

SOUTH AFRICA / JUDGMENT

Allen v Wesbank (78281/2018) [2020] ZAGPPHC 297 (25 June 2020)

[2020] ZAGPPHC 297

COURT

North Gauteng High Court, Pretoria

BEFORE

Mavundla

CASE / FILE NUMBER

78281/2018

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IN THE HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE

NUMBER:78281/ 2018

In

the matter between:

ANTHONY
STEWARD ALLEN
APPLICANT
And
WESBANK
RESPONDENT

JUDGMENT

MAVUNDLA, J.

- [1] This court dismissed with costs the applicant's application for rescission of a default judgment granted against him on 14 December 2018.
- [2] At the time of granting the order, the reasons were not furnished. The relevant court file was taken to have the order prepared. Unfortunately, the court file was never returned to have the reasons prepared, resulting in the delay of preparation thereof.
- [3] The request for the reasons was also not brought to the attention of the court, thus compounding the further delay, which is regrettable and sincerely apologised therefore. The reasons are set out herein bellow.
- [4] The relevant judgement sought to be rescinded was obtained by default in the following terms:

4.1 termination of the agreement.

4.2 return of a BMW X1 S Drive 18L F48 with engine number 50099926 and chassis number WBAHU120105FS5584 ("the vehicle") to the plaintiff forthwith.

4.3 an order authorising the Plaintiff to apply to Court on the same papers supplemented insofar as may be necessary, for the judgment in respect of any damages and further expenses incurred by the Plaintiff in the repossession of the Vehicle, which amount can only be determined once the Vehicle has been repossessed by the Plaintiff and has been sold;

4.4 costs of R200.00 and Sheriff's fee of R335, 25.

- [5] The applicant's application for rescission was formulated as follows:

5.1 rescinding the default judgment granted against the applicant in favour of the respondent on 14 December 2018, under case number 78281/ 2018.

5.2 an order setting aside, the agreement entered between the parties alternatively, suspending it as contemplated in terms of section 83(2) of the National Credit Act 34 of 2005 ("NCA").

BACKGROUND**APPLICANT'S VERSION**

- [6] The applicant purchased two motor vehicles from Melrose Arch BMW simultaneously, after he was informed by a friend of a structured finance deal offered by Melrose Arch BMW in terms of which the latter offered its clients of a dealer assistance to potential qualifying clients who wished to purchase a brand-new BMW.

[7] Through this investment (dealer assistance) it was explained to him that there would be a reduced monthly instalment, alternatively no instalment, to be paid and the instalment would be offset by the return of the investment and even in some cases, receive cash from the investment after the instalment had been paid.

[8] On 12 May 2017 the applicant received correspondence from Lineveld at BMW containing a letter and an on-line finance application. The applicant was requested to complete a letter and an on-line application. The applicant was requested to furnish copies of, inter alia, his identity document, payslip, and bank statements.

[9] On even date the applicant provided BMW with copies of his payslip for the period of January 2017 to April, which evidenced:

9.1 a basic salary of R16, 865 .58 (Sixteen Thousand Eight Hundred and Sixty-Five Rand and Fifty-Eight Cents).

9.2 Total monthly deductions ranging between R10, 400. 00 (Ten Thousand Four Hundred Rand) and R15, 200. 00 (Fifteen Thousand Two Hundred Rand).

9.3 average commission earned over the four-month period in an amount of R52, 288. 00 (Fifty-Two Thousand Two Hundred and Eighty-eight Rand).

9.4 a monthly nett payment ranging between R55, 700.00 (Fifty-five Thousand Seven hundred Rand) and R71, 900. 00 (Seventy-one Thousand Nine Hundred Rand).

[10] Following on this, on 15 May 2017 the applicant provided BMW with:

10.1 a copy of his bank statements for the period January to February 2017 reflecting a closing balance of R5,414. 96 (Five thousand Four Hundred and fourteen Rand and Ninety-Six Cents; and

10.2 the completed finance application recording:

10.2.1 monthly income at 64, 251. 00 (Sixty-four Thousand Two Hundred and Fifty-One Rand.

10.4.2 monthly expenses at R40, 487. 00 (Forty Thousand four Hundred and Eighty-Sven Rand)

10.2.3 disposable income of R23, 764.00 (Twenty-Three Thousand Seven Hundred and Sixty-Four Rand) (which varies according to commission payments received).

[11] Following on the above, on 26 May 2017 the applicant received from Lineveldt an email correspondence which set out:

11.1 the purchase price of a new 2017 BMW X4M Sport.

11.2 the settlement offer in respect of a trade-in vehicle in the amount of R300, 000. 00 (Three Hundred Thousand Rand).

11.3 that the applicant would receive a monthly rebate through QSG Investments at the rate of 6% on the amount of R300, 000. 00 in the sum of R18,000. 00 (Eighteen Thousand Rand) per month.

11.4 repayment on a straight deal of 72 months, no residual, at approximately R21, 000. 00 (Twenty-One Thousand Rand) per month.

11.5 that the applicant would be liable for repayment of the balance of the monthly instalment in the amount of R3, 000. 00 (Three Thousand Rand), which is the amount applicant believed to be the amount he would be paying in respect of the vehicle.

[12] The applicant subsequently received an offer to purchase via email, which he did not sign. He, however, took delivery of both BMW S26 X4 Sports Coue and a BMW F48X1SAV.

RESPONDENT'S VERSION

[13] According to the RESPONDENT, On or about 17 June 2017 the applicant and the respondent concluded a written Instalment agreement. The applicant breached the agreement in that he failed to effect payments in terms of the agreement and was in arrears with his payments in the amount of R82 155.23 as at 27 September 2018 being the time of issuing of the summons. It is common cause that the monthly instalments were R15 731.20 per month.

[14] Summons was served on the applicant's chosen domicile address at [...]. It is also common cause that section 129 notice was duly sent by registered post and the notification delivered to the receipt at this aforesaid domicile chosen address.

[15] No notice to defend was entered and default judgment was subsequently granted on 14 December 2018 by this Court.

[16] The applicant then proceeded to bring the application for rescission of the judgment on 11 April 2019 after alleging that he received notice thereof on 13 March 2019.

[17] The application was sought in terms of the Uniform Court Rules:

17.1 rule 42(1)(a), alternatively

17.2 rule 31(2)(b), and alternatively

17.3 common law.

[18] It is trite that a judgment may be set aside through either:

18.1 rule 42 (1) under this rule: The court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind, or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.
- (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error, or omission.
- (c) an order or judgment granted as the result of a mistake common to the parties.

[19] At common law the Court has discretion to grant rescission of judgment where sufficient or good cause has been shown. The applicant must, show sufficient cause which means that he must give an acceptable explanation of his default and this must coexist with evidence of reasonable prospects of success on the merits. If one of the essentials is lacking, then the court will not come to his assistance; vide *Harris v ABSA Bank Ltd t/a Volkskas*; [1] *Mutebwa v Mutebwa and Another*. [2] The application must be brought within reasonable time upon becoming aware thereof.

[20] In the matter of *Mutebwa v Mutebwa and Another* (supra) at 198 I Jafta J held that: "The terms 'sufficient cause' and 'good cause' means the same thing. The only difference is that Rule 31(2)(b) refers to 'good cause'. The requirements therefore are identical. In *Chetty v law Society, Transvaal* 1985

(2) SA 756 (A) the Appellate Division had occasion to consider the requirements of 'sufficient cause'. At 765A-C Miller JA said:

"The term "sufficient cause" (or "good cause" defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairns Executors v Gaarn* 1912 AD 181 at 186 per Innes JA.) But in principle and in long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on merits such party has a bona fide defence which, prima fade, carries some prospects of success... It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would negate if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

[21] The applicant contended that the judgment was sought and granted erroneously in that:

21.1 it was granted without a certificate of balance or a transaction history attached.

21.2 there was no cause of action made out in the particulars of claim.

21.3 section 129 notification was not delivered.

21.4 the address [...] to which the one notification was allegedly directed, is the address of the applicant's father and not of the applicant.

21.5 the applicant or his father did not receive a notification to attend to the upliftment of the letter from the relevant post office.

21.6 accordingly the judgment granted falls to be rescinded in terms of rule 42(1)(a) and the common law.

RESCISSION IN TERMS OF Rule 31(2) (b)

[22] Rule 31(2)(b)) reads as follows:

"b) A defendant may within 20 days after he 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 to it seems meet."

[23] In general terms a judgment is erroneously granted if there existed at the time of its issue, facts of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment; vide *Nyingwa v Moolman N.O.*[3]

[24] In the matter of *Lodhi 2 Property Investments CC v Bondev Developments (Pty) Ltd 2007*

(6) SA 87 (SCA) the Supreme Court of Appeal held that a judgment to which a plaintiff is procedurally entitled in the absence of the defendant, cannot be said to have been granted erroneously.

[25] In the matter of *Dlamini v Standard Bank of South Africa Ltd; in re: Standard Bank of South Africa Ltd v Dlamini*[4] Ratshibvumo AJ held that:

"[9] In interpreting the judgment in *Sebola*, the court held In *Balkind v ABSA Bank*[9] the court interpreted the *Sebola* judgment adopting the following approach,

'on my interpretation of *Sebola* and particularly in view of the absence of any section in the Act which requires proof of receipt by the consumer, or proof of delivery

at the correct address, or more importantly proof that the notice actually came to the attention of the consumer, the degree of proof required by the judgment leaves room for a finding of fictional fulfilment of the principle that the s 129 notice had come to the attention of the consumer. For instance, a recalcitrant debtor who deliberately avoids the notification to collect a registered item, or, having received the notification, deliberately avoids collecting it, cannot hide behind non-receipt of the notice or be heard to say it did not come to his/her attention.'

[10] It follows therefore that the mere fact that the applicant claims that she did not receive the sec 129 letter cannot in itself be a reason to find that the judgment was erroneous since it is not even a legal requirement for the respondent to prove that she received it."

[26] In casu, the section 129 notification was delivered at the chosen domicile address, a fact not controverted by the applicant. Similarly, the summons was served at the chosen domicile address. In my view, there was compliance with the provisions of section 129, and

there was proper service of the summons. Accordingly, I find that the judgment was not erroneously sought nor granted in the absence of the applicant.

- [27] The default judgment was granted on 14 December 2018. The applicant alleged that he received notice thereof on 13 March 2019. The application for rescission was brought on 11 April 2019. On this version, the application was brought within the prescribed twenty days in terms of rule 31(2)(b).
- [28] The applicant alleged that he has a bona fide defence to the action. It needs noting that he did not deny that he was in arrears with his monthly instalments. He however contends that the purchase price was highly inflated and that the agreement between himself and the respondent was founded on a fraud committed by Melrose Arch BMW. He concludes that there was reckless trading on the part of the respondent and that therefore the agreement stands to be set aside.
- [29] It is worth noting that the applicant, is not contending that the vehicle should be returned to the respondent as the result of alleged void agreement on account of the alleged fraud on the part of Melrose Arch BMW. He wants the agreement to be voided but for him to keep the vehicle, which stance is not consonant with bona fides.
- [30] The applicant entered into an oral agreement with a different party in respect of returns on oil, namely the QSG Investment to pay his monthly instalments.[5] The respondent was no party to this arrangement. The applicant alleged that he never signed the purchase agreement but took delivery

of two vehicles. On this version, the ineluctably conclusion is that the applicant obtained the vehicle in casu fraudulently and has no legitimate reason to want to keep the vehicle. Besides, he connived with Lineveldt to provide false information regarding his financial status.[6]

[31] In the result, the conclusion this court arrives at is that:

31.1. the default judgment was not erroneously granted.

31.2 the applicant does not have a bona fide defence to the respondent's claim.

31.3 the application for rescission stands to be dismissed with costs.

[32] For the aforesaid reasons the following order was issued:

1. That the application for rescission is dismissed.
2. That the applicant is ordered to pay the costs of the application.

N M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 25/06/2020

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[1] 2002 [3] ALL SA 215 at 217.

[2] 2001(2) SA 193 (TkHC)at 1980-F-1.

[3] 93 (2) SA 508 T· K at 510D-G.

[4] (40577/2015) [2017] ZAGPHC 31 (23 February 2017).

[5] Vide page 10 paragraph 26-33 of his affidavit.

[6] Vide paragraphs 58 and 56 at paginated page 23-24.

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