

SOUTH AFRICA / JUDGMENT

Cooper v Standard Bank of South Africa Limited (370/2016) [2017] ZAGPPHC 97 (27 March 2017) [2017] ZAGPPHC 97

COURT

North Gauteng High Court, Pretoria

BEFORE

C J Collis

CASE / FILE NUMBER

370/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 370/2016

DATE: 370/2016

In the matter between:

CRISTAL MARTIE LYNETT COOPER

APPLICANT

and

STANDARD BANK OF SOUTH AFRICA LIMITED

RESPONDENT

J U D G M E N T

COLLIS AJ:

INTRODUCTION

[1] In the present application the Applicant seeks an order for the rescission of a default judgment taken against her on 3 February

2016. The application is brought in terms of the provision of Uniform Rule 31(2) (b) and was opposed by the Respondent.

- [2] At the commencement of the proceedings, the Applicant applied for a postponement of the application in order to file a Replying

affidavit, Heads of Argument and Practice note. The application for a postponement was opposed by the Respondent on the basis that notice of the enrolment of the application took place as far back as 9 September 2016 and that only on 8 March 2017, being the eve of the hearing did the Applicant approach the Respondent to have the matter postponed.

- [3] Furthermore as at date when the application was made, counsel for the Respondent had already been briefed on the matter and as such the Respondent could not agree to a postponement.

- [4] In view of the fact that the request for a postponement was not properly motivated, the court in exercising its discretion refused

the application for a postponement.

BACKGROUND

- [5] On or about 5 July 2012 the parties entered into a written instalment sale agreement in terms whereof the Respondent sold and delivered to the Applicant a 2010 Kia Soul Polo 1.6 MT motor vehicle with engine number G4FCAH475745 and chassis number KNAJT811 LA7168851.

- [6] In terms of the agreement the total amount payable by the Applicant to the Respondent was an amount of R 229 914.00 of which the first instalment was payable on 31 August 2012 and thereafter 71 monthly instalments of R 3193.25 was to be made on each successive month with the final instalment of R 3193.25 to be made on 31 July 2018.

- [7] The agreement further provided that at all material times the Respondent would remain the owner of the motor vehicle until the

applicant had paid all amounts due under the agreement and in the event of the Applicant failing to comply with any of the terms and conditions provided for in the agreement, or failing to pay any amount due under the agreement, the Respondent would be entitled, at its election and without prejudice to obtain an order for the return of the motor vehicle; to retain all payments already made in terms of the agreement; and to claim as liquidated damages if necessary any shortfall due to it in terms of the agreement.

- [8] In breach of the agreement, the Applicant failed to make due and punctual payments of the monthly instalments payable in terms of the agreement. As at 31 October 2015, the Applicant was in arrears in the amount of R 121 838.07.

UNIFORM RULE 31(2)(b)

- [9] Rule 31(2) (b) provides as follows:

"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 to it seems meet. "

[10] An Applicant in order to meet the requirements for an application for rescission of judgment under Rule 31(2) (b) must show the following:

- (a) He (the Applicant) must give a reasonable explanation of his default. If it appears his default was wilful or that it was due to gross negligence the Court should not come to his assistance;
- (b) His application must be bona fide and not made merely with the intention to delay the Plaintiff's claim;
- (c) He must show that he has a bona fide defence to the Plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at trial, would entitle him to the relief he asked for. [1]He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

[11] A court must therefore in this application for rescission decide whether 'sufficient cause' has been shown to rescind the judgment. In *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) the requirements of this concept were considered by Miller JA and stated as follows at 756A-C:

'The term sufficient cause (or good cause) defies precise or comprehension definition, for many and various factors require to be considered. But it is clear that in principle and in the long standing practice of our Courts two essential elements of 'sufficient cause' for rescission of judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a bona fide defence which prima facie, carries some prospect of success.'

[12] I will proceed to deal succinctly with the requirements as mentioned above.

ABSENCE OF WILFULNESS

[13] The wilful or negligent nature of the defendant's default is one of the considerations which the court takes into account in the exercise of its discretion to determine whether or not good cause is shown.[2] It then follows that the

reasons

for the Applicants' absence or default must therefore be set out, this is because it is relevant to the question whether or not, his or her default was wilful. In *Silber v Ozen Wholesalers (Pty) Ltd*[3] it was held that the explanation for the default must be sufficiently full to enable the court to understand how it came about and to assess the Applicant's conduct and motives.

[14] Before a person can therefore be said to be in wilful default, the following elements must be shown:

- (a) knowledge that the action is being brought against him or her;
- (b) a deliberate refraining from entering an appearance, though free to do so; and
- (c) a certain mental attitude towards the consequence of default.

[15] In her Founding affidavit[4] the Applicant sets out that she had failed to file a notice of intention to defend the summons, as she did not receive the summons and if she did she would have defended the proceedings. Albeit that the summons was served at 218 Erasmus Street Meyerspark, she no longer resided at this address and had in fact changed the said address with the Respondent.[5]

[16] In her founding affidavit, the Applicant does not deny that the address of service of the summons was indeed her chosen domicilium et executandi address as per the agreement.[6] Her affidavit is also silent as to when as she contends the change of her address was brought to the attention of the Respondent and whether such change of her address was indeed made in writing as is required in terms of clause 23.3 of the Instalment sale agreement.[7]

[17] Furthermore, her application is in addition thereto, not supported by a confirmatory affidavit, deposed to by her husband, confirming that he on her behalf had attended at the bank in order to change her domicilium address.

[18] As to the absence of wilfulness on her part, the Applicant also contends that she never received the section 129 notice, as same was sent to her chosen domicilium as per the agreement, which she had not been residing at since 7 December 2015.

[19] Given the totality of what has been expounded herein above, in the absence of a sufficiently full explanation to explain her default, this Court is not placed in a position to assess the absence of wilfulness on her part and as a consequence, I cannot find that the first requirement of absence of wilfulness on her part has been met.

BONA FIDE DEFENCE

[20] In essence the defence raised by the Applicant appears in paragraph 7 and 9 of the founding affidavit. Therein the Applicant sets out that she disputes that her account had fallen into arrears and that for some or other unknown reason to her, she could not explain as to why the debit order signed in favour of the Respondent was not processed properly. Immediately when the arrear status of her account was brought to her attention, she embarked on her

own investigation and informed the officials of the Respondent that she disagreed with their calculations of the arrear amount due by her. She nevertheless made two separate payments of R 10 000 and R 3500 respectively in order to avoid unnecessary legal action being taken against her.[8]

[21] In rebuttal to the evidence tendered by the Applicant as set out above, the Respondent in opposition sets out that during the period 31 December 2012 to 31 March 2015, nine (9) debit

orders

had been returned to the Respondent due to insufficient funds held in her account and even though certain cash payments were made by her, these payments were insufficient to bring her account up to date.[9] Since January 2016, no further payments had been received from her. [10]

[22] Clause 18.1 of the terms and conditions of the instalment sale agreement defines default to be as follows:

"18.1. Default in terms of this Agreement will occur if;

18.1.2. you fail to pay any amount payable to us in terms of this Agreement on the due date;"

[23] It is worth mentioning that the signature of the Applicant appears on the instalment sale agreement as well as on every page of the terms and conditions. Further that it is common cause between the parties that this was the agreement concluded between them.

[24] In terms of the instalment sale agreement, payments had to be made by the Applicant at the end of each succeeding month, (being the due date) and what is evident from annexure "STD3" to the answering affidavit, irregular payments were made by her for the months of May, September, October, November and December 2015.

[25] As no replying affidavit had been filed to this application, no evidence in this regard in rebuttal had been presented by the

Applicant and as such the evidence of the Respondent in this regard remains uncontested.

[26] As a consequence I cannot but conclude that, as regards the merits, the applicant has no bona fide defence which prima facie carries some prospect of success.

[27] In the result I make the following order:

27.1 The application is dismissed with costs on an Attorney and Client scale.

C. J. COLLIS

ACTING JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPLICANT: ADV. F LAMPRECHT

INSTRUCTED BY: L.P.BAARDMAN ATIORNEYS

FOR RESPONDENT: ADV. P OOSTHUIZEN

INSTRUCTED BY: S.ROUX INCORPORATED

DATE OF HEARING: 13 MARCH 2017

DATE OF JUDGMENT: 27 MARCH 2017

[1] Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (0)

[2] Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at 5308-531B

[3] 1954 (2) SA 345 (A) at 353A

[4] Founding Affidavit paragraphs 5 to 9

[5] Founding Affidavit paragraphs 13,16, 31 and 32.

[6] See Annexure A to the summons, clause 23.1

[7] Annexure A to the summons: Clause 23.3 "Until all Repayments due to us have been received and this Agreement has been terminated you must inform us in writing within 10(ten) Business days after the change of any change to: 23.3.1. your residential or business address; and 23.3.4 your notice address, postal address, telefax number or email address."

[7] Annexure A to the summons: Clause 23.3

"Until all Repayments due to us have been received and this Agreement has been terminated you must inform us in writing within 10(ten) Business days after the change of any change to:

23.3.1. your residential or business address; and

23.3.4 your notice address, postal address, telefax number or email address."

[8] Founding Affidavit paragraphs 11 and 12 respectively

[9] Answering Affidavit paragraphs 6 and 8 respectively

[10] Answering Affidavit paragraph 10.2

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