FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 5639/2010

In the matter between:

JAMES WILLIAM JOHN KUHL Applicant

and

IMPERIAL BANK LIMITED Respondent

JUDGMENT: LEKALE, J

HEARD ON: 2 FEBRUARY 2012

DELIVERED ON: 9 FEBRUARY 2012

INTRODUCTION

[1] This is an opposed application for rescission of a judgment issued in default of a plea in this court on the 20th April 2011 for delivery of a motor vehicle which was the subject matter of a credit agreement governed by the provisions of the National Credit Act no 34 of 2005 (NCA).

BACKGROUND

[2] Applicant entered into the relevant agreement and accepted

delivery of the motor vehicle on or about the 10th June 2008. The agreement was eventually ceded to the respondent after a debt re-arrangement order had been issued.

[3] In 2009 the applicant consulted a debt counsellor who determined that he was over indebted. On the 27th October 2009 the magistrate's court at Klerksdorp issued a debt re-arrangement order in terms of section 87(1)(b)(ii) of NCA with the respondent's consent. The order fixed monthly instalments in respect of the debt due to the respondent at R1 086,34.

[4] The debt re-arrangement order further appointed Consumer Protection Excellence (CPE) as the payment distribution agent (PDA) for the purpose of fulfilling the applicant's obligations to the affected credit providers.

[5] On or about the 10th of November 2010 the respondent issued summons against the applicant in terms of the credit agreement as it stood before it was amended by the re-arrangement order.

[6] Upon receipt of the summons the applicant approached his

debt counsellor, who also happens to be his attorney, for assistance. The said attorney directed a letter to the respondent's attorneys drawing their attention to the existence of the debt re-arrangement order, among others.

[7] When no satisfactory response was received from the respondent's attorney, an appearance to defend the matter was entered through the applicant's correspondent attorneys in Bloemfontein. Instructions to that effect were given per electronic mail by the applicant's attorneys in Potchefstroom.

[8] The respondent, eventually, delivered a notice of bar against the applicant after placing him on terms by way of a letter.

[9] Judgment was, thereafter, taken by default when the applicant's plea was not delivered within the prescribed time period.

[10] On the 8th July 2011 the applicant was alerted to the existence of the judgment. He, thereupon, informed his attorney accordingly who, in turn, verified the information. The present application was, thereafter, launched on the grounds that:

10.1 the applicant was not in wilful default with regard to the delivery of his plea and the default was attributable to innocent miscommunication between his Potchefstroom attorneys and their Bloemfontein correspondents;

10.2 the debt claimed was subject to a re-arrangement order and the agreement was not legally terminated because the respondent failed to comply with the provisions of the Credit Agreement regulating cancellation in so far as it did not send any notice of cancellation to the debt counsellor, among others.

[11] The respondent delivered an opposing affidavit in terms of which it, effectively, admitted that the applicant's debts were re-structured by the court order but maintains that:

11.1 the applicant was not in compliance with the court order because he did not pay for certain months and, when he did pay, he paid amounts lesser than those ordered by the court;

11.2 the applicant has not furnished any proof of payment to the PDA.

[12] The respondent, further, enclosed a copy of a notice of withdrawal from the debt re-arrangement order and/or agreement dated the 16 February 2010 as proof that it notified the applicant and the debt counsellor accordingly.

ISSUES

[13] The parties are, effectively, in dispute over the following questions:

13.1 whether or not failure to deliver a plea can, fairly and in law, be attributed to the applicant; and

13.2 whether or not the applicant has shown good cause for rescission regard being had to the fact that he did not furnish any documents from which it could, objectively, be assessed if he was in compliance with the debt re-arrangement order.

APPLICANT'S VERSION AND CONTENTIONS

[14] The applicant delivered a deposition by his attorney in terms of which it is explained that the plea was sent per electronic mail to his Bloemfontein attorneys and a confirmation or a read report was duly received. He also enclosed a further affidavit

from his Bloemfontein Attorney to the effect that no receipt of such a pleading can be traced in their system as well as the fact that the secretary, to whose electronic mail address the plea was sent, has since left the attorney's employ.

[15] With regard to whether or not the applicant was in compliance with the debt re-arrangement order, the applicant's attorney replied on affidavit that the PDA had deducted its fees erroneously from the payments made for the benefit of the respondent and paid over R1 057,85 instead of R1 086,34 as ordered by the court. The applicant's version is further to the effect that he could not access statements for payments made before the 10th February 2010 as the PDA had changed its computer systems during or about February or March 2010. He is still waiting for the relevant documents and hopes to furnish them as soon as they are available.

RESPONDENT'S VERSION AND CONTENTIONS

[16] The respondent's position is that no satisfactory explanation for the default has been furnished and that the applicant has failed to proof that he complied with the relevant order. In this regard

Mr Snellenburg, appearing for the respondent, contends that the applicant could, at least, have furnished his bank statements showing that he paid over to the PDA.

APPLICABLE PRINCIPLES

[17] As correctly submitted by Mr Snellenburg, the onus is generally on the defendant to proof the alleged payment as well as the debt in respect of which such payment was made. (See **ITALTILE PRODUCTS (PTY) LTD v TOUCH OF CLASS** 1982 (1) SA 288 (O) at 290D – H.)

[18] The parties are, effectively, in agreement that, in order for an applicant for rescission to succeed at common law, he is expected to give a reasonable explanation of his default and to show that he has a *bona fide* defence which *prima facie* has some prospect of success. (See **COLYN v TIGER FOOD INDUSTRIES LTD t/a MEADOW FEED MILLS (CAPE)** 2003 (6) SA 1 (SCA) at 9D – F.)

[19] It suffices, for rescission purposes, if the applicant sets out averments which, if established at the trial, would entitle him to

the relief he seeks. (See **GRANT v PLUMBERS (PTY) LTD** 1949 (2) SA 470 (O) at 476).

[20] In appropriate cases, where no blame can be attributed to a litigant, the courts are reluctant to penalise a litigant on account of the conduct of his attorney. (See **SALOOJEE AND ANOTHER, NNO v MINISTER OF COMMUNITY DEVELOPMENT** 1965 (2) SA 135 (A) at 140H – 141A).

[21] Where the consumer is in default on the debt re-arrangement order, the credit provider is entitled to withdraw from the re-arrangement and to enforce the original credit agreement by, *inter alia*, complying with its provisions. (See **FIRSTRAND BANK v FILLIS** 2010 (6) SA 565 (E).

[22] In an application for rescission of judgment the court is not enjoined to scrutinise too closely whether the defence is well founded. It is sufficient if it appears to the court that there are, *prima facie*, sufficient reasons for allowing the defendant to lay, before the trial court, the facts which he thinks are necessary to meet the plaintiff's claim. (See **RGS PROPERTIES v**

ETHEKWINI MUNICIPALITY 2010 (6) SA 572 (KZG) at 575D – F).

FINDINGS

[23] The explanation furnished for and on behalf of the applicant for the default appears plausible regard being had to the fact that the secretary, to whose electronic mail address the plea was sent, is no longer in the employ of the applicant's Bloemfontein attorney. There exists, in my view, a reasonable possibility that, had she been available she would have, most probably, been able to shed more light on the issue. In this regard it is worth noting that instructions relating to appearance to defend were also sent per e-mail and were, undisputedly, received.

[24] Even if I am wrong in the aforegoing finding, I am satisfied that none of the ineptitude and remissness involved in the default can fairly be attributed to the applicant. It is clear from the explanation offered by the attorney that the intention was always to defend the matter. In this regard a letter directed to the respondent's attorneys, before appearance to defend was entered, clearly indicates that the intention was to resolve the

matter the soonest.

[25] Over-indebtedness and strained financial circumstances are no defence to the merits of a claim for payment of a debt. Debt review, as a statutory process, does not seek to relieve the consumer of his contractual obligations but aims to achieve either a voluntary debt restructuring or a debt re-arrangement by the magistrate's court. (See **COLLETT v FIRSTRAND BANK LTD** 2011 (4) SA 508 (A) at paragraph [10]).

[26] For the applicant in this matter to succeed in showing a *bona fide* case which, *prima facie*, carries some prospect of success, he does not have to show that he is not indebted to the respondent. He only has to show that he is in compliance with the debt re-arrangement order as issued by the magistrate's court.

[27] It is correct, as contended for the respondent, that it is not forthrightly averred for the applicant that he has paid for the three-month period commencing from November 2009 to and including January 2010. It is only alluded that payments were

and are being made to the PDA which has to pay over to the relevant credit providers.

[28] I am, however, persuaded to exercise the court's overriding discretion in favour of granting the application because there exists a reasonable possibility that payments were made to the PDA. In this regard it should be noted that it is averred, on behalf of the applicant, that the necessary documentation was requested from the PDA but had not been received when the deposition was made. I am, thus, satisfied that the applicant has, *prima facie*, placed sufficient reasons before the court to allow him to lay before the trial court the facts that he thinks are necessary to meet the respondent's claim. It is, further, possible that, had the respondent's case in the summons disclosed the existence of the debt re-arrangement order and failure by the applicant to comply therewith, the applicant would have had ample opportunity to amass the necessary information and documentation to sufficiently show compliance with the order.

[29] In the light of the aforegoing it is not necessary for me to

engage with the alleged failure by the respondent to place the applicant in *mora* as required by the agreement

COSTS

[30] The respondent contends that the applicant should be saddled with the costs of the application because he seeks an indulgence and the application was occasioned by his side.

[31] On behalf of the applicant, Mr Tsangarakis requests the court to award costs, if appropriate, against the applicant on a magistrate's court scale because the amount claimed falls within the quantitative jurisdiction of that court.

[32] In response, Mr Snellenburg retorts that this court also has jurisdiction to entertain the claim.

[33] I can find no reason to deprive the respondent of part of its costs. As pointed out by Mr Snellenburg, the action was equally justiciable in the High Court and there exists no evidence to suggest any malice or untoward motive on the part of the respondent when it approached this court by way of

action.

[34] Indeed the applicant seeks an indulgence from the court and it cannot be argued, with any measure of conviction, that the respondent had no just cause for opposing the application bearing in mind the meagre information supplied by the applicant to establish his *bona fides* in launching the application as well as the fact that short payments were, admittedly, made on the order, (See generally **BREITENBACH v FIAT SA** 1976 (2) SA 226 (T)).

ORDER

[35] In the result, the judgment granted in default of the plea against the applicant on the 20 April 2011 is hereby rescinded.

[36] The applicant is granted leave to generally defend the matter by, *inter alia*, delivering his plea within the prescribed period calculated from the date of this order.

[37] The applicant is, further, ordered to pay the costs of the application.

L. J. LEKALE, J

On behalf of the applicant:	Adv. S. Tsangarakis Instructed by: Kramer, Weihmann & Joubert Inc BLOEMFONTEIN
On behalf of the respondent:	Adv. N. Snellenburg Instructed by: Rossouws Attorneys BLOEMFONTEIN

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