



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

**CASE NO: 25121/2018
25124/2018**

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED: NO</u>
[6 JULY 2021]	
..... SIGNATURE	

In the matter between:

LERATO INNOCENTIA MOFOKENG

Applicant

and

GMG TRUST COMPANY (SA) (PTY) LTD

First Respondent

WILLEM SWANEPOEL N.O.

Second Respondent

BRENDAN HARMSE N.O.

Third Respondent

WESSEL STADLANDER N.O.

Fourth Respondent

This Judgment was delivered electronically to the parties' legal representatives on 8 July 2021, and the deemed date of handing down the Judgment is accordingly 8 July 2021. The Judgment will also be uploaded to Caselines.

J U D G M E N T:

NEL AJ

- [1] The Applicant, Ms Lerato Innocentia Mofokeng (“the Applicant”) seeks the rescission and setting aside of two default judgments granted against her under case numbers 25121/2018 and 25124/2018 respectively, on 14 October 2019 by His Lordship Mr Justice Mudau (“Mudau J”).
- [2] Although two separate Default Judgments were granted (under the aforesaid two case numbers), the Applicant seeks the rescission of both judgments in one application.
- [3] The application for rescission of both Default Judgments was launched on 26 October 2019. The Respondents set the Rescission Application down for hearing (almost a year after the Rescission Application was launched), and served a Notice of Set Down on 4 September 2020, for the hearing to be held on 16 November 2020.
- [4] Neither the Founding Affidavit nor the Answering Affidavit can be described as models of clarity, but I ascertained that the rescission of both judgments can be heard in one application, as all of the issues and documentation in the two actions that resulted in the actions and the Default Judgments being granted are identical, save for the fact that the Default Judgments relate to the purchase of two different motor vehicles, with one motor vehicle being an

Audi A5 TFSI Cabriolet and the other motor vehicle being a Volkswagen Golf VII GTI.

[5] Similarly, the factual and legal aspects relating to the rescission of the two Default Judgments and the grounds for rescission of the two Default Judgments, are identical, and can be determined in one application. The motor vehicles play no part in the determination of the Rescission Application.

[6] The relevant terms of the two Default Judgments granted which are identical, save for the description of the two motor vehicles, were the following:

[6.1] The credit agreements concluded between the Applicant and Volkswagen Financial Services South Africa (Pty) Ltd ("Volkswagen Financial Services") were cancelled;

[6.2] The Applicant was obliged to return the two motor vehicles to the Respondents;

[6.3] Judgment in respect of the quantum of damages that the Respondents may have suffered was postponed, pending the return of the motor vehicles, the valuation of the motor vehicles and the sale of the motor vehicles.

RELEVANT BACKGROUND FACTS

[7] The Applicant stated that she concluded credit agreements with Volkswagen Financial Services in respect of both motor vehicles in 2016. The Respondents deny this. The Applicant did not attach any

documents in support of her contention. It appears from the Particulars of Claim (and the subsequent affidavits that I considered) that the dispute relates purely to the dates of conclusion of the credit agreements.

- [8] There is no dispute that the Applicant received possession of both motor vehicles in terms of an agreement, regardless of whether it be classified as a credit agreement or an instalment sale agreement, and that she has paid certain instalments in respect of the purchase price of the motor vehicles.
- [9] On 31 March 2017 Volkswagen Financial Services instituted two separate legal actions against the Applicant (under case numbers 11485/2017 and 11486/2017 respectively) founded on two instalment sale agreements and obtained Default Judgment as against the Applicant. The terms of the Default Judgments were not referred to, but are irrelevant, having regard to the subsequent events. It appears that the Applicant ceased making any payments in respect of the two motor vehicles in 2017, which prompted the institution of the actions by Volkswagen Financial Services.
- [10] The Judgments granted in favour of Volkswagen Financial Services under case numbers 11458/2017 and 11486/2017 were rescinded on application, during May and June 2017, respectively. The grounds of rescission were not disclosed.
- [11] During August 2018 Volkswagen Financial Services withdrew the two actions referred to in the previous two paragraphs. The reason for such withdrawal is not explained, and is in any event not relevant. I can only

assume that Volkswagen Financial Services had no *locus standi*, having regard to the subsequent allegations made.

[12] The Applicant alleged that she understood that the right, title and interest in the indebtedness of the Applicant to Volkswagen Financial Services, under the instalment sales agreements concluded with Volkswagen Financial Services, were ceded to Velocity Finance Insurer Trust ("Velocity") in May 2015 (Agreement number 87001652167) and January 2016 (Agreement number 87003328201), based on information she had received in correspondence addressed to her by Smit Jones Pratt Attorneys dated 29 May 2018. The Applicant did not attach the relevant correspondence to her Affidavits, but the Respondents attached the letter to their Answering Affidavit.

[13] In the Particulars of Claim of the Actions referred to below, the Respondents allege that the Respondents are the trustees of Velocity, and have launched the Actions in such capacity.

[14] It is also alleged in the Particulars of Claim that both credit agreements concluded between the Applicant and Volkswagen Financial Services were ceded to Velocity.

[15] The agreements conferring the legal rights on the Respondents to have launched the Actions are titled "*SALE AGREEMENT*". In terms of clause 4 of the Sale Agreements, Volkswagen Financial Services sold its right, title and interest in the credit agreements concluded with the Applicant, to Velocity, by way of an out-and-out cession. In the circumstances it is alleged in the Particulars of Claim that Volkswagen Financial Services ceded all of

its rights, title and interest in the credit agreements concluded with the Applicant to Velocity.

[16] The Respondents thereafter instituted two separate legal actions against the Applicant in this Division, under case numbers 25121/2018 and 25124/2018 respectively ("the Actions").

[17] The dates utilised in the Founding Affidavit are confusing and appear to be chronologically incorrect. As an example, it is alleged that the Respondents launched the Actions on 6 July 2019, yet the case numbers of the Actions indicate that the Actions were issued in 2018. The Chronology prepared by the Parties does not assist, as it commences on 6 June 2019, when leave to defend was granted in respect of Summary Judgment Applications.

[18] The Chronology does not comply with the Practice Directives of this Division, as a Chronology is required to *inter alia* include all factual dates relevant to the merits of the application, and not just the procedural dates. The Chronology should accordingly have commenced with the date when the first agreement (presumably an instalment sales agreement) was concluded as between the Applicant and Volkswagen Financial Services.

[19] On 10 July 2019 the Respondents served Notices of Bar after the Applicant had failed to file her Plea timeously. During the five-day period provided in the Notices of Bar for the filing of a Plea, the Applicant filed Notices in terms of Rule 30A(1). (I mention as an aside, that the Chronology refers to this as having taken place on 19 June 2019 further illustrating the lack of care taken in ensuring that the Chronology is accurate and serves the purpose for which it was intended).

- [20] The Respondents set the applications for Default Judgment down for hearing on 14 October 2019. On such date Mudau J granted Default Judgment against the Applicant in respect of both of the Actions.
- [21] It is set out in the Answering Affidavit (and was raised during argument) that at the hearing of the Default Judgments the Applicant's counsel raised the arguments now set out in the Rescission Application, including the effect of the service of the Rule 30A(1) Notice. It is also set out in the Answering Affidavit that Mudau J provided Applicant's counsel with two opportunities to seek the upliftment of the Notices of Bar and to seek extensions for the filing of a Plea, which invitation was declined. These allegations are not disputed by the Applicant.
- [22] The Applicant has now sought the rescission of both Default Judgments granted by Mudau J under case numbers 25121/2018 and 25124/2018 respectively.
- [23] As referred to above, the relevant facts in respect of the Actions (and the Rescission Application) are identical, save for the fact that each Action relates to a different motor vehicle. The Rescission Application relates to both Default Judgments granted, and the Applicant has "consolidated" the seeking of rescission in respect of both Default Judgments. In the circumstances this Judgment will relate to, and apply to, both Actions and the Rescission of both Default Judgments.

IN LIMINE POINT: LACK OF JURISDICTION

- [24] In the Answering Affidavit and in the Respondents' Heads of Argument, the Respondents submitted that the launching of the Rescission Application is "*procedurally incompetent*" on the basis that the Applicant has incorrectly utilised Rule 42 of the Uniform Rules of Court, and as the Judgments granted by Mudau J are not Default Judgments granted in the absence of the Applicant. The aspect of "*absence*" is crucial to the *in limine* point.
- [25] The Respondents accordingly contended that I have no jurisdiction to hear the Rescission Application, and that the Applicant ought properly to have launched an application for leave to appeal the Judgments of Mudau J.
- [26] It is trite that the rescission of a Default Judgment can be sought in three distinct manners, being in terms of the common law, in terms of Rule 31 and in terms of Rule 42(1).
- [27] Whilst there is no specific reference in the Applicant's Notice of Motion or Founding Affidavit to Rule 42, the Applicant does state in paragraph 47 of the Founding Affidavit that "...*the order or judgment was erroneously sought and/or erroneously granted...*".
- [28] It is presumably based on such allegation that the Respondents have (reasonably) assumed that the Applicant's Application for Rescission is based on Rule 42(1).
- [29] Rule 42(1)(a) of the Uniform Rules of Court utilises the phrase "*erroneously sought or erroneously granted*", and entitles a Court, either *mere motu* or on

application, to rescind an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[30] In the Answering Affidavit the Respondents carefully analysed Rule 42(1) and concluded (and submitted) that reliance on Rule 42(1) is not available to the Applicant.

[31] Rules 42(1)(b) and (c) are clearly not applicable to this Rescission Application as the Respondents correctly set out in their Answering Affidavit. It is clear from the affidavits filed on behalf of the Applicant that no reliance is placed on Rules 42(1)(b) and (c).

[32] The Respondents however concluded that Rule 42(1)(a) is also not applicable, and is in fact incompetent, on the basis that the Judgments were not granted in "*the absence of any party affected thereby*" as referred to in Rule 42(1)(a).

[33] The Respondents pointed out that the common law and Rule 31(2)(b) would also not find application in this Rescission Application, as both Rule 31(2)(b) and the common law relate only to the rescission of default judgments that were granted in the absence of the person seeking rescission of the default judgments.

[34] The thrust of the Respondents' *in limine* point (regardless of which rule or common law is relied upon) is that the Application for the Rescission of the Default Judgments is defective, in that the Applicant should have launched an application for leave to appeal, on the basis that the Default Judgments granted by Mudau J were not granted in the absence of the Applicant.

- [35] This contention is confirmed in the Heads of Argument filed on behalf of the Respondents, where it is submitted that the Application for Rescission of Judgment is procedurally incompetent and should be dismissed on the basis that the Default Judgments were not granted in the absence of the Applicant.
- [36] It is clear from the affidavits filed that the Applicant was legally represented at the hearing of the Default Judgment applications and that argument was raised on behalf of the Applicant against the granting of default judgment.
- [37] There is no suggestion in any of the affidavits that the legal representative representing the Applicant at the hearing of the Default Judgment before Mudau J placed the Applicant's version in respect of the merits of the Actions fully before the Judge, or made any representations or submissions in respect of her version of the merits of the Actions.
- [38] The arguments and submissions made on behalf of the Applicant at the hearing of the Default Judgments related primarily to reasons as to why the Default Judgment Applications were premature and defective and should not be heard.
- [39] Whilst I accept that there must have been some overlap of arguments that related to the merits of the Actions with the arguments raised on behalf of the Applicant, the submissions made on behalf of the Applicant related primarily to the effect of the service of the Rule 30(A)(1) Notice on the Notices of Bar, and whether the Default Judgment Applications were properly before, and could be heard by, Mudau J.

- [40] The full version and defence of the Applicant in respect of the allegations made in the Particulars of Claim were not placed before Mudau J at the time of the hearing of the Default Judgments, either by way of evidence, pleadings or affidavit, and certainly could not have been, as the Applicant had not yet filed a Plea.
- [41] In the circumstances, it must be accepted that the Applicant's version in respect of the allegations made in the Actions and the merits of the Actions were not heard or considered by the Court hearing the Application for Default Judgment.
- [42] In the matter of *Ferreiras (Pty) Ltd v Naidoo and Another*¹ De Villiers AJ was faced with a similar argument as raised in the *in limine* point in this Application.
- [43] Briefly summarised, it was submitted in the *Ferreiras* matter that a rescission application of a default judgment had been the inappropriate procedure to follow, as the judgment sought to be rescinded in the *Ferreiras* matter was not a default judgment, as the counsel for the party against whom default judgment had been granted was present in Court when the default judgment was granted. It was submitted in that matter that a judgment is only a default judgment if it is granted in the physical absence of the party and the party's legal representatives against whom the judgment is sought.
- [44] De Villiers AJ considered the matters of *Katritsis v De Macedo*², *Pitelli v Everton Gardens Projects CC*³ and *Rainbow Farms (Pty) Ltd v Crockery*

¹ (69094/2014) [2017] ZAGP JHC 392 (11 December 2017).

² 1966 (1) SA 613 (A).

*Gladstone Farm*⁴ in determining when a judgment is regarded as being a default judgment.

[45] In explaining when a judgment is regarded to be a default judgment, De Villiers AJ stated, *inter alia*, that a judgment granted against a party in circumstances where that party has not placed its version before the Court, even if the party is at Court or is legally represented, is still classified as a default judgment. I am in respectful agreement with De Villiers AJ in respect of such conclusion.

[46] I am of the view that any judgment granted against a litigant in a default judgment application, in circumstances where such litigant has not placed its version on the merits before the Court, even if the litigant is present and/or legally represented, must still be regarded as a default judgment.

[47] In the matter of *Britz and Others v Modloga and Others*⁵ three applicants sought the rescission of an order made by consent during a trial. The Court held that the jurisdictional fact required, as set out in Rule 42(1)(a), that an order was erroneously sought or granted in the absence of the three applicants, were not met, as the applicants' legal representatives, who were concluding the trial when the order sought to be rescinded was made, were present at Court. The Court held that in the circumstances the requirements of "*absence*" of the applicants was not met.

³ 2010 (5) SA 171 (SCA).

⁴ (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017).

⁵ (21653/2011) [2015] ZAGPPHC 171 (25 March 2015).

- [48] The *Britz* matter is clearly distinguishable, as it related to a consent order rather than a default judgment, and there were disputes as to the mandate of the applicants' legal representatives.
- [49] Respondents' counsel relied on the matter of *De Allende v Baraldi*⁶ for the submission that the Default Judgments were not granted in the absence of the Applicant, and she could accordingly not rely on Rule 42(1).
- [50] In the *De Allende* matter the Court considered an appeal from the Magistrate's court, and the proper interpretation of Section 36(a) of the Magistrate's Court Act. Section 36 of the Magistrate's Court Act sets out the types of judgments that can be rescinded in the Magistrate's Court, and is not limited to default judgments.
- [51] In the *De Allende* matter judgment was granted after the filing of pleadings and pursuant to an application in terms of Rule 60(3) for the striking out of the defendant's plea and the granting of judgment.
- [52] The judgment considered in the *De Allende* matter was accordingly not strictly a default judgment in the sense of the judgment that is being considered in this Application .
- [53] The relevant portion of Section 36(a) reads as follows:

"The Court may ...

(a) Rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted."

⁶ t/a Embassy Drive Medical Centre 2000 (1) SA 390 (T).

[54] In the *De Allende* matter the Court held that the defendant in the Magistrate's Court who was granted rescission could not rely on Section 36(a), as the defendant had been represented at Court, and accordingly the judgment was not granted in the absence of the party.

[55] Whilst the judgments relating to the meaning of "*absence*" in considering rescission applications are not all harmonious, subject to what I set out below, I am satisfied that despite the presence and the submissions made by Applicant's counsel at the hearing of the Default Judgments before Mudau J, the judgments granted were indeed Default Judgments and are susceptible to rescission.⁷

[56] When it was Respondents' turn to address me at the hearing of the Application, Respondents' counsel referred to the *Ferreiras* matter (cited in the Heads of Argument of Applicant's counsel) informed me that the Respondents have elected to abandon the *in limine* point, and no longer place reliance on such *in limine* point.

[57] I am accordingly not required to provide a finding as to whether the Applicant was absent at the hearing of the Default Judgments and am also not required to determine the meaning of "*absence*" as referred to in rule 42(1)(a).

⁷ See also: *Morris v Autoquip (Pty) Ltd* 1985 (4) SA 398 (W); and *FNB v Myburgh and Another* 2002 (4) SA 176 (CPD).

THE “GROUNDS” OF RESCISSION

- [58] Under the heading of “*GROUNDS FOR RESCISSION*” the Applicant has set out a number of allegations in support of her application for rescission. I have summarised the allegations below.
- [59] The Applicant states that she concluded credit agreements with Volkswagen Financial Services in respect of the two motor vehicles on 4 January 2016 and 8 March 2016, respectively.
- [60] The Applicant states that she did not conclude any credit agreements with the Respondents.
- [61] The Applicant contends that she was not aware of the cession of any right, title and interest in the agreements concluded between the Applicant and Volkswagen Financial Services to Velocity. The Applicant implied that she did not consent to the cession.
- [62] The Applicant implies that the Respondents have breached the provisions and regulations of the National Credit Act, Number 34 of 2005, as amended (“the NCA”).
- [63] The Applicant alleges that the Respondents have no *locus standi* to have instituted the Actions as against her.
- [64] The Applicant states that no further legal proceedings could have been instituted against her in respect of the two motor vehicles after the withdrawal of the actions instituted against the Applicant by Volkswagen Financial Services.

- [65] The Applicant contends that the applications for Default Judgment filed by the Respondents were premature, as the Applicant had filed Rule 30A(1) Notices during the five-day period stipulated in the Notices of Bar, on the basis that the Respondents had not attached "*true copies*" of the Cessions relied on in the Respondents' Particulars of Claim.
- [66] The Applicant stated that the Default Judgments were erroneously sought and granted.
- [67] The Applicant contends that the Rule 30A(1) Notices constitute pleadings as contemplated by Uniform Rule of Court 26 and that she was accordingly not in default.
- [68] The Applicant alleges that the hearing of the Default Judgment Applications by Mudau J was "*irregular*" and "*incompetent*".
- [69] The Applicant states that she did not abandon her right to file a Plea, and intended to do so after the Rule 30A(1) Application had been determined.
- [70] The Applicant alleges that the copies of the credit agreement concluded between herself and Volkswagen Financial Services, and the cession concluded between Volkswagen Financial Services and Velocity should have been attached to the Particulars of Claim.
- [71] The Applicant alleges that she has a *bona fide* defence against the Respondents' claims in the Actions.
- [72] The Applicant alleges that the Plaintiff's Particulars of Claim do not substantiate a valid cause of action.

[73] In paragraph 55.1 of the Founding Affidavit, the Applicant alleges that “*in support of this*” she refers the Court to the “*grounds of defence*” as set out in the Affidavit Resisting Summary Judgment which “*should be incorporated herein by reference*”.

[74] The contents of paragraph 55.1 of the Founding Affidavit are not only inappropriate and improper, but also most unhelpful. It is not clear whether the reference to the phrase “*in support of this*” refers only to the preceding paragraph wherein it is alleged that the Respondents’ Particulars of Claim do not substantiate a valid cause of action, or all of the preceding paragraphs of the Founding Affidavit. Similarly, the statement that “*my grounds of defence contained in my previous affidavit...should be incorporated herein by reference*” is vague, unhelpful, inappropriate and improper.

[75] In the matter of *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa*⁸ the Court stated as follows:

“Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met.”

[76] The bald allegation by the Applicant that the contents of the Affidavit Resisting Summary Judgment, insofar as it may relate to any other grounds or defences should simply be incorporated in her Founding

⁸ 1999 (2) SA 279 (T) at 324F-G. See also *Lipschitz and Schwarz N.N.O. v Markowitz* 1976 (3) SA 722 (W) at 775H and *Port Nolloth Municipality v Xahalisa & Others; Luwalala & Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 111B-C.

Affidavit is entirely unhelpful, and does not enable the Respondents to know what case to meet. Crucially, it also does not set out before the Court determining the Rescission Application what other grounds or defences should be considered.

[77] In the matter of *Engen Petroleum Limited v Webrrref Trading* 31 CC⁹ the Court, in referring to the incorporation of affidavits and documentation solely by reference stated as follows:

*“One would think that the proposition only has to be stated for it to be rejected. A formulation as broad as this in an affidavit fails to define the issues between the parties and does not place the essential evidence before the Court seized with the matter. Neither the Court nor the other party will know prior to the hearing what is in issue.”*¹⁰

[78] It is therefore no surprise that in answering to paragraph 55 of the Founding Affidavit the Respondents simply denied that the Respondents Particulars of claim do not substantiate a valid cause of action.

[79] In addition, the Affidavit Resisting Summary Judgment was not even attached to the Applicant's Founding Affidavit in the Rescission Application.

[80] Despite the improper conduct of the Applicant, and my entitlement to ignore the contents of the Affidavits Resisting Summary Judgment, I called for copies of the Affidavits Resisting Summary Judgment, and considered the contents thereof. Two additional allegations were contained in the Affidavit Resisting Summary Judgments which may impact on the Rescission

⁹ *trading as Elm Street Service Station and Another* (32424/13) [2017] ZAGPJHC 192 (3 July 2017).

¹⁰ At paragraph 38.

Application, and I have accordingly set them out below, and have considered them.

[81] The Applicant alleges that she “*denies the contents of being in arrears with VFSSA and/or the [Respondents] ... without proof (of) the agreement which the [Applicant] is said to have defaulted*”.

[82] The Sale Agreement raises “*serious legal non-compliance issues*” with provisions of the Companies Act and the NCA.

THE REPLYING AFFIDAVIT

[83] In the Replying Affidavit the Applicant elected not to respond to the contents of the Answering Affidavit on an *ad seriatim* basis. No proper reasoning is set out for such election.

[84] It is trite that an applicant must make out his or her case in the founding affidavit, and should not attempt to make out his or her case in a replying affidavit. The phrase “*An applicant must stand or fall by his/her founding affidavit*” is often referred to in judgments of the various Courts.¹¹

[85] Whilst there are exceptions to such general rule, it was not suggested that any exception should apply in this Application, and I am satisfied that there are no exceptions applicable.

[86] Despite my view in such regard, I still had regard to the additional ground raised in the Replying Affidavit, being that the Applicant alleges that the

¹¹ *Director of Hospital Services v Ministry* 1979 (1) SA 626 (A) at 635H-636C. See also *Ramosebudi v Mercedes Benz Financial Services South Africa (Pty) Ltd* (51196/2017) [2019] ZAGPPHC (20 March 2019) at paragraph [11].

cessions of the credit agreements are not lawful and may be in contravention of the Companies Act, the Income Tax Act, and the Tax Administration Act, without setting out the manner of contravention, and the allegation is simply meaningless.

[87] The Applicant accuses the deponent to the Answering Affidavit of perjury, without setting out in what manner she allegedly perjured herself. There is clearly no basis for such allegation.

[88] However, relying on such unsubstantiated accusation the Applicant then attempts to discredit the allegations made by Ms Stewart.

[89] The Applicant however avoided dealing with certain of the crucial allegations and invitations as set out in the Answering Affidavit.

THE RELEVANT LEGAL PRINCIPLES

[90] It is not possible to determine from the contents of the Applicant's Heads of Argument whether the Applicant is relying on Rule 32, Section 42(1) or the common law as the legal basis for the rescission of the two Default Judgments.

[91] It appears from the phrase "*erroneously sought*" as used in paragraph 45, and the phrase "*erroneously sought and/or erroneously granted*" in paragraph 47 of the Founding Affidavit that the Applicant seeks to rely on Rule 42(1).

[92] In the Applicants' Heads of Argument, submissions are set out relating to an explanation for default, good cause and a *bona fide* defence, which are requirements of rescission in terms of Rule 31 and of the common law.

[93] I will accordingly briefly set out the relevant legal principles applicable to all three methods of seeking rescission, and consider whether the Applicant is entitled to rescission on any of the three legal bases in terms of which rescission can be sought.

[94] In the High Court an application for the rescission of a judgment can be based on Rule 31, Rule 42(1) or the common law.¹²

[95] In terms of Rule 31(2)(b) (and any default judgment granted by a Court under Rule 31(5)(d)), a defendant may apply to Court to set aside the judgment of a Court and the Court may, upon good cause shown, set aside the default judgment. The Courts have stated the following principles in relation to "good cause"¹³:

[95.1] The applicant must give a reasonable explanation of his or her default. If it appears that his or her default was wilful or due to gross negligence, the Court should not come to his or her assistance;

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

¹² *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038A.

¹³ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-477.

[95.3] The applicant must show that he or she has a *bona fide* defence to the plaintiff's claim. It is sufficient if he or she makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him or her to the relief asked for. He or she need not deal fully with the merits of the case and produce evidence that the probabilities are in his or her favour.

[96] In relation to wilful default or gross negligence, the Courts have held:

[96.1] While a Court will decline to grant relief where the default has been wilful or due to gross negligence, the absence of wilfulness or gross negligence is not a prerequisite to the granting of relief;¹⁴

[96.2] For a person to be said to be in wilful default, the test is whether the default is deliberate, ie when a defendant with full knowledge of the circumstances and the risks attendant on his or her default freely takes a decision to refrain from taking action.¹⁵

[97] Although an applicant does not need to deal fully with the merits of the case, the grounds of defence must be set forth with sufficient detail to enable the Court to conclude that he or she has a *bona fide* defence.¹⁶

¹⁴ *Harris v ABSA Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) para 6

¹⁵ *Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk* 1987 (2) SA 414 (O) at 417E-H

¹⁶ *Standard Bank of SA Ltd v El-Naddaf and Another* 1999 (4) SA 779 (W) at 785G-786D

[98] A Court may rescind a judgment under Rule 42(1) where the order or judgment was erroneously sought or granted in the absence of any party affected thereby. The relevant principles applicable to Rule 42(1)(a) are the following:

[98.1] Once the Court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause for the subrule to apply;¹⁷

[98.2] Generally, a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment;¹⁸

[98.3] An order is also erroneously granted if there was an irregularity in the proceedings, or it was not legally competent for the Court to have made the order.¹⁹

[99] In order to succeed in terms of the common law, an applicant for rescission of a judgment taken against him or her by default must show good or sufficient cause. The test of good or sufficient cause is similar to that for Rule 31(2)(b) given above. This generally entails three elements; The applicant must (i) give a reasonable and

¹⁷ *Naidoo v Somai* 2011 (1) SA 219 (KZP) paras 4 & 5. See also *Bakoven (Pty) Ltd v G J Homes* 1990 (2) SA 446 (E).

¹⁸ *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GNP) para 9.

¹⁹ *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 417G.

acceptable explanation for the default; (ii) show that the application is made *bona fide*; and (iii) show that on the merits he or she has a *bona fide* defence which *prima facie* carries some prospect of success.²⁰

ISSUES TO BE DETERMINED

[100] The Joint Practice Note which was uploaded to Caselines by the Respondents on 4 November 2020, which ought to have defined the issues to be determined in the application, as agreed between the parties, appears to have been purely filed in order to comply with the Practice Directives, and has simply paid mere lip service to the requirements of the Practice Directives. As an example, the common cause facts set out in the "Joint Practice Note" specifically record that it is common cause that the application should be dismissed. It could never have been common cause that the application should be dismissed with costs, as in such instance the application would not have been proceeded with. It appears that no attempt was made to prepare a proper Joint Practice Note.

[101] In the section of the "Joint Practice Note" where the issues for determination should have been set out, it is recorded that the Applicant failed to satisfy the requirements of any of the recognised grounds upon which her Judgment is to be rescinded and set aside. The statements made under the heading of Issues to be Determined

²⁰ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11.

simply comprise the submissions of the Respondent, and do not set out the issues to be determined.

[102] The same “Joint Practice Note” was e-mailed to me on 13 November 2020 by the Respondents’ attorneys. The Applicant’s legal representatives did not even bother to file a Practice Note.

[103] It is clear that neither of the parties applied their minds to the requirements of a Joint Practice Note, the purpose of such Practice Note, and the assistance it should provide to the presiding Judge.

[104] I was accordingly required to identify the issues to be considered and determined without any guidance, which I did by carefully considering the affidavits filed in the application and the Heads of Argument filed on behalf of both parties.

[105] The issues to be considered in determining whether the relief sought in the Rescission Application should be granted or refused, are the following:

[105.1] The lack of *locus standi* of the Respondents;

[105.2] Non-compliance with the provisions and regulations of the NCA by the Respondents;

[105.3] The effect of the actions instituted (and later withdrawn) by Volkswagen Financial Services against the Applicant;

[105.4] The prematurity of the Applications for Default Judgment;

[105.5] The excipiability of the Respondents’ Particulars of claim;

[105.6] The Applicant's entitlement to file a Plea;

[105.7] The omission of annexures from the Particulars of Claim;

[105.8] The denial of indebtedness;

[105.9] Non-compliance with the Companies Act and the NCA; and

[105.10] The contraventions of Statutes;

[106] The issues will be considered separately below, under separate headings.

First Issue: Lack of *Locus Standi* of the Respondents

[107] In support of the submission that the Respondents do not have the necessary *locus standi* to have instituted action against the Applicant, the Applicant stated in the Founding Affidavit that she concluded credit agreements with Volkswagen Financial Services in respect of the two motor vehicles forming the subject matter of the Actions, that she did not conclude any credit agreements with the Respondents, and that she was not aware of the cession of any right, title and interest in the agreements concluded between Volkswagen Financial Services and herself to Velocity.

[108] In the Founding Affidavit, the Applicant states that the Respondents "*clearly had no locus standi to institute the aforesaid legal actions against me because, inter alia, they never concluded any agreement with me*".

- [109] The Respondents do not contend that Velocity (or the Respondents) concluded any agreements with the Applicant, and do not rely on the conclusion of any agreement with the Applicant for their cause of action.
- [110] Despite the cession of Volkswagen Financial Services' rights, title and interest in the credit agreements concluded by the Applicant to Velocity, being of crucial importance in order to establish the Respondents' *locus standi* which had been challenged, the Respondents blandly stated in the Answering Affidavit that all credit agreements concluded between consumers and Volkswagen Financial Services are ceded to Velocity, and that the Respondents are not obliged to have notified the Applicant of the cessions.
- [111] Despite clear challenges to the cessions in the Founding Affidavit, the Respondents did not take the opportunity in the Answering Affidavit to clearly set out how the cessions came about, when the cessions were effected, what the relevant clauses of the cessions stipulated, and the rights that the cessions confer on the Respondents.
- [112] In the Respondents' Heads of Argument, Respondents' counsel correctly states: "*The primary defence which the Applicant seeks to advance at the hearing relates to the denial that a valid and binding cession of rights in and to the underlying agreement took place between Volkswagen, the initial contracting party and the Trust*". Having regard to such submission, I would have expected full details of the cession to have been set out in the Answering Affidavit, and the supporting documentation to be attached.

- [113] Respondents' counsel stated in the Heads of Argument that the cession of rights from Volkswagen to the Trust "*has been duly pleaded*", but what was pleaded was not set out in the Answering Affidavit or in the Respondents' Heads of Argument.
- [114] I called for copies of the Particulars of Claim (which should have been uploaded to Caselines) in order to have regard to what had been pleaded.
- [115] It is clear from the Particulars of Claim that Volkswagen Financial Services ceded its right, title and interest in and to the credit agreements concluded with the Applicant to the Velocity Trust, and as set out in the Sale Agreement, the transfer of right, title and interest was by way of an out-and-out cession.
- [116] I should also mention that in the Section 129 letters sent to the Applicant on 29 May 2018, the Applicant was advised of the cession of the credit agreement to Velocity.
- [117] The Respondents, in their capacities as Trustees of the Velocity Trust accordingly launched the Actions on behalf of the Velocity Trust.
- [118] The claim as instituted by the Respondents against the Applicant is clearly based on the cession of the right, title and interest in the agreement concluded between the Applicant and Volkswagen Financial Services to Velocity.
- [119] I should mention that defining the Trustees of the Velocity Trust in the Answering Affidavit as "the Trust" is not only inaccurate, but confusing, particularly as the first Trustee is itself a Trust. The "Trust" is not even

defined in the Answering Affidavit. Such description leads to the absurdity contained in paragraph 2 of the Answering Affidavit which, having regard to the description of the Trustees as “the Trust”, refers to a round-robin resolution of the trustees of the trustees, which is clearly nonsensical. In other instances references are made to the “*Trust*” which is intended to be a reference to the Velocity Trust and not the trustees. Every reference to the “Trust” had to be carefully considered to determine what was intended.

[120] Neither of the parties explained clearly in any of the affidavits filed, what the legal nexus between the Respondents and Velocity was. Only upon receipt of copies of the Particulars of Claim and a careful perusal of the correspondence did I understand the precise nature of the relationship.

[121] The Applicant contends that she was not aware of the cession and infers that her consent to the cession was required, which consent she did not grant.

[122] The Respondents deny that there was any obligation to notify the Applicant of the cession of rights.

[123] In a letter attached to the Particulars of Claim dated 19 June 2018, the Applicant was advised once again of the cession to Velocity, and it was pointed out that the Applicant had consented to the cession.

[124] Clause 16.2 of the credit agreements relied on by the Respondents and attached to the Particulars of claim record that Volkswagen Financial Services are entitled to transfer any of their rights.

[125] In the circumstances, it is clear that the Respondents, having regard to the allegations contained in the Particulars of Claim, and the annexures filed in support thereof, did have the necessary *locus standi in judicio* to have launched the Actions as against the Applicant, and the first issue raised by the Respondent is devoid of merit.

Second Issue: Lack of Compliance with the Provisions and Regulations of the NCA by the Respondents

[126] The Applicant implied that the Respondents breached the provisions and regulations of the NCA.

[127] The Applicant has not set out precisely what obligations the Respondents had in terms of the NCA, or in what manner the Respondents have breached their obligations or the provisions and regulations of the NCA.

[128] The Respondents stated that there had been proper compliance by the Respondents with the provisions and regulations of the NCA, and invited the Applicant to set out in her Replying Affidavit what the contraventions of the NCA by the Respondents were. The Applicant did not respond to such invitation.

[129] In the circumstances, the vague suggestion that the Respondents did not comply with the provisions and regulations of the NCA is entirely meaningless, and there is accordingly no merit in the second issue raised by the Applicant.

Third Issue: The Effect of the Actions instituted by Volkswagen Financial Services against the Applicant

- [130] The Applicant alleged that on 31 March 2017 Volkswagen Financial Services instituted two legal actions against the Applicant based on instalment sale agreements which actions were withdrawn during August 2018.
- [131] The Applicant alleges that as a result of the withdrawal of the actions by Volkswagen Financial Services "*those cases could (and can) never be brought back, as [Volkswagen Financial Services] never specifically said the matters were only provisionally withdrawn*".
- [132] The contention that the Respondents are prohibited from instituting action against the Applicant in respect of the same instalment sale agreements and/or credit agreements simply on the basis that Volkswagen Financial Services had previously instituted actions, and had then withdrawn its actions instituted against the Applicant is clearly without any merit.
- [133] Any party, or any other third party with the necessary *locus standi*, is entitled to institute fresh proceedings against a defendant, after an action has been withdrawn, as the withdrawal of the action does not render any issues *res judicata* and as the actions have certainly not been finally determined.
- [134] In the Applicant's Heads of Argument, it was submitted that there were issues of *res judicata* and/or *lis pendens* arising from the actions instituted by Volkswagen Financial Services, but no facts were set out in any of the affidavits to support such submissions.
- [135] In the circumstances, the third issue raised on behalf of the Applicant has no merit.

Fourth Issue: Prematurity of the Applications for Default Judgment

- [136] The Applicant alleges that the Applications for Default Judgment filed by the Respondents were premature, as the Applicant had filed Rule 30A(1) Notices during the five day period stipulated in the Notices of Bar for compliance, and that in the circumstances the Applications for Default Judgment could not have been filed or set down. The Applicant alleges, on the same basis, that the hearing of the Default Judgment Applications by Mudau J was “*irregular*” and “*incompetent*”.
- [137] The Applicant submitted that the delivery of the Rule 30A(1) Notices, in response to the Respondents’ Notices of Bar constituted a further procedural step in the Actions, and therefore constituted compliance with the requirements of the Notices of Bar.
- [138] Whilst a litigant is clearly entitled to make use of Rule 30A(1) in circumstances where the other litigating party fails to comply with any of the Uniform Rules, or with a request made, such step must be initiated prior to the expiry of the time period available to the party complaining of an irregularity, before such party is required to take another step. The Applicant should accordingly have filed the Rule 30A(1) Notice prior to the date by when she was required to file a Plea to the Particulars of Claim.
- [139] The irregularity complained of by the Applicant is that the Respondents failed to comply with Rule 18(6), and failed to attach to the Particulars of Claim “*a true copy*” of the written cessions relied on in the Particulars of Claim. The Applicant alleges that as a result of such irregularity she elected to invoke the provisions of Rule 30A(1).

- [140] In terms of Rule 18(12) of the Uniform Rules of Court, it is stipulated that if a party fails to comply with any of the provisions of Rule 18, the pleading will be deemed to be an irregular step and the opposing party will be entitled to act in accordance with Rule 30 of the Uniform Rules of Court.
- [141] Rule 30 applies to irregularities of form and not to matters of substance, and any non-compliance with the provisions of Rule 18 would relate to an irregularity of form, rather than an irregularity of substance.
- [142] Rule 30A (which replaced the previous Rule 30(5)) provides a general remedy for non-compliance with the Uniform Rules of Court.
- [143] In circumstances where a specific Rule provides its own remedy for non-compliance with that Rule, a party should ordinarily invoke the provisions of the Rule providing its own specific remedy.
- [144] In the Founding Affidavit the Applicant states that she was entitled to invoke the provisions of Rule 18(12) of the Uniform Rules of Court.
- [145] In the circumstances, and having regard to the particular complaint raised by the Applicant, it would have been more appropriate to rely on the provisions of Rule 30 in order to obtain compliance with Rule 18(6) of the Uniform Rules of Court, rather than seeking to rely on Rule 30A.
- [146] It is however not necessary to finally determine whether the Applicant should have utilised Rule 30 or Rule 30A, as the Applicant elected to rely on Rule 30A, and it is irrelevant, for the purposes of this Application to determine which Rule should have been utilised, as the effect would have been the same.

- [147] The Applicant alleges that the filing of the Rule 30A Application in response to the Respondents' Notices of Bar constituted compliance with the demand as set out in the Notices of Bar, and that accordingly she was not *ipso facto* barred, and that the Respondents were not entitled to rely on the Bar to apply for default judgment.
- [148] In terms of Rule 26, a party failing to deliver a Plea within the stipulated time stated must be provided with a Notice of Bar calling upon such defaulting party to deliver "*such pleading within five days after the day upon which the notice is delivered*".
- [149] It is also recorded in Rule 26 that "*any party failing to deliver the pleading referred to in the notice within the time therein required ... shall be in default of filing such pleading and ipso facto barred ...*".
- [150] It is accordingly clear that Rule 26 requires the filing of a specific pleading, as referred to in the Notice; in this instance a Plea, which was not complied with by the Applicant. The only recognised alternative to the filing of a Plea within the time period is an Exception or a Notice to Remove Cause of Complaint, which are regarded as pleadings.
- [151] Whilst the Applicant contends that a Notice in terms of Rule 30A(1) constitutes a pleading for the purposes of Rule 26, such allegation is without merit. I was not referred to any authority in support of such contention. A Notice in terms of Rule 30A(1) is not a pleading and does not meet any of the characteristics of a pleading.

[152] In the circumstances, the filing of a Rule 30A(1) Notice did not suspend or interrupt the five day period provided to file a Plea, does not qualify as a pleading, and resulted in the Applicant being *ipso facto* barred.

[153] The Applicant's contentions that the Default Judgments were erroneously sought and erroneously granted, and that the hearing of the Default Judgments was irregular and incompetent are based on the allegations that the Default Judgment Applications were premature.

[154] The Default Judgment Applications were not premature, and there is accordingly no merit in the fourth issue raised by the Applicant.

Fifth Issue: The Excipiability of the Respondents' Particulars of Claim

[155] The Applicant alleged in the Founding Affidavit that the Respondents Particulars of Claim do not disclose a valid cause of action, but she has not set out in the Rescission Application (or in the Affidavit Resisting Summary Judgment) in what manner the Particulars of Claim do not disclose a cause of action. The allegation is accordingly meaningless and unhelpful. Although the Applicant's counsel touched on the Particulars of Claim being improperly pleaded, and referred to Non-Joinder and Misjoinder, no proper basis for alleging the lack of a cause of action was made out.

[156] In the circumstances, there is no merit in the fifth issue raised by the Applicant.

Sixth Issue: Entitlement to file a Plea

[157] The Applicant alleged that by filing a Rule 30A(1) Notice, she did not abandon her right to file a Plea and intended to do so after the Rule 30A(1) Application had been determined.

[158] By electing to file the Rule 30A(1) Notice, rather than filing a Plea or an Exception, in the face of a Notice of Bar, the Applicant effectively did abandon her right to file a Plea.

[159] As already set out above, at the hearing of the Default Judgment Applications the Applicant was provided with an opportunity by the presiding Judge to seek the upliftment of the Notice of Bar and apply for an extension of time within which to file a Plea, which opportunity the Applicant, through her legal representatives, rejected.

[160] In the circumstances, the sixth issue is similarly without any merit.

Seventh Issue: Copies of Agreements to be attached to the Particulars of Claim

[161] The Applicant alleged that the signed original copies of the credit agreements concluded between herself and Volkswagen Financial Services, and the cessions concluded between Volkswagen Financial Services and Velocity should have been attached to the Particulars of Claim.

[162] The Particulars of Claim that I have had sight of refer to the credit agreement concluded between the Applicant and Volkswagen Financial Services and the Deed of Cession (described as a sale agreement), as relied on by the

Respondents, copies of which have been attached to the Particulars of Claim.

[163] In the circumstances, it appears, on a *prima facie* basis that the Respondents have complied with the issue raised by the Applicant.

[164] Insofar as the Applicant wishes to allege that the credit agreement and cession relied upon by the Respondents are not the correct agreements, are not the agreements that relate to her, are unsigned, are invalid, that different agreements ought to have been attached, or wishes to raise any other objection to such attachments, such aspect should have been raised timeously in terms of Rule 30 or Rule 30A, or as a defence in the Applicant's Plea.

[165] In the circumstances, the seventh issue raised by the Applicant is without any merit.

Eighth Issue: Denial of indebtedness

[166] In the Affidavit Resisting Summary Judgment the Applicant alleged that she "*denies the contents of being in arrears with VFSSA and/or [the Respondents] ... without proof [of] the agreement which the [Applicant] is said to have defaulted.*"

[167] The wording of the Applicant's allegation is very carefully framed, as it is clear that the Applicant is not prepared to admit that she is in arrears, unless

Volkswagen Financial Services and/or the Respondents provide her with proof of the agreement in terms of which she purchased the motor vehicles.

[168] It appears that the Applicant is of the view that in the absence of being provided with a written credit agreement she is not obliged to make payment for the two motor vehicles to Volkswagen Financial Services, despite being in possession of, and utilising, the motor vehicles at the time.

[169] In the Answering Affidavit the Respondents pointed out that the Applicant has not made any instalment payments to Volkswagen Financial Services since 2017, and as at the date of preparation of the Answering Affidavit, the Applicant was in arrears in respect of an amount in excess of R1 million in respect of both motor vehicles. The Applicant did not deny or dispute such allegations in her Replying Affidavit.

[170] In the circumstances, there is clearly no merit in the vague suggestion that the Applicant is not in arrears with her payments to Volkswagen Financial Services and the eighth issue has no merit.

Ninth Issue: Non-Compliance with the Companies Act and the NCA

[171] In the Affidavit Resisting Summary Judgment the Applicant alleged that the sale agreement raises "*serious legal non-compliance issues*" with the provisions of the Companies Act and the NCA.

[172] The Applicant, does not provide any details as to the alleged non-compliance, and the bald allegation is simply unhelpful and entirely meaningless.

[173] In the circumstances, the ninth issue is similarly without any merit.

Tenth Issue: Contraventions of Statute

[174] Whilst I have set out above that an Applicant must make out his or her case in the Founding Affidavit, the Applicant raised one further issue in the Replying Affidavit, which I had regard to, being that the cessions of the credit agreements by Volkswagen Financial Services to Velocity are not lawful, and “*may*” be in contravention of the Companies Act, the Income Tax Act and the Tax Administration Act.

[175] As with the previous allegations of contraventions and non-compliance, the Applicant has not set out in what manner there has been a contravention, or which provisions of the various Acts have been contravened.

[176] Once again, the bald allegations are simply meaningless, and the tenth issue also has no merit.

RESCISSION OF THE DEFAULT JUDGMENTS

[177] Having considered the various complaints, contentions and issues raised by the Applicant, it is necessary to determine whether the Applicant is entitled to rescission of the two Default Judgments.

Rescission in terms of Rule 42(1)

[178] The Applicant submitted that the Default Judgments heard by Mudau J were both erroneously sought and granted on the basis that the Default Judgment applications were premature, and that the filing of a Rule 30A Notice by the Applicant interrupted the effect of the Notice of Bar and it was accordingly erroneous to seek Default Judgment in circumstances where the Applicant had not been barred.

[179] Similarly, it is contended that the Default Judgments were erroneously granted by Mudau J, in circumstances where the Applicant had not been barred because of the interruption of the Notice of Bar.

[180] As set out above, in discussing the relevant legal principles, a judgment is regarded as being erroneously granted if there existed at the time of the granting of judgment a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge not to grant the judgment.

[181] The Applicant has not alleged that there was any fact of which the Judge was unaware at the time of granting the Default Judgments.

[182] I was advised by Respondents' counsel, which was not disputed by Applicant's counsel, that all of the arguments raised in the Rescission

Application and in the Heads of Argument filed in support of the Rescission Application were raised before Mudau J at the hearing of the Default Judgment.

[183] Whether or not each and every possible fact or argument was raised before Mudau J is not strictly relevant, as no fact or aspect is raised in the Rescission Application which the Applicant contends is new, and that Mudau J was not aware of, and which fact or aspect would have induced Mudau J not to grant Default Judgment.

[184] As already set out above, the filing of a Rule 30A(1) Notice did not interrupt the Notice of Bar, and upon the expiry of the five day period provided in the Notice of Bar the Applicant was *ipso facto* barred. Even if Mudau J had been unaware of this fact at the time of the granting of the Default Judgment, it is not a fact, if raised for the first time in the Rescission Application, which would have caused him to refuse Default Judgment, if it was raised at the hearing of the Default Judgment.

[185] As already stated, there is not any allegation in any of the affidavits filed on behalf of the Applicant contending that there were any aspects that Mudau J was unaware of at the time of hearing the Default Judgment Applications.

[186] Whilst a default judgment will be regarded as being erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the Court to have made the Order, I am satisfied that there was no irregularity, and that it was indeed legally competent for Mudau J to have granted the Default Judgment Orders.

- [187] The alleged irregularities raised and relied on by the Applicant are simply spurious.
- [188] As an example, the Applicant complains of the manner in which the Default Judgment Applications were heard, being by Mudau J, rather than a Registrar, but elsewhere in the affidavit states that the Default Judgment Applications ought to have been held before a Judge in open Court. Another example is the suggestion that Mudau J did not hear evidence as referred to in Rule 31(2)(b), but evidence is not required in each and every application for default judgment, and it will be entirely dependent on the relief sought as to whether evidence is required or requested.
- [189] Whilst I am certainly not sitting in appeal of the Default Judgments granted by Mudau J, I am of the view, having regard to the allegations made in the Particulars of Claim and the nature of the Default Judgments sought, that no evidence would have been required in the Default Judgment hearings.
- [190] As I have already found that the hearing of the Default Judgments were not premature, the Applications were not erroneously sought.
- [191] It is accordingly clear that the Default Judgments were not erroneously granted, that there were no irregularities, and that it was legally competent for Mudau J to have granted the Default Judgments.
- [192] In the circumstances, I am satisfied that the Default Judgments were not erroneously sought or granted, and are not susceptible to rescission in terms of Rule 42(1).

Rescission in terms of Rule 31(2)(b)

- [193] Insofar as the Applicant may be relying on a rescission of the Default Judgments on the grounds set out in Rule 31(2)(b), the Applicant is required to show good cause as to why the Default Judgment should be rescinded.
- [194] The Applicant is firstly required to provide a reasonable explanation of the event placing her in default, which resulted in the granting of the Default Judgment. The Applicant's explanation cannot be regarded as being wilful or due to gross negligence, as the Applicant's conduct in filing a Rule 30A(1) Notice rather than filing a Plea (or even an Exception, having regard to the allegation that the Particulars of Claim do not disclose a cause of action) was presumably based on the legal advice that the Applicant received.
- [195] Whilst the basis of the default may be wrong in law, it still suffices as a reasonable explanation for the Applicant's default.
- [196] The Applicant must then secondly show that the Application for Rescission is *bona fide* and has not been made with the intention of merely delaying the Respondents' claim.
- [197] The Applicant asserts that she wants to defend the Actions instituted by the Respondents, and it cannot be suggested that the Rescission Application is not *bona fide*, or was brought with the intention of delaying the Respondents' claim.
- [198] The Applicant is then thirdly required to show that she has a *bona fide* defence to the Respondents' claim. Such *bona fide* defence need only be

established on a *prima facie* basis, in the sense that averments should be set out in the Rescission Application which if established at the trial, would entitle the Applicant to the relief she seeks.

[199] The *bona fide* defence must be set out with sufficient detail to enable a Court to conclude whether or not an Applicant has a *bona fide* defence to the Actions.

[200] The Applicant's defence appears to be that the Applicant did not conclude any agreements with Velocity, and that the Applicant did not consent to the cession of the right, title and interest of the agreements concluded between herself and Volkswagen Financial Services to Velocity.

[201] As regards the "*defence*" of not concluding a credit agreement (or any other agreement) with Velocity, it is not the Respondents' case that such an agreement was concluded, and that "*defence*" is of no relevance.

[202] As regards the second "*defence*", being that the Applicant did not consent to the cession of the right, title and interest in the credit agreements concluded between the Applicant and Volkswagen Financial Services to Velocity, the Applicant does not allege that it was a legal or contractual requirement that her consent to the cession is required.

[203] The statement that the Applicant did not consent to the cession, without an allegation that her consent was required does not constitute a defence.

- [204] It is most certainly not uncommon for cessions to be concluded between two parties, which cessions do not require the consent or input of the third party debtor.²¹
- [205] Applicant's counsel submitted during argument that the Applicant had set out a *bona fide* defence in the Affidavits Resisting Summary Judgment that she had filed, but despite a careful perusal of such Affidavits, I could not find any *bona fide* defence.
- [206] The Applicant is effectively contending that there was not a valid and binding cession but has not set out any averments which if established at the trial, would constitute a defence. The Applicant is not entitled to simply make a bald allegation of a defence but must set out sufficient detail relating to the defence for the Court to consider whether there is a *bona fide* defence.
- [207] In the circumstances, I am satisfied that the Applicant has not set out a *bona fidei* defence, even on a *prima facie* basis, and is accordingly not entitled to rescission in terms of Rule 31.

Rescission in terms of the Common Law

- [208] The requirements for rescission under the common law are very similar to the requirements for rescission in terms of Rule 31(2)(b), and also requires the applicant to show that on the merits of the action the applicant has a *bona fide* defence which *prima facie* carries some prospects of success.

²¹ *Hillock & Another v Hillsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) at p 515.

[209] Having regard to what I have already set out above in respect of the Applicant's lack of establishment of a *bona fide* defence, I am satisfied that the Applicant has not met the requirement of establishing a *bona fide* defence which *prima facie* has some prospects of success at the trial.

[210] In the circumstances, the Applicant is not entitled to a rescission of the Default Judgments under the common law.

COSTS

[211] The Respondents submitted that the Rescission Application should be dismissed, and that the Applicant should be ordered to pay the costs of the Application on the attorney and client scale.

[212] During the period of the COVID -19 pandemic, which shows no signs of abating, the Courts have sought, and implemented adaptations to ensure that Court proceedings are not brought to a standstill.

[213] In order to ensure that the audio-visual hearings which have been implemented can be dealt with as smoothly as possible, the Judge President issued a Directive dated 18 September 2020, wherein the specific requirements to be adhered to during the pandemic are set out.

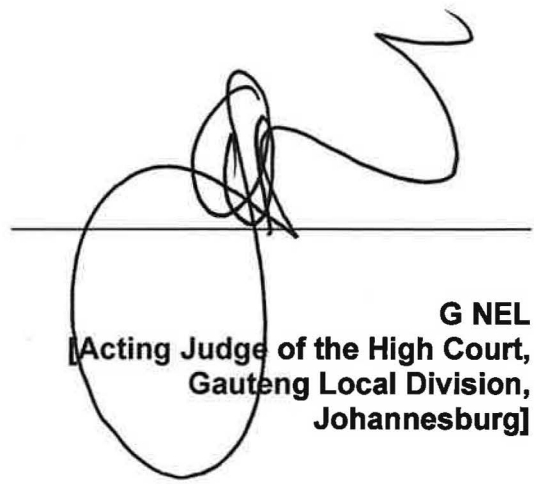
[214] The requirements of the Practice Directive were certainly not complied with by the parties in this Application. In particular, I refer to the contents of paragraph 104 of the Directive, which stipulates that the counsel for the opposing parties must hold a pre-hearing conference and prepare a Joint Practice Note setting out, *inter alia*:

- [214.1] The relevant factual chronology;
- [214.2] Common cause facts;
- [214.3] Issues requiring determination; and
- [214.4] Other matters relevant for the efficient conduct of the hearing, to present to the Judge seized with the matter.
- [215] The Joint Practice Note is to be uploaded to the case file on Caselines and also transmitted by e-mail to the Judge no later than five court days prior to the hearing date.
- [216] In this Application the Respondents (understandably) elected to set the Application down for hearing and in so doing, to some extent, accepted the responsibilities of *dominus litis*.
- [217] As already set out in the Judgment, no Joint Practice Note was prepared, with the result that none of the issues to be set out in the Joint Practice Note, aimed at assisting the Court to hear and facilitate the matter was available, the contents of the Affidavits were not clearly set out and were disjointed, correspondence referred to in the affidavits were either not attached or their relevance was not explained, and I was required to understand the sequence of events by perusing ancillary documents, and the contents of correspondence.
- [218] The pleadings and all relevant affidavits and supporting documents were not uploaded onto Caselines, requiring me to call for copies of the Particulars of Claim and the Affidavits Resisting Summary Judgment.

- [219] As appears from the Judgment, there were many different aspects to be considered and numerous issues to be determined. None of the issues were properly identified, as they ought to have been, in a Joint Practice Note.
- [220] Had the parties held a joint pre-trial conference as was required, it may very well have been agreed at such conference that the *in limine* aspect raised by the Respondents was no longer being pursued. I would then presumably have been advised that the *in limine* point was no longer being persisted with, and that there was accordingly no need to read and deal with substantial portions of the papers and read all of the judgments referred to in respect of the *in limine* point.
- [221] I accept that both the Applicant and the Respondents were responsible for the failures and omissions set out above.
- [222] In the circumstances, and having regard to what I have set out above under the heading of "COSTS", I deem it appropriate that each party should bear its own costs.

THE ORDER

- [223] I accordingly make the following order:
- [223.1] The Application for Rescission of the Default Judgments granted on 14 October 2019 under case numbers 25121/2018 and 25124/2018 respectively, is dismissed;
- [223.2] Each party is to pay its own costs incurred in the Rescission Application.



G NEL
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Judgment: 6 July 2021

APPEARANCES

For the Applicant: Adv M S Sebola

Instructed by: Sebola Nchupetsand Sebola Inc

For the Respondent: Adv S Aucamp

Instructed by Smit Jones Pratt Attorneys