feed Mills Cape* 2003 (6) SA 1 (SCA) at para 5 – 7. To illustrate the point, it could be instructive to refer to the following passage uplifted from the case:

> '[5] It is against this common-law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced. The Rule caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the Courts a discretion to order it, which must be exercised judicially (Theron NO v United Democratic Front (Western Cape Region) and Others) and Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another.[6] Not every mistake or irregularity may be corrected in terms of the Rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law. That is why the common law is the proper context for its interpretation. Because it is a Rule of Court its ambit is entirely procedural.'

APPLICATION

[14] It is clear that the existence of a procedural irregularity does not robotically relieve an applicant of the duty of furnishing a reasonable and acceptable explanation for his default, showing that he has a bona fide defence with prima facie prospects of success and that the application is bona fide. The Applicants have not

made any attempt whatsoever to show good cause. This Court is in the dark why the Applicants failed to enter an appearance to defend. In the absence of that explanation, this Court has no choice but to accept that the Applicants deliberately failed to defend the action.

[15] The Applicants' reference to the case of *Lodhi 2 Properties Investments CC supra* is completely misguided. Rule 31(5)(a) is clear that where no intention to defend has been served, the applicant does not need to notify the respondent that he is applying for default judgment. This must be contrasted with a situation where the respondent has served a notice of intention to defend in which case the applicant would be obliged. The case mentioned by the Applicants concerns the latter situation. The application should therefore be dismissed on this ground alone.

[16] That said, there is authority that failure to show good cause can be excused provided there exist prospects that the applicant's defence in the main action will succeed. However, for reasons that will follow below, I do not believe that this is the case. I am therefore compelled to determine whether the defence of the Applicants is bona fide or not. If this Court was to grant the relief sought, it seems that the Applicants' defence will be that the Respondent advanced reckless credit to the First Applicant because it did not conduct due diligence to satisfy itself that the First Respondent was the right candidate deserving of the credit that it advanced to her.

[17] It is correct that Section 81(2)(a) of the National Credit Agreement 34 of 2005 requires the Respondent to conduct an assessment prior to advancing credit. There is no express let alone implied suggestion in the NCA that the Respondent was

under obligation to go beyond the information obtained at the assessment interview with the First Applicant to verify its veracity before approving the credit. If the Respondent took all reasonable precautions in the process of eliciting information from the First Applicant, as I believe it did, the Applicants cannot later turn around and blame it for advancing reckless credit.

[18] It is evident from the forms completed by the First Applicant that she consciously furnished misleading information with the objective of persuading the Respondent to grant credit to her. In this regard, it could be useful to scrutinise some of the information that she confirmed at the end of page 2 of Annexure 'A' to the answering affidavit. Of particular interest to this Court is her confirmation in subparagraphs E and F that she did not have any current debt re-arrangement in existence and that she has not previously applied for a debt re-arrangement respectively.

[19] When completing the customer application details, which is annexed to the answering affidavit as Annexure 'F', the First Applicant again confirmed that she was not under a debt rearrangement and that she had previously not applied for debt re-arrangement. The information supplied on Annexures 'A' and 'F' is manifestly incorrect. The First Applicant had been placed under debt review at the time, which had come into operation in 2011. So, contrary to what she states in subparagraph F and Annexure 'F', she has previously applied for a debt re-arrangement, hence she was placed under debt review in 2011.

[20] For proof of income, the Respondent obtained the First Applicant's pay slip. Thereafter, the First Applicant completed an affordability assessment form whose information was necessary to conduct an assessment for purposes of determining her eligibility to credit. One of the First Applicant's pay slips is dated 13 March 2013. According to that pay slip, the taxable earnings of the First Applicant amounted to R18 579.98 and the net pay to R18 899.44.

[21] The affordability assessment form describes the Respondent's calculation. It shows that the total net income as calculated by the Respondent amounted to R18 899.44. The calculations demonstrate that the First Applicant had monthly expenses of R10 718.52 and that she was then left with a difference of R8 123.92, which represented her monthly disposable income. On that calculation, the First Applicant could comfortably afford a monthly installment of R4 421.10.

[22] During argument in court, the Second Applicant argued that in its assessment of the First Applicant, the Respondent reflected him as an income earner when it was aware that the contrary was true. This contention must be rejected as bereft of any merit whatsoever. The name of the Second Applicant is cited merely to show that he is the First Applicant's husband and that they are married in community of property. There is no item to which financial responsibility has been assigned to him.

[23] Based on the above, prospects of success of the defence of the Applicants is bleak. Accordingly, it will not be sound to grant them the relief sought while it is unquestionable that their defence is untenable. Perhaps I should emphasize that the main hurdle for the Applicants was their failure to show good cause. I have stated

earlier that even if this Court was prepared to overlook that requirement, it would still not assist them because their defence is not sustainable.

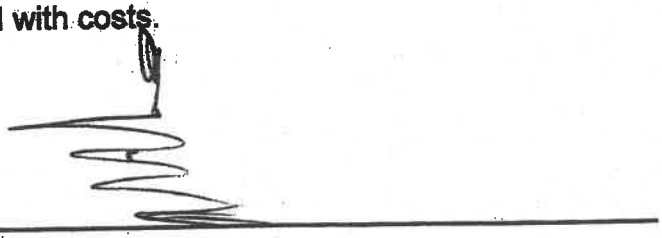
CONCLUSION

[24] Judgment was correctly sought and granted because the Applicants had breached the terms of the instalment sale agreement by failing to make monthly instalments. The Applicants have failed to show good cause why they failed to defend the case. Even if one were to excuse that shortcoming, their defence, for reasons stated above, is untenable. The application to rescind is not bona fide and has been launched mainly to delay or avoid the inexorable.

ORDER

[25] The application fails and I make the following order:

1. The application is dismissed with costs.



B A MASHILE
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

APPEARANCES:

For the Applicant: In Person

For the Respondent: Adv K Meyer
Instructed by: De Jager Kruger Van Blerk Attorneys