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

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

30/4/2019 .....
DATE SIGNATURE

CASE NO: 21522/2018

IN THE MATTER BETWEEN

H2 HOLDINGS (PTY) LTD t/a H2 AUTO	**1ST APPLICANT/ 1ST RESPONDENT IN THE MAIN APPLICATION**
OSUNDE AMBROSE	**2ND APPLICANT/ 2ND RESPONDENT IN THE MAIN APPLICATION**
AND	
REATILE ADELAIDE MAOTO	**RESPONDENT/APPLICANT IN THE MAIN APPLICATION**

JUDGMENT

SENYATSI AJ

[1] This is an opposed application for rescission of judgment granted by default against the Applicants on 10 July 2018.

[2] The brief background is that the Respondent was surfing the internet during January 2017 looking for a car and came across an advertisement on www.cars.co.za. She then called the second Applicant and obtained the details of the business address where she would come to view the car. The vehicle she was interested was an AUDI A3 1.4 TFSI stronic sunroof 2016("the vehicle") model which was represented to her to be in a good condition.

[3] She went to view the vehicle and became interested in the purchase thereof. The vehicle was presented to her as a 2016 model.

[4] The vehicle was fully funded by ABSA and little did she know that the vehicle had serious defects and that it had been written off by ABSA Short Term Insurance Company and sold by the latter to Salvage Management and Disposal ("the SMD").

[5] She obtained the AA report and vehicle check certificate from Audi Bruma Johannesburg. The latter confirmed that the vehicle was purchased on 30 November 2015 at Audi centre Pinetown. It is not

clear from the certificate what the odometer reading of kilometres covered was.

[6] The Respondent also averred that the vehicle was purchased as salvage due to an accident and sought and obtained default judgment against the Applicants.

[7] In their application for rescission of the judgment, the Applicants contend that when the vehicle was purchased, it was still under Audi motor-plan and under warranty. They furthermore contend that the vehicle had travelled less than 17 000km and that since it had been collected by the Respondent, it has accumulated 64 000km.

[8] They contend that the alleged damage was solely caused by the Respondent.

[9] They contend furthermore that they have bona fide defence to the claim. They contend that they knew about the action brought against them. The judgment came to their attention on 17 July 2018. They contend that judgment was obtained on the same date their legal representatives were instructed to oppose the application brought by the Respondent.

[10] The Applicants claim that they never received any default judgment application relating to this matter. The main application, so contend, the Second Applicant, was served on 48 Crozier Street Town-View, Johannesburg South whilst he alleges that he resides at 46 Crozier Street, Town View, Johannesburg South. I must state that from inspection of the return of service marked "R16" and annexed to the Respondents' opposing affidavit, the address of service is 46 Crozier street Town View, Johannesburg and service was personal to the Second Applicant. There can therefore not be any doubt that service was proper, contrary to what the Second Respondent contends.

[11] The only defence raised by the Applicants is that the vehicle was used for more than 15 months. The Applicants contend that the mechanical issues with the vehicle is due to what they call "warn out" which presumably means wear and tear. They contend that there was no life time obligation on the Applicants to ensure the vehicle sold to the Respondent shall not have mechanical issues in future.

[12] They further contend that the Respondent had incurred excessive travel kilometres on the vehicle for her own benefit.

[13] The issues for determination is whether the Applicants were in wilful default and whether they have a bona fide defence to the claim.

[14] Rule 31(5) (a) of the Uniform Rules of this Court provides as follows:

"(a) Whenever a Defendant is in default of delivery of notice of intention to defend or of a plea, the Plaintiff, if he or she wishes to obtain judgment by default shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a Defendant is in default of delivery of plea, the Plaintiff shall give such Defendant not less than 5 days' notice of his or her intention to apply for default judgment."

[15] It is trite that the Applicant for rescission of judgment must show good cause. One such element of good cause is that the Applicant was not in wilful default. (*See Maujean t/a Audio Video Agencies v Standard Bank of S.A Ltd 1994 (3) SA 801 (C) at 803J*).

[16] In consideration of the application for rescission, the Court looks at the reasons for the Applicant's default as one of the essential ingredients of the good cause to be shown (See *Harris v Absa*

Bank Ltd t/a Volkskas 206 (4) SA 527 (T) at 529(E-F). The wilful default on the part of the Applicant is not a sustentative or compulsory ground for refusal of an application for rescission.

[17] The wilful or negligent nature of the Defendant's default is one of the considerations which the Court takes into account in the exercise of its discretion to determine whether or not good cause is shown (See *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E) at 708G).*

[18] In Brown v Chapman 1928 TPD 320 at 328, the Court held that the reasons for the Applicant's absence or default must, therefore, be set out because it is relevant to the question whether or not his default was wilful. In Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A), it was held that the explanation for the default must be sufficiently full to enable the Court to understand and appreciate how it really came about, and to access the Applicant's conduct and motives. The application which fails to set out these reasons is not proper. (*See Marais v Mdowen 1919 OPD 34*). Where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle the Applicant to the relief sought.

[19] Before a person can be said to be in wilful default, the following elements must be shown:

(a) knowledge that action is being brought against him;

(b) a deliberate refraining from entering appearance, though free to do so; and

(c) certain mental attitude towards the consequences of default.

[20] The Applicant was held to be in wilful default where he was unable to instruct an attorney because of lack of funds (See *Bowes v Puinmick 1905 TS 156*), where he absented himself from trial after he had been notified of the date of trial (See *Newman (Pty) Ltd v Marks 1960 (2) SA 170 (SR)*; where he ignored summons served on him, despite advice to consult an attorney (See *Naidoo v Narainsamy 1956 (3) SA 223 (N)*).

[21] In Silber v Ozew Wholesalers (Pty) Ltd (supra), the Appellate Division held that "good cause" includes, but not limited to the existence of a substantial defence. *In Gaep v Saambon Bank Ltd; Smith v Saambon Bank Ltd 2002 (6) SA 346 (SE) at 349B-E* it was held that the requirements of good cause cannot be held to be satisfied unless there is evidence not only of the existence of a

substantial defence but, in addition of the bona fide presently held desire on the part of the Applicant for the relief actually to raise the defence concerned in the event of the judgment being rescinded. (See *Gaep v Tansley NO 1966 (4) SA 555 (C) at 560).*

[22] The analysis of the Applicants papers reveals that they were aware of the action against them. This is borne out by the evidence of the Second Applicant where he states that he was aware of the action. He, however, fails to provide any evidence as to the reason why the notice to oppose was not filed on time. The Second Applicant only claims in his founding affidavit that default judgment was entered on the date that instructions was given to his attorney to oppose. He offers not supporting affidavit by his attorney.

[23] Furthermore, the Second Applicant claims that the Notice of Motion was not served on him but at 48 Crozier Street, Town View, Johannesburg South whereas he resides at 46 Crozier Street, Town View, Johannesburg South. He fails to attach any return of service in support of his claim.

[24] In her opposing affidavit, the Respondent contends that the service was properly effected and was done so personally on the Second

Applicant. In support of her contention, she annexed the sheriff's return of service which confirms her claim.

[25] The analysis of the alleged bona fide defence claimed by the Applicants indicates, contrary to the founding papers of the Respondent in the main action, that they merely allege that the claims by the Respondent are verbal. Further to this, the Applicants contend that the motor vehicle has accumulated an additional 45 000km and this, so contend the Applicants, is the basis of their defence.

[26] The Applicants fail in their attempt, to show good cause on both the reasons for default well as the bona fide defence to the main claim.

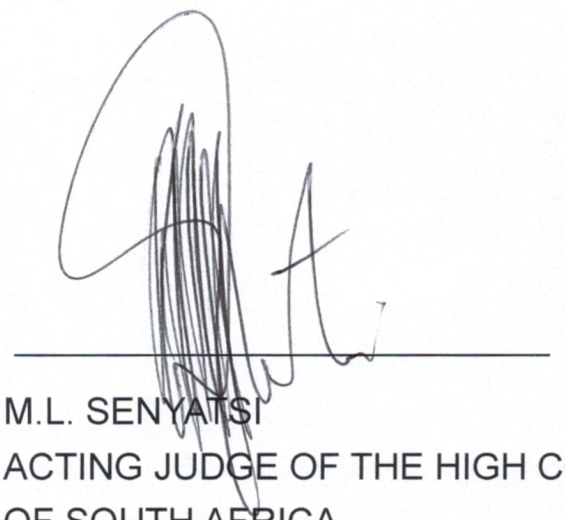
[27] Serious averments were made against them in the main application that this Court expected to have an answer to as a way of showing good cause for the relief sought. The Applicants have, in my views, failed dismally to show such good cause for such relief.

[28] Having regard to the evidence before me, I am not persuaded that a good cause for the relief sought has been shown. Consequently, the application for rescission must fail.

ORDER

[29] The following order is made:-

(a) The Application for rescission of judgment is dismissed with costs.



M.L. SENYATSI
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances:

Date of hearing : 30 January 2019

Date of Judgment : 30 April 2019

For the Applicant s	: Adv. M.S Naude
Instructed by	: Symes Inc Attorneys
For first Respondent	: Adv. Tsatsi
Instructed by	: JL Raphiri Attorneys Inc