

SOUTH AFRICA / JUDGMENT

Mahlaba v Absa Bank Limited (18278/16) [2017] ZAGPJHC 112 (21 April 2017)

[2017] ZAGPJHC 112

COURT

South Gauteng High Court, Johannesburg

BEFORE

Opperman

CASE / FILE NUMBER

18278/16

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE NO: 18278/16

Reportable: No

Of interest to other judges: No

Revised.

21/4/2017

In the matter

between:

MAHLABA: KARABO Applicant
and
ABSA
BANK
LIMITED Respondent

JUDGMENT**OPPERMAN J****INTRODUCTION**

[1] This is an application for the rescission of an order granted on 4 July 2016 for the return of a Volkswagen Polo 1.4 motor vehicle ('the vehicle'). The application was launched on 6 September 2016.

FACTS UNDERPINNING THE ORDER

[2] On 27 September 2013 the respondent, as seller and the applicant as purchaser, entered into a written instalment sale agreement in terms of which the respondent sold to the applicant the vehicle ('the agreement').

[3] In terms of the agreement the applicant had to make 72 monthly repayments of R3 666.57.

[4] The applicant fell into arrears with her monthly repayments and:

4.1. on 13 April 2016 a letter in terms of Section 129 ('the section 129 letter') of the National Credit Act 34 of 2005 ('the NCA') and a letter indicating the respondent's notice of intention to cancel the agreement, was sent to the applicant by way of registered post;

4.2. the letters were sent to the Diepkloof post office and on 18 April 2016 a first notification was sent to the applicant to collect the letters which she failed to do;

4.3. the letters were returned to the Saxonwold post office;

4.4. on 5 May 2016 and after the lapse of 10 days, the respondent cancelled the agreement;

4.5. on 30 May 2016 summons was issued;

4.6. on 8 June 2016 the summons was served on the applicant's chosen domicilium address, which address is also applicant's residential address.

4.7. No notice of intention to oppose was received from the applicant and the applicant did not make any arrangement for the payment of the arrears;

4.8. On 4 July 2016 the respondent applied for default judgment.

[5] An order was granted by the registrar:

5.1. Confirming the cancellation of the agreement;

5.2. For the vehicle to be returned to the respondent; alternatively to be attached by the sheriff;

5.3. Costs in the sum of R200 plus Sheriff's fees.

[6] On 11 August 2016 the vehicle was repossessed.

[7] On 9 September 2016 an order was granted suspending the sale on auction of the vehicle.

THE DEFENCES

[8] The applicant contends that:

8.1. she did not receive the section 129 letter;

8.2. she did not receive notice of the legal proceedings;

8.3. she was not in arrears of her monthly payments;

8.4. her mother and the respondent had agreed that her mother would make payment of her monthly instalments.

APPLICABLE LEGAL PRINCIPLES

[9] The Court may, upon good cause shown, set aside a default judgment on such terms as to it seems meet. The applicant has to (a) provide a reasonable explanation for her default, (b) show that her application is brought bona fide, and (c) be able to show that she has a bona fide defence to the respondent's claim which prima facie has some prospect of success, see *Ferris and another v Firststrand Bank Ltd*, 2014

(3) SA 39 CC at para [23].

The Default

[10] The applicant alleges that she does "not understand as to how the respondent came to the conclusion that [she] is in arrears without first contacting me and if there is such then it can be clarified and sorted before taking legal action against me".

[11] She also states that she did not receive the summons and therefore did not have knowledge of the legal action.

[12] Attached to the respondent's answering affidavit are printouts indicating the attempts made by the respondent to contact the applicant prior to instituting action. These printouts (the correctness of the content not being in dispute) reveal:

12.1. on 24 February 2016 a representative of the respondent visited the premises of the applicant and spoke to applicant's mother who confirmed the applicant's cell phone number;

12.2. on 1 March 2016 the applicant's mother called and said she had paid R4 000 (which had been done) and would pay the balance of the arrears on 5 March 2016 (which was not done);

12.3. on 16 March 2016 a text message was sent to the applicant requesting payment of the arrear amount of R6 041.54;

12.4. on 22 March 2016 a representative of the respondent recorded "battling to get hold of client, another sms sent...";

12.5. on 29 March 2016 a representative of the respondent visited the property and was informed that the applicant was not at home as she had gone to the gym. It was also noted that the motor vehicle was at home.

12.6. Several messages were left for the applicant but she did not respond;

12.7. on 9 May 2016 another sms was sent to the applicant indicating that she should contact the respondent and that the respondent would be commencing legal action on the vehicle account;

12.8. on 9 May 2016 a voicemail was left for the applicant to call the respondent who failed to do so.

[13] The summons was served on 8 June 2016 by attaching same to the principal door of the applicant's residence. On the very next day the applicant's mother made payment of R 6 500. The applicant contends that such payment was made on the same day but that the payment had nothing to do with the receipt of the summons. It seems highly unlikely that an amount almost equal to two monthly installments was made quite independently from and without knowledge of the summons.

[14] I need not find that the applicant had actual knowledge of the action which had commenced against her as respondent has complied with the rules and has served the summons in accordance therewith. Were I called upon to make a finding in this regard I would be driven to conclude that the facts are overwhelmingly stacked against the applicant on this point ie that she did in fact have knowledge of the summons which had been served at her residential address (also being her domicilium address) and that is precisely why the amount of R 6 500 had been paid on such day.

Section 129 Demand

[15] It is common cause that the section 129 notice was sent to the correct post office (Diepkloof) and that a notification was sent to the applicant to collect the letter from such post office. In her founding affidavit the applicant states that she approached the post office in Diepkloof who advised her that the letters had been returned because they had never been collected. The applicant has not disputed the correctness of the tracking results which indicates that she was notified to collect the registered items both in respect of the registered letter number RC 042 140 162 ZA, being the section 129 letter and, registered letter number RC 042 140 176 ZA, being the notice to cancel the agreement, letter.

[16] In *Kubyana v Standard Bank of South Africa Ltd*, 2014 (3) SA 56 (CC), Mr Kubyana had defaulted on his motor vehicle repayments on a number of occasions. After he consistently remained in arrears,

Standard Bank sent him a notice in terms of section 129(1) of the Act by way of registered mail to his elected registered address. Mr Kubyana failed to collect the notice from the post office, after the post office notified him twice that he had documents for collection. The post office returned the unclaimed section 129 notice to Standard Bank, which then issued summons. Mr Kubyana

argued that Standard Bank did not comply with its obligations in terms of section 129, as he had not received the notice as was evident by the return of the notice to Standard Bank by the post office.

[17] The court held that there was no obligation on Standard Bank to use additional measures to ensure that the notice reached Mr Kubyana, as there was no requirement to bring the notice under the subjective knowledge of the consumer. Beyond ensuring that the notice was sent to the correct post office, there was no further obligation on Standard Bank as the placement of additional requirements on the credit provider would impose an excessively onerous standard of performance and afford consumers the advantage of being able to ignore valid notices.

[18] The respondent complied with its obligations and was entitled to institute legal action and obtain default judgment.

[19] The respondent has provided no explanation as to why she did not collect her post from the Post Office.

[20] Mr Maseti representing the applicant, contended that the respondent was legally obliged to do more. He argued that the respondent needed to show that the applicant actually received knowledge of the section 129 letter. For this proposition he relied on the decision of *Nkata v First Rand Bank*, 2016 (4) SA 256 (CC). He was unable to direct the court to the particular passage in the authority which supported that proposition. However, para

[34] and in particular footnote 26 of the *Nkata* judgment (*supra*) reinforces reliance on the *Kubyana* (*supra*) judgment.

[21] Conclusion in respect of proof of delivery of the section 129 letter –

21.1. It is common cause that the section 129 letter was sent to the correct branch of the Post Office being Diepkloof, which is in accordance with the postal address nominated by the applicant.

21.2. It is common cause that the Post Office issued a notification to the applicant that a registered item was available for her collection. It is important to note that the applicant does not contend that she did not receive such a notification. She fails to deal with this feature at all. It would have been a simple matter to say that she had not received the notification had this indeed been the case. After all, she is applying for the rescission. She did not do so.

21.3. The Post Office's notification reached the applicant. This I infer from the fact that the Post Office sent the notification to the applicant's correct postal address.

21.4. A reasonable consumer would have collected the section 129 letter and would have engaged with its contents.

[22] The applicant's argument was premised on the fact that the registered letters had been returned to the dispatching Post Office being Saxonwold and that it was accordingly clear that the section 129 letter had not actually come to the applicant's attention. In terms of Kubyana (supra) this is not a requirement. Notice that a registered letter was available for collection, had to reach the consumer. I find that this had occurred and that the applicant had chosen not respond to such notification.

Bona fide defence

[23] The applicant contends that she has paid the monthly instalments. She has provided no proof of this. The respondent has attached

applicant's payment history. It is apparent from this document that the respondent did not comply with her obligations. The content of this document has not been disputed.

[24] The applicant contends that she became unemployed and that her mother then made arrangements with the respondent 'to make transfers'. She explains that this was 'considered' by the respondent. It does not appear that an agreement was reached in this regard. If an agreement were reached, the applicant is silent about the terms of this agreement. No affidavit by the applicant's mother has been attached to the applicant's papers.

[25] It is, however, clear that neither the applicant nor her mother, were able to meet the monthly installments, that the applicant fell into arrears and that the respondent was entitled to cancel the agreement.

CONCLUSION

[26] Assuming that the applicant is able to overcome the difficulties of explaining her default, the applicant fails dismally in showing she has any defence on the merits. There are no triable issues were the judgment to be rescinded.

[27] On 9 September 2016 an order was granted suspending the sale on auction of the vehicle. This order was obviously granted subject to finalisation of this application. To avoid any uncertainty I intend uplifting such suspension expressly.

ORDER

[28] I accordingly grant the following order:

1. The application is dismissed with costs.
2. The suspension of the sale on auction is uplifted.

I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 18 April 2017

Judgment

delivered: 21 April 2017

Appearances

For Applicant: Adv Erasmus

Instructed by: Smit Sewgoolam Inc

For Respondent: Mr Maseti

Instructed by: Maseti Attorneys

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