IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO. : 1366/2016

Heard on: 06 June 2019

Date delivered: 30 July 2019

In the matter between:

LULAMILE LORDVICE PONONO Applicant/Defendant

And

THE MOTOR FINANCE CORPORATION Respondent/Plaintiff

JUDGMENT

MAJIKI J

[1] This is an application for rescission of a default judgment. The respondent and the applicant had entered in an instalment sale agreement for the purchase of a motor vehicle. The applicant failed to keep up with the monthly repayments in the agreement. Summary judgment for the return of the motor vehicle and cancellation of the agreement was obtained by the respondent. The vehicle was sold in execution by the sheriff. Subsequently, the respondent issued summons for the difference between the outstanding amount and the value of the motor vehicle. The applicant filed notice to oppose. An application for summary judgment in relation to the second summary judgment was refused. The applicant defended the matter. On the date of trial there was no appearance on his behalf and judgment was

obtained by default. He now seeks rescission of the said default judgment. The application is opposed by the respondent.

[2] The applicant has applied for condonation of the late filing of the application for judgment. Rule 31(2)(b) requires the application to be made within 20 days of the applicant becoming aware of the judgment. My reading of the papers reveals that he became aware of the judgment on 28 February 2018, his application papers were served on 28 March 2018. The date of filing is not apparent. If it follows the date of service, the application would comply with the rule.

[3] It is common cause that on 16 January 2009, the parties entered into a written instalment sale agreement. The applicant purchased a 2008 Toyota Avanza (motor vehicle) from the respondent. The agreement is governed by section 8 of the National Credit Act 34 of 2005 (NCA). Within five (5) days of delivery of the motor vehicle, it suffered a mechanical breakdown, its engine overheat. The applicant took the motor vehicle to the respondent. All attempts by the respondent to repair it failed, until it broke down completely. Eventually the vehicle was returned to the respondent permanently. The applicant continued to pay monthly instalments until he was not able to do so. He was then successfully sued for cancellation of the agreement, amongst others. Later, he was sued for a sum of R124 467.80 being difference between the amount the motor vehicle was sold for and the full outstanding balance. The applicant resisted the second action and filed a counterclaim. For circumstances alleged by the applicant, his opposition and counterclaim could not be pursued to finality. I will revert to those allegations later herein.

[4] In the counterclaim, whose averments I have been asked to incorporate herein, the applicant alleges that it was a material, express, tacit or implied term of the contract that the motor vehicle would be free from defects upon delivery or within a reasonable time thereafter. Part K of the extract of the written contract, attached to the respondent's answering affidavit at paragraph 3, provides that the applicant must inspect the goods and ensure that they are free of defects. According to the respondent the agreement

also provided that, no warranties, guarantees or undertakings of whatever nature as to the quality of goods or their fitness for the purpose they are intended for had been made by the respondent.

[5] According to the respondent the motor vehicle was still under a manufacturer's guarantee. It was purchased by the respondent as a demonstration model with about 7000 kilometres odometer reading. The respondent sold the motor vehicle to the applicant with an extended warranty which would become operational on termination of the original motor plan.

[6] The vehicle was duly sent to Buffalo Toyota. Buffalo Toyota claimed from Toyota South Africa. Toyota South Africa repudiated the claim on the basis that the damage was caused by the person who operated the motor vehicle. The radiator cap was opened negligently.

[7] The respondent informed the applicant that the vehicle could be repaired for a total cost of R12 000.00, which would have to be payable by the applicant. The applicant demanded the return of the vehicle in full working condition. Further, he stated that had he been aware that the vehicle was defective, he would not have entered into the contract of sale, in the first place.

[8] The respondent repaired the motor vehicle. The applicant had already fallen in arrears in the sum of R24 800.00 by then. The respondent then demanded payment of arrears and repair costs. The motor vehicle was handed to the applicant who later returned it with further complaints.

[9] According to the applicant, when he returned the vehicle permanently to the respondent, and when the respondent accepted the motor vehicle, the applicant was cancelling the agreement.

[10] Subsequently, the respondent advised the applicant that the dispute was between the applicant and Buffalo Toyota. The respondent denies that the agreement was cancelled by the applicant and states that the applicant

was not entitled to do so. Further, the respondent states that it did not accept the vehicle but it was surrendered by the plaintiff, hence it sought confirmation of termination of the agreement from court.

[11] Rule 31(2)(b) provides:

> "A defendant may within twenty (20) days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court, may, upon good cause shown set aside the default judgment on such terms as it seems meet".

Good cause has been stated to encompass two elements;

1. Reasonable explanation for the default and

2. That on the merits the applicant must have a *bona fide* defence, which *prima facie* carries some prospect of success.

In **Silber** v **Osen Wholesalers (Pty) Ltd** 1954 (2) SA 345 AD 353A, it was held that the explanation for the default must be sufficiently full to enable the court to understand how it came about, and assess the applicant's conduct and motives. The authors of Erasmus Superior Court Practice, second edition at D-367 expand on this by referring to the authority in **Benicke** v **Winter** 1426 SWA 59, and state that, an application which fails to set out those reasons is not proper, but where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle the applicant of the relief sought. The said authors go on to state that before a person can be said to have been in wilful default the following elements must be shown:

1. knowledge that the action is brought against him;

2. a deliberate refraining from entering appearance, though free to do so and

3. a certain mental attitude towards the consequences of the default.

[13] According to the applicant, his matter could not be pursued due to unfortunate circumstances of changing hands at his legal representatives' firm of attorneys. He had filed notice to defend the initial summons but summary judgment was granted. On the second summons after summary judgment was refused, he even filed a counterclaim. In March 2015 Mr Jikwana who he originally instructed, left practice to become an advocate. Incidentally, he appears in this matter as an advocate. Shortly thereafter, Mr Yeko took over the matter. He also left in September 2016. Mr Yeko had always assured him that the matter was being taken care of and that he would inform him when the matter was ripe for trial. Again, Mr Qumntu took over the matter and left as well. It was after the involvement of Mr Nohesi in the same firm of attorneys that there was progress in the matter. In January 2018, Mr Nohesi contacted the respondent's attorneys who confirmed that default judgment was obtained on 21 February 2017. The notice of set down for 21 February 2017 sent, care of, his Mthatha correspondents could not reach him. He was not in wilful default in failing to attend court.

[14] He only learnt of the default judgment on 28 February 2018. The contents of the applicant's founding affidavit have been confirmed by Mr Nohesi in as far as they relate to him. In the replying affidavit he states that his original firm of attorneys (Jikwana Incorporated) ceased to exist, Nohesi attorneys served notice of acting on 18 September 2018.

[15] He, the applicant on his part did not deliberately or unreasonably cause the delay. He had been following up on the progress of the matter after he instructed the firm of his legal representatives to defend the matter. He learnt of judgment on 28 February 2018. The application papers were served on 28 March 2018. It is not apparent as to when the application was filed in court. The judgment itself was obtained without hearing evidence or without the damages affidavit being filed.

[16] The applicant further explains the delays caused by the difficulties in obtaining information due to the closure of his original firm of attorneys. His reply was filed late, as a result. The answering affidavit had also been filed out of time. There was no explanation by the respondent in this regard. However, when the matter was argued these issues were no longer pursued.

[17] According to the respondent, no confirmatory affidavits have been filed to support what the applicant averred about his legal representatives. As regards damages affidavit or *viva voce* evidence, it submits that the claim was in respect of outstanding balance in terms of the agreement between the parties. The agreement and the certificate of balance had been placed before court.

[18] As regards *bona fide* defence, the applicant is required to have a *bona fide* defence which, *prima facie* carries some prospect of success. The averments he or she sets out must, if established at trial, enable him to be entitled to a relief. The defence has to be good in law.

[19] The applicant stated that the basis of his defence is as stated in his counterclaim. Therein, he stated that it was an express, tacit or implied term of the agreement that he would have the right to cancel the agreement should the goods be defective upon delivery, if the respondent failed to remedy the defect within a reasonable time. The respondent's delivery of the motor vehicle with a mechanical defect was a defective malperfomance. The respondent breached the agreement. He denies that he had dealings with the dealer in his transaction. The respondent had confirmed that the applicant terminated the contract in terms of section 127 of the NCA. This the respondent placed in dispute. However, according to the applicant the respondent even gave him the estimated value of the motor vehicle in terms of section 127 (2) to be R62 000.00.

[20] As regards the first order of summary judgment he states that he agreed to it because he had already cancelled the agreement. His defence was never ventilated and determined.

[21] The respondent avers that the defence pursued herein failed when it was raised in the opposing affidavit resisting the first summary judgment. According to the respondent, after it was informed of the problem that the motor vehicle was overheating, it contacted Buffalo Toyota. The claim by Buffalo Toyota was repudiated by Toyota South Africa. The applicant was advised to take up the matter with the dealer.

[22] In terms of Section 1 of the Consumer Protection Act 68 of 2008 (CPA) the respondent is not a Supplier. The supplier therein is defined as a person who markets (promote or supply) goods or services. The respondent merely provided credit for the financing of the sale transaction. Both the applicant and the respondent are consumers in terms of the CPA. In terms of Section 5(2)(d) of the CPA the transaction that constitute credit agreement under the provision of NCA is excluded from the provisions of CPA. The goods and services that are subject of the transaction are however, not excluded. The object of section 5(2)(d) of the CPA is to distinguish the position of a credit provider from that of a supplier. Further, it is to protect the contractual rights of a credit provider.

[23] Further, it is submitted on behalf of the respondent that the CPA however, makes no provision for the reservation of the consumer's statutory protection against supplier, where the credit provider had financed the supply of goods. The applicant did not request the respondent to cede its rights as a consumer in terms of the CPA to the defendant. The right being to be able to return the vehicle to the supplier against the refund of a purchase price. Alternatively, he did not request the respondent to exercise those rights against the supplier.

[24] Finally, the applicant did not return the vehicle within six (6) months as provided for in Section 5(b)(2) of the CPA. On 9 October 2009,

from the correspondence between the parties, the vehicle was still with the respondent and not returned to the supplier. For these reasons the respondent avers that the applicant has no *bona fide* defence to the claim.

[25] In my view, the applicant was clearly not aware of the notice of set down which led to the default judgment being granted. I am unable to faulter the applicant for the circumstances which led to the failure of him being advised of the date. On his part he kept checking progress with an attorney who would be at the offices of his legal representatives. He would be assured that all was in order. I have had regard to the criticism that he did not attach confirmatory affidavits of respective attorneys he referred to. His evidence is that when he attended the offices he would find someone else, up to Mr Nohesi who has deposed to a confirmatory affidavit. I find no reason not to accept his unchallenged evidence about what is in his personal knowledge. When he learnt of the judgment on 28 February 2018, the application for rescission of the default judgment was served by 22 March 2018. His intention to defend the matter is apparent in his plea and counterclaim. I am therefore satisfied with his explanation for the default, he did not deliberately refrain from defending the matter to finality.

[26] As regards *bona fide* defence the applicant avers that he cancelled the contract on the basis that the motor vehicle was defective. The respondent avers that he was not entitled to do so. The respondent is not the supplier of the motor vehicle. The vehicle was not timeously returned to the supplier or at all. In my view the applicant's defence *prima facie*, carries some prospects of success. With regard to whether the return of the vehicle to the respondent, within five (5) days of purchase and later returned to the supplier, it cannot be readily concluded that same fell short of the provisions of the CPA.

[27] In the matter I was referred to, **MFC and JAJ Botha** Case No. 6981/2013, delivered in the Western Cape High Court on 15 August 2013, the vehicle was returned after a month to the credit provider. Unlike the

motor vehicle in *casu*, in JAJ Botha's matter there is no indication of the involvement of the supplier in the issue of the return of the defective motor vehicle. Further, it is in dispute between the parties as to what warranties were included in the agreement between the parties. If evidence at trial establishes that the warranties existed, the court may well still find that the applicant was entitled to and did cancel the agreement.

[28] As regards costs, I am unable to find that the respondent's opposition was not warranted. The issues raised in this application for rescission are highly contentious and both parties are justified to have ensured that they are brought before court.

In the result,

1. Application for rescission of the judgment of 21 February 2017 is hereby granted.

2. No order as to costs is made.

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B Majiki
Judge of the High Court

Counsel for the applicant	:	Mr Jikwana
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