



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

50025/2019

CASE NO:

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 15 DECEMBER 2022
SIGNATURE

In the matter between:

NELSON LOGISTICS CC

First Applicant

JOSHUA NELSON

Second Applicant

and

**FREIGHTLINER FINANCE AND INSURANCE
A DIVISION OF MERCEDES-BENZ FINANCIAL
SERVICES SOUTH AFRICA (PTY) LTD**

Respondent

Summary: *Application for rescission of judgment – service of the summons – claims for payment in respect of nine different instalment sale agreements in composite particulars of claim – service effected at the chosen domicile of five of those accounts – service of process in respect of all claims should have come to the notice of the*

defendant despite different domicile for four of claims – merits – despite payments been made in respect of some of the accounts unbeknown to cancellation thereof, they still remained in arrears – no defence demonstrated – default judgment correctly granted – no reply to answering affidavit in rescission application confirming all this – no good cause for rescission therefore shown – application refused with costs.

ORDER

The application is dismissed, with costs.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] The applicants are the judgment debtors of a vehicle financing company. They seek rescission of a default judgment granted against them on 12 September 2019 in respect of nine installment sale agreements.

Procedural background

[2] Freightliner Finance and Insurance, a division of Mercedes-Benz Financial Services South Africa (Pty) Ltd (Freightliner) obtained default judgment against Nelson Logistics CC (Logistics) and Mr Joshua Nelson (Nelson) on 12 September 2019. The causes of action were based on 9 instalment sale agreements and a deed of suretyship.

[3] The nine installment sale agreements featured as nine different claims, labelled alphabetically from claim A to claim I. They all relate to credit agreements in respect of large commercial vehicles purchased by Logistics and for which Nelson had signed surety. The agreements fall outside the ambit of the National Credit Act.¹

[4] In the default judgment, the cancellation of all the agreements was confirmed and Logistics was ordered to return all the vehicles. Freightliner was granted leave to approach the court on the same papers, duly supplemented, for orders of payment of the difference between the balances outstanding and the market values of the respective vehicles in the event of there being a shortfall after repossession and sale of the vehicles.

[5] At the time that summons was issued, Logistics was in arrears by some R700 000.00 and the total outstanding amount was R5 381 970.28.

[6] On 23 October 2019 the sheriff attended the business premises of Logistics in order to execute a warrant issued pursuant to the default judgment. This prompted Logistics and Nelson to launch an application for rescission of judgment on 15 November 2019.

¹ 34 of 2005

[7] Freightliner delivered its answering affidavit late, on 7 July 2020. Freightliner's application for condonation for this late delivery was not opposed. Condonation was accordingly granted.

[8] On 3 September 2021 Logistics and Nelson delivered a supplementary affidavit, "correcting" some errors in the founding affidavit and seeking to add new facts.

[9] After having given prior notice, the notice of motion in respect of the rescission application was amended by the complete substitution thereof on 4 October 2021.

[10] On 11 October 2021 Freightliner delivered its Heads of Argument.

[11] On 6 May 2022, Makhoba J set aside the applicants' supplementary affidavit as an irregular step.

[12] On 10 August 2022, Logistics and Nelson were ordered to deliver their Heads of Argument within 10 days from date of service of the order, which took place on 23 August 2022. The heads of argument were delivered on 13 September 2022, envisaging the delivery of a replying affidavit the next day. This never happened.

The merits of the rescission application

[13] In order to succeed with a rescission application in terms of Rule 31(2) (b), which is the rule applicable to this matter, an applicant must show "good cause".

[14] The requirements of "good cause" in the context of a rescission application are that:

- (a) *He (i.e the applicant) must give a reasonable explanation of his default. If it appears that his default was willful or that it was due to gross negligence the Court should not come to his assistance.*
- (b) *His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.*
- (c) *He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour'.²*

[15] Regarding the issue of willful default: service on Nelson took place by way of affixing at his residential address. He simply denied having received it. Logistics had a more technical approach. It had chosen No 1, 15 Froneman Street Kempton Park as its chosen domicile in respect of the agreements which formed the subject matter of claims A, E, F, G and H. This was never changed. In respect of the agreements which formed the subject matter of claims B, C, D and I, Logistics had chosen a different address, being one from which it later traded. Freightliner had been entitled to effect service of its summons at the first-mentioned address in respect of claims A, E, F, G and H. This is where service of the combined summons, containing particulars of all nine claims had been effected. Had separate summonses been issued in respect of each claim, there might have been more substance to Logistics' objection that service in respect of claims B, C, D and I were at an address not chosen in respect of those

² *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 - 477 cited with approval in numerous cases, listed in Footnote 7 on D1 - 366 of Van Loggerenberg (4ed), *Erasmus: Superior Court Practice*, 2nd Edition, vol 2.

claims as a domicile. Where the claims were all combined in a single summons, Logistics' objection becomes somewhat facetious when service in respect of five of the claims were proper. Therefore its lack of explanation for its default does not, in these circumstances, amount to a "reasonable explanation", as required.

[16] But that is not the end of the matter. Even if it were to be found that Logistics was not in willful default of defending the matter in respect of claims B, C, D and I, the issue of the existence of a *bona fide* defence still has to be adjudicated.

[17] Prior to the issue of summons, letters of demand, called "breach notices" were sent in respect of all the claims. These letters indicated that, in the event of arrears in each account not becoming settled within 10 days from the date of those letters, being 29 May 2019, the agreements would be cancelled and the vehicles be repossessed.

[18] According Freightliner, the arrears were not paid, resulting in summons being issued wherein notice of the vehicles was claimed.

[19] According to Logistics, it had, unbeknown of the summons, made payment in reduction of some of the claims. Even when these payments were allocated by Freightliner, all of the accounts in respect of all the claims were still in arrears at the time when summons was issued.

[20] Logistics has conceded that there were arrears in respect of claims A, D, E and I, but allege that the other accounts were not in arrears. The details of the accounts produced by Freightliner (which had not been placed in disputed by way of any replying affidavit) however indicated that all the accounts were in arrears at the time action was instituted, only accounts G and H were not in

arrears by the time judgment was granted and, by the time that the answering affidavit was deposed to, all the accounts were again in arrears.

[21] The fact that accounts G and H were not in arrears at the time of judgment, matters little, as they had previously been in arrears and in default of payment beyond the breach notices. This had resulted in those agreements also being cancelled by way of the summons. Subsequent payments might therefore reduce the liability of Logistics and the exposure of Nelson, but the right to cancel had already arisen and Freightliner's election had already been made by that time. The same applies to subsequent payments.

[22] Apart from these facts, no other bona fide defence had been made out on the papers. The proverbial "bottom line" is simply that Logistics had, by its own admission, fallen in arrears with its payments to Freightliner, resulting in the agreements being cancelled and, when payments were subsequently made, it was too little and too late.

[23] Neither Logistics nor Nelson have made out any other case satisfying the requirements of Rule 31(2)(b) as already referred to above. It must follow that the rescission application must fail. There is no cogent reason why costs should not follow the event.

Order

[24] The following order is granted:

The application is dismissed, with costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 8 November 2022

Judgment delivered: 15 December 2022

APPEARANCES:

For the Applicants: Adv Z F kriel
Attorney for the Applicants: Finck Attorneys, Pretoria

For the Respondent: Adv J Minnaar
Attorney for the Respondent: Hammond Pole Majola Attorneys,
Johannesburg
c/o NVG Attorneys, Pretoria