



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO: 56928/2021

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO
- (4) DATE: 12 JUNE 2023
- (5) SIGNATURE: *ML SENYATSI*

In the matter between:

CLENDIA LEDILE MAKGALEMELE

Applicant

and

**TOYOTA FINANCIAL SERVICES
(SOUTH AFRICA) LTD**

Respondent

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines Judgment is deemed to be delivered.*

SENYATSI J

- [1] This is an application for reconsideration and rescission of the judgment obtained by default against the applicant on 24th February 2022. The applicant also applies for the condonation of the late filing of the application. The application is brought in terms of rules 31(5)(d) and 41(1) of the Uniform Rules of Court.
- [2] The respondent was the applicant in the main application in terms of which it had sought and obtained the cancellation of the instalment sale agreement as well as the repossession of a motor vehicle financed in terms of said instalment sale agreement. The instalment sale agreement had been concluded between the parties on 24 October 2017.
- [3] When the repossession order was granted, the applicant was in arrears with her repayment obligations. She does not deny this assertion in her papers but states that she was a few months in arrears with her repayment obligations. She contends that when the default judgment was obtained, the respondent had failed to comply with the provisions of section 129 of the National Credit Act (“the NCA”). Furthermore, she contends that the default judgment was granted prematurely before the expiry of the *dies* as provided for by the Uniform Rules of Court.

[4] The issues for determination are as follows:

- (a) whether the respondent complied with sections 129 and 130 of the National Credit Act (“NCA”) before enforcing the instalment sale agreement;
- (b) whether the default judgement was granted prematurely before the expiry of the *dies* as provided for by the rules of Court;
- (c) whether the applicant has satisfied the requirements for condonation of the late filing of the application; and
- (d) whether the applicant has satisfied the requirements for rescission of the default judgment. The law on each of the issues will be dealt with hereunder.

[5] Section 129 of the NCA makes provision for the required procedures before debt enforcement could be implemented and reads as follows:

“(1) consumer is in default under a credit agreement, the credit provider-

- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
- (b) Subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-
 - (i) First providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
 - (ii) Meeting any further requirements set out in section 130.

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such order.

(3) Subject to subsection (4); a consumer may-

(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit providers permitted default charges and the reasonable costs of enforcing the agreement up to the time of re-instatement; and-

(b) After complying with paragraph (a), may resume possession of any property that has been repossessed by the credit provider pursuant to an attachment order.

(4) A consumer may not re-instate a credit agreement after-

(a) the sale of any property pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123.-"

[6] Section 130 makes provision for the enforcement of a debt procedures in court and states as follows:

"(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and -

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (9), or section 129 (1), as the case may be;

(b) in the case of a notice contemplated in section 129 (1), the consumer has-

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

(2) ...

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) ...

(4) In any proceedings contemplated in this section, if the court determines that-

(a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (a), or has approached the court in circumstances contemplated in subsection (3) (c) the court must-

(i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;

(c) ...”

[7] The purpose of section 129 of the NCA is to provide protection to credit consumers by requiring that notice of default must be given before legal remedies could be enforced in the courts by credit providers.¹

[8] In Amardien and Others v Registrar of Deeds and Others² the Constitutional Court described the purpose of section 129 in the following terms:

“(a) It brings to the attention of the consumer the default status of her credit agreement.

(c) It provides the consumer with an opportunity to rectify the default status of the credit agreement in order to avoid legal action being instituted on the credit agreement or to regain possession of the asset subject to the credit agreement.”

(c) It is the only gateway for a credit provider to be able to institute legal action against a consumer who is in default under a credit agreement.”

[9] The applicant raises the non-compliance with sections 129 and 130 procedures in her heads of agreement and did not do so in her founding affidavit. I had regard to the section 129 notice letter attached to the combined summons. It is evident from the contents thereof that it mentions the total balance, the amount of arrears that need to be settled, the fact that the applicant has various options as prescribed by the NCA with regards to referring the matter to a debt counsellor or credit ombud if she had queries in regard to the amount indicated in the letter as outstanding. The letter itself was sent to the applicant by registered post. The applicant is silent on what she did with the options made available to her by the letter. I am

¹ See First Rand Bank Ltd t/a First National Bank v Moonsammy (07747/2018) [2020]- ZAGPJHC 105; 2021 (1) SA 225(GJ) (15 April 2020) at para 17.

² 2019 (3) SA 341 (CC) at para 56.

therefore satisfied that the provisions of sections 129 and 130 of the NCA were complied with by the respondent. Accordingly, there is no merit in the contention that the sections were not complied with.

[10] I now deal with the contention that the default judgment was granted prematurely by the Court. Rule 31(2) (a) of the Uniform Rules state as follows:

“Whenever in an action of the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for the default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.”

The applicant contends that the default judgement was granted by error because the *dies* had not expired and seeks the judgment to be set aside in terms of rule 42 (1) of the Uniform Rules.

[11] Rule 42(1) (a) provides that the High Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind, or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby³. The argument before me therefore centres around the question whether the facts upon which the applicant relies give rise to the sort of error for which the rule provides and, if so, whether the order was erroneously sought or erroneously granted because of it.

[12] Rule 42 caters for mistake. Rescission or variation does not follow automatically upon proof of a mistake. The rule gives the courts a

³ See *Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills Cape* (127/2002) [2003] ZASCA 36; 2 All SA 113(SCA) (13 March 2003) at para 3.

discretion to order it, which must be exercised judicially.⁴ Not every mistake or irregularity may be corrected in terms of the rule. It is, for the most part at any rate, a restatement of the common law. It does not purport to amend or extend the common law.⁵

- [13] Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order containing a patent error or omission (rule 42(1) (b)); or an order resulting from a mistake common to the parties (rule 42(1)(c)); order an order erroneously sought or erroneously granted in the absence of a party affected thereby (rule 42(1) (a)). In the present case the application was, as far as the rule is concerned, is only based on Rule 42(1) (a) and the crisp question is whether the judgment was erroneously granted. The applicant contends that the *dies* had not expired when the judgment was granted.
- [14] The combined summons was served by the sheriff at the chosen *domicilium* of the applicant on the 17th of December 2021 by affixing copies to the outer or principal door at the given address. There was no notice of appearance to defend filed by the applicant. Service of the court process to a given *domicilium* address has been held to be a good service.⁶ The application for default judgment dated 31st of January 2022 was filed at Court and on the 24 February 2022, the default judgment was granted in favour of the respondent for the cancellation of the agreement between the parties and the applicant was ordered to return to the respondent a 2015 Toyota Avanza with the full details described in the order.
- [15] The applicant contents that when judgment was sought and obtained on the 24th of February 2022, the 10 days period had not yet elapsed, if regard is

⁴ See Theron NO v United Democratic Front (Western Cape Region) and Others 1984(2) SA (C) at 536G; Tshivhase Royal Council and another v Tshivhase and another; Tshivhase and another v Tshivhase and another [1992] ZASCA 185; 1992(4) SA 852(A) 862J-863A.

⁵ See Harms, Civil Procedure in the Supreme Court, B42-1.

⁶ See Chris Mulder Genote v Louis Meintjies Konstruksie (Edms) Bpk 1988 (2) SA 433 (T).

had to the fact that summons was served on 17 December 2021. This complaint has no basis because the *dies* elapsed on 5 January 2022 and not the 31st of January 2022 as contended by the applicant. In any event, the order was granted only on the 24th of February 2022. Accordingly, I find no basis to allege that the court made an error in granting the default judgment. When the registrar of the Court referred the application for default judgment to Court, it was dealt with by Court having considered the papers before it and it could not find anything untoward with the papers. It follows therefore that there is no basis for this Court to reconsider the judgment under Rule 31(5)(d) or rescission in terms of rule 42(1).

- [16] The third issue is whether the applicant has shown good cause for application for condonation of the late filing of this rescission application. Rule 31 (2) (b) states that:

“a defendant may within 21 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 it deems fit, if it is satisfied that good cause has been shown”.

- [17] Our courts have had an opportunity to explain what is meant in the rule by “a good cause”. In *Bangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd*⁷ it was held that:

“19. For rescission to be granted in terms of rule 51 (2) (b) the appellant needs to establish ‘good cause’. In *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty)Ltd* 1975(1) SA 612 (D), Howard J (as he then was) commented at page 613B-D that;

‘In terms of Rule 31 (2) (b) the Court has a discretion to set aside a default judgment ‘upon good cause shown.’ The Rules contain no definition of ‘good cause’ but the Courts have provided one, in effect, by laying down certain requirements which an applicant must comply with before he can be held to

⁷ 2011(3) SA 447(KZP) at para 19.

have shown good cause or, what is practically synonymous, 'sufficient cause' for various kinds of procedural relief.'

[18] In *Silber v Ozen Wholesalers (Pty) Ltd*⁸ it was held as follows with regards to the definition of 'good cause':

".. applicant had always been obliged to set out the reasons why he did not appear, as well as the grounds of his defence, but it was only in 1936 by another amendment that the application was required to be on affidavit. It seems clear that by introducing the words 'and if good cause be shown' the regulating authority was imposing upon the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for rescission, such good cause including but not being limited to the existence of a substantial defence. The onus is upon the applicant for rescission to establish that such good cause exists in the circumstances of each case."

[19] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*⁹ the court held that:

".. the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success."

[20] Our Courts have also been reluctant to give the phrase "good cause" a precise meaning. For instance, in *Kritzinger v Northern Natal Implement Co Ltd*¹⁰ it was stated by James JP that:

"A consideration of the various cases on the subject of good cause shows that there is an understandable reluctance to give the phrase a circumscribed and inelastic meaning and it is, I think, clear that each case must stand on its own facts. It appears, however, to be generally accepted that good cause cannot be

⁸ 1954 (2) SA 345 (AD) at 352F-G

⁹ Above footnote 3 at 9E-F.

¹⁰ 1973(4) SA 542 (N) at 546 A-C.

held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, of a *bona fide* desire by the applicant to raise the defence if the application is granted.”

[21] Again in Construction (Pty) Ltd v Wait¹¹ Smalberger J held that:

“In determining whether or not good cause has been shown, and more particularly in the present matter, whether the defendant has given a reasonable explanation for his default, the Court is given a wide discretion in terms of Rule 31 (2) (b). When dealing with words such as ‘good cause’ and ‘sufficient cause’ in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairn's Executors v Gaarn* 1912 AD 181 at 186; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352 - 3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.”

[22] In the instant case, the applicant states in her founding affidavit that she was sceptical that the sheriff was authorised to repossess the vehicle as respondent had previously, around September 2021 sent its agent to her house for the purposed of surrendering the vehicle and she states that she refused as she was still making payments. She does not deny that her account was in arrears but states that she queried some of the line items indicated on her statements such as the extended warranty of the motor vehicle. She furthermore avers that she only became aware of the judgment on the 22nd of April 2022 when the sheriff came to her house with the warrant of delivery to repossess the vehicle. She then states that during May 2022 she forwarded an e-mail to the respondents’ attendees requesting copies of documents related to the possession of the vehicle and the

¹¹ 1979(2) SA 298 (E) at 300H-301A.

judgment against her. She received the requested documents on the 4th of May 2022. She then launched the application during June 2022. Based on her explanation, I have no difficulty in condoning the late application for re-consideration and rescission of the default judgment.

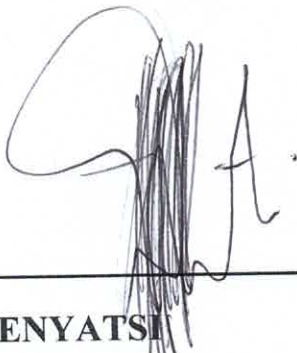
- [23] I now deal with the final issue of whether the requirements for rescission of the default judgment have been met. I have covered the law on the 'good cause' to be shown for a rescission application to be favourably considered. It is critical, *inter alia*, that the applicant bears the onus of showing a defence to the claim. The applicant does not deny that her account is in arrears. She contends that the reason she fell behind with her repayments obligations was due to the imposition of the State of Disaster in response to the Covid-19 pandemic by Government which had an adverse effect on her business. The question is whether this so-called defence can be sustained to avoid the contractual obligations. I am of the view that it cannot and accordingly, this does not meet the requirement of good defence.
- [24] The applicant also contends that she queried some of the line items on her statement of account from the respondent. The question is whether those items are in fact and at law valid defences which can entitle the applicant to have the judgment rescinded and therefore allow the case to proceed to trial. It should be remembered that the agreement and its terms are not in dispute together with the fact that in the event of any litigation, the respondent will seek the applicant to pay on the scale as between attorney and client.
- [25] I hold the view that there are no valid defences to justify rescinding the default judgment and that in any event the so-called reasons for default are not raised as *bona fide* defence to resist the litigation. Accordingly, the

requirements for rescission of the default judgment have in my view, not been established. Consequently, the application stands to be dismissed.

ORDER

[26] Consequently, the following order is made:

- (a) Condonation for the late filling of the application is granted;
- (b) The application for rescission of the default judgment is dismissed;
and
- (c) The applicant is ordered to pay costs on the scale as between attorney and client.

A handwritten signature in dark ink, appearing to be 'ML Senyatsi', is written over a horizontal line. The signature is somewhat stylized and includes a large loop on the left side.

**ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

DATE APPLICATION HEARD: 24 April 2023

DATE JUDGMENT HANDED DOWN: 12 June 2023

APPEARANCES

Counsel for the Applicant/Defendant: Adv O Leketi

Instructed by: Baepi Dyasi Attorneys

Counsel for the

Respondent/Plaintiff: Adv J Govender

Instructed by: Smith Van Der Watt Inc.