

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 24471/2012

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

07/09/2018
DATE

AW Modisa
SIGNATURE

In the matter between:

TOP MARKS PRE-OWNED (PTY) LTD
REGISTRATION NO. 2001/021333/07

Applicant

and

THE MOTOR FINANCE CORPORATION (PTY) LTD
REGISTRATION NO.: 2001/012691/07

Respondent

J U D G M E N T

MODISA AJ:

- [1] This is an application for the rescission of judgment against the order which was granted by Ledwaba DJP on 28 January 2016;
- [2] The order which the Applicant seeks to rescind was granted in the absence of the Respondent despite the notice of set down having been properly served on 19 September 2014;
- [3] It is therefore common cause that a proper notice of set down was served and filed and that the Applicant's attorneys of record received the said notice of set down;
- [4] At the commencement of the proceedings of this rescission application an order for the condonation of the late filing of the replying affidavit was granted;
- [5] The Applicant concedes that there was negligence on the part of the instructing attorney acting on behalf of the Applicant but an argument is made on behalf of the Applicant that there was no wilful default on its part;
- [6] The Respondent is of the view that there exist wilful default and the Applicant does not have a *bona fide* defence;
- [7] The rescission application is brought in terms of common law¹;
- [8] According to the Applicant's version , the notice of set down did not come to the Applicant's instructing attorney attention due to the fact that two files were opened and the notice of set down was placed in an old file²;
- [9] Furthermore, the Applicant avers that although there was communication

¹ See : Founding affidavit , pp 7 para 11

² See : Founding affidavit , pp16, para 48

between the two set of attorneys, which communication also included the date of the enrolment of the matter on the civil trial roll, such correspondence was transmitted to an incorrect email address;

[10] The new email address could be gleaned on annexure AA6³ and the aforesaid email also conveyed the following message:

" We further require your Counsel's contact details so that the pre-trial conference can be scheduled, the trial set down for the 28th of January 2016. Kindly provide us therewith at your earliest convenience..."

[11] This Court has been informed that the old email address was johann@jdwattorneys.co.za whereas the new email address which appears on annexure AA6 referred to in the preceding paragraph is johann@svminc.co.za ;

[12] There is nothing to suggest that the Applicant's attorneys did not receive the email mentioned and referred to as annexure AA6. There is no explanation tendered in this regard. It is irrelevant as to whether annexure AA4 and AA5 which were allegedly transmitted to the Applicant's attorneys of record have been received or not;

[13] The Applicant also content that the failure of the Respondent to comply with their request for further particulars meant that the matter was not ready for trial. I disagree with this proposition to an extend that if a party fails to comply with the other party's request for further particulars it means that the party requesting such particulars is at liberty to compel the other party to comply and if he or she fails to do so, he or she would have waived his or her right to enforce compliance and once pleadings are closed an application for trial date can be obtained and the matter will proceed

accordingly for trial;

[14] This Court is of the view that the Applicant was in wilful default because there is an ineluctable inference which can be drawn to the effect that annexure AA6 was transmitted to the Applicant's attorneys of record and it was well received;

[15] The Respondent also argued that a diligent attorney should also have diarised the date which was encapsulated on the notice of set down. I agree with the Respondent's argument in this regard;

[16] It is trite law that a party seeking a rescission of a judgment granted in his or her absence has to show good cause, which involves giving a reasonable explanation for his or her default and demonstrating that he or she has a *bona fide* defence⁴;

[17] The Applicant in this matter failed to show good cause as well as a reasonable explanation for being in default in respect of the trial of 28 January 2016;

[18] An attorney's negligence does not always constitute a reasonable explanation⁵;

[19] I will now turn to deal with whether the Applicant has a *bona fide* defence or not;

[20] The Applicant alleges that it has a *bona fide* defence, which in essence entails the following:

⁴ See : Standard Bank of SA Ltd v El -Naddaf & Another 1999 (4) SA 779 (W) at 780 F-H
⁵ See : Salojee & Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 141 B-E;
 Ferris & Another v First Rand Bank Ltd & Another 2014(3) BCLR 321 (CC) at para [25]

20.1 He has no duty to verify the identity documents;

20.2 The Applicant could not have reasonably been aware of the fraud;

20.3 The fact that a person other than an accredited person dealt with the "consumer" was not negligent;

20.4 The breach, if so, by the Applicant of the terms of MSRA⁶ did not contribute to the Respondent's loss and

20.5 The amended particulars of claim filed during May 2014 introduced a new cause of action which has prescribed.

[21] I agree with the Respondent that these issues are all without merit. It is common cause that the transaction and agreement was fraudulent and there was therefore no agreement at all with the consumer⁷;

[22] I have not been informed as to whether there was an objection which was raised against the amendment but the Court was only informed that the amendment was effected on 05 May 2014;

[23] If the Applicant was desirous of persisting with issues pertaining to the amendment, an objection should have been raised;

[24] The Applicant primarily rely on the issue of prescription. Service of the summons, which took place during May 2013, interrupted the period of prescription in terms of section 15 (1) of the Prescription Act No 68 of 1969. It is not disputed that service of the summons took place during May

⁶ : Master Sale and Representation Agreement

⁷ See : Founding affidavit pp13 para 32
Answering affidavit pp57 at para 34.5

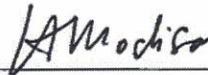
2013. I therefore I agree with Counsel for the Respondent that there is no prescription in this regard;

[25] The Applicant failed to demonstrate any *bona fide* defence it might have had against the Respondent's claim;

[26] In so far as the submission by the Applicant's Counsel to the effect that the Respondent does not mention which clauses it relies on , I am of the view that the declaration is not fatally defective in that regard and the Applicant should have invoked the provisions of Rule 18 of the Uniform Rules of Court.

[27] In the circumstances, the following order is made:

1. The application is dismissed with costs.



MODISA AJ
HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 28 AUGUST 2018

DATE OF JUDGMENT:

APPLICANT'S COUNSEL: ADV C JOOSTE

APPLICANT'S ATTORNEY: JOHAN DE WET ATTORNEYS

RESPONDENT'S COUNSEL: ADV M REINECKE

RESPONDENT'S ATTORNEYS : DRSM ATTORNEYS