

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2021/41892

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

2 August 2024
DATE

SIGNATURE

In the matter between:

LEON WYNAND FREEMAN

Applicant

And

**SHACKLETON CREDIT MANAGEMENT (PTY)
LIMITED
(Registration No. 2002/017997/07)**

Respondent

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date for hand-down is deemed to be 2 August 2024.

JUDGMENT

KEIGHTLEY J

[1] This is an opposed application for rescission of a default judgment granted against the applicant in terms of which he was ordered to pay to the respondent an amount of R178,293.99,

interest and costs. A warrant of execution was subsequently issued and executed pursuant to the default judgment. The action by the respondent, Shackleton Credit Management (Pty) Ltd (Shackleton), was premised on a loan agreement entered into between the applicant and a credit provider, Direct Axis, a business unit of First Rand Bank Limited. Shackleton subsequently acquired the rights from Direct Access under the loan agreement as cessionary.

[2] The above facts are common cause. The applicant does not dispute that monies were lent and advanced to him under the loan agreement, or that he did not make all repayments. However, the applicant contends that default judgment was erroneously sought and granted and that it must be rescinded under rule 42(1)(a) of the uniform rules of court. Alternatively, he contends that he is entitled to rescission under rule 31(2)(b) in that he has a bona fide defence to the action.

[3] As is often the case in matters of this kind, the applicant advances several grounds to support his case for rescission. They span the usual gamut, including alleged defective service, and failure to comply with the requirements of the National Credit Act. In my view, there is little to support the case for rescission on most of the grounds advanced, save for two, which are interrelated.

[4] Some context is relevant to the issues at hand. Shackleton instituted the action based on a simple summons. In it, Shackleton averred that the action arose out of monies lent and advanced to the applicant 'in terms of an oral agreement for a personal loan'. It averred further that the terms and conditions of the agreement were recorded in writing, annexed to the summons as 'B'. Shackleton further annexed a copy of what it referred to as a certificate of balance, marked and annexed as 'C'. In the absence of the applicant entering an intention to defend the action, Shackleton applied for and was granted the default judgment in the amount stated in the certificate of balance. The certificate of balance reflected the full, capital sum Shackleton claimed was outstanding on the loan.

[5] The loan agreement was granted for the sum of R150 000, which the applicant was obliged to repay in monthly instalments of R5 132.30, over a period of six years. At the time summons was issued, this period had not yet lapsed. The applicant's main contentions arising from this

situation is that judgment was sought and was granted for an amount which, on the papers, was not yet due and payable. Related to this point, he contends that the claim was proved by a certificate of balance even though the agreement made no provision therefor.

[6] The gist of the applicant's case is that the loan agreement pleaded by Shackleton contained no acceleration clause. As an acceleration clause is not implied by law,¹ Shackleton was not entitled to sue for instalments that had not yet become due: all it could sue for was those payments which were already overdue when summons was issued. Linked to this, not only was no provision made in the loan agreement relied upon for the amount due to be proven by way of a certificate of balance, but in addition, the certificate presented to the court erroneously reflected the accelerated amount Shackleton claimed was due and payable when, in truth, it was not. For these reasons, the applicant asserted that this was a case where rule 42(1)(a) had application: the default judgment had been erroneously sought and granted in that the amount in respect of which it had been granted was not due and payable.

[7] In its answering affidavit, Shackleton produced what it averred were the terms of and conditions that formed part of what it then asserted was a partly written and partly oral agreement. The applicant points out, correctly, that these alleged terms and conditions were not attached to the summons and did not form part of the pleadings before the Judge granting default judgment. Further, no assertion was made in the summons of the existence of an acceleration clause, or that provision was made in the oral agreement pleaded for the use of a certificate of balance as proof of the amount owing.

[8] It may well be that the action was poorly drafted, and that the drafter simply neglected to attach what appear to be standard terms and conditions for personal loans extended by Direct Axis. However, that is not for this court to decide. Shackleton expressly relied on an oral agreement. The Applicant denies that the terms and conditions attached to the answering affidavit (and not the summons) formed part of the agreement that he entered into. Being a cessionary, and not having been involved in the events leading up to the conclusion of the

¹ *Nedbank v Fraser and Another* 2011 (4) SA 263 (GSJ) at para 29.

agreement, Shackleton cannot gainsay the applicant's assertion in this regard. In any event, what is clear is that the documents attached to the summons did not provide evidence of the existence of an acceleration clause justifying a claim based on the full principal debt.

[9] In these somewhat peculiar circumstances, it seems to me that there is some merit in the applicant's case that Shackleton erroneously sought judgment in respect of the full accelerated amount of the principal debt in circumstances where it failed to plead that this was a term of the agreement relied upon in the summons. While overdue payments may have been payable when summons was issued and default judgment granted, it is impossible, without further facts, to ascertain what amount was in fact due and payable on Shackleton's pleaded case at that time. Unfortunately, acting on erroneous assertions, the court erroneously ordered default judgment for the full amount.

[10] It is unfortunate that a relatively small debt has engaged the High Court in several rounds of litigation. It is hoped that the matter may be resolved by a simple statement and debasement exercise undertaken between Shackleton and the applicant without the need for further litigation.

[11] For these reasons, the application for rescission must succeed.

[12] I make the following order:

1. The judgment granted by this Court on 31 January 2022 under the above case number is rescinded and set aside.
2. The warrant of execution issued under the above case number is set aside.
3. The funds attached by the Respondent under the warrant of execution are to be released to the Applicant.
4. The Respondent is ordered to pay the costs of the Applicant.



**R KEIGHTLEY
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

For the Applicant:

J G Dobie
Instructed by Reaan Swanepoel
Attorneys

For the Respondent:

R Stevenson
Instructed by Lynne and Main
Incorporated

Heard: 06 June 2024

Delivered: 02 August 2024