REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO. 50491/2011

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

18 May 2018
DATE

SIGNATURE

In the matter between:

DALIEN KOEKEMOER Applicant

and

BMW FINANCIAL SERVICES SA (PTY) LTD First Respondent

THE SHERIFF PRETORIA SOUTH EAST Second Respondent

JUDGMENT

NOCHUMSOHN (AJ)

1. This is an application for the rescission of two judgments brought either in terms of Rule 42 on the basis that the Judgments were sought erroneously, alternatively upon the common law.

2. The Application was enrolled before me, on my opposed motion roll for hearing on 15 May 2018. Mr Welgemoed appeared on behalf of the First Respondent. There was no appearance on behalf of the Applicant. Mr Welgemoed submitted from the Bar that he had telephoned attorney Koos van der Merwe on 10 May 2018, who advised him that he would be withdrawing as the attorney of record. Van der Merwe did so withdraw on 11 May 2018 and a copy of the Notice of Withdrawal was handed up to me. Attorney Theo Tromp then corresponded with the First Respondent's Attorneys advising that he had instructions to come on record and called for copies of all of the papers. Mr Welgemoed submitted that his instructing attorneys, Strauss Daly, made copies of the papers available for collection by Mr Tromp, but which papers were not collected, and, neither did Mr Tromp serve a Notice of Appointment as Attorney of Record. In the circumstances, I allowed the application to proceed, in the absence of the Applicant or her legal representatives.

3. Both Judgments were granted by default in terms of Rule 31(5), the first of which was granted on 10 October 2011, and the second upon 20 October 2016.

4. The Order granted in the **first Judgment** was for the cancellation of the Instalment Sale Agreement entered into between the parties on 28 November 2008, and, for the return by the Applicant of certain BMW 520d motor vehicle

financed thereunder, to the First Respondent. Moreover, in terms of such Order, the First Respondent's claim for damages was postponed *sine die*.

5. The Order granted in the **second Judgment** was for payment of damages in the sum of R532 610.37 plus interest calculated at prime less 3,5431% per annum calculated from 19 June 2016 until date of payment. Such second Judgment was represented by the damages claim, which had been postponed *sine die* in the first judgment.

6. The reason for the postponement of the damages claim was attributable to the need for the First Respondent to uplift the vehicle, pursuant to the Order handed down in the first Judgment, to value same, to sell same and to quantify its damages thereafter.

7. The following facts are pertinent, by way of illumination of background:

   7.1. In terms of paragraph 15.1 of the Instalment Sale Agreement the Applicant selected the address given by her on the quotation as her chosen *domicilium citandi et executandi;*

   7.2. The quotation reflects the address selected by the Applicant as 104 Pretoria Road, Rynfield, and such document is signed by the Applicant;

   7.3. On 27 September 2010, the First Respondent dispatched to the Applicant's said *domicilium* address a Notice in terms of Section 129(1) of the National Credit Act No. 34 of 2005 ("the Act"), the contents of which notice complies with the section. Such notice and proof of postage in respect thereof via registered mail is attached to the First Respondent's Answering Affidavit as annexure **"X2"**;

7.4. The Applicant applied for debt review in 2011 in terms of Section 86(4)(b) of the Act, but did not proceed with such process, the First Respondent having terminated its participation in terms of Section 86(1) of the Act on 27 May 2011;

7.5. On 22 May 2011, the First Respondent dispatched a further Notice in terms of Section 129 of the Act to the same address, again via registered mail. Whilst such notice did not convey notification of the Applicant's rights to refer the Agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, and did not bear a reference to the remedies foreshadowed in Section 86(10) of the Act, this was not necessary, given that the Applicant had already pursued debt review process and the mechanics of Section 86(10) had been exhausted.

7.6. On 6 June 2011, the First Respondent dispatched to the said *domicilium* address, a letter in which it conveyed notification of cancellation of the Instalment Sale Agreement;

7.7. On 12 September 2011 the Summons was served by the Sheriff of the Court by way of affixing a copy to the main entrance at the chosen *domicilium* address, 104 Pretoria Road, Rynfield, Benoni;

7.8. On the 15 September 2016 and at 13h15 the Sheriff of the Court served the second Application for Default Judgment in terms of Rule 31(5) with the damages Affidavit annexed thereto at the said *domicilium* address, 104 Pretoria Road, Rynfield, by affixing a copy thereof to the main entrance in accordance with Rule 4(1)(a)(iv);

7.9. The Applicant became aware of the first Judgment on 13 December 2011, and upon investigation at the High Court and perusal of the court file ascertained that the Summons had been served at 104 Pretoria Road, Rynfield, Benoni;

7.10. On 18 January 2012 the Applicant delivered a Notice of Motion for an Order rescinding the first Judgment, to which was attached an Affidavit deposed to by her husband, in which it was alleged that:

7.10.1. the Applicant became aware of the Judgment on 13 December 2011;

7.10.2. the Applicant did not receive the Summons or any Notice in terms of Section 129(1) of the Act;

7.10.3. from a perusal of the court file, the Applicant ascertained that the Summons had been served at 104 Pretoria Road, Rynfield, Benoni;

7.10.4. the Applicant's correct business address is 140 Pretoria Road, Rynfield, Benoni and not 104 Pretoria Road, Rynfield, Benoni.

7.11. Such prior Application for Rescission of Judgment was heard in 2012 and dismissed as a result of the matter having been launched by the Applicant's husband, who did not have *locus standi.*

7.12. The Applicant first became aware of the second Judgment, for the first time, after the Sheriff attached her goods at her residential address in early 2017.

8. The current application was only launched some five years after the Applicant acquired knowledge of the first judgment. There is no application for condonation for the late launching of the Application, neither is there any explanation by the Applicant for her failure to have re-launched an application herself for rescission, her first attempt having been fatally defective, arising out of the fact that her husband did not have the necessary *locus standi*.

9. It was held by Eloff JP in the full Bench Appeal of the then Transvaal Provincial Division from a decision of Leveson J in the then Witwatersrand Local Division, at G in the case of ***First National Bank of SA Ltd v van Rensburg NO & others 1994 (1) SA at page 678*** that:

> *"If in such an application the common law is sought to be invoked the application should be made within a reasonable time. A reasonable time had, as already found, elapsed and there was no explanation for the delay (at 681 H). The appeal was accordingly dismissed."*

10. By the same line of reason, it is abundantly clear, on the Applicant's own evidence that:

10.1. she had full knowledge of the first Judgment in December 2011;

10.2. she knew, or ought reasonably to have known that the claim for damages had been postponed *sine die* in terms of the first Order;

10.3. she had appointed attorneys Aucamp & Cronje, who launched the first Rescission Application on 19 January 2012, for which purpose the court file had been perused and a detailed Founding Affidavit had been submitted in support of the relief sought. It thus stands to reason that the Applicant was fully informed of the detail, meaning and effect of the first Judgment, and must have known that it was the intention of the First Respondent to apply to court subsequently for entry of a subsequent Judgment awarding the damages once quantified.

11. In the light of what the Applicant must have known, or ought reasonably to have known, she should have brought a further application to court for the rescission of the first Judgment immediately after the dismissal of her first Application for Rescission, for want of *locus standi.*

12. There is a silence from the Applicant as to the reasons for her failure to have launched an application for the rescission of the first Judgment for a period of some five years.

13. Moreover, no application for condonation is brought.

14. In the circumstances, a five year delay is grossly unreasonable and inexcusable.

15. In ***Uitenhage Transitional Local Council v South African Revenue Services 2004 (1) SA 292 (SCA) at 297 paragaph 6,*** the court stated:

> *"Condonation is not to be had merely for the asking; A full detailed and accurate account of the causes of delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if non-compliance*

is time related, then the date, the duration and the extent of any obstacle on which reliance is placed must be spelt out."

There is no detail provided for the delay, there is no accurate account of the causes for the delay, leaving the court unable to understand the reasons for such delay. Nothing is spelt out, leaving the court to conclude that the delay of some five years was plain reckless, in the circumstances, knowing full well that the filing of a further Application for Default Judgment for damages would have been inevitable. Moreover, it is common cause, that at the time of the launching of the current application, the Applicant was aware that the vehicle had been sold. I agree with the point taken by Mr Welgemoed for the First Respondent in his Heads of Argument, that the non-joinder by the Applicant of the purchaser of such vehicle renders the Rescission Applicant as against the first Judgment, fatally defective.

16. For these reasons alone, I am disinclined to grant the rescission of the first Judgment.

17. Turning to the merits of the application, the main thrust of the Applicant's case is that she did not receive the summons, she did not receive the Section 129 notices, she did not receive the letter of cancellation, and on her version of events, the Section 129 notices fell short of the requirements. *De facto,* the contents of such notices meet with the requirements, particularly in the circumstances that the Applicant had applied for debt review which was unsuccessful and the rights in terms of Section 86(10) had been fully exercised. In the raising of all of these technical defences, the Applicant did not deny that she was in arrears on the Instalment Sale Agreement, neither did she question

the correctness of the quantum of such arrears, as expressed in the respective 129 notices. Hence, it appears that there is no real dispute in relation to the indebtedness and thus no real defence to the main claim.

18. It was wrongful of the First Respondent to have served the Application for Default Judgment in terms of Rule 31(5) in respect of the second Judgment, at the same *domicilium* address, knowing full well, as it did, that the Applicant's correct address was 140 Pretoria Street and not 104. The First Respondent's submissions to the effect that the Applicant had failed to give notice of change of address in accordance with the contract, falls to be rejected, in circumstances where the First Respondent had been notified by way the Founding Affidavit to the first Rescission Application of such error in the selected *domicilium* address. It was thus incumbent upon the First Respondent to have given notice of the second Default Judgment Application to the Applicant, at her correct address, rather than slavishly follow the wording of a contract by effecting service at an address which it knew to be erroneous. Whilst this court frowns upon the First Respondent for such conduct, it is nevertheless left to be decided whether or not it would have made any difference, had such Notice of Application for Default Judgment been delivered to the Applicant.

19. The only semblance of a defence which the Applicant makes out is that there may have been a duty upon the First Applicant to mitigate its loss by attaching, removing, valuing and selling the motor vehicle far sooner than it did.

20. The Applicant raises the point in the Founding Affidavit that the First Respondent waited more than five years after obtaining the first Default Judgment, before obtaining the second Default Judgment. In addition, the Applicant avers that

according to the Respondent, the Respondent had advised the Applicant on 28 March 2014 of the valuation of the vehicle in terms of Section 127(2) of the Act and had sold the vehicle on 16 April 2014 for R90 060.00 and claimed damages thereafter of R532 610.37.

21. The Applicant raised the point that the First Respondent was duty-bound to limit its losses and had failed to do so by waiting twenty-eight months after the grant of the first Order on 10 October 2011, before selling the vehicle. The Applicant raised the point that the vehicle would have depreciated substantially since 10 October 2011 until date of the valuation by the sworn appraiser and the conveying of notification of such value to the Applicant on 28 March 2014.

22. The First Respondent avers in the Answering Affidavit in response to the accusation of its failure to limit its losses, that the vehicle was only recovered in April 2014 after it was traced and thereafter sold on 30 April 2014 for R15 000.00 more than its value, as determined in accordance with the notice given under Section 127 of the Act. What the First Respondent does not explain is the reason for the delay in the filing of the Application for the Second Judgment. The notice of such application is dated 9 September 2016, the damages Affidavit in support thereof was deposed to by the First Respondent's manager, Bavika Chhotalal on 8 September 2016, the application was served by affixing to the principal door at the wrong address on 15 September 2016, and filed in court on 11 October 2016.

23. There is no cogent explanation as to why these steps were taken in September and October 2016, given that the vehicle was sold in April 2014, thereby creating a delay of some thirty months, during which time substantial interest ran against the Applicant, who was not to blame in any way for such delay.

24. As was held in ***Jayber (Pty) Ltd v Miller & others [1980] 2 All SA 346 (W)***

> *"The onus of proving that the plaintiff could and should have taken steps to mitigate its damages rests on the defendants. If they showed that there were steps open to the plaintiff to reduce the damages in this case obviously to find a new tenant, and that these steps were reasonable and such that a prudent businessman would have taken, then the plaintiff cannot recover such damages as could have been avoided."*

25. Considering all of the above facts, if the Applicant was sincere in establishing a defence based upon the First Respondent's failure to have mitigated its loss, one would have expected the Applicant to have responded in her Replying Affidavit to the First Respondent's averments to the effect that the vehicle was only recovered in April 2014 and sold on 30 April 2014. The Replying Affidavit is devoid of any response, leaving the Court in the dark as to the reasons.

26. The obligation to mitigate the loss in these circumstances could not only have been the obligation of the First Respondent. Failing the launching of a further application for the rescission of the first Order, after the dismissal of the first attempt, the Applicant herself ought to have taken positive steps to have assisted the First Respondent in handing over the motor vehicle for its disposal. The Applicant is silent on this issue. One would have expected the Applicant to explain in her papers what steps she took to ensure the delivery of the vehicle to the First Respondent. Rather than do this, the Applicant chose to do nothing, and only reacted at a time after service of a Warrant of Execution upon her in February 2017, by the launching of the current application on 18 April 2017. It is thus clear that the Applicant's approach was dilatory, and absent any

explanations from her as to what steps she took to ensure the delivery of the vehicle to the First Respondent, she cannot at this stage possibly defeat any portion of the claim or discharge any onus *vis-à-vis* the First Respondent's alleged failure to have mitigated its loss.

27. In the circumstances, I find there is no merit or substance to any of the defences raised by the First Respondent barring the fact that the Application for Default Judgment, in respect of the second Order was wrongfully served by the First Respondent at an address which the First Respondent knew to be incorrect. Notwithstanding the wrongfulness of this conduct, the reality is that the Applicant's defences would have been no better had such Default Judgment Application been properly served on her in September or October 2016.

28. In the result I make the following Order:

    28.1. The Application is dismissed;

    28.2. The Applicant is liable to pay the costs of the First Respondent, as taxed between party and party.

NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:	No appearance
Instructed by:	J H Van der Merwe Inc (withdrew 11 May 2018)
On behalf of the First Respondent:	Advocate C Welgemoed
Instructed by:	Strauss Daly Attorneys
Date of Hearing:	15 May 2018
Date of Judgment:	18 May 2018