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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. **32048/2020**
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:
DATE 07 JUNE 2024
SIGNATURE

In the matter between:

WIKUS PIETERSE Applicant

and

BMW FINANCIAL SERVICES SA (PTY) LTD Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 07 June 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The matter before this Court is essentially an opposed recission application in which the applicant, Wikus Pieterse, also seeks the re-instatement of a credit agreement and ancillary relief. The applicant and the respondent, BMW Financial Services SA (Pty) Ltd, have been embroiled in an acrimonious tug of war for the past four (4) years over a BMW M5 (F10) with engine number 2[...] [vehicle]. The applicant purchased the vehicle in October 2018 by entering into an instalment sale agreement with the respondent [agreement]. The respondent opposes the relief sought.

[2] The judgment, the subject matter of the recission relief was obtained by default in terms of uniform rule 31 and was duly granted on 8 December 2020 [the judgment]. There appears to be some dispute relating to which sub paragraph of uniform rule 31 the judgment was granted. It may be a material issue but for introductory purposes, the judgment was obtained in circumstances where the applicant had entered an appearance to defend, failed to deliver a plea timeously. The applicant did deliver his plea before the respondent applied for default judgment, albeit a few hours before.

[3] The applicant brings his recission relief by casting his rescission net wide. He brings it in terms of rule 31(2)(b) [rule 31 request], rule 42(1)(a) [rule 42 request] and in common law. None of these grounds were formally withdrawn and this Court, in so far applicable, will deal with them if necessary.

[4] Before dealing with the recission relief it is helpful, by way of introduction, to place the background giving rise to the judgment into perspective. This is so as the trigger event, the applicant's default to pay the instalments due in terms of the agreement, occurred during an exceptional time in South Africa that being during lockdown as a result of Covid 19. To commence, on the 19 June 2020 the respondent due to the applicant's default of payment caused a section 129 notice [129 notice] in terms of the National Credit Act, 34 of 2005 [the Act] to be sent to the applicant. The 129 notice, informed the applicant of his arrears in the amount of R 25 275.30. The 129 notice essentially urged the applicant to respond by making payment of the arrears or to initiate a proposal to make a plan to bring his payments up to date, by agreement. No mention in the 129 notice was made of

cancellation of the agreement. The respondent provided its bank account details for payment. Failure to act in terms of the 129 notice, the respondent warned, it would within 20 days (presumably in terms of the terms and conditions within 20 days of receipt) institute legal action to enforce the agreement.

[5] The arrear amount at the material time was R 25 275.30. This roughly translates into just less than 2 (two) months due payments in terms of the agreement. The applicant responded and on the 3 July 2020 before the 20-day cut off period, contacted the respondent wanting to agree to a restructuring payment plan. The respondent informed the applicant on the 6 June 2020 that the file had already been handed over for legal proceedings. This occurring prior to the 20-day cut off period referred to in the 129 notice. Notwithstanding and on the 20 July 2020 the respondent and the applicant entered into a debt restructuring agreement. The respondent's attorneys were aware of the debt restructuring agreement and were in contact with the applicant.

[6] Mosopa J delivered a judgment in this matter dealing with the applicant's urgent relief to stay the sale in execution of the vehicle, in which he stated at paragraph [23]:

> "*The applicant reasonably responded to the section 129 notice and over and above that, made payments amounting to more than what was agreed upon. The applicant did not eschew reliance on the consensual dispute resolution mechanism provided by the NCA, for the reasons I provided above. It is for this reason that I am of a considered view that his application (to stay the sale of the motor vehicle) (own emphasis) should succeed. The cost aspect relating to this application should be considered at the determination of the rescission application which this court intends to do*."

[7] Mosopa J further found that although the applicant and the respondent's attorneys had entered into a debt restructuring agreement which the applicant honoured by paying more than agreed amount, the respondent only within 7(seven) days of the debt restructuring agreement, proceeded with litigation by

issuing summons in the High Court. This not in the spirit of the debt restructuring agreement. At the time the summons was issued, Mosopa J illustrated that the applicant, even after the summons was served continued to pay the monthly instalments up and until the 30 November 2020 totalling R 35 533.00.

[8] In summary by way of introduction, the applicant illustrated his *bona fides* by timeously responding to the 129 notice and by honouring his commitment in respect of the debt restructuring agreement. The respondent conversely before the 20 days in the 129 notice had lapsed and notwithstanding the debt restructuring agreement, handed the matter over to its legal department. The respondent too, notwithstanding the applicant's payments in terms of the debt restructuring agreement commenced legal action against the applicant claiming confirmation of the cancellation of the agreement, the return of the vehicle, damages to be determined all on High Court scale costs. This was within 7 (seven) days after concluding the debt restructuring agreement.

[9] At this stage and by simply applying the Constitutional Court's sentiments as Mosopa J did with reference to Kubyana v Standard Bank of South Africa Limited,[1] the respondents have failed to discharge their statutory notice obligations. This a weighty factor when dealing with the applicant's entitlement to disrupt the enforcement of and the consequences of the judgment. This will be dealt with below.

[10] The procedural facts which follow unfortunately are no different and the respondent and their legal representatives have displayed conduct worthy of Judicial scrutiny.

PROCEDURAL STEPS

[11] The applicant received the summons on the 17 July 2020 and the applicant contends that he contacted the respondent's attorney to ascertain the status of the

[1] 2014 (3) SA 56 (CC) at par [34] to [35].

debt restructuring agreement. The response was that he now had to pay the full arrears and legal costs to stay the legal action.

[12] At paragraph 11 of the particulars of claim the respondent pleads that due to the breach of the agreement the respondent terminated the agreement alternatively that the agreement is terminated herewith (summons being the notice of termination).

[13] The applicant now represented entered an appearance to defend on 4 August 2020. On 22 September 2020 the respondent served a notice of bar calling on the applicant to file his plea and warning of failure to do so. At this stage the applicant was still paying the respondent.

[14] On the 13 October 2020 and at 12h30 via email, the applicant filed his plea admitting arrears but pleaded the debt restructuring agreement. His attorney requested an indulgence by consent to accept the plea so that the matter could be ventilated properly.

[15] The respondent's attorney, notwithstanding the payment recorded in August and in October failed to consider the request and nor did they wish to accept the plea that had already been served. This an obstructive and nonsensical reaction. Simply put, even under bar accepting the service of a pleading does not automatically uplift the bar however, service thereof remains a procedural fact.

[16] The respondent's attorney at 14h25 on the same day serve a notice of application for default judgment.

[17] The notice of application for default judgment was a cut and paste which failed to set out the procedural position correctly. It contained an allegation that the applicant failed to serve a plea and confused default judgment allegations with summary judgment allegations. Reference is made to paragraph 5 wherein the respondent stated" *The Applicant has a 15 (fifteen) day's within which to apply for default judgment."* Presumably making reference to a summary judgment application in terms of uniform 32.

[18] On the 13 November 2020 the applicant served an urgent application in terms of uniform rule 27(3) for the upliftment of the bar. The application although set down for the 24 November 2020 was not opposed and it appears was struck for lack of urgency. The applicant has not set it down again for hearing nor withdrawn the application. The rule 27(3) on the papers and the respondent's Counsel arguing that the rule 27(3) application is *lis pendens.* The applicant's attorney withdrew shortly after that on the 4 December 2020.

[19] The index to the application for default judgment which now was to serve before a Judge in 'open Court' did not incorporate a full set of pleadings filed nor was the Court informed of or directed to the fact of the pending application in terms of uniform rule 27(3) existed.

[20] The default judgment application was duly set down for 8 December 2020, the applicant's attorney was served with a copy of the index to the pleadings for 8 December 2020 as well as a formal set down. The applicant responded on 8 December 2020 but was turned away due to Covid-19 regulations. Open Court as envisaged, was not open to the applicant. His absence not wilful.

[21] Significantly too, and prior to the matter coming before this Court on 8 December 2020, the applicant continued to pay an instalment of R 9,000.00 on 30 October 2020 and R 9,000.00 on 30 November 2020. Reference to these amounts too, were recorded by Mosopa J in his judgment to which reference has been made.

[22] The founding papers deposed to by Bavika Chhotalal, the manager and asset and loss recovery at BMW, in support of the application for default judgment, was silent on the fact that the applicant filed a plea under bar, silent about the rule 27(3) application, silent on the debt reconstruction agreement. The deponent merely stated, as advised by the attorneys, that she believed they were entitled to judgment and that the agreement had been cancelled.

[23] In consequence, Lukhaimane AJ was not appraised of all the facts on affidavit and under oath, the applicant was precluded from appearing to appraise the Acting Judge of material issues. The matter was heard on the papers.

[24] The judgment was granted by Lukhaimane AJ on the 8 December 2020 and uploaded on the 14 December 2020 to caselines.

[25] The warrant of execution was served on the applicant on the 10 February 2021.

RULE 42 REQUEST

[26] This Court having regard to all the steps taken by the respondent from the time the 129 notice came to the applicant's notice, having regard to the positive steps taken by the applicant, the procedural steps and mishaps taken by their attorneys, that fact that the rule 27(3) is regarded by both parties as *lis pendens* . In the premises the judgment was erroneously sought by the respondents as envisaged in terms of uniform rule 42(1)(a). In fact, the facts demonstrate too, that because the Acting Judge appeared to have been precluded from all the facts before making a final pronouncement, in particular the pending rule 27(3) application, the judgment was erroneously granted. The application for default premature in circumstances where the bar could have been lifted, therein lies the mischief.

[27] The rule 42 request must succeed.

[28] However, in so far necessary, this Court considers the rule 31 relief.

RULE 31 REQUEST

Has the applicant shown good cause ?

[29] In so far as the Court's enquiry into the rule 31 request is concerned this Court considers good cause before condonation as the prospect of success of the recission relief a factor for consideration if the delay is unreasonable.

[30] The chronology and the background of this matter illustrate that the applicant reacted to the 129 notice in time, honoured his commitments in respect of the debt restructuring agreement, filed a plea albeit late, attempted to uplift the bar on an urgent basis, succeeded in staying the sale in execution when the respondent wished to sale the vehicle on auction and too, had to incur further costs to obtain contempt relief against the respondent in order to exercise his rights. His default in serving his plea does not finds its origins from gross negligence nor as it appears was it wilful.

[31] The applicant has demonstrated a *prima facie* prospect of success. [2] This in light of his timeous response to the 129 notice and the debt restructuring agreement which occurred within the 20-day period. The applicant has set out his case, explained his position in clear and unambiguous terms and demonstrated a continuous willingness to proceed. The applicant has shown good cause.

[32] The Court now turns to condonation in so far as the common cause facts dictate that the applicant failed to bring the application within twenty (20) days after he had acquired knowledge of such judgment as envisaged in terms of rule 31(2)(b).

[33] In argument the respondent's Counsel stated that the explanation required in respect of condonation should be expanded from the notice from when the applicant received the notice of set down. The difficulty with the expanded argument is that the rule is specific – that the applicant only needs show twenty (20) days from when he has knowledge. According to the applicant he acquired knowledge for the first time when he received a copy of the warrant of execution from the Sheriff, being 10 February 2021. The applicant confirming that he did not

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[2] See **De Wet v Western Bank Limited** 1979 (2) SA 1031 (A) at 1042.

have access to caselines and was unrepresented at the time. A reasonable explanation.

[34] Considering the facts, the applicant launched the recission application on the 6 April 2021, a day after the applicant brought an urgent application to stay the proceeding before Mosopa J. The delay in respect of this application is approximately 38 Court days which, having regard to the simultaneous urgent application is not unreasonable and certainly demonstrates the applicant's willingness to and intent to proceed. The applicant has demonstrated a *prima facie* prospect of success and in light of the procedural steps taken by the respondent including the necessity for the applicant to obtain contempt relief the weight must favour the applicant.

[35] In consequence, the applicant in any event also succeeds under the rule 31 request. The necessity to deal with the common law request not only unnecessary but not competent in light of the Court's findings.

REINSTATEMENT RELIEF

[36] To determine the trigger for the cancellation of the agreement, the Court looks to the terms and conditions attached and referred to in the particulars of claim. The respondent relies on breach as the reason for cancellation. The terms and conditions deal with, *inter alia*, breach of a credit agreement where the Act is applicable at paragraph 11.3.

[37] In short, in terms of paragraph 11.3.2.1, if the applicant has not responded to the 129 notice by failing to make payment of the amount in the notice or *inter alia,* to make a payment arrangement by agreement within the 20-day period of receipt of the notice, then the respondent may elect to cancel the summons in terms of 11.3.2.3. The respondent's particulars of claim simply state that due to the applicant's breach of the agreement, the respondent terminated the agreement, alternatively the agreement is terminated by the summons.

[38] No notice of cancellation forms part of the papers. The respondent in his heads of argument stated that " *The Respondent therefore cancelled the agreement before the payment of any arrears when the summons of served*". No reliance nor appreciation of the applicant's response to the 129 notice is made nor for paragraph 11.3 of the terms and conditions.

[39] This means that the summons served as notice of cancellation in circumstances when the respondent, in terms of its own terms and conditions was not entitled on the facts, to elect cancellation of the agreement at the time the summons was served. The applicant had timeously responded to the 129 notice call and the parties had reached an agreement of repayment. The terminated the credit agreement does not appear to have taken place in terms of section 123(2) of the Act. Notice of the cancellation of the agreement by way of the summons was premature as demonstrated on the papers. We know that Mosopa J found that the respondent's attorney simply ignored the debt restructuring agreement at the time the summons was served. This would explain why the applicant once again on receipt of the summons enquired of the status and terms of the debt restructuring agreement and why the particulars of claim are silent on that issue. The respondent's attorney now simply ignoring the purpose and credence of the debt restructuring agreement moved the target unilaterally, this at the cost of the applicant. In consequence, the respondent's entitlement disturbed on its own version. The prayer for confirmation of the termination not competent at the time it was sought. The financial consequences as a result thereof dire for the applicant.

[40] Without due and lawful cancellation of the agreement at the material time, no lawful cancellation followed. The applicant open in terms of section 129(3) of the Act to remedy the default. No statutory prohibition exists in terms of section 129(4) for the respondent to reinstate the agreement.

UPLIFTMENT OF THE BAR

[41] As to the relief pertaining to the upliftment of the bar, the application although unopposed has not been withdrawn and is still pending. No consolidation

sought nor granted. Nothing precludes the applicant now from obtaining the relief as prayed for on the unopposed roll. This relief as prayed for on these papers must fail.

COSTS

[42] The applicant prays for a punitive cost order. There is no reason why costs should not follow the result. However, this Court must consider the evidence to exercise a discretion judicially on whether a punitive cost order is warranted.

[43] This Court is appalled by the respondent's disregard of the reason and purpose of the 129 notice. It too, is deplored by the actions of the respondent for referring the matter to their legal department before the 20-day period had expired and for not ensuring that the legal department either returned the instruction or sufficiently gained knowledge of the agreed repayment agreement especially during lockdown to avoid an injustice from occurring.

[44] Furthermore, the respondent's attorney's actions, procedural mishaps and blatant disregard of the importance of placing all facts before a Court, is to be frowned upon. The desperate need to control a narrative does not provide comfort for a Court who relies on the veracity of evidence drafted by legal practitioners. The tempo of the matter and disregard for the human element at a time during lockdown is noteworthy.

[45] One accepts that the respondent is entitled to payment in as much as the applicant is entitled to make good on failure to pay during lockdown. In fact, certain credit providers granted their consumers grace during that same period. Grace not a blanket requirement in law but certainly a factor to consider particularly when a consumer reacts, commits and demonstrates his *bone fides* as the applicant did.

[46] Mosopa J in his judgment ordered that the costs of this application be costs of the recission. This Court therefore considers that aspect too, although not specifically argued. The Court is indebted to the respondent's Counsel for bringing that particular judgment to the Court's attention.

[47] This Court having considered all the circumstances including the factors for consideration deems it appropriate to grant a punitive cost order.

In this regard, the following order:

1. The judgment granted by Lukhaimane AJ on the 8 December 2020 is hereby rescinded and set aside.

2. The Respondent is ordered to return the 2012 BMW M5 (F10) with engine number 2[...] and chassis number W[...] to the Applicant.

3. The warrant/s issued as a result of the judgment referred to in prayer 1 hereof, are hereby set aside.

4. The Respondent is to reinstate the agreement of the 2 October 2018 and to, within 10 days of this order, account fully to the Applicant in terms of and as envisage in section 129(3) of the National Credit Act 34 of 2005 of the arrears, prescribed default administrative charges and reasonable costs of enforcing the agreement due by him prior to the institution of legal action.

5. Condonation is granted to the Applicant for the late filing of this application.

6. The Respondent is ordered to pay the costs of this application on an attorney client scale which costs are to include the costs occasioned by the stay proceedings before Mosopa J by order the 5 May 2024 on the same scale.

L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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