IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 6454/2019P

KWALULUA, ELLIOTT THEMBA **APPLICANT**

And

POTPALE INVESTMENTS (PTY) LTD **RESPONDENT**

JUDGMENT

BEZUIDENHOUT J:

[1] Applicant (defendant in the action) is seeking rescission of a judgment granted in favour of respondent (plaintiff) on 14 September 2020. Applicant also seeks the return of a 2017 Toyota Quantum Sesfikile.

[2] It is submitted on behalf of applicant that in terms of the judgment in the matter of Xulu v Standard Bank of South Africa Limited and Others case number 1570/21 ZAKZPHC 23 August 2021 judgment in matters in terms of the National Credit Act cannot be granted by the Registrar and should be granted by a court. It was therefore submitted that as this judgment was granted by the Registrar it should be rescinded on that basis alone. It was further submitted that applicant is seeking rescission of the judgment in terms of the common law and that he has a *bona fide* defence.

[3] It was submitted that applicant found the summons in his post box and that he thereafter sent by registered post and filed a notice of intention to defend on 30 September 2020. He was therefore not in wilful breach and that it was only when he

approached his attorney that he established that he had a valid defence. It was submitted that applicant did not receive the notices in terms of section 129 and 130 of the National Credit Act and that there had not been compliance with the decision of Kubyana v Standard Bank of SA 2014(3) SA 56 (CC).

[4] It is contended in the founding affidavit that there was no service of the summons on applicant but applicant later confirms that the summons was found in the post box of his chosen *domicilium* and that he filed a notice to defend. Therefore it is apparent that indeed there was service of the summons on applicant. It is also contended that the section 129 and 130 notices in terms of the National Credit Act 34 of 2005 had not been sent or received. A consideration of the papers indicate that the said notices were sent by registered post; that the proof of postage and the track and trace report from the post office are attached indicating that the notices were sent out. Accordingly there was compliance with the requirements as set out in the decision of Kubyana at paragraphs 39 and 40 thereof.

[5] Applicant mustppellant make out a case for the relief sought in his founding affidavit. It is contended by applicant that he never knew that he was signing a certificate of balance and that a clause in the credit agreement to the effect that the certificate of balance indicates the outstanding amount is a contravention of the Consumer Protection Act 68 of 2008. He also disputes the amount which he says he is owing. He therefore submits that he has good prospects of success.

[6] From applicant's affidavit it appears that the notice of intention to defend was received by the Registrar of the High Court Pietermaritzburg on 30 September 2020.

[7] The section 129 Notice was posted by registered post to his address on the 15 May 2019 and the notification indicates that it was sent out on 28 May 2019. On 11 August 2020 the summons and particulars of claim were served by the Sherriff by placing a copy at the gate of the *domicilium citandi et executandi* as the premises were locked. This appears from the Sheriffs return of service. On 14 September 2020 the Registrar granted judgment for the return of the said motor vehicle. A warrant was thereafter issued on 16 September 2020. As indicated earlier the notice of intention to defend was filed at the Registrar's office on 30 September 2020 which was after the judgment had been

granted on 14 September 2020 and service by the Sherriff of the summons on 11 August 2020. Applicant however fails to provide any date on which the summons was found by him in the post box. It is thus not possible to determine when he received it. He also does not declare when he went to see his attorney.

[8] In his replying affidavit applicant again contends that he did not receive the summons but then in the next paragraph admits that he became aware of the summons as it was in the post box. The summons was therefore indeed served. Applicant fails to indicate the date when he received the summons, it is, therefore not possible to determine whether it was before judgment was granted or not. It is clear from the decision in Kubyana that all that has to be shown is that the notices were duly posted by registered post and that the notification was sent out by the post office. Nothing further is required and it is not necessary for defendant to prove that indeed it came to his notice. In his replying affidavit he contends he only established that the judgment had already been granted when the notice to defend was filed at court.

[9] Applicant admits that he is in default of payment but disputes the amount of indebtedness. He states "I have no knowledge of the capital indebtedness but the amount of forty thousand five hundred and twenty-eight rand and twenty-three cents (R 40 588.23) sounds almost double what I had in mind." It is therefore clear that he himself is not sure of what the amount owing is but merely that it sounds to him to be incorrect. Applicant has also failed to prove that the interest charged was in contravention of the Consumer Protection Act 68 of 2008.

[10] Accordingly applicant has failed to set out any *bona fide* defence and that there had not been compliance with the Rules of court and with the provisions of the National Credit Act.

[11] It is correct that it was found in the matter of Xulu 1570/21 of this Division that judgments in terms of the National Credit Act should be granted by the court and not the Registrar. It is therefore follows that indeed the judgment which was granted by the Registrar in this matter was incorrectly granted and falls to be set aside.

[12] Although the judgment granted by the Registrar falls to be rescinded for the reasons set out above, it is apparent from the papers that there had been due compliance with all the requirements. Applicant has failed to have the said judgment rescinded on any of the other grounds as there had been due compliance with all the requirements. Therefore considering that all the requirements had been satisfied, this Court is entitled in the interest of justice to grant the judgment on the same terms as that which was granted by the Registrar.

[13] As set out above applicant has failed to show that there was any defect in the procedure followed or that he has a *bona fide* defence and accordingly the application for rescission on those grounds cannot succeed. The decision in this Division has found that the judgment should not have been granted by the Registrar and on that issue applicant is successful. This Court is however entitled to grant such judgment. It would therefore appear to me that it would be just and equitable that respondent pay 50 % of applicants costs in respect of the opposed application.

I therefore make the following order:

1. The application for rescission is granted and respondent is ordered to pay 50 % of applicant's costs.

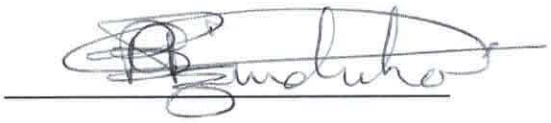
2.1 The agreement between applicant (defendant) and respondent (plaintiff) is confirmed.

2.2 Return of the 2017 TOYOTA QUANTUM 2.5 D-4D SESFIKILE 16S with engine number [redacted] and chassis number [redacted] to the respondent (plaintiff) forthwith by applicant (respondent).

2.3 Expenses incurred for removal, valuation storage and sale of the vehicle.

2.4 Applicant (defendant) to pay attorney and client costs to be taxed.

3. The respondent (plaintiff) shall allege and prove in its action for any outstanding damages, that it has complied with the requirements as set out in paragraph no. 20.3 of the order in Firstrand Bank Ltd t/a Wesbank v Davel (1229/2018) (2019) ZA SCA 168 (29 N0vember 2019)



BEZUIDENHOUT J.

The matter was heard electronically and the judgment will be sent to the respective parties electronically and is deemed to be handed down at 10h00 on 2 March 2022

JUDGMENT RESERVED: **3 FEBRUARY 2022**

JUDGMENT HANDED DOWN ELECTRONICALLY: **2 MARCH 2022**

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