



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 24143/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 7 February 2023

In the matter between:

SIFUBA: PAKAMISA AUGUSTINE

APPLICANT

and

WESBANK

FIRST RESPONDENT

SHERIFF PRETORIA SOUTH EAST

SECOND RESPONDENT

JUDGMENT

ALLY AJ

INTRODUCTION

[1] This is an application for the rescission of judgment handed down by this Court dated 21 October 2021. This application is opposed by the First Respondent.

[2] The application has been launched, from what appears from the Notice of Motion, in terms of Rule 31 (2) (b) and or alternatively Rule 42 of the Uniform Rules of Court.

[3] Both parties were represented by Counsel.

FACTUAL BACKGROUND

[4] The First Respondent sold the Applicant a motor vehicle described as a Volvo XC90 D5 in accordance with an instalment sale agreement.

[5] The Applicant fell into arrears with his payments and the First Respondent obtained a default judgment against the Applicant which forms the basis of this application.

[6] The Applicant alleges that he did not receive notice of the summons. The summons, it is common cause, having been served by affixing to the principal door at the *domicilium* address.

LEGAL FRAMEWORK

[7] Rule 31 (2) (b) provides as follows:

“(b) A defendant may within 20 days after he 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 to it seems meet.”

[8] Rule 42 (1) provides as follows:

“(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.”

ANALYSIS AND EVALUATION

[9] Our Courts have laid down certain requirements in dealing with the abovementioned Rules. In this regard, the case of Colyn¹ has established the following:

¹ Colyn v Tiger Food Industries Ltd 2003 (6) SA 1 (SCA) at para 11;

“The applicant must show cause why the remedy should be granted. That entails (a) giving a reasonable explanation of the default; (b) showing that the application is made bona fide; and (c) showing that there is a bona fide defence to the plaintiff’s claim which prima facie has some prospect of success. In addition, the application must be brought within 20 days after the defendant has obtained knowledge of the judgement”.

[10] The question is whether the Applicant has made out a case in terms of Rule 31 (2) (b). The first issue is whether the Applicant has lodged his application in time in terms of the Rule.

[11] The Rule is clear that the application must be launched within 20 days of having obtained knowledge of the judgment. In my view, I am satisfied that the Applicant only came to know of the judgment on 14 December 2021 when the Sheriff came to remove the motor vehicle mentioned above.

[12] However, the Applicant must also explain the delay in launching this application and I also find in his favour that he has explained the circumstances surrounding how he came to know of the judgment and the practical steps he took to launch this application in the shortest possible time.

[13] The real issue in this application in terms of Rule 31 (2) (b) is whether the Applicant has a *bona fide* defence to the claim of the Respondent for cancellation of the agreement and payment of the amount claimed in the summons.

[14] The Applicant has gone to great lengths in explaining how he fell on bad times in terms of his debts and that he was expecting a foreign posting by the Government of South Africa which would assist with his debts.

[15] The Applicant goes further and states that he had an agreement with a person employed by the Respondent to pay the amount of R14 000 – 00 [fourteen thousand rand] per month which amounts he was paying.

[16] The question that arises is whether the Respondent can be held to what one of their employees informed the Applicant? Furthermore can the Respondent be estopped from denying the existence of an agreement between the Applicant and the Respondent that was negotiated through one of its employees, Mr Seanego?

[17] The Respondent denies the said negotiated agreement and further submits that Mr Seanego had no authority to negotiate or enter into such agreement. The Respondent furthermore submits that the instalment sale agreement contained a non-variation clause which required that any variation to the terms of the agreement

must be done in writing and signed by both parties and since the 'negotiated agreement' with Mr Seanego was not in writing, the Applicant cannot rely on same.

[18] I will assume in Applicant's favour that he had an oral agreement with Mr Seanego that the abovementioned amount of R14 000 – 00 [fourteen thousand rand] can be paid and was paid monthly by the Applicant.

[19] The problem, however, that the Applicant faces is the law regarding non-variation clauses². These cases make it clear that a non-variation clause in a contract is binding on the parties and an oral agreement that has the effect of changing the obligations of the parties is invalid. The estoppel point in favour of the Applicant, in my view does not trump the law on non-variation clauses.

[20] Put differently, although this Court has sympathy with the practical steps taken by the Applicant during the time when he was in dire financial circumstances, the law as it stands is not able to assist him. Accordingly, Applicant's reliance on Rule 31 (2) (b) must fail as the Applicant does not have a *bona fide* defence to the claim.

² SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A);
Brisley v Drotsky 2002 SCA; Kovaks Investments 724 Pty Ltd v F.C. Marais 2009 SCA 84 @ para

[21] The Applicant has also relied on Rule 42 to rescind the default judgement. Accordingly, it necessary to also investigate whether the said Rule comes to the assistance of the Applicant.

[22] In this regard, our Courts³ have interpreted Rule 42 as follows:

“an order or judgement is “erroneously granted” when the court commits an error in the sense of a mistake in a matter of law appearing on the proceedings of a record. (The shorter Oxford dictionary). It follows that the court in deciding whether a judgement was “erroneously granted” is, like a court of appeal, confined to the record of proceedings. In contradiction to relief in terms of rule 31 (2) (b) or under common law, the applicant need not show (good cause) in the sense of an explanation for his default and a bona fide defence...”

[23] Furthermore, our Courts⁴ have also held that a judgement or order was not erroneously granted if a defence is subsequently disclosed.

[24] The Applicant submits that the error committed on the facts of this case, is that the Court hearing the application was not aware that the summons had not

³ Bakoven Ltd v GJ Howes Pty Ltd 1990 (2) SA 466 (E) at page 471 E-F

⁴ Lohdi 2 Property Investments CC v Bondev Developments Pty Ltd 2007 @ para 17 and 27

come to the attention of the Applicant. At this point it must be noted that service of the summons by the Sheriff took place by affixing same to the principal door. The Applicant submits that the Court should recognise the service as effected by the Sheriff as proper service. The Applicant, however, provides no authority for the proposition that the Court should ignore the service. Service on the elected *domicilium* of a party, contained in a contract, is proper service unless such party is able to show that the *domicilium* has been changed in writing.

[25] It is appropriate at this time to explain what has been said in **Lohdi 2⁵** regarding service of a summons:

"I agree that Erasmus J in Bakoven adopted too narrow an interpretation of the words 'erroneously granted'. Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned

⁵ Supra @ para 24

the judgment is granted erroneously.⁶ See in this regard Fraind v Nothmann 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.⁷

[26] Now it is correct that where it shown that, for example, the summons was served on the grass, at the *domicilium* of a party then and that event, it can be held that proper service has not taken place. However, on the facts of this case before this Court, it cannot be stated that affixing on the principal door of the Applicant's chosen *domicilium* is not proper service. It is true that if it was shown by the Applicant, that the service of the summons was not proper, he would have been entitled to rescission of the default judgement in terms of Rule 42.

[27] However, as explained above, the Applicant has not shown that the service effected by the Sheriff on 10 June 2021, was not proper and accordingly, the reliance by the Applicant on Rule 42 for the rescission of the default judgement must fail.

COSTS

⁶ *Clegg v Priestley* 1985 (3) SA 950 (W) 954C-J. *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) paras 9-10.

⁷ At 839H-I.

[28] I cannot see why this Court should not follow the norm that the successful party is entitled to their costs and none has been shown. Accordingly, the Respondent, having been successful is entitled to their costs.

CONCLUSION

[29] Accordingly, for the reasons set out above, Applicant's application for rescission of the Order dated 11 October 2021 must fail.

[30] As a result, the following Order shall issue:

- a). The application for the rescission of the Order dated 11 October 2021 is hereby dismissed;
- b). The Applicant is to pay the costs of this application.



ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **7 February 2023**.

Date of virtual hearing: 16 August 2022

Date of judgment: 7 February 2023

Appearances:

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Attorneys for the 1st Respondent: **STRAUSS DALY INCORPORATED**

Ref: W. Melamed

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