**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**
**NORTH GAUTENG DIVISION, PRETORIA**

**CASE NO: 9455/2015**

22/8/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED. ✓

..... 22.8.16
**SIGNATURE** **DATE**

In the matter between:

**MR MATLOBOKO JOHNSON MASENYA** Applicant

and

**FIRSTRAND BANK LIMITED t/a WESBANK** Respondent

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**J U D G M E N T**

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**MSIMEKI J,**

**INTRODUCTION**

[1] This is a rescission of judgment application. The applicant seeks an order rescinding a judgment which was granted on 12 March 2015. He also seeks an order condoning the late launching of the application as the Uniform Rules of Court require and the uplifting and suspension of all process issued pursuant to the judgment of 12 March 2015 and costs of suit.

**BACKGROUND**

[2] On 7 July 2010 the respondent and the applicant entered into an electronic Large Instalment Sale Agreement ("the agreement") in terms of which the respondent sold and delivered to the applicant a certain 2010 Audi Q5 2.0T FSI Quattro (132KW) motor vehicle with chassis number WAUZZZ8R3AA097076 and engine number CDC113133 ("the vehicle"). The agreement is annexure LM2 to the founding affidavit. The total price was R817 368 48. Interest amounting to R286 127 87 calculated at 15.00% per annum was included. The cash price of the vehicle was R406 935 95. The purchase price was payable in 72 equal monthly instalments of R11 352 34. Ownership of the vehicle remained vested in the respondent until all amounts due by the applicant to the respondent in respect of the agreement were paid in full. The respondent had the right to cancel the agreement in the event that the applicant failed to pay any amount due to the respondent, take the vehicle back, sell the vehicle, keep all payment the applicant made and claim the balance (if any) from the applicant as damages in terms of clause 12 of the agreement.

[3] In breach of the agreement, the applicant failed to pay the monthly instalments due to the respondent in respect of the agreement. The applicant applied for a debt review on 28 May 2014 but the debt counsellor only prepared a debt arrangement proposal on 28 November 2014. The proposal was submitted to the respondent after the

respondent had already terminated the debt review in terms of the provisions of **Section 86(10) of the National Credit Act 34 of 2005** (**"the NCA"**). Copies of the termination letters dated 25 November 2014 sent to the debt counsellor, to the applicant and the National Credit Regulator are attached to the answering affidavit as annexures "LM3", "LM4" and "LM5". The applicant, at the time of the termination, was in arrears with the payment in the sum of R117 775 53. This appears from the detailed statement of account attached to the answering affidavit marked "LM6".

[4] Summons was issued and same was served on the applicant on 13 February 2015 as evidenced by the sheriffs return of service which is annexure "LM7" to the answering affidavit. The applicant, after receipt of the summons, failed to enter an appearance to defend. The Court, according to the respondent, on 12 March 2015 granted a valid and a proper order in the respondents favour. The order is annexure "LM8".

[5] Advocate D. H Maluleke for the respondent, at the outset of the hearing, informed the Court that:

1. There was no appearance on behalf of the applicant.

2. The Respondent's attorneys served and filed the Notice of Set Down when the applicants attorneys did not serve and file the applicant's replying affidavit and the applicants Heads of Argument.

3. The Notice of Set down was received by the applicants attorneys on 30 October 2015.

4. The matter was set down for hearing on the opposed roll of 29 February 2016.

[6] The application, as already alluded to, is for the rescission of the default judgment granted on 12 March 2015. The respondent is challenging and opposing the application on the following grounds:

1. The applicant has no *bona fide* defence to the respondents claim.

2. Having regard to the disclosed defence, the relief sought would be inappropriate.

3. That the rescission of the judgment would serve no purpose.

4. That the applicant failed to disclose certain salient and material facts.

5. That no replying affidavit was filed dealing with the issues raised in the answering affidavit and;

6. That the cases of **Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 634E-F** and **Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E-G** were, therefore, applicable to the facts of this case.

[7] The applicant's case is that he admits that his account with the respondent was in arrears in an amount of R117 774 53 at the time that he deposed to the founding affidavit on 29 May 2015. He applied for a debt review on 21 May 2014 in terms of **Section 86(1) of the NCA** because he was over indebted. Distribution, according to his debt counsellor and the debt review proposal, was effected by Payment Distribution Agency to various creditors which included the respondent as from 17 December 2014 to the time the founding affidavit was deposed to. Upon being served with a summons by the Sheriff of the Court he immediately contacted his debt counsellor who asked that they

be given the summons. He obliged. He was advised that they would resolve the matter on his behalf. Although he communicated with his debt counsellor several times enquiring about the progress he received no noteworthy response or help.

[8] On 25 March 2015, upon being served with a warrant of execution to repossess his motor vehicle by the Sheriff, he immediately telephoned the debt counsellor. Again the debt counsellor seems not to have given him any joy. He then sought legal assistance and consulted with his attorneys on 23 April 2015. His attorneys promised to write to the respondent while he raised the money for the case. The respondent responded to the applicant's attorneys advising them that they would not entertain the matter as the contract had been cancelled. His attorneys again addressed another letter to the respondent with a new payment proposal which, again, was not acceptable to the respondent which had already advised them that the agreement between the applicant and the respondent had been cancelled.

[9] The application has been brought out of time necessitating a simultaneous application for condonation for the late filing of the rescission application. The applicant holds the view that he has good prospects of success in the main action because **Sections 129 and 130 of the NCA** were not complied with and that the respondent instituted the action against him in bad faith as it had been receiving payment from Payment Distribution Agency on his behalf although such payment had not been in accordance with the agreement between them. The fact that he offered to pay R15 000 00 which was more than the monthly instalment of R11 000 00, according to him, enhanced his prospects of success in the main action. All this means is that he wants to pay R15 000 00 once the default judgment is rescinded.

[10] The issue to be determined is whether, under these circumstances, the applicant is entitled to the relief that he seeks.

[11] On behalf of the respondent, it is submitted that the applicant does not have a bona fide defence to the applicant's claim. This, because the applicant admits that he is in arrears with the monthly payments. He, then tenders payment of the debt. Clearly, the applicant does not dispute that he owes the respondent. He merely admits that he has breached the agreement. It is this breach which entitled the respondent to cancel the agreement. It is submitted on behalf of the respondent that the applicant failed to serve and file its replying affidavit. He also filed no heads of argument. The allegations stated by the respondent in its answering affidavit, according to the submission, remain unchallenged and should, accordingly, be accepted according to the principles enunciated in **Plascon-Evans and the Stellenbosch Farmers Winery cases** *(supra)*. The submission seems to have merit.

[12] In **Stellenbosch Farmers' Winery v Stellenvale Winery** *(supra)* **at 235D-E** Van Wyk J said:

*"...It seems to me that where there is a dispute as to as to the facts a final interdict should only be granted in notice of motion proceedings, if the, facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order...Where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted."*

This was cited with approval in **Plascon-Evans and Stellenbosch Farmers Winery** (*supra*).

[13] It is noteworthy that:

1. The applicant applied for a debt review on 28 May 2014.

2. The debt re-arrangement proposal was prepared on 28 November 2014. Effectively it took the debt counsellor nearly six months to prepare the proposal.

3. The proposal was submitted to the respondent after the debt review process, in terms of **Section 86(10) of the NCA**, had been cancelled by the respondent. Letters of such cancellation

appear to have been duly forwarded to the applicant, the National Credit Regulator and the debt counsellor as already shown above.

4. **Section 129 (4) of the NCA** prohibits the re-instatement of a credit agreement which has duly been cancelled. This agreement, in my view, has been cancelled. Rescinding the default judgment, in my view, will have no practical effect.

5. A Court grants default judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant not having given notice of an intention to defend is not defending the matter and that the plaintiff, in terms of the Rules, is entitled to the order sought.
See, in this regard, **Lodhi 2 Properties Investment CC and Another v Bondev Developments (Pty) ltd 2007 (6) SA 87 (SCA) at [27]**.

[14] The applicant, in an application for rescission of judgment, needs to show good cause before a judgment can be rescinded.

[15] The applicant, in the current matter, showed no interest in the matter. He merely left everything in the hands of the debt counsellor. The debt counsellor, too, showed no urgency in the matter. This is because the Court is not told why it took nearly six months to prepare the proposal. The Court is also not told that the agreement was cancelled before the proposal reached the respondent. This is evident and properly communicated to the applicant's attorneys by the respondent's attorneys.

[16] The applicant, surely, is well aware that he has no defence to the plaintiff's claim. He concedes that he owes the respondent and that he is in arrears with the monthly payments. The applicant needs rescission because he wants to pay the respondent. This has never

been a defence. The applicant should simply pay the respondent. Indeed, whatever payments are made after the agreement has been cancelled and judgment taken are proper payments. The applicant, in any event, owes the respondent. The judgment does not have to be rescinded for the applicant to pay the respondent. The money is due, owing and payable by him to the respondent. There is no defence and no reason why the applicant should not pay the respondent.

[17] The application, in my view, should fail. Similarly, the application for condonation for the late filing of the application becomes unnecessary. I am not satisfied that the applicant should pay costs on a punitive scale.

**ORDER**

[18] **The following order is made:**

**The application is dismissed with costs.**

**M. W. MSIMEKI**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION OF THE HIGH COURT,**

**PRETORIA**