

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION,  
JOHANNESBURG**

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| (1) | REPORTABLE: YES / NO                   |
| (2) | OF INTEREST TO OTHER JUDGES:<br>YES/NO |
| (3) | REVISED.                               |

.....	.....
DATE	SIGNATURE

**CASE NO: 6820/2017**

In the matter between:

**MIDDLETON: ELIAS**  
**(ID No: 480[...])**

Applicant/Defendant

and

**FIRSTRAND BANK LIMITED**  
**t/a WESBANK**  
**(REGISTRATION No: 1929/001225/06)**

Respondent/Plaintiff

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**JUDGMENT**

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**SOUTHWOOD AJ:**

**A. INTRODUCTION**

- [1] This is an application for rescission of a judgment granted by the Registrar of the above Court on 2 May 2017.
- [2] The applicant also seeks condonation for late delivery of the application for rescission and costs in the event of opposition.
- [3] The respondent seeks dismissal of the application with punitive costs.
- [4] The application for rescission is based on Rule 42,<sup>1</sup> Rule 31(2)(b) or the common law.
- [5] On 20 June 2016, the parties entered into a written instalment sale agreement for the purchase of a motor vehicle described as a 2009 Renault Logan 1,6 Expression, chassis number: MA1[...], engine number: UC37284.
- [6] The relevant terms of the agreement provided *inter alia* that if the applicant failed to pay any amounts due under the agreement (clause 12.1.2), then the respondent would be entitled at its election and without

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1 The relevant subparagraph of Rule 42 is not specified.

prejudice to (clause 13.2) take repossession of the motor vehicle in terms of an attachment order, retain all payments already made by the applicant in terms of the agreement and to claim as liquid damages, payment of the difference between the balance outstanding and the market value of the motor vehicle determined in accordance with clause 11.5.2.3 of the agreement which amount would be immediately due and payable (clause 13.2.2);

[7] In terms of the agreement, the respondent could provide a certificate from any one of its managers whose position it would not be necessary to prove, showing the amounts that the applicant owed to the respondent. The applicant agreed that the respondent could take any judgment or order that it was entitled to in law based on the amount contained in the certificate, unless the applicant disagreed with such amount and was able to satisfy the Court that the amount in the certificate was incorrect (clause 22.5).

[8] Prior to receiving the summons, in or about November 2016, the applicant took the motor vehicle to a dealer, Top Speed Motors.

[9] The applicant ceased paying instalments on the agreement from December 2016.

[10] The respondent took possession of the vehicle.

[11] On or around 24 February 2017, the respondent instituted action against the applicant. The combined summons prayed for the following relief:

[11.1] Cancellation of the agreement as at judgment;

[11.2] Confirmation that the respondent is authorised to retain possession of the vehicle;

[11.3] An order authorising the respondent to sell the vehicle and credit the proceeds towards the reduction of the applicant's debt;

[11.4] Costs of suit on an attorney and client scale including storage costs, cartage costs, appraisal fees and collection charges.

[12] The basis of the relief sought in the combined summons was that it was an express term of the agreement that the applicant would pay to the respondent an initial deposit of R5000. On the amount of R78 817.50, the principal debt, the applicant undertook to pay the respondent an amount of R60 494.58 in respect of finance charges at the rate of 20,74% NACM fixed over a period of 72 months. The total amount therefore owed by the applicant to the respondent in terms of the agreement amounted to R139 312.08 payable in 72 payments of R1 934.89 on the same day of each successive month, the first of which payment was due and payable on 1 August 2016.

[13] The respondent pleaded, further, that the applicant had breached the agreement by failing to maintain regular payments and was in arrears in the sum of R9 104,07.

[14] The combined summons was served personally on the applicant at the applicant's chosen *domicilium citandi et executandi* at 7 Christiaan de Wet Street, Duncanville on 2 March 2017. The applicant failed to enter appearance to defend. The due date for such appearance was 16 March 2017.

[15] Accordingly, the respondent applied for default judgment in terms of Rule 31(5)(a) i.e. for default judgment granted by Registrar of this Court for judgment in the same terms as sought in the Particulars of Claim.

[16] On 2 May 2017, the Registrar granted default judgment as follows:

[16.1] Cancellation of the agreement as at the date of judgment;

[16.2] Confirmation that the respondent is authorised to retain possession of the vehicle;

[16.3] An order authorising the respondent to sell the vehicle and credit the proceeds towards the reduction of the debt;

[16.4] Costs of suit in the amount of R200,00 plus Sheriff.

[17] Pursuant to the above judgment, the respondent sold the motor vehicle on 20 July 2017.

[18] The applicant, through its attorney, became aware of the default judgment on 30 April 2018. The application for rescission, despite being dated 31 October 2018, was only served on the respondent's attorneys on 9 November 2018, substantially later than the 20 days required by Rule 31(2)(b). In my view, condonation would also be necessary for a rescission application based on Rule 42 or the common law which requires that the application be brought within a reasonable time.<sup>2</sup>

## **B. CONDONATION**

[19] It is trite that an applicant seeking condonation is required to show good cause which should, at least, proffer a reasonable explanation for his default and indicate that he has reasonable prospects of success.

[20] The respondent's explanation for failing to bring the rescission application timeously is the following:

[20.1] during the months of May, June and July 2018, the applicant's attorneys had difficulty contacting him and attempted to obtain relevant documents from the Court file;

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2 *Firestone South Africa (Pty ) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306H; *First National Bank of Southern Africa Ltd v Van Rensburg NO* 1994 (1) SA 677 (T) at 681E-G

[20.2] the attorney had difficulty locating the file;

[20.3] on 11 July 2018, the applicant consulted with counsel and was informed that it was necessary to obtain a full factual history and obtain all necessary documents.;

[20.4] only in October 2018, did the applicant's attorney obtain all the relevant documents;

[20.5] only at the end of October 2018 was it possible to draft the rescission application.

[21] The documentation and information which were not in the applicant's possession and which were required for the rescission application are not indicated. The applicant was in possession of the Particulars of Claim and could therefore identify the basis of the claim as well as the basis for default judgment. The details of the attorneys acting for the respondent are clearly indicated in the Combined Summons. It is unclear why the applicant did not seek the documents which it sought in the Court file from the respondent's attorneys. In any event, other than the application for default judgment, it is unclear what other documents (which were not in the applicant's possession) could be obtained from the court file.

[22] In my view, the explanation for the delay in bringing the application for rescission is woefully inadequate and lacking in detail and does not properly explain why almost seven months elapsed before the applicant brought this application.

### **C. PROSPECTS OF SUCCESS**

[23] The prospects of success of the rescission application are relevant for the application for condonation.

[24] Accordingly, it will be necessary to deal with the requirements for rescission under the various heads relied on by the applicant to determine whether these requirements have been met.

[25] Although the applicant refers broadly to Rule 42, his contentions indicate a reliance on Rule 42(1)(a). This is confirmed in the heads of argument filed on behalf of the applicant.

[26] Rule 42(1)(a) provides for rescission of a judgment which has been erroneously sought and granted in the absence of the party affected thereby.

[27] In relation to rescission in terms of Rule 31, it is doubtful whether the applicant can bring an application for rescission in terms of this rule where the Registrar has granted default judgment. Rule 31(2)(b), which



contemplates rescission of a default judgment, applies only to judgments granted by a Court. A party's remedy where the Registrar has granted judgment is to set the matter down for reconsideration by the Court in terms of Rule 31(5)(d). Since the requirements are the same<sup>3</sup>, I shall consider the application as though brought in terms of Rule 31(5)(d).

[28] The applicant must show:

[28.1] a reasonable explanation for the default;

[28.2] that the application for rescission is *bona fide* and not made with the intention to delay the respondent's claim;

[28.3] a *bona fide* defence to the respondent's claim.<sup>4</sup>

[29] Insofar as the common law is concerned, presumably the applicant relies on the fact that the judgment was granted by default as he does not allege facts which indicate that judgment was obtained by fraud, *iustus error*, or that new documents have been discovered.

[30] The applicant must show good or sufficient cause as in the case of a rescission application in terms of Rule 31.<sup>5</sup>

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3 *Lazarus and another v Nedcor Bank Ltd; Lazarus and Another v Absa Bank Ltd* 1999 (2) SA 782 (W) at 785B-D

4 *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at [4]

5 *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at [11]

- [31] The applicant contends that the combined summons was served on him on 2 March 2017. He states, further, that he approached his current attorneys, and requested that it take all necessary steps to defend the respondent's claim against him. This is not confirmed by his attorney.
- [32] The applicant states further that his attorneys allocated him to one Angela Mpambani to deal with the matter, that she contacted the respondent (it's unclear why she did not contact the respondent's attorneys indicated in the combined summons), that she met with one Mr Laubscher of the respondent who conceded that the motor vehicle had serious mechanical defects, that Mr Laubscher contacted the respondent's offices in Cape Town to instruct them to suspend the proceedings against the applicant, that the action became pended and, accordingly, that this was the reason that the applicant's attorneys did not deem it necessary to enter appearance to defend. None of these allegations is confirmed with the result that save for the first allegation, the remainder of the allegations are inadmissible hearsay.
- [33] Although the applicant explains that Ms Mpambani's whereabouts are unknown, there is not a scintilla of documentary evidence to support the allegations regarding the alleged agreement. It also does not explain why the attorneys' firm is unable to confirm, at least, some of the allegations. I have serious doubts regarding the credibility of the allegations and, accordingly, do not have regard to them.

[34] Accordingly, the applicant has failed to establish that there was an agreement between the parties that the matter would be kept in abeyance. As such, default judgment was not erroneously sought and granted and the application cannot succeed in terms of Rule 42(1)(a).

[35] Furthermore, the applicant did not furnish a reasonable explanation for his default in failing to enter appearance to defend. The applicant has failed to establish that the reason for the failure to enter appearance to defend was as a result of the parties' agreement to stay the matter.

[36] Insofar as the merits are concerned, the applicant ceased making payments as required by the instalment agreement in December 2016. The applicant contended that he was entitled to do so because the respondent had taken possession of the motor vehicle. The applicant's counsel could not explain how these facts constituted a defence to the requested cancellation of the agreement and subsequent order authorising the respondent to retain possession of the motor vehicle.

[37] Counsel for the applicant, correctly, did not pursue the other defences raised in the papers and in the heads of argument prepared by her attorney, namely:

[37.1] that the vehicle was spoliated by the respondent;

[37.2] non-compliance with the National Credit Act 34 of 2005 ('NCA');

[37.3] lack of consent by the applicant's wife to the conclusion of the agreement;

[37.4] the amount owing is incorrect;

[37.5] the capacity of the Mr Khoza to depose to the respondent's answering affidavit.

[38] The applicant failed to establish how these contentions, if correct, established a *bona fide* defence to a claim for cancellation and subsequent relief arising from the cancellation.

[39] In my view, they do not.

[40] In the premises, the applicant has failed to establish good or sufficient cause for granting the rescission in terms of Rule 31, Rule 42 or the common law.

[41] Accordingly, condonation cannot be granted for the failure to bring the application timeously.

#### **D. COSTS**

[42] The applicant's explanation for his failure to bring this application timeously and for his failure to enter appearance to defend is bald and, in the main, based on inadmissible hearsay.

[43] The applicant raised a number of complaints in the papers which did not raise a *bona fide* defence to the claim resulting in the default judgment. The heads of argument filed on his behalf, with a minimal reference to authority, similarly, failed to indicate how these complaints constituted defences. The applicant's counsel pursued only one argument without reference to authority.

[44] The overwhelming impression given by the application is that it is not *bona fide* and that it caused the respondent unnecessary trouble and expense which it ought not to bear in the sense contemplated by *Johannesburg City Council*<sup>6</sup>. I accordingly find that a punitive costs order is warranted.

## **ORDER**

[45] In the premises, the following order is made:

[45.1] The application is dismissed with costs, such costs to be on the attorney and client scale.

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<sup>6</sup> *Johannesburg City Council v Television and Electrical Distributors (Pty) Ltd and Another* [1997] 1 All SA 455 (A) at 472

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F SOUTHWOOD  
ACTING JUDGE OF THE HIGH COURT  
OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION,  
JOHANNESBURG

**Appearances:**

Date of hearing : 6 August 2019

Date of Judgment : 02 October 2019

For the Applicant : R Tsalong

Instructed by : S. Suleman Attorneys

For Respondent : CA du Plessis

Instructed by : Rossouws, Lesie Inc