IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2019/42590

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

DATE: 21 NOVEMBER 2022

In the matter between:

DOROTHY ZWANE	First Applicant
SANLAM TRUST LIMITED	Second Applicant
MERISE MONTEZ VAN WYK NO	Third Applicant

And

FIRSTRAND BANK LIMITED	Respondent

JUDGMENT

VILJOEN AJ

[1] This is an application for the rescission of a judgment granted by default against the first applicant on 7 September 2020. The default judgment in question confirmed the cancellation of an instalment sale agreement concluded between Mzwandile Sydney Zwane, the late husband of the first applicant, and the respondent. The order directed the first applicant to return the vehicle, the subject of the instalment sale agreement, to the respondent.

[2] The first defendant's husband passed away on 12 November 2018. The second applicant was appointed as the executor of the late Zwane's estate in terms of a joint will executed by the first applicant and Zwane. The third applicant was appointed executor as a nominee of the second applicant. By all accounts, neither the second nor the third applicant took any interest in these proceedings. Their joinder to the proceedings came about at the instance of the first applicant by way of an application for their joinder launched after the default judgment sought to be rescinded had been granted.

[3] The founding affidavit contains a prayer for the condonation of the late filing of the application for rescission. The notice of motion does not contain this prayer. Nevertheless, since the delay was not significant, and the respondent did not raise any prejudice there is no reason for me not to consider the merits of the application.

[4] The first applicant seeks the rescission of the default judgment relying on the provisions of Rule 31(2)(b). That rule permits the rescission of a judgment granted by default "*upon good cause shown*".

[5] To show good cause, it is trite, an applicant must:

5.1. give a reasonable explanation of her default;

5.2. show that she has a *bona fide* defence to the claim; and

5.3. show that the application is *bona fide* and not made merely to delay the claim.[1]

[6] It is equally trite that an applicant's explanation for her default must be sufficiently full so that the Court is able to understand how it came about and to assess the applicant's *bona fides*.[2]

The explanation for the default

[7] The summons was served on the first applicant on 12 December 2019. She does not dispute the service of the summons. The first applicant did not give notice of an intention to defend the action. She does not dispute her default.

[8] The first applicant explains that "*subsequent to receiving the summons from the Plaintiff [sic], same was sent to the executor of the estate*". The papers do not explain who sent the summons to the executor nor when this was done.

[9] It is apparent that the first applicant understood the significance of the summons. However, she professes a belief that the matters raised in the summons fell within the scope of the duties of the executor. Claims against her husband's deceased estate, so the first applicant states, had to be dealt with by the executor.

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1 *Grant v Plumbers* 1949 (2) SA 470 (O) at 476

2 *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A

[10] The first applicant states that she "*relied solely on the executor to handle any and all legal process pertaining to [her] husband's deceased estate*". The summons, however, is clear that the respondent's claims are against the first applicant. The founding affidavit indicates that she appreciated this.

[11] It is impossible to reconcile the first applicant's expressed belief that the summons had to be dealt with by the executor with her knowledge that the claims stated therein were against her.

[12] Be that as it may. The court is not told how the executor reacted to being sent the summons. The papers do not reveal any contact at all between the first applicant and the executor to discuss the content of the summons or the way forward.

[13] Thereafter, by her own account, the first applicant washed her hands completely of the matter. She took no further interest in the pending litigation, not even making the most superficial of enquiries from the executor on the status of the matter.

[14] In the heads of argument filed on behalf of the first applicant the following submission is made:

> "6.3 *The Executors [sic] of the estate wilfully, alternatively negligently failed to inform the [first applicant] of the progress of the matter, and furthermore failed to file opposing papers, or even inform the [first applicant] that their office would not be dealing with the matter."*

[15] This submission is founded on an unsubstantiated premise. The papers establish no grounds for any obligation on the executor to defend the matter

on the first applicant's behalf or to make reports to her. Moreover, to the first applicant's knowledge, by March 2020, the third applicant had indicated her intention to resign as executor.

[16] The founding papers underplay the significance of the executor's resignation. The first applicant dismisses the telephonic notification of the executor's resignation as "*incorrect and fraudulent*". This comment is unhelpful to the first applicant's cause. It is also entirely gratuitous, devoid of substance and quite frankly inappropriate. Fraud is a serious allegation and is, it must be remembered, not lightly inferred.[3]

[17] In the event, the respondent would not apply for default judgment until August 2020, some 6 months after the first applicant learnt of the executor's resignation. The first applicant did not avail herself of the reprieve the delayed application for default judgment afforded her, not to the extent of making the most basic of enquiries about the status of the matter. She does not explain her inaction.

[18] The first applicant instead chose to keep possession and use of the vehicle ignoring the fact that the vehicle was the subject of an instalment sale agreement, that the account was in arrears, that the respondent retained ownership of the vehicle, and that it demanded the return thereof. She was spurred into action only upon the sheriff taking possession of the vehicle on 20 October 2020.

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3 *Gilbey Distillers & Vintners (Pty) Ltd v Morris NO* 1990 (2) SA 217 (SECLD) at 226A

[19] The nearest the applicant's papers come to a justification for her continued default and her continued use of the vehicle is her stated expectation that the proceeds of a policy on the life of her late husband would cover all the debts of his estate. The papers do not advance this explanation beyond stating that the policy was never paid out and that the matter is pending before "the Ombudsman".

[20] I am unable to conclude from the aforesaid that the first applicant succeeded in providing a comprehensive and reasonable explanation for her default indicative of *bona fides*.

[21] I should mention that the first applicant introduced the content of the estate file kept by the Master of the High Court by way of an affidavit deposed to by her attorney and uploaded to CaseLines on 27 September 2022. There was an objection by the respondent to the admission of this affidavit, it having been filed out of time.

[22] Despite the respondent's objection, I considered the content of the affidavit file to determine whether any portion thereof could be of assistance to the first applicant's cause. I found most of it to be irrelevant to the matter before me.

[23] The affidavit, however, contains the letter of resignation from the second and third applicants dated 19 June 2020. The resignation letter describes the first applicant as uncooperative and disinterested in threatened legal action by creditors of the estate. In the concluding paragraphs, the writer states: "*She has advised that she wants nothing to do with us and that we should not ever contact her again otherwise she will open a case of harassment against us.*"

[24] These comments, if accepted as evidence of the truth thereof, are potentially further destructive of the first applicant's explanation for her default. They called for an explanation from the first applicant. Considering my findings about the cogency and acceptability of the first applicant's explanation for her default, the executor's comments about the first applicant's attitude and conduct may be disregarded without affecting the outcome.

Rule 31(2)(b) or Rule 42(1)(a)

[25] I indicated above that the first applicant based her application on the provisions of Rule 31(2)(b). In the argument before me, it was contended that the first applicant's *bona fide* defence lies in the fact that the judgment was erroneously sought or erroneously granted. The *bona fide* defence element of "*good cause*", so the argument went, is wide enough that an error in the granting or seeking of a default judgment is encompassed in the scope thereof.

[26] This seems to me to be an unnecessary conflation of two independent bases upon which a Court that would otherwise be *functus officio* can revisit a judgment.[4] Rule 31(2)(b) permits a Court to come to the aid of a judgment debtor who has a defence to the claim upon which judgment was granted but failed to avail herself timeously of the opportunity to defend such claim. Rule 42(1)(a) is an aid to a judgment debtor to rescind a judgment granted in her absence to which the judgment creditor was procedurally not entitled.[5]

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4 See also *Colyn v Tiger Food Industries Ltd t/a Meadow Geed Mills (Cape)* 2003 (6) SA 1 (SCA) at [8]: "*The trend of the Courts over the years is not to give a more extended application to the Rule to include all kinds of mistakes or irregularities."*

5 *Freedom Stationery (Pty) Ltd and others v Hassam and others* 2019 (4) SA 459 (SCA) at [18]

[27] The subsequent disclosure of a defence does not transform a judgment, which had been validly obtained, into an erroneous order.[6] Similarly, in my view, the fact that a default judgment was granted in error does not become a defence to the underlying claim.

[28] For purposes of this judgment, however, it is unnecessary to consider the notional existence and extent of overlap between Rules 31(2)(b) and 42(1)(a). As I shall point out, it is my assessment that the first applicant has shown neither a *bona fide* defence to the claim nor that the default judgment was granted in error.

No bona fide *defence*

[29] As the owner of the vehicle in question, the respondent is entitled to claim possession thereof. The first applicant may not withhold possession from the respondent unless she is vested with some right enforceable against the respondent.[7] Once the respondent establishes ownership and the first applicant's possession of its property, the onus rests on the first applicant to establish a right to continue to hold the property.[8] Neither the respondent's ownership nor the first applicant's possession of the vehicle is in dispute.

[30] The content of the founding affidavit dangles the first applicant between two conflicting propositions. She contends that she was not a party to the instalment sale agreement and ought thus never to have been joined to the proceedings. She, however, also appears to contend that she stepped into

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6 *Lodhi 2 Properties Investments CC and another v Bondev Developments* 2007 (6) SA 87 (SCA) at [27]

7 *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B-C

8 *Chetty v Naidoo* at 20C

the shoes of the Late Zwane and continued up to the repossession of the vehicle to make payment of the instalments, thus acquiring a right to possess and use the vehicle.

[31] Neither of these opposing propositions comes to the first applicant's aid. If she is not bound by the instalment sale agreement, she has no right to possession of the vehicle. If she is bound by the instalment sale agreement, the terms thereof must be applied to her.

[32] In terms of the agreement, the respondent is entitled in the event of a breach by the consumer either to claim immediate repayment of the outstanding balance or to take repossession of the vehicle. The failure to pay amounts due in terms of the agreement constitutes a breach.

[33] There is no dispute that the instalment sale account was in arrears at the date of judgment. The respondent did not claim damages against the first applicant. Therefore, the precise quantum of the arrears is immaterial to the default judgment that was granted. Once it is accepted that the account was in arrears, it must be accepted that the respondent acted within its rights to claim repossession of the vehicle. That the vehicle was "*close to being paid off*" establishes no right to retain possession. These are not proceedings for the execution of a judgment against a primary residence.

[34] I conclude therefore that the first applicant has shown no *prima facie* right to retain possession of the vehicle and, consequently, no *bona fide* defence.

Judgment not granted in error

[35] Turning then to the argument that judgment had been granted in error. This argument is premised on the misjoinder of the first applicant.

[36] In her heads of argument, the first applicant argues:

> *"6.5 The [first applicant] should not have been cited personally and or alternatively dealt with directly subsequent to the [respondent] being made aware that the deceased's estate is under administration.*
>
> *"6.6 The matter should accordingly be finalised between the Plaintiff and the executors of the estate."*

[37] These submissions might notionally assist the first applicant had the default judgment concerned contractual damages. It concerns, however, possession of the vehicle. Since the first applicant was in possession of the vehicle, she was the correct party from whom the respondent had to vindicate its property.

[38] There is no contention that the judgment was in some other respect irregular.

[39] In consequence, I find that the default judgment was not erroneously sought or granted.

Conclusion

[40] The application must therefore be dismissed.

[41] In the premises, I make the following order:

1. The applicant is dismissed.

2. The first applicant is ordered to pay the costs thereof.

H M VILJOEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 November 2022.

Date of hearing: 11 October 2022

Date of judgment: 21 November 2022

Appearances:

Attorneys for the first applicant: THABANG MASHIGO ATTORNEYS

Counsel for the first applicant: MS J D B THEMANE

Attorneys for the respondent: SMIT JONES & PRATT

Counsel for the respondent: MS K MEYER