

REPUBLIC OF SOUTH AFRICA



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

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

2023/05/08

DATE

SIGNATURE

CASE NO: 22/6757

In the matter between:

FAS AGRO (PTY) LTD

FRED MCCARTHY

BUSISIWE MCCARTHY

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

and

WESBANK, A DIVISION OF

FIRSTRAND BANK LTD

RESPONDENT

Neutral citation: *FAS AGRO (PTY) LTD AND OTHERS v WESBANK, A DIVISION OF FIRSTRAND BANK LTD* (Case No: 2021/14859) [2023] ZAGPJHC 491 (8 May 2023)

JUDGMENT

MARAIS AJ:

- [1] In this application, the applicants apply for the rescission of a judgment granted in favour of the respondent on 25 April 2022.
- [2] The respondent issued a summons in this court on 21 February 2022 against the respondents, in which summons the respondent made a claim against the applicants in unusual terms, namely that they be ordered “*the one paying the other to be absolved*” to return a Toyota Hilux motor vehicle sold in terms of an instalment agreement between the respondent and the first applicant (alleging a breach of the agreement and cancellation thereof), with a further prayer that the “damages and interest component” of the respondent’s claim be postponed *sine die*, and that costs on the attorney and client scale be granted against the applicants.
- [3] The claim against the second and third applicants were based on deeds of suretyship signed by them, in which they bound themselves as sureties and co-principal debtors in respect of the payment liability of the first applicant.

- [4] It is to be noted that an order for the return of the motor vehicle sold to the first applicant would only have been competent against the first applicant, being the counterparty to the instalment agreement with the respondent, unless it was alleged that the other respondents were in possession of the vehicle and the respondent was entitled to a *rei vindicatio* against them. This was, however, not the respondent's case as set out in the particulars of claim.
- [5] It is also to be noted that despite alleging that it was a term of the instalment agreement that upon breach of the agreement, the respondent would be entitled to cancel the agreement and claim damages (which is a remedy the respondent has in law in any event), the particulars of claim do not appear to develop or pursue such claim for damages. Yet, in the prayers, the respondent sought an order for the postponement of such claim.
- [6] The summons was served on the applicants on 10 March 2022 at an address that is alleged to be the chosen *domicilium citandi* of the applicants. On the applicants' version this address is also the principal place of business of the first applicant, and the second and third applicants' place of residence.¹
- [7] There is no allegation in the present application that the address where the summons was served was not the applicants' chosen *domicilium citandi*. To the contrary, Mr Baloyi, who appeared on behalf of the applicants during the hearing of this matter, conceded that the summons was properly served on the applicants' chosen *domicilium citandi*.

¹ Founding affidavit par 2

[8] After the applicants failed to enter an appearance to defend, the respondent proceeded to apply for default judgment to the Registrar in terms of Rule 31(5). Pursuant to this application, the Registrar granted default judgment on 25 April 2022.

[9] It appears that the unusual "*joint and several, the one paying the other to be absolved*" phraseology in connection with the return of the vehicle was repeated in the Registrar's order, with the effect that on a proper interpretation the order for the return of the vehicle was granted against all three applicants.

[10] From the order signed by the Registrar it also appears that the order for the postponement of the damages claim was not granted, the relevant paragraph having been deleted. While it is unknown why this order was not granted, the refusal to grant it was justified at least on the basis set out above, namely that there was in essence no claim for damages that needed to be postponed pending the retrieval of the vehicle.

[11] The effect of the order was also that the applicants were ordered to pay the costs of the action (which was finalized with the default judgment) jointly and severally.

[12] I am of the view that the order that was sought and granted was flawed, in that:

[12.1] An order for the return of the vehicle should not have been sought and granted against the second and third applicants on the facts pleaded by the respondent; and

[12.2] Consequently, no cost order should have been granted against the second and third applicant.

[13] On the 14th of June 2022 the applicants' attorney of record served the present application for rescission on the respondent's attorney of record. Neither the notice of motion, nor the founding affidavit indicated on what basis the application is brought, i.e. in terms of rule 31, or Rule 42 or the common law. The applicants made the following allegations in their founding affidavit:

[13.1] They stated that the summons only came to their attention on 2 June 2022, when they went to the place of business of the first applicant, which is also the place of residence of the second and third applicant, after having been away on a farm in North-West Province where they are apparently farming. This was after the sheriff attempted to execute the judgment.²

[13.2] They state that "as far as they are aware" the first applicant was up to date with payments in terms of the instalment agreement;³

[13.3] They state that the judgment was granted "in error" in that the National Credit Act ("the NCA") is applicable to the agreement, and the respondent failed to comply with section 129 and 130 of the Act.⁴

[14] In the applicants' heads of argument, the applicants' attorney sought to invoke the provisions of Rule 42, by referring to the possibility of a rescission of

² Founding Affidavit par 4.6

³ Founding Affidavit par 5.5

⁴ Founding Affidavit par 6

judgment on the basis that it was erroneously sought or granted in the absence of the party against whom the judgment was granted. The applicants' attorney argued in his heads of argument that the summons was served at an address where the applicants were no longer residing.⁵ However, it was the applicants' version in the founding affidavit that the address where the summons was served, was indeed the place of business of the first applicant and the place of residence of the second and third applicants. The facts, therefore, do not support the submission by the applicants' attorney. This argument was not repeated during the hearing of this matter.

[15] Neither the founding affidavit, nor the applicants' heads of argument dealt with the fact that the summons was served at the applicants' alleged chosen *domicilia citandi*. If the relevant address was a chosen *domicilium citandi*, the service of the summons by way of annexing it to a gate at the address would have been valid service in terms of rule 4. As indicated above, the applicants conceded valid service on chosen *domicilia citandi*.

[16] As such, the applicants were constrained to either bring this application in terms of rule 31, or the common law. In both instances, the applicants had to show "good cause" for the rescission, which entails that the applicants had to provide an acceptable explanation for their default and a *bona fide* defence to the claim.

[17] The applicants' allegation that they only became aware of the summons on 2 June 2022⁶, as they spend most of their time on the farm in the North-West

⁵ Par 3 of the applicants' Heads of Argument

⁶ Founding Affidavit par 4.6

Province, is denied by the respondent on the basis that of an opinion that “*the excuse is poor*”.⁷ In the face of the factual allegation by the applicants, and in the absence of any factual evidence by the respondent to the contrary, the court has no reason not to accept the applicants’ version.

[18] On the evidence before court, the court, therefore, finds that the applicants only became aware of the summons on 2 June 2022, after judgment had already been granted.

[19] Whether this is an acceptable explanation for the default in entering an appearance to defend remains to be seen, because if the applicants had no defence to the action, they would presumably not have entered an appearance to defend in any event. Defendants in the position of the applicants are required to aver that they intended to enter an appearance to defend, because they have a defence which they intended to pursue to trial. Absent a defence that will be pursued, the desire on the part of a defendant to enter an appearance simply demonstrates *mala fides* on the part of such defendant.

[20] This matter, therefore, evolves entirely around the question whether the applicants demonstrated that they have a *bona fide* defence which *prima facie* has prospects of success if proven at the trial.

[21] On the papers before court, the conclusion of the instalment agreement between the first applicant and the respondent is common cause.

⁷ Answering Affidavit par 25

[22] Regarding the alleged default by the first applicant to pay the agreed instalments, the applicants entire defence is predicated on the terse statement that “*as far as we are aware, we were up to date with the payment of instalments*”.

[23] This speculative statement by the applicants does not assist their case. The applicants were required to present admissible evidence which at least establishes a *prima facie* defence, which proven at trial, will constitute a valid defence.⁸

[24] In the particulars of claim a specific allegation was made that the first applicant was in arrears with payments, and in support of the application for default judgment, a certificate of balance was filed (in accordance with the agreement), which indicated that by the time the judgment was granted the amount of the arrears grew substantially.

[25] The court is of the view that an applicant in a rescission application, being faced with specific allegations in a summons, and evidence in support of an application for default judgment, is obliged to deal specifically with those allegations and evidence by way of admissible evidence and cannot resort to bald statements. This does not mean that the applicants had to prove their defence in this application on a balance of probability; what was required was that admissible evidence be lead that at least showed that there was a *prima facie* defence.

⁸ See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA)

[26] To the extent that the applicants allege that they have made all the payments agreed upon, the *onus* to prove such payments would ultimately be on the applicants.⁹ The applicants made no attempt to present admissible *prima facie* evidence of the alleged payments to the court.

[27] The respondent presented to the court a statement of account in an attempt to prove the falsity of the applicants' allegations regarding the absence of arrear payments. This evidence presented by the respondent was inadmissible, being clearly hearsay evidence and evidence contrary to the best evidence rule, with no attempt made to comply with the provisions of the Electronic Communications and Transactions Act, Act 25 of 2002.

[28] However, the respondent also attached a certificate of balance to its answering affidavit, and despite an absence of an allegation to that effect in the answering affidavit, the certificate was purportedly signed by two managers of the respondent, which in terms of the instalment agreement constituted admissible *prima facie* evidence, and which indicated that the arrears on the account had increased even further.

[29] No replying affidavit was filed by the applicants.

[30] In the premises, the Court finds that the applicants have not made out a case that the first applicant's payments in terms of the instalment agreement were up to date.

⁹ See *Pillay v Krishna and Another* 1946 AD 946

[31] The further defence raised relates to the applicability of the NCA, and whether section 129 and 130 thereof had to be complied with by the respondent, it being common cause that the respondent did not comply with the Act.

[32] In this regard:

[32.1] The applicants make the allegation that the NCA is applicable and also allege that the particulars of claim do not contain sufficient averments to sustain a cause of action; and

[32.2] It is the respondent's case that the NCA is not applicable to the instalment agreement and suretyship agreements in question.

[33] It is to be noted that in the particulars of claim, the respondent relied on the exemption from the NCA, in terms of section 4(1)(b) thereof, on the basis that the agreement was a large agreement, and the first applicant being a corporate entity. This allegation was repeated in the answering affidavit, and is evidently correct, as the principal debt in terms of the agreement was approximately R260 000.00, being in excess of the upper threshold of R250 000.00 determined by the Minister in terms of section 7 of the NCA.

[34] Mr Baloyi argued on behalf of the applicants that it has not been proven that the first applicant's annual turnover or net asset value was less than R1 million. Section 4(1)(b) provides that the NCA is not applicable if the agreement is:

“a large agreement, as described in section 9 (4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7 (1).”

[35] However, this section has been the subject matter of interpretation by the courts, which have found that the section should be interpreted on the basis that the company’s net asset value or turnover is irrelevant.¹⁰

[36] Consequently, the NCA was not applicable to the instalment agreement and the first applicant had no defence based on the provisions of the NCA.

[37] That being the case, the NCA is also not applicable to the deeds of suretyship signed by the second and third applicants as section 5(8) of the NCA makes the NCA applicable only to credit guarantees in relation to agreements to which the Act applies.¹¹

[38] The result is that the applicants have not made out a case that there is any defence to the respondent’s claim against the first applicant for the return of the motor vehicle.

[39] Reverting to the deficiencies in the judgment against the second and third applicants, it is clear that no judgment should have been sought or granted against the second and third applicants for the return of the vehicle sold to the

¹⁰ See *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* 2009 (3) SA 384 (T) par [13].

¹¹ See *FirstRand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another (supra)* at [18]

first applicant, in the absence of allegations sustaining such claim against them. The order granted against them cannot stand. The result is that the cost order against them can also not remain.

[40] The order for the postponement of the damages claim has also not been granted against the second and third applicants.

[41] On the issue of costs, it is to be noted that the outstanding balance in this matter falls within the jurisdiction of the Magistrates' Court. Whilst the respondent was fully entitled to institute action in this court despite such fact¹², it is a matter of concern that the respondent did not limit the costs of the action to costs on the Magistrates' Court scale, as there is no particular complexity in the present matter that specifically require the attention of the High Court. It would appear to me that it would be justified to vary the judgment in this matter, to limit the costs to the costs on the Magistrates' Court scale.

[42] I am of the view that the variation of the order does not constitute substantial success in this matter, as the order for the delivery of the vehicle which is central to this matter will stand. The result is that the applicants are liable for the costs of this application, but also limited to the Magistrates' Court scale.

[43] I therefore make an order in the following terms:

[43.1] The applicants' application for rescission of the judgment granted on 25 April 2022 is dismissed with costs on the Magistrates' Court scale.

¹² See *Standard Bank of South Africa Ltd and Others v Mpongo and Others* 2021 (6) SA 403 (SCA)

[43.2] The default judgment order granted in this matter on 25 April 2022 is varied to read as follows:

“1 The first defendant is ordered to forthwith deliver to the Plaintiff a Toyota Hilux 2.4 DG A/C P/U S/C with chassis number AHTEB8CB502803387 and engine number 2GD0617837; and

2 The first defendant is ordered to pay the costs of this action on the attorney and client scale, limited to the relevant Magistrates' Court scale.”

D MARAIS

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

8 MAY 2023

Appearances:

Appearance for applicants:	A W BALOYI (Attorney)
Instructed by:	A W BALOYI ATTORNEYS
Appearance for Respondent:	ADV JC VILJOEN
Instructed by:	ROSSOUWS, LESIE INC

Date of hearing:	8 May 2023
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Date of Judgment:	8 May 2023
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