

SOUTH AFRICA / JUDGMENT

Mlanjana Trading CC and Others v Nedbank Limited; In re: Nedbank Limited v Mlanjana Trading CC and Others (49/2017) [2017] ZAFSHC 177 (28 September 2017)

[2017] ZAFSHC 177

COURT

Free State High Court, Bloemfontein

BEFORE

C Reinders

CASE / FILE NUMBER

49/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

No: 49/2017

In

the application between: MLAJANA
TRADING
CC 1st
Applicant
(Registration
number 2009/217692/23)
MPHO
MARIANNA
THUTHANI 2nd
Applicant
(Identity
number [...])
THEMBANI
JONAS
THUTHANI 3rd
Applicant
and
NEDBANK
LIMITED (of which MFC is a
division) Respondent
In

re: In

the matter between: NEDBANK
LIMITED (of which MFC is a
division) Plaintiff
MLAJANA
TRADING
CC 1st
Defendant
MPHO
MARIANNA
THUTHANI 2nd
Defendant
THEMBANI
JONAS THUTHANI 3rd
Defendant

JUDGMENT

BY: C REINDERS, J

DELIVERED ON: 28 SEPTEMBER 2017

- [1] This is an application for the rescission of default judgment granted by the Registrar of this court. The first applicant is Mlajana Trading CC ("the CC"), a close corporation with chosen domicilium citandi et executandi at 6 De Waal Road, Ehrlich Park, Bloemfontein ("the domicilium"). The second and third applicants are the married couple Mrs Mpho Marianna Thuthani ("Mrs Thuthani") and Mr Thembani Jonas Thuthani ("Mr Thuthani") respectively,

residing in Durban, Kwazulu Natal. The application is opposed by the respondent, Nedbank (Pty) Ltd who conducts business as The Motor Finance Corporation (Pty) Ltd ("the MFG").

- [2] It is common cause that the CC purchased a Ford Ranger motor vehicle ("the vehicle") from MFG in terms of a written agreement ("the agreement") on 18 November 2013. At all times relevant the Thuthani's were the only members of the CC and stood surety for its obligations under the agreement. Due to the failure of the CC to make punctual payments in terms of the agreement, MFC cancelled the agreement and sued for return of the vehicle and liquidated damages. On the 7th February 2017 judgment by default

was granted against the applicants for inter alia confirmation of cancellation of the agreement and return of the vehicle. The MFC hereafter obtained a warrant for attachment and delivery of the goods which the sheriff served personally on Mr Thuthani on 18 February 2017 at the chosen domicilium address. The sheriff was refused access to the premises and the applicants (more in particular the third applicant) refused to hand over of the vehicle despite the intervention of the South African Police Services. On 16 March 2017 this application was launched.

- [3] It is trite law that, in order to succeed in an application for rescission of a judgment, an applicant must show good cause for the setting aside of same. This would entail at least the following:

3.1 Applicant must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance;

3.2 The application must be bona fide and not made with the intention of merely delaying plaintiff's claim;

3.3 Applicant must show that he has a bona fide defence to plaintiff's claim. It is sufficient if a bona fide defence is made out in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for.

See: *Grant v Plumbers (Pty)Ltd* 1949 (2) SA 470 (O) at 476-7

See also: *Colyn v Tiger Food Industries Ltd t/a Meadow Feeds Mills (Cape)* 2003 (6) SA 1 (SCA) at para [11]

- [4] The explanation for the delay in opposing the action is set out in the founding affidavit by Mr Thuthani. Although the summons was served at the chosen domicilium of the applicants by affixing a copy thereof to the main entrance of the property, the CC no longer conducts business from the said address. The Thuthani's also do not live there anymore. As a result hereof the summons only came to the applicants' attention on 16 January 2017 when his father-in-law sent it to him via e-mail.
- [5] The applicants aver that they have a bona fide defence on the merits. The better the chances of success on the merits, the less I should concern myself with the absence of a good explanation for the delay.

[6] The upshot of the defence that applicants wish to rely upon is to be found in the notices in terms of Sec 129 of the National Credit Act 34 of 2005 ("the NCA") that was sent to the domicilium address of the applicants and, so the argument goes, they did not receive the notices due to their absence at the said address. They

only became aware of the mechanisms afforded to them by the NCA upon perusal of the summons (with the Sec 129 notices annexed thereto).

Had they received the said notices, they would have made use of these mechanisms.

[7] The essential question to be answered is accordingly if the NCA finds any applicability to the agreement in casu. Under the heading

"Application of Act" Sec 4 deals extensively with the applicability of credit agreements under the NCA and spells out precisely when the Act does not apply by identifying exemptions. Sec 4 (1)(b) exempts a "large agreement" where "the consumer is a juristic person whose asset value or annual turnover is below the threshold value determined by the Minister". It is common cause that the CC is a juristic person and the principle debt in terms of the agreement far exceeded the threshold for a large credit agreement.

[8] Mr Els on behalf of applicants argued that the applicants should be afforded the rights in terms of the Sec 129 notices which MFC chose to grant the applicants by annexing these notices to the summons. Mr Van Aswegen appearing for MFC however submitted that the fact that MFC elected to send notices in terms of Sec 129 to the applicants does not advance the defence of the applicants as the provisions of the NCA applies ex lege. I agree with Mr Van Aswegen. As was articulated by Satchwell J in *First Rand Bank (a division of Firststrand Bank Ltd) v Kaydeez Therapies CC (in liquidation) and Others* 2013 (6) SA 308 (GSJ) at para [15] with reference to a statute:

"It obtains its force by reason of the will and decision of the legislature, not because individuals or entities elect to be subject thereto."

[9] According to the applicants, the effect of not receiving the Sec 129 notices was that they were deprived of an opportunity to resolve the dispute or to bring their payments up to date. In view thereof that the NCA is not applicable the defences and resolution methods available under the NCA is simply not applicable herein and therefore the applicants make out no defence.

[10] Having reached the conclusion that the applicant has no bona fide defence it follows that applicant has not shown good cause. After all, if the applicant has no defence, it would not serve any purpose

to rescind the judgment granted by the Registrar.

[11] Although applicants aver that attempts were made to settle the arrear payments due to the MFC, it is not in issue that the CC was in breach of the agreement by virtue of its failure to make punctual payments. As such the MFC was and still is entitled to cancellation of the

agreement and repossession of the vehicle. The CC indicates that it is willing to pay the arrears and all related costs involved. However, it is not in dispute that the CC still enjoys the usage of the vehicle, makes no payments and refuses to hand over the vehicle to the MFC in terms of an order of this court. If it is true that MFC is not prepared to accept payment it is at best regrettable as far as I am concerned. However, I cannot force MFC to accept payment herein and the decision to cancel is that of MFC. They chose to cancel as they were legally entitled to do in particular in view of my finding that the NCA is not applicable.

See in general: *Nkata v Firststrand Bank Limited and Others* 2016 (4) SA 257 (CC)

[12] For the reasons above the application cannot succeed and I make the following order:

The application is dismissed with costs.

C. REINDERS, J

On behalf of the applicants: Adv. J.H. Els

Instructed by:

H.F. Attorneys

BLOEMFONTEIN

On behalf of the respondent: Adv. W.A. van Aswegen

McIntyre Van der Post

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