CCA/96/2012

IN THE HIGH COURT OF LESOTHO
(Commercial Division)

In the application of:

HALIFELE ALPHLEDAH. MACPHERSON **APPLICANT**

AND

STANDARD LESOTHO BANK LIMITED **1ST RESPONDENT**
DEPUTY SHERIFF **2ND RESPONDENT**

JUDGMENT

Coram : **L. Chaka-Makhooane J**
Dates of Hearing : **23rd August, 2013, 31st October, 2013, 28th November, 2013, 10th February, 2014, 18th March, 2014, 6th May, 2014**
Date of Judgment : **15th August, 2014**

SUMMARY

Application for rescission in terms of Rule 45 (1) (a) following a judgment in default – Applicant failing to convince the court to grant a rescission order because there was no cause of action – The application also having been over taken by events – Application dismissed and rule nisi discharged with costs.

ANNOTATIONS

CITED CASES

1. Burton v Thomas Barlow & Sons (Natal) 1978 (4) SA 795
2. Chetty v Law Society Transvaal 1985 (2) 756
3. CGM Industrial (Pty) Ltd v Adelfang Computing (Pty) Ltd LAC (2007 - 2008)
4. Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003.
5. Dakoven Ltd & G J Howes (Pty) Ltd 1992 (2) SA 466 (E) 471.
6. Dawson & Fraser (Pty) Ltd v Havenga Construction (Pty) Ltd 1993 (3) SA 397 (BGD).
7. De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A).
8. Director Hospital Services v Mistry 1999 (1) SA 626 (A)
9. Deary v Deary 1971 (1) SA 227.
10. First National Bank of SA Ltd v Van Resburg No 1994 (1) SA 677 (T)
11. Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)
12. Nyigwa v Moolman No 1993(2) SA 508.
13. Open Bible Ministries & Another v Ralitsie Nkokorane & Another 1991 – 1992 LLR & LB 112.
14. Plascon Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (4) SA 623 (A).
15. Saphula v Nedcor Bank 1999 (2) SA 76 (W).
16. Schmidlin v Multisound (Pty) Ltd 1991 (2) SA 151 (C)
17. Terrace Auto Services Centre (Pty) Ltd and Others v First National Bank 1996 (3) SA 209 (W).
18. Van Aswagen v Kruger 1974 (3) SA 204 (O).
19. Van Der Merwe v Bona Ero Park (EDMS) BPK 1998 (1) SA 697 (T).

STATUTES

1. High Court Rules, 1980

[1] This is an application for a rescission of a judgment in default granted in terms of prayers 2 (a) of the Notice of Motion.

[2] The applicant was served with an interim court order in November, 2012 following an application for repossession by the 1st respondent. The applicant duly complied with the order and released the vehicle to the deputy sheriff, who it is alleged promised the applicant that her vehicle would be returned to her if she continued to pay her instalments. Clearly this was outside the 2nd respondent's made.

[3] According to the applicant she paid her instalments to the 1st respondent in relation to the Hire Purchase agreement religiously and has never at any stage defaulted. The applicant also laments that despite settling her arrears the motor vehicle was not returned to her. It is her case that the court erroneously granted judgment in default in the main application because the court was under the mistaken impression that she had defaulted in the payment of her monthly instalments. In this regard Counsel for the applicant **Ms Mokheseng** was relying on **Rule 45 (i) (a)**[1].

[4] According to the applicant the judgment in the main application was obtained on the basis of fabricated facts. The court was misled by the 1st respondent (applicant in the main) by insisting that the applicant had failed to pay certain monthly instalments and consequently breaching the Hire Purchase contract. It is **Ms Mokheseng's** submission that, had the court been privy to the fact that the applicant had kept up with her instalments, the court would not have granted the default judgment. The court was referred to the cases of **Deary v Deary**[2] **and Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)**[3].

[1] High Court Rules, 1980
[2] 1971 (1) SA 227 at 230
[3] 2003 (6) 1 (SCA) ([2003]) 2 All SA 113

[4] The 1st respondent vehemently opposes the application for rescission on the basis that the case made out by the applicant is fatally defective for the following reasons;

a) the procedure adopted has been an abuse of urgent applications;

b) the prayers sought are untenable more especially when it is common cause between the parties that the vehicle in question has already been sold;

c) since the application is premised on **Rule 45 (1) (a)**,[4] the facts foreshadowing the application do not found a cause of action for rescission.

[6] This being an application for rescission, the court must satisfy itself that the applicant has established and proved the following;

i) that he/she was not in wilful default;

ii) that he/she has a *bona fide* defence to the claim

iii) that the application is not merely for dilatory purposes[5].

[7] I must say in all honesty, I am confused by the applicant's actions from when she was first served with the interim order initially in the main application. I observe that she was served on the 16th November, 2012, by the Deputy Sheriff but by the time the rule nisi was confirmed on the 29th November, 2012, the applicant had still not shown any interest. The applicant's counsel

[4] High Court Rules

[5] Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O)

only came to court on the 31st May, 2013 to bring the current rescission application.

[8] By this time the applicant was aware that the vehicle in question had already been sold. Be that as it may, the applicant does not bother to inform the court why she was unable to defend the repossession application in the first place. Over and above this, she moves the court on an urgent basis even though she approached the court almost six (6) months later, after the granting of the final order, in the main application. Now, as far as the urgency goes, the applicant will agree that, it will be hard to convince the court that, urgency was ever an issue. That means the element of urgency falls away.

[9] Moving on to the cause of action, we have already established that at the time the applicant approached the cart she was already aware that the vehicle in question had already been sold. That is, by the time she reacted the court had confirmed the *rule nisi* in the repossession application, thereby giving lee way to the respondent to dispose of the vehicle if it so wished.

[10] Furthermore, it is still confusing to the court why the applicant is so adamant that she was not in default on her instalments thus being in arrears. When she was served with the interim order for repossession, she allowed the vehicle to be repossessed, even though according to her, she had never defaulted on her payments. The applicant had some options open to her, such as defending or opposing the application for repossession or to either reinstate or settle the agreement. *In casu* the applicant clearly reinstated the agreement since she resumed the agreement by paying the arrears of

instalments owing. However, it is clear that she did not negotiate for the return of her vehicle with the respondent, as a result they went ahead and sold it in order to pay off the amount comprising the applicant's arrears of instalments (which could also include interest and charges such as repossession costs, costs of holding, storage, costs of valuing and preparing the vehicle for sale, etc).

[11] It is clear that there were arrears since the applicant was agreeing with the 1st respondent hence her payment of the amount *inter alia* of thirteen thousand Maluti (M13 000.00) on the 26th March, 2013, as evidenced by annexure "HM3". Never once did she refuses to pay any arrears when she was made aware of her default. It seems to me that the applicant is aware that this application has been over taken by events. If anything her issue with the respondent could be resolved by way of other remedies. As far as this application is concerned, I agree with the 1st respondent that she has no cause of action. This simply means prayers such as (d), (e) and (f) fall away. The vehicle in question is long gone.

[12] The applicant also fails to convince the court that the order granted by it in the main application was erroneously granted. It is clear that contrary to what she has averred, she was in default of paying her arrears. There was nothing prevently the court from granting the repossession application. The applicant rightly or wrongly has conceded that she was in arrears at some point though she eventually paid them off. In this regard prayer (a) stands to be dismissed, while prayers (b) and (c) will automatically be affected by the same fate since they are incidental.

[13] The parties have agreed that any issues unresolved will be dealt with at a later state. In this regard prayer 2 (g) falls in that category.

[14] I must mention that I am not particularly impressed by the 1st respondent's part in this case. It is clear that the 1st respondent does not give out enough information to its clients such as the applicant *in casu* in their repossession cases, to enable those clients to exercise options available to them. It is clear that the applicant was not made aware of the impending sale of her repossessed vehicle, which information she was entitled to. She was entitled to reasonable notice of the sale of the vehicle, if it was by public auction and she was also entitled before the sale, to obtain a valuation of the goods (at her expense of course) if the sale was by public auction. Above all, she was entitled, if it is before sale, to settle the agreement among other things. It seems to me that the 1st respondent issues scanty or no information at all and this I find disturbing. I asked to be supplied with a breakdown of the various payments made by the applicant during the life of the Hire Purchase agreement, even that was a hassle. It took many months of postponing the matter because the 1st respondent was having trouble finding its records. Of importance is that during that exercise, only then did the applicant find out that she was possibly entitled to a refund.

[15] The 1st respondent's Counsel is urged to advise his clients to do things by the book and have them issue out enough information to their clients.

[16] It is for the forgoing reasons that I make the following order;

(a) prayers 2 (a) to (f) in the Notice of Motion are dismissed;

(b) the *rule nisi* granted in the application for rescission is hereby discharged;

(c) the court declines to make a ruling in relation to prayer 2 (g) since the parties have agreed to resolve it at another time;

(d) costs are awarded to the 1st respondent.

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L. CHAKA-MAKHOOANE
JUDGE

For applicant : **Ms Mokheseng**

For 1st respondent : **Mr. Mpaka**

No representation for the 2nd respondent.