

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

Case Number: 53195/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 6 JUNE 2023

SIGNATURE:

SIFISO HARVEY NKOSI

Applicant

and

ABSA BANK LTD

Respondent

JUDGMENT

SC VIVIAN AJ

1. This is an application to rescind an order granted in the absence of the Applicant. In this judgment, I find that although the Applicant has established the jurisdictional threshold in terms of Rule 42(1)(a) for the Court to rescind the order, it is not in the interests of justice for the Court to do so. I accordingly exercise my discretion to refuse to rescind the order.
2. The Respondent instituted action proceedings against the Applicant on 24 July 2019 for recovery of monies lent and advanced by it in terms of two home loans secured by mortgage bonds. The sheriff's return of service records that summons was served on the Applicant personally on 7 August 2019. On 25 January 2021, the Applicant delivered a notice of intention to defend. (The

intervening time period is not explained.) However, the Applicant did not deliver a plea and did not respond to a notice of bar.

3. The Respondent then applied for default judgment. It also launched an application in terms of Rule 46A, which was served by sheriff with a date for hearing of 23 June 2021. The sheriff's return again records that it was personally served on the Applicant. However, whereas the return of service for the summons records service at "Unit 5"¹ of a sectional title development, the return of service for the Rule 46A records service at "Unit 2". The mortgage bonds record that the mortgaged property is "Unit 5", but in his notice of intention to defend, the Applicant selected "Unit 2" as his address for service of documents in this matter.
4. The Applicant did not attend Court on 23 June 2021. However, the matter was removed from the roll by the presiding Judge due to an inconsistency in the notice of intention to defend as uploaded to Caselines.
5. The Respondent again caused the Rule 46A application to be served on the Applicant, this time with a date for hearing of 9 September 2021. Again, the sheriff's return of service recorded personal service on the Applicant at "Unit 2". Again the Applicant did not attend Court on 9 September 2021. However, the Respondent had failed to timeously comply with practice directives, and the matter was again removed from the roll.
6. Once again, the Respondent caused the Rule 46A application to be served on the Applicant, this time with a date for hearing of 22 November 2021. Again, the sheriff's return of service recorded personal service on the Applicant at "Unit 2". Again the Applicant did not attend Court on 22 November 2021.
7. On this occasion, the Court entered default judgment and declared the immovable property executable. The Respondent caused a writ of execution to

¹ I deliberately do not include the full address

be issued. When served with the writ of execution, the Applicant launched an application for rescission of the default judgment.

8. The application for rescission was opposed by the Respondent. It caused an answering affidavit to be delivered. The Applicant delivered a brief replying affidavit. Thereafter, the Respondent was the only party actively taking steps to have the rescission application heard. It launched an application to compel the Applicant to deliver his heads of argument. An order to this effect was granted on 9 March 2023. The Applicant thereafter delivered heads of argument, which I have considered.
9. This matter was enrolled by the respondent on the opposed motion roll for the week of 29 May 2023 and was allocated to me. The Respondent's attorneys served a notice of set down on the Applicant by email on 19 April 2023. On 24 May 2023, the Applicant sent an email to the Respondent's attorneys in which he recorded his agreement with the joint practice note. The joint practice note recorded the date for hearing.
10. I allocated the matter for hearing on 29 May 2023. On 26 May 2023, the Respondent's attorneys sent an email to the Applicant enclosing a copy of my updated directive showing this allocation.
11. At 08:30 on 29 May 2023, the Respondent's attorneys sent an email to the Applicant reminding him of the allocation. However, they said that the matter was allocated for 11h30 when it was in fact allocated for 10h00.
12. When the matter was called at shortly after 10h00 on 29 May 2023, the Applicant was not present. I stood the matter down until 11h30 to allow the Respondent's attorneys to make further efforts to contact the Applicant. I was informed from the bar that an attempt to telephone him failed. At 10h28, the Respondent's attorneys sent an sms to the Applicant again notifying him that the matter would be heard at 11h30. The Applicant did not respond to the sms and did not attend Court.

13. The matter accordingly proceeded in the absence of the Applicant.
14. I have considered the Applicant's founding and replying affidavits in the application for rescission. The Applicant does not offer any explanation for his failure to deliver a plea or for his failure to attend Court on 22 November 2021, when default judgment was entered. In the circumstances, he does not make out a case either under Rule 31(2)(b) or at common law because he has not given a reasonable explanation for his default and accordingly does not show good cause for the judgment to be set aside.
15. What remains is Rule 42(1)(a). That Rule empowers the Court to rescind an order or judgment that is erroneously sought or erroneously granted in the absence of a party affected thereby. There is no requirement that good cause be shown. Default judgment was entered in the absence of the Applicant. The order was erroneously sought and granted for the reason set out below.
16. However, as I discuss below, once these jurisdictional requirements have been met, I have a discretion as to whether to rescind the order, which I must exercise judicially.

Erroneously sought or granted

17. The Applicant says that the Respondent did not prove compliance with Section 129 of the National Credit Act (Act 34 of 2005; "the NCA").
18. The issue relates not to the content of the notice but rather to the question of whether it was delivered to him in accordance with the requirements of Section 129 of the NCA. The relevant part of Section 129 reads:

"(5) The notice contemplated in subsection (1)(a) must be delivered to the consumer—

(a) by registered mail; or

(b) to an adult person at the location designated by the consumer.

(6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).

(7) Proof of delivery contemplated in subsection (5) is satisfied by—

(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

(b) the signature or identifying mark of the recipient contemplated in subsection (5)(b)."²

19. The Applicant says that the Respondent has not proved that the address to which the notice was sent is the address chosen by him. The notice was addressed to Unit 5. It is an express term of both of the mortgage bonds that the physical address of the mortgaged property is the address chosen by the Applicant for service of all notices, communications or legal process for the purposes of the bond. It is his *domicilium citandi et executandi*. In both bonds, the mortgaged property is a unit consisting of Section 5 and an undivided share of the common property in the sectional title scheme. In my view, this is the address chosen by the Applicant.
20. The Applicant says that his address is Unit 2. That may well be the house number, but the unit number in the sectional title scheme that is registered in his name and over which the mortgage bonds were passed is Unit 5.
21. The notice was despatched by registered post. The Respondent attached both the “track and trace” report from the Post Office and the stamped proof of postage from the Post Office.

² These subsections were added to the NCA in the National Credit Amendment Act (Act 19 of 2014)

22. The Applicant, however, says that it appears from the “track and trace” report that the notice was last scanned at Booyens and that this is not the relevant post office. He attaches evidence to show that the post office where he resides is the Southgate Post Office. The Applicant provides a map showing that the two branches of the Post Offices are 9 kilometres apart. He annexes track and trace reports for other registered mail addressed to him, which show that Booyens is not the correct branch of the Post Office. Accordingly, he says that the “track and trace” report shows that the notice was sent to the incorrect branch of the Post Office.
23. The Respondent does not meaningfully deal with the allegation that the notice was sent to the incorrect branch of the Post Office. It says that it is not for the Respondent to nominate the branch of the Post Office. I am not sure what is intended by this statement. The Respondent asserts that the Applicant has not annexed proof from the Post Office that postal code 2095 is not applicable to the Booyens Post Office. The Respondent overlooks the fact that the postal code does not appear in the choice of address in the mortgage bonds. The Respondent also points out that the “track and trace” report also shows that the first notice was sent to Jet Park. But Jet Park is more than 40 km from the Applicant’s address. It is in Ekurhuleni. The Applicant’s address is in the south of Johannesburg.
24. Accordingly, on the papers before me, the notice appears to have been misdirected to the wrong branch of the Post Office.
25. Section 129(7)(a) makes it plain that the credit provider does not have to prove that the debtor actually received the notice. As Lowe J explained:

*“Relevant to this matter then whilst Section 129 now does not require actual receipt of a Section 129 notice – which is deemed to be delivered, the Section does not deal with the issue of the consumer giving proof of non-receipt. **Kubiyana** provides that if the credit provider can prove delivery by registered mail in compliance with Section 129 (as in this matter) the onus shifts to the consumer to adduce evidence as to why this*

was not received. If these reasons are not acceptable that is to the detriment of the consumer and notice is established. Importantly in **Sebola** referring to registered post Cameron J held “... registered letters may go astray, at best there is a high degree of probability that most of them are delivered”³

26. Both **Kubyana** and **Sebola** were decided before the insertion into the SCA of the subsections quoted above. But both held that what is required of the credit provider is to ensure that the notice is delivered to the correct branch of the Post Office.⁴ In my view, this is what the legislature intended by “*the relevant post office*”.
27. The requirement is accordingly that the credit provider must annex to its particulars of claim (or founding affidavit where applicable) proof in writing not only that the notice has been despatched by registered post, but also that it has been delivered to the correct branch of the Post Office. This is usually in the form of a “track and trace” report.
28. I accept that the error was most likely made by the Post Office. But the NCA is clear: the credit provider must produce written confirmation by the postal service or its authorised agent of delivery to the relevant post office. The proof that the Respondent produced does not show delivery to the relevant post office.
29. Compliance with Section 129 of the NCA is mandatory. A notice in terms of Section 129 is attached to the particulars of claim “*as proof of compliance with the Act but not as constituting compliance.*”⁵ I agree with the reasoning of de Villiers AJ in **Moonsammy** where he held:

³ Wesbank v Ralushe 2022 (2) SA 626 (ECG) at para 40. The references in the passage are to Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC) and Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC)

⁴ Kubyana, *supra* at para 32, Sebola, *supra* at para 75

⁵ Land and Agricultural Development Bank of South Africa v Chidawaya and Another 2016 (2) SA 115 (GP) at para 22

“[47.5] Attaching a s 129 default notice to a summons, or application for payment, for default judgment or for summary judgment, is not notice to a consumer of default, advising her or him what options she or he may have. It does not bring about a pause.

[47.6] The very purpose of such an attachment is to prove prior compliance with s 129 and no notice is given to the credit receiver that she or he has time to consider alternative steps whilst litigation is paused.

[47.7] Accordingly, nothing could be deduced from the lack of a reaction by the credit receiver to the notice in terms of s 129 attached to the summons, or application for payment, for default judgment, or for summary judgment. She or he is not called upon to react to the notice.

[47.8] The law requires of the creditor, as part of its cause of action, to allege compliance with s 129 of the NCA ...”⁶

30. Because the notice was misdirected to the wrong branch of the Post Office, default judgment was erroneously sought and erroneously granted.
31. Accordingly, the two jurisdictional requirements of Rule 42(1)(a) are met.

Discretion

32. Rule 42(1)(a) provides that the Court may rescind an order that is erroneously granted in the absence of any party affected thereby. There are a number of High Court judgments in which it was held that the word “*may*” does not mean that the Court has a power to refuse to rescind an order once the jurisdictional requirements have been met.⁷

⁶ FirstRand Bank Ltd t/a First National Bank v Moonsammy t/a Synka Liquors 2021 (1) SA 225 (GJ)

⁷ For example: Mutebwa v Mutebwa and Another 2001 (2) SA 193 (TkH) at para 17; Tshabalala and Another v Peer 1979 (4) SA 27 (T) at 30D

33. However, the Constitutional Court has recently clarified that the Court indeed has a discretion to refuse to rescind an order once the jurisdictional requirements of Rule 42(1)(a) have been met. In **Zuma v Secretary**, Justice Khampepe held:

*“However, when a rescission application is brought, a litigant must meet the jurisdictional requirements for rescission, set out in rule 42(1)(a) or the common law, before a court can exercise its discretion to rescind an order. Even if the specific pre-requisites are met, it must still be in the interests of justice for a court to exercise its discretion to entertain the matter.”*⁸

34. The learned Judge continued:

*“It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court “may”, not “must”, rescind or vary its order – the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially.”*⁹

35. An example of the Court refusing to rescind an order despite the jurisdictional facts being present is **van der Merwe v Bonaero Park**.¹⁰ That was a provisional sentence action. Provisional sentence was granted eight days after service of the summons on the applicant’s *domicilium citandi et executandi*. The minimum period in terms of Rule 8 is ten days. It was common cause that the order was erroneously sought or granted within the meaning of Rule 42(1)(a). Maritz AJ exercised his discretion to refuse to rescind the order

⁸ Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at para 50

⁹ Zuma v Secretary, *supra* at para 53; See also Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at para 5

¹⁰ Van der Merwe v Bonaero Park (Edms) Bpk 1998 (1) SA 697 (T). It should be noted that although van der Merwe v Bonaero Park (Edms) Bpk 2000 (4) SA 329 (SCA) is an appeal in the same matter, it is not an appeal against the judgment refusing to rescind the provisional sentence order. See para 1 of the latter judgment.

because, on the facts placed before him, if he rescinded the order and the matter was referred back for the hearing of provisional sentence, the Court hearing the provisional sentence would most likely enter provisional sentence. The interests of justice would not be served if the provisional sentence order was rescinded.¹¹

36. Accordingly, it is a judicial exercise of the discretion to refuse to rescind an order where the rescission will have no practical effect and merely cause delay. The Court roll is notoriously busy. Litigants who do not exercise their right to be heard when properly notified cannot expect as of right to be granted rescission based on a dilatory defence when all that the rescission is likely to achieve is delay.

37. In a footnote in **Zuma v Secretary**, the following is said:

“One of the most important factors to be taken into account in the exercise of discretion, so the Court in Chetty found at 760H and 761E, was whether the applicant has demonstrated “a determined effort to lay his case before the court and not an intention to abandon it” for “if it appears that [an applicant’s] default was wilful or due to gross negligence, the court should not come to his assistance.”¹²

38. I accept that, at the stage when the Court is asked to enter judgment, it cannot do so in the absence of proof that the notice has been delivered to the relevant branch of the Post Office. But in exercising its discretion in deciding whether to rescind an order erroneously granted because the notice has been delivered to the relevant branch of the Post Office, I am of the view that the Court can and should consider whether its order will have any practical effect.

39. If the Court that granted the order had been aware of the defect in delivery of the Section 129 notice, it would have stayed proceedings in terms of Section

¹¹ At 709 D to F

¹² *Zuma v Secretary*, *supra* at footnote 20. The reference is to *Chetty v Law Society*, Transvaal 1985 (2) SA 756 (A)

130. But this does not make the proceedings a nullity. As Justice Cameron explained in **Sebola**, the bar on proceedings is dilatory, not absolute.¹³ In **Sebola**, the Constitutional Court held that default judgment entered when the notice had been despatched by the credit provider to the correct address but, as in this case, had been diverted to the wrong post office.

40. But there the similarity stops. Summons in **Sebola** was served by affixing a copy to the principal door of their domicilium address. The debtors were not aware of the summons until after default judgment was entered against them. They applied for rescission. This was the first time that they could have been aware of the defective delivery of the Section 129 notice. They had received neither the summons nor the notice.¹⁴ They accordingly raised the failure to deliver the notice at the first available opportunity.
41. The Applicant in this case did not receive the Section 129 notice because it was diverted to the wrong branch of the Post Office. But he did receive the summons. The notice and the track and trace reports were attached to the summons. He entered an appearance to defend, but failed to plead. He was notified of hearings in Court on three separate occasions before default judgment was entered against him, but failed to attend Court.
42. The Applicant waited until after default judgment was entered to raise the issue. Even then, he has again failed to attend Court. It can hardly be said that he has shown a determined effort to place his case before the Court.
43. The Applicant raises only one defence, namely the failure to deliver the Section 129 notice. He disputes neither his indebtedness to the Respondent nor his breach of the loan agreements.
44. The defence that the Applicant relies on is, as Justice Cameron held, dilatory. It is so that delivery of the notice is a requirement. For that reason, the judgment

¹³ *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) at para 53

¹⁴ See para 9

was granted in error. But that does not mean that the Court will now come the Applicant's assistance.

45. The conduct of the Applicant creates the impression that the rescission of the order will cause delay, but no more. The Applicant shows no real intention to take advantage of the pause created by the notice. He does not say what he would have done if he had received the notice. It will simply be another matter clogging this Court's roll. It would not be in the interests of justice to rescind the order.

46. Accordingly, I exercise my discretion to refuse to rescind the order.

47. The Respondent seeks costs on the attorney and client scale. In my view, the conduct of the Applicant merits a punitive order.

48. I accordingly grant the following order:

48.1. The application for rescission is dismissed.

48.2. The Applicant is to pay the costs of this application on the attorney and client scale.

Vivian, AJ

Acting Judge of the Gauteng Division of the High Court of South Africa

APPEARANCES:

For the Applicant: No Appearance

For the Respondent: Jacques Minnaar, instructed by Hammond Pole Attorneys

Date of hearing: 29 May 2023

Date delivered: 6 June 2023