IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.
(3) REVISED.

DATE **SIGNATURE**

CASE NO.: 21195/2021

Date of hearing: 8 February 2023

Date of Judgment: 7 March 2023

In the application between:

LORRAINE MAPHAGE MADIHLABA Applicant

and

WESBANK (a division of FirstRand Bank Limited) Respondent

In re:

In the matter between:

WESBANK (a division of FirstRand Bank Limited) Applicant

and

LORRAINE MAPHAGE MADIHLABA Respondent

JUDGMENT

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1. This is an application for rescission of judgment. The applicant in the application for rescission of judgment is the defendant in the main action. The respondent in the application for rescission of judgment is the plaintiff in the main action. I shall refer to the parties as in the action:

   1.1. the plaintiff is Wesbank, being a division of FirstRand Bank Limited; and

   1.2. the defendant is Lorraine Maphage Madihlaba.

2. The plaintiff, the bank, premised on a breach of an instalment sale agreement, in respect of a Mazda CX-7 2.3 DISI Individual A/T (herein "the vehicle"), obtained default judgment on 1 September 2021, against the defendant, for termination of the agreement, the return of the vehicle and costs limited to R200 plus sheriff fees of R438.15.

3. Important for purposes of this decision, is that a further order was issued authorizing the plaintiff to apply in the same action, supplemented to the extent required, for judgment in respect of damages that the plaintiff may have suffered,

and further expenses incurred in the disposal of the vehicle. As things stand, no monetary judgment has been issued.

4. The defendant applies for rescission of the default judgment, premised on the provisions of Rule 31(2)(b), alternatively Rule 41(1)(a) of the Uniform Rules of Court.

5. At the hearing of this application for rescission of judgment, I requested the defendant's counsel, Mr. Mathopo, to indicate what the grounds would be for a rescission premised on the provisions of Rule 41(1)(a) which allows a rescission where an order or judgment is erroneously sought or erroneously granted in the absence of a party affected thereby. The defendant's counsel, well prepared, sought to convince the court that the judgment was erroneously granted premised on the following:

    5.1. the summons was not served upon the defendant, because it was served, so the argument went, outside the hours by which a sheriff is allowed to serve court documents in conflict with the provisions of Rule 4 of the Uniform Rules of Court.

    5.2. as such, he argued that the service is void or defective, and the consequent judgment a nullity, and

    5.3. secondly, that the required notice in terms of Section 129 of the National Credit Act, No. 34 of 2005 (herein the "***NCA***") was not properly sent, and

5.4. thirdly, since the instalment sale agreement was only partially attached to the summons, judgment ought not to have been granted.

6. Prior to me dealing with the rescission of judgment, premised on Rule 32(1)(b), I intend to first dispose of these issues. The defendant relied *inter alia* on the case of *Lodhi 2 Investments CC and Another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA)*, where the Supreme Court of appeal, at paragraph 24 says:

> "*[28] I agree that Erasmus J in Bakoven adopted too narrow an interpretation of the words 'erroneously granted'. Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the Sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings…* "

7. In paragraph 11 of the founding affidavit in support of the rescission application is admitted that the sheriff served the summons at the chosen *domicilium citandi et executandi* of the defendant. The defendant alleges that, at the time when the sheriff served the summons at that address, she was not in the Gauteng Province,

but was in another province, and therefore she did not receive notice of the summons. The latter averment of the defendant seems not to be seriously contested. The fact that service happens on a chosen *domicilium* address in the temporary absence of a party does however not make it defective service.

8. It is important that the defendant does not dispute that the sheriff served the summons at her *domicilium citandi et executandi*. She merely relies on her own absence from the address, which she concedes to be both her residential address and her *domicilium citandi et executandi.* As such, it can be accepted that, if there is no other defect in the service, the service occurred in terms of the provisions of Rule 4(1)(a)(iv). That would ordinarily be proper.

9. In this case, however, it was argued for the defendant that in terms of Rule 4(1)(b) service must occur between the times of 07h00 and 19h00. The summons was served at 19h18 which is outside the prescribed times, so the argument went. With reliance on the case of *Nkutha and Another v Standard Bank of South Africa Limited and Others (2017) ZAGPJHC 282 at paragraph 19*[1] it was argued that, since the summons was therefore not served in accordance with the Rules of court, a judgment granted pursuant to that defective service is *void ab initio*.

10. I disagree. Rule 4(1)(b) stipulates, and I quote:

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[1] *The case differentiates between service, which is not effected in accordance with the Rules, and is accordingly defective, and where service occurs but did not come to the attention of the defendant. The former would make judgment ab initio void, whilst the latter would allow a rescission on good cause shown.*

"*(b) Service shall be effected as near as possible between the hours of 7:00 and 19:00.*"

11. The hour of 19h18 is surely "*as near as possible*" to the hour of 19h00. The proposition that service after 19h00 is defective is therefore incorrect. My view in this regard is further supported by the provisions of Rule 68 of the Uniform Rules of Court, dealing with the tariff for sheriffs. Rule 68(17) stipulates, and I quote:

"*17(a) Where the mandator instructs the sheriff, in writing, to serve or execute a document referred to him in item 2 or 5*[2] *on an urgent basis or after hours, the sheriff shall charge an additional fee, irrespective of whether the service or execution was successful, and such additional fee shall be paid by the mandator, save where the court orders otherwise.*

(b) For purpose of paragraph (a) –

(i) 'urgent' means on the same day or within 24 hours of the written instruction; and

(ii) 'after hours' means any time –

(aa) before 7h00 or after 19h00 on Mondays to Fridays; or

(bb) on a Saturday, Sunday or public holiday."

[2] *which includes a summons*.

12. As such, there exists legally no impediment against the sheriff serving "*after hours*" or shortly after 19h00, as the sheriff did in this case. This point raised by the defendant can therefore not succeed.

13. The second point is that the notice in terms of Section 129 of the NCA, which had to be dispatched in terms of the provisions of the NCA was not properly sent in that, so it is alleged in paragraph 31 of the defendant's heads of argument, it "*cannot be evidenced that it was served by registered mail to the applicant*". I proceed to investigate this issue.

14. The section 129 notice was attached, as Annexure "B1" to the particulars of claim and is dated 30 March 2021. Annexure "B2" constitutes a notice of the Post Office which lists the registered letters sent by the plaintiff's attorney, Strauss Daly, on 31 March 2022. The list evinces an official stamp of the Menlyn Post Office. It indicates that the letter, with number WB1/4758, was sent to the defendant by registered post to her chosen *domicilium citandi et executandi* at 106 Zulweni Flats, 589 Church Street, Arcadia, Pretoria. Annexure "B3" is the parcel tracking notice, which was issued by the Sunnyside Post Office, wherein the Sunnyside branch of the Post Office indicated that it had sent the notification of a registered letter on 14 April 2022 to the defendant.

15. The notion that there were two parcel tracking numbers does not assist, because Annexure "B3" refers to the item number PE9043811635ZA. This corresponds with the parcel track number in Annexure "B2". The notification was sent to the correct chosen *domicilium citandi et executandi* address. The fact that there was a second parcel sent to a flat with number 205, not being 206, does not assist the defendant in this regard.

16. In the case of *Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC)* and in paragraphs 86 and 87 the Constitutional Court had the following to say:

> *"[86] For these reasons, adding the indications the Act offers to the signal importance the notice occupies in the statutory scheme, I conclude that the obligation s 130(1)(a) imposes on a credit provider to 'deliver' a notice to the consumer is ordinarily satisfied by proof that the credit provider sent the notice by registered mail to the address stipulated by the consumer in the credit agreement, and that the notice was delivered to the post office of the intended recipient for collection there."*

And:

> "*[87]* … *Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. If, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim…*"

17. The defendant did not properly engage with the issue. In paragraph 17 of the affidavit in support of the application for rescission of judgment, she merely said that the plaintiff needed to satisfy the court that she received the Section 129 letter. That, premised on the Sebola-case, is incorrect. She then claims that she did not receive the Section 129 letter and contends that the parcel tracking results

demonstrate that she did not receive the letter. This is also incorrect because the parcel results demonstrate the opposite.

18. Be that as it may, the defense raised in that regard would, at best, serve as a dilatory defense[3]. In this case, however, the facts show that the parcel was indeed dispatched to the defendant's local post office, and that she was notified of the delivery of the notice.

19. As a third point, the defendant raised the issue that a full copy of the written instalment agreement was not attached to the particulars of claim. In this respect, it is important to mention that the agreement is not in dispute. Instead, it is admitted that such an agreement was concluded. Although it is true that only a part of the agreement is attached to the particulars of claim, the defendant could not point out anything that could substantiate an exception to the particulars of claim. This is so because the agreement and its terms, as pleaded, are admitted. The fact that the full agreement has not been attached to the particulars of claim does not entail that the judgment was erroneously sought and erroneously granted. In this respect, my view is underpinned by the judgment of *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd 2014 (2) SA 119 (WCC)* where that court held at para 21:

"[21] I also, with respect, disagree with the learned judge's proposition that 'in the absence of the written agreement the basis of the [plaintiffs'] cause of action does not appear ex facie the pleadings' (para 18). If a plaintiff pleads the conclusion of a written contract and the terms relevant to his

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[3] Sebola supra at para 87: *"If it finds that the credit provider has not complied with s 129(1), it must in terms of s 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed."*

> *cause of action, the cause of action will appear ex facie the particulars of claim…"*

20. The failure to annex a written agreement may elicit an objection that there was no compliance with Rule 18(6) of the Uniform Rules of Court, but it does not make the pleading automatically offensive or embarrassing. It would undoubtedly not be objectionable where the contract and its terms have been admitted. In this case, the objection was raised because only a portion of the agreement was attached. It is only a part of the standard terms and conditions portion of the instalment agreement that has been partially omitted. The remainder of the documents confirm the factual proposition that a written instalment sale agreement was concluded.

21. The only benefit that the defendant derives from this is that it is not open for the plaintiff to rely on the "*non-variation*" clause that plaintiff alleges is part and parcel of the agreement, since it is not part and parcel of the portion of the agreement attached to the summons. I shall revert to this aspect later in my judgment.

22. The third point also fails. As such, the defendant's reliance on the provisions of Rule 42(1)(a) are unfounded and a rescission cannot be granted premised on that Rule.

23. The defendant must therefore bring her rescission within the ambit of the provisions of Rule 32(1)(b). This requires the defendant to have brought the application for rescission of judgment within 20 days after she obtained knowledge of the judgment. She seeks condonation in this respect. The application for condonation is opposed. I intend to grant the request for condonation. Save for the

fact that it is in the interest of justice to do so, the defendant's explanation, although not set out with all the required particularity, is reasonable:

23.1. she became aware of the default judgment in December 2021. This is within the period of the festive season.

23.2. she tells this court that she does not have money for legal services and could only find attorneys to assist her with the matter on a *pro bono* basis in February 2022.

23.3. her attorneys came on record on 10 February 2022.

23.4. thereafter exchanges were made between the attorneys acting for the different opposing parties, which includes a request that execution on the default judgment be halted whilst engagements were attempted between the parties.

23.5. this did not bear any fruit and the attorneys, acting *pro bono* could thereafter only find counsel to act on a *pro bono* basis on 27 February 2022.

23.6. counsel then advised that a fraud complaint ought to be filed with the plaintiff, premised on the allegations of fraud dealt with hereinafter. This occurred on 28 February 2022.

23.7. it is submitted by the defendant that somewhere in March 2022 the plaintiff, who had received the fraud complaint, refused to consent to a rescission of default judgment, whereafter an application for the rescission was delivered on 28 April 2022.

24. This is surely out of time, but in my view the non-compliance with the Rules is not so flagrant and gross that merely because of this the application for condonation should be dismissed.[4] I therefore hold the parties will suffer no prejudice as the issues raised by the defendant in her application for rescission require closer scrutiny, and warrant this court's discretion to be exercised in favor of the defendant seeking condonation.

25. The late filing of the application for rescission of judgment is condoned.

26. Had it not been for the defendant's own breach of the settlement arrangement that she herself relied upon this case may very well have presented itself with a triable issue in respect of the allegations of fraud. This is, however, not something that I need to express any view on.

27. The defendant premises her case upon an alleged fraud perpetrated upon her by an employee or employees of the plaintiff, being the bank. Attached to her rescission application, as Annexure "LM3", is a complaint that the defendant directed to the plaintiff. She seems to have been assisted by someone in the employ of the Competition Commission in formulating the complaint. In her complaint, she:

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4 *see: Byron v Duke Inc. 2022 (5) SA 483 (SCA).*

27.1. concedes that she was in arrears with her instalment agreement, with account number 85257130595.

27.2. that she was in arrears seems to have been conveyed to her by a certain Desree Moonsamy, who was on the face of it employed by the plaintiff's specialised collections department, who provided her with a landline number.

27.3. she used the landline number, which she says is the plaintiff's phone number and the plaintiff's receptionist put her through to the said Desree Moonsamy.

27.4. she says that Desree Moonsamy told her to pay the outstanding indebtedness in instalments into a certain bank account, the details which are set out in the complaint.

27.5. she then tells that she has been paying monthly instalments into that bank account from 2019 to 2022, and was therefore surprised to learn, in December 2021, when she was approached by the sheriff with a court order to attach her car.

27.6. she made further enquiries with the bank and was told by someone else at the bank that she had been paying all along in the wrong account.

28. Her case is therefore that in November 2019, and this is conveyed in the application for rescission of judgment, in an endeavor to make payment

arrangements, she contacted the plaintiff and spoke to the said individual. She tells the court that in conversation with the representative of the plaintiff, she undertook to make payments of monthly instalments of R3 500.00 which the bank then, being represented by the said representative, accepted and that she was provided with the alleged "erroneous" account number wherein she had to pay the monthly instalments of R3 500.00.

29. She tells, in paragraph 20 of the founding affidavit, that in accordance with the verbal arrangement made with the representative of the plaintiff, she made monthly instalment payments in amounts varying from R3 500.00 to R5 000.00 from January 2020 and provides proof of such payments.

30. In response thereto the bank tells that no such arrangement was made. No objective evidence is, however, provided from the person implicated by the defendant, and referred to as being the person in the collections department of the plaintiff that committed the alleged fraud[5]. The plaintiff also tells this court that the defendant cannot rely on such an agreement, because a verbal agreement is ousted by the so-called non-variation clause which is part and parcel of the instalment agreement.

31. I already indicated hereinbefore that that portion of the instalment agreement, which is attached to the rescission application, does, unfortunately for the plaintiff, not demonstrate that there is such a non-variation clause. I was urged to accept that, the fact that a non-variation clause exists, is not disputed in the replying

[5] The plaintiff abandoned reliance on its duplicating affidavit, which could only be allowed with permission of the court. The plaintiff withdrew its application to admit the further evidence. I therefore must ignore the duplicating affidavit.

affidavit but this is not entirely correct. The defendant insists in the replying affidavit that there was a verbal agreement which the defendant accepts as being valid.

32. Bearing in mind that the defendant seems to accept that she had been defrauded by whomever she spoke to, she effectively conceded that she did not pay the plaintiff, but someone else. I do not intend to deal with the question whether the plaintiff would be excused from a possible fraud perpetrated by its employees, because that is not necessary.

33. For purposes of this rescission application and if I were to provisionally accept the defendant's version, the following is relevant. The defendant's case is that she and the plaintiff entered into a verbal agreement varying to a limited extent the written agreement, in November 2019, which is after the conclusion of the written instalment agreement with *inter alia* the following terms:

    33.1. she would, monthly as from November 2019 pay an amount of R3 500.00 per month.

    33.2. she was to pay it into a specific account with a number which was provided by the bank (being the account number which seems to have been the wrong account number).

34. It is the defendant's case that, when she made that arrangement, she was already in arrears. The payment would therefore not resolve the arrears, because the total instalment payable monthly as per the *Quotation Cost of Credit for an Intermediate*

Instalment Agreement, Annexure "A" to the particulars of claim, would be R4 268.93 per month. The new arrangement would keep the account in arrears. It is, however, not impossible that the plaintiff would be willing to accept the instalments of R3 500.00 per month and restructure the period for the repayments.

35. The problem that the defendant faces with her version is this. She did not honor her own payment arrangement. She failed to pay in the months of December 2019, March 2020, July 2020, August 2020, December 2020, January 2021, February 2021, May 2021, and June 2021. After the last payment, made on 18 November 2021, no further payments were made.

36. In this respect, she has provided proofs of payment, which are attached as Annexures "LM1.1" and "LM1.2". The period from December 2019, being the commencement of her payment obligation in terms of the alleged verbal agreement, up until November 2021, constitutes a period of 24 months. In that period, had she complied with her own arrangement, she would have been obliged to pay R84 000.00. She only paid R57 000.00.

37. The summons was issued in April 2021. By then, she had to pay already for 15 months. She would therefore have been required to have paid an amount of R52 500.00 by April 2021 already. On her version, she only paid R39 000.00.

38. On the conceded facts before this court, the plaintiff would be entitled to cancel the agreement and claim return and possession of the vehicle, should the defendant not comply with her payment obligations. The plaintiff pleads in paragraph 8 of the particulars of claim:

"8. The agreement furthermore states that should the Defendant fail to pay the payments on due date or fail to satisfy any of his other obligations in terms of the Agreement the Plaintiff shall, without prejudicing any of his other rights in law, be justified in:-

a. cancelling the agreement and in the instance of such cancellation:

i. claim return and possession of the vehicle."

39. In this respect the defendant says in paragraph 6 of her founding affidavit that: *"… I understand all my obligations in terms of the Agreement…".* No dispute in respect of that what is pleaded by the plaintiff is raised or exists.

40. The defendant, on her own version, failed to comply with the alleged new agreement or arrangement concluded. As such, the bank was entitled to an order terminating the agreement and claim repossession of the vehicle. This is the default judgment that has been granted and cannot be faulted.

41. The defendant firstly concededly failed to comply with the written agreement, and according to herself, had to reach settlement on how to the pay her arrears and indebtedness due to the bank. She then paid into a wrong bank account, but even if that was occasioned due to an alleged fraud perpetrated upon her by a bank official, she did not even comply with that arrangement. She, on her own version, was in breach of her alleged new payment arrangement. She failed to honor it.

42. There exists therefore no good cause to rescind the judgment granted.

43. There is nothing that prevents the defendant from entering an appearance to defend the second part of the relief that plaintiff seeks. The default judgment incorporates the second part of the relief in that an order was granted authorizing the plaintiff to apply in the same action, supplemented to the extent required, for judgment in respect of damages that the plaintiff may have suffered, and further expenses incurred in the disposal of the vehicle. No money judgment has been granted.

44. To the extend therefore that the defendant believes (and I refrain from expressing any view in this respect), that the payments made into the wrong account should somehow be considered in reduction of the quantum of a future money judgment, she should be allowed to deal with that, when the plaintiff applies for such judgment. I therefore intend to refuse the application for rescission of judgment with the express provision that should the defendant claim for damages and/or a money judgment, it must give proper notice of that intention to the defendant and provide the defendant with the application or amended papers in support of such relief.

45. I therefore make the following order:

45.1. Condonation for the late brining of this rescission application is granted.

45.2. The defendant's application for rescission of judgment is refused with costs.

45.3. The plaintiff shall, if it supplements its papers to bring the envisaged application for judgment and/or applies for judgment in respect of damages, serve such application upon the defendant and her attorney of record so that the defendant may defend those proceedings, if so advised.

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D VAN DEN BOGERT
Acing Judge
High Court of South Africa
Gauteng Division, Pretoria

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