

SOUTH AFRICA / JUDGMENT

Majola v BMW Financial Services South Africa (Pty) Limited and Another (2488/2018)

[2020] ZAKZDHC 52 (26 October 2020)

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COURT

Kwazulu-Natal High Court, Durban

BEFORE

Masipa

CASE / FILE NUMBER

2488/2018

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA****KWAZULU-NATAL****LOCAL DIVISION, DURBAN****Case****No: 2488/2018****IN****THE MATTER BETWEEN:****SILINDILE****PRETTY MAJOLA**

Applicant

and

BMW**FINANCIAL SERVICES SOUTH AFRICA**

First

Respondent

(PTY)**LIMITED****THE****SHERIFF OF THE HIGH****COURT**

Second Respondent

ORDER

1.

The

application for condonation is refused with costs.

2.

As a

consequence of the refusal of condonation, the rescission application

is dismissed with costs.

JUDGMENT

Delivered on: 26 October 2020

Masipa J:

Background

[1] This is an application for the rescission of judgment granted on 19 April 2018. By agreement between the parties and as is provided in the directive dated 2 October 2020 for the COVID19 pandemic this matter was determined on the papers. In compliance with the directive, the parties filed a joint statement setting out the issue in dispute.

Facts

[2] The applicant and the first respondent concluded an instalment sale agreement in terms of which the applicant purchased a BMW 118i M Sport Line 5DR motor vehicle. The purchase price was R594 002.81 payable in 59 instalments of R7 242.35 each. According to the first respondent, the applicant fell into arrears with her instalments. This is disputed by the applicant who contends that she paid all of her arrears. On 6 March 2018, the first respondent instituted action against the applicant for breaching the instalment sale agreement.

[3] Summons was served at the applicant's domicillium address, being a post box in a complex. The applicant contends that she did not receive the summons as it is not clear who the post box belonged to. On an unspecified date, the applicant received a telephonic demand for the delivery of the vehicle pursuant to judgment being granted against her. She consulted her attorneys on 11 October 2018 who advised her that she should request for a warrant of delivery as

they wanted to challenge the claim of arrears in terms of s 11 of the National Credit Act 34 of 2005. She requested for a copy of warrant of delivery which was sent to her on 17 October 2018 with a copy of the judgment and payment history. She and her attorneys realised on 19 October 2018 that this challenge was not applicable.

[4] The rescission application was filed on 18 December 2018 due to difficulties locating the court file. Attempts had been made since 23 October 2018. Thus there is a condonation application embodied in the rescission application.

[5] The applicant's application for rescission is based on three grounds being:

(a) Non-service of summons;

(b) That the applicant did not receive the notice in terms of s 129 of the National Credit Act; and

- (c) That on 3 August 2015 she paid R33 000 thereby settling the arrears and reinstating the agreement.

The issue to be decided

- [6] Whether the applicant is entitled to the rescission of the default judgment granted against her.

The condonation application

- [7] In respect of the late filing of the application, the applicant avers that there was no undue delay and that condonation may be granted since there is a reasonable explanation for the delay; the application is made bona fide and not for purposes of delaying payment; there has been no reckless disregard of court rules and the first respondent has not suffered any prejudice. She avers further that her attorneys experienced difficulties in locating the court file and wrote to the registrar on 5 November 2018 advising of this. The first respondent avers that the applicant failed to provide an explanation for the entire period of the delay.
- [8] It is trite that in considering a condonation application, courts must take into consideration the degree of lateness, the explanation for the delay, prospects of success and the importance of the case. See *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A). Additional factors include the importance of the case, the nature of the relief, the other party's interest in finality, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the person responsible for the non-compliance. See *Saloojee & another, NNO v Minister of Community Development* 1965 (2) SA 135 (A) and *Grootboom v National Prosecuting Authority & another* 2014 (2) SA 68 (CC) at 32-34.
- [9] As is correctly submitted by the first respondent's counsel, when applying for condonation, the explanation for the delay must cover the entire duration of the delay. According to the applicant, she became aware of the judgment sometime before 11 October 2018 or at the most, on 11 October 2018. The rescission application was then filed on 18 December 2018. If 11 October 2018 is the date accepted as being when she became aware of the judgment, Uniform rule 31(2)(b) provides for a rescission application to be launched within 20 days of her becoming aware of the judgment. In this case, 20 days would have expired on 8 November 2018. There is a broad averment by the applicant that the court file could not be located as at 5 November 2018 and nothing said as to when the file was ultimately located. Accordingly, the applicant has failed to provide an explanation which sufficiently covers the entire duration of delay which on her own version is 28 days.
- [10] The explanation provided for the lateness is also vague and is linked to the issue of the file not being located. The prospects of success are dealt with more fully by considering the merits of the rescission application. I deal with this later on in this judgment.

The deposition challenge

- [11] The first respondent challenged the commissioning and asks for the application to be dismissed on that ground alone. The first respondent avers that the commissioner of oaths failed to state his full name, business address, designation, area of appointment or office held as is required by the provisions of s 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. According to the first respondent, it was impossible *ex facie* the document to ascertain whether it was properly commissioned. Subsequent to this challenge, the applicant attended to the deposition in order to cure the defect. A reading of the first respondent's heads of argument and the joint minute suggests that this point was abandoned. This however is not clear. Consequently, I proceed to deal with the matter hereinafter.
- [12] In *S v Munn* 1973 (3) SA 734 (NC) at 737D-E, the court considered the issue of the commissioning of affidavits. After considering necessary rules of interpretation, the court held that the relevant regulations in this regard were directory only and not peremptory. At 737H-738A, the court considered the failure to properly attest to an affidavit and concluded that unless there was duress or undue influence, the affidavit may still be valid provided there was substantial compliance with the formalities to give effect to the purpose of the legislator. Failure to consider such affidavit would be to place form over substance.
- [13] Although the police officer that commissioned the affidavit did not fully comply with the requirements set out in the regulation, his failure to furnish his full details, while not ideal, does not affect the substance of the affidavit. Contrary to what the first respondent averred, we know that the commissioner of oaths is a police officer based at the Pinetown Community Service Centre since he placed his stamp setting this out. Of course we do not have his full name and designation. In my view, there was substantial compliance with the relevant provisions.

The rescission application

- [14] It is trite that the requirement for rescission is to determine whether there is sufficient cause or good cause. Uniform rule 31(2)(b) sets out two elements to be met:
- (a) A reasonable and acceptable explanation for the default.
 - (b) The existence of a bona fide defence or reasonable prospects of success.
- [15] The first respondent contends that the applicant failed to indicate the provisions under which the rescission application is brought. It contends that if it is in terms of rule 31(2)(b), the application was brought out of the 20 days provided for in the rule and there is no reasonable explanation for the delay. Accordingly, the application should be refused.

The s 129 notice and the summons

- [16] According to the applicant, the first respondent did not deliver the s 129(1)(a) notice required in terms of the National Credit Act. This is because the notice letter attached to the first respondent's papers precedes the date of breach. Further, she contends that she never

received the default letter. The post office report only proves that the notification reached the relevant postal agency and does not prove that it was received. The first respondent relies on *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) and *Sebola & another v Standard Bank of South Africa Ltd & another* 2012 (5) SA 142 (CC) to argue that this was sufficient proof of delivery of the s129 notice letter.

- [17] The first respondent that the s 129 notice and summons were served at a duly elected address and the applicant has not denied that she lives there. It should be noted however, that evidence relating to the s129 notice letter only shows its delivery at the post office and not the domicillium address. If regard is had to the second respondent's return of service, even if a notice was sent to the domicillium address, it cannot reasonably be concluded that the post box at the complex is a reliable mode of service.
- [18] The first respondent's contention that the applicant did not obtain knowledge of the action due to her own action or omission cannot be sustained. No person lives in a post box. Accordingly, service to a post box, especially at a building complex cannot amount to adequate or proper service. There is nothing to suggest that the post box is a dedicated post box of the applicant. The first respondent accepts that the said post box is communal but contends that a person is tasked to receive the post. There is no evidence to support this contention.
- [19] On the issue whether the credit agreement can be reinstated, the first respondent contends that in terms of s 129(4) of the National Credit Act, this is no longer possible since the first respondent instituted proceedings and obtained judgment. The agreement was cancelled. The first respondent contends that in any event, the applicant had not paid the arrears in full. Accordingly, the agreement cannot be reinstated. It was argued that the applicant had no bona fide defence.
- [20] On the merits of this case, the applicant has set out a reasonable and acceptable explanation for the default which is simply that she was unaware of the summons and the s 129(1) notice. In *Sebola* the court stated the following
- [74] These considerations drive me to conclude that the meaning of "deliver" in s 130 cannot be extracted by parsing the words of the statute. It must be found in a broader approach — by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that the s 129 notice in fact reached the consumer. As pointed out earlier, the statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high significance of the s 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer.
- [75] Hence, where the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential. Even though registered letters may go astray, at least there is a "high degree of probability that

most of them are delivered”. But the mishap that afflicted the Sebolas' notice shows that proof of registered despatch by itself is not enough. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by s 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.’ (Footnote omitted).

[21] In Kubyana, the court after considering Sebola, stated the following:

‘[54] The Act prescribes obligations that credit providers must discharge in order to bring s 129 notices to the attention of

consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that —

- (a) the s 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;
- (b) the Post Office issued a notification to the consumer that a registered item was available for her collection;
- (c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and
- (d) a reasonable consumer would have collected the s 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a) – (c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.’

[22] It is undisputed that the first respondent sent the s 129 notice to the applicant. In respect of this application, the first respondent stops there and does not deal with the other requirements set out in Kubyana. Taking this into consideration, together with the second respondent's return of service in respect of the summons and the applicant's averment, it cannot be said that the post office notification reached the applicant.

The defence

[23] In respect of a bona fide defence, the applicant contends that there are no arrears since the first respondent failed to take into account her payment of R33 000 made on 3 August 2018, which had the effect of reinstating the agreement. An instalment sale agreement is reinstated where the arrear amount is paid in full prior to the granting of judgment. See *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC). The issue to be determined is whether the applicant paid her arrears and whether at the time when such payment was effected

the agreement could be reinstated.

[24] It is not disputed that the applicant paid the R33 000. The first respondent however avers that as at the date when the applicant effected payment, the applicant's arrears had escalated to R45 694.65. consequently, the R33 000 paid by her was insufficient to settle the arrears. This was not disputed by the applicant.

[25] In Nkata the court stated as follows:

'[100] Sections 129(3) and (4) have introduced the novel relief of reinstatement, which parts ways with the debt-collection measures of old. The relief is available when a credit agreement is in default but has not been cancelled by the credit provider. Once the consumer makes specified overdue payments, the agreement is reinstated. What is more, she may resume possession of the property that has been repossessed by the credit provider under an attachment order. The evident purpose of s 129(3) is to urge consumers to pay their overdue amounts, default charges and legal costs to their lenders and, in turn, consumers in good standing are rewarded with reinstatement of the credit accord and the return of their attached property.'

[26] The court went further to state the following:

'[104] At the outset, I observe that ss 129(3) and (4) start with what a consumer may and may not do. It is the consumer who may reinstate a credit agreement. This she may do "any time before the credit provider [cancels] the agreement". So, as long as the agreement is current, she may elect to reinstate it. The clear import is that for purposes of reinstatement the consumer is the protagonist. She may disclose her design to the credit provider but she is not compelled to give notice to or seek the consent or cooperation of the credit giver.' (Footnote omitted).

[27] Reinstatement follows payment of all amounts that are overdue and before the credit provider cancels the agreement. Cancellation must be in accordance with ss 129 and 130. Therefore, if there was no such compliance, then the credit agreement cannot be said to have been cancelled.

[28] I am satisfied that the applicant has provided a reasonable and acceptable explanation for the default. She however falls short of proving the existence of a bona fide defence. If this is so, then the judgment cannot be rescinded since this will be done solely for the waste of the first respondent and the court's time. Having found that the applicant lacks a bona fide defence, I conclude that there are no prospects of success in the rescission application.

[29] I accordingly make the following order

3. The application for condonation is refused with costs.
4. As a consequence of the refusal of condonation, the rescission application is dismissed with costs.

Masipa J

Details of the Hearing

Matter set down:

7 October 2020 (No Oral Submissions)

Date of Judgment:

26 October 2020

Counsel for Applicant:

CW Haverman

Instructed by:

CWH Attorneys.

Counsel for the first Respondent: D D Naidoo

Instructed by:

Maynard Menon Govender Inc.

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