

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 21341/243

In the application between:

RONEL CANDICE VAN LOUW

Identity number: 8[...]

Applicant

[Defendant in main action]

and

NEDBANK LIMITED

(Registration number: 1951/000009/06)

Respondent

[Plaintiff in main action]

In re: the action between:

NEDBANK LIMITED

Plaintiff

And

RONEL CANDICE VAN LOUW

Defendant

Coram: Acting Justice A Montzinger

Heard: 03 September 2024

Delivered electronically: 03 September 2024

JUDGEMENT

Montzinger AJ:

Summary Introduction

1. This is an opposed application to rescind a default judgment.
2. On 22 July 2022, the applicant¹ and the respondent², (*Nedbank*), concluded an instalment sale agreement for a 2022 Chery Tiggo 7 Pro 1.5T Distinction CVT vehicle. By February 2023, the applicant had defaulted on the instalments. Nedbank then instructed an external debt collector to engage with the applicant to settle the arrears, conclude a repayment arrangement, or agree to a voluntary surrender of the vehicle. On 13 February 2023, the debt collector attempted to contact the applicant but was unsuccessful.
3. In March 2023, Nedbank continued to communicate with the applicant regarding the arrears on her account, which at that stage amounted to R19,709.41, excluding collection and legal fees. On 25 April 2023, Nedbank received a Form 17.1 notification indicating that the applicant had applied for debt review with a K Schweidler, a debt counsellor. However, the debt counsellor failed to provide Nedbank with an acceptable repayment proposal, and the applicant's account fell further into arrears. Consequently, Nedbank decided to pursue legal action.
4. On 20 September 2023, Nedbank's attorneys sent a notice to the applicant, terminating the purported debt review process³. Additional termination notices followed, with no response from the applicant. On 27 November 2023, Nedbank issued summons, which the Sheriff personally served on the applicant on 14 December 2023. Nedbank sought the termination of the sale agreement, the return of the vehicle, and associated costs. The applicant did not file a notice of intention to defend the action.

¹ As the defendant in the action

² As the plaintiff in the action

³ 28 September 2023, 23 October 2023, and 30 October 2023

5. On 19 March 2024, Nedbank applied to the Registrar for default judgment, which was granted on 10 April 2024. Following this, a warrant for the delivery of the vehicle was issued and personally served on the applicant by the Sheriff on 30 May 2024. The vehicle was removed from the applicant's possession that same day. This prompted the applicant to launch an urgent application on 9 July 2024, seeking to prevent the sale of the vehicle at an auction pending the finalisation of a rescission application. The applicant premised the rescission on rule 42(1)(a) of the Uniform Rules of Court that the judgement was erroneously sought and granted in her absence.
6. The urgent application was set down for 23 July 2024. However, the issue of staying the auction became moot as Nedbank decided to keep the vehicle in safekeeping pending the outcome of the rescission application. The parties agreed to a draft order providing for the postponement of the rescission application and the filing of further affidavits. Despite this, no replying affidavit or heads of argument were filed on behalf of the applicant. Although the issue of staying the warrant of removal was moot, the heads of argument filed on 2 September 2024 still referenced the application to stay the execution of the default judgment without addressing the rescission application.
7. In any event, I am satisfied that issue of the stay of the warrant of removal is moot and that there is only a rescission application before me.

Procedural issues and conduct of attorneys

8. The conduct of the attorney representing the applicant in this matter falls far below the standard of professionalism expected by a legal professional. On 2 September 2024, after lunch, Advocate Desmond M Gabone, who claimed to have been instructed by Ramabu Attorneys, belatedly filed heads of argument. However, these heads of argument failed to address the issue of the rescission of judgment, focusing instead on the application to stay the warrant of removal—a matter that was moot and not before the court.

9. On the morning of the hearing, at 09:04, my registrar received an email from Mr. J November, who identified himself as the secretary of Mr. Ramabu. This email informed the court that Advocate Gabone had withdrawn from his mandate to appear and that no alternative arrangements had been made for representation. In court, I was informed that this was due to a lack of finances. The email also stated that Mr. Ramabu was indisposed and was being monitored in Johannesburg, with a medical note to be provided as soon as possible. A postponement was requested through this email. Nedbank's attorney opposed the request, highlighting the inappropriateness of seeking a postponement via email and emphasising that the applicant, as *dominus litis*, should be present in court.
10. At 10:05, Mr. November appeared in court on behalf of Ramabu Attorneys. It was immediately apparent that Mr. November was not an admitted legal practitioner, nor did he present himself in a manner befitting the *decorum* of the court. His casual attire was inconsistent with the professional standards expected of someone working in a legal office or who respects the court. When asked to substantiate his claims about receiving a message from Mr. Ramabu early in the morning, Mr. November stated that the phone containing the message was left at home.
11. The conduct of Mr. Ramabu of Ramabu Attorneys in this matter is to be strongly deprecated. His actions—failure to file a replying affidavit, condoning the filing of inadequate heads of argument on the incorrect issue, failure to ensure proper representation at the hearing, and the unprofessional behaviour by a representative of his office exhibited in court—fall woefully short of the standards mandated by the Legal Practice Act and the Code of Conduct for Legal Practitioners, as established by the Legal Practice Council. According to the Legal Practice Act 28 of 2014, attorneys are expected to uphold the dignity and *decorum* of the legal profession, act with integrity, and ensure that their conduct does not bring the profession into disrepute. The actions of Mr. Ramabu in this case reflect a disregard for these principles and undermine the trust placed in legal practitioners by the court and the public.

12. While I will refrain from referring the matter to the Legal Practice Council at this stage, I will certainly take this conduct into account when evaluating an appropriate order for costs. Mr. Garces, who appeared for Nedbank, confirmed his instructions to oppose any further postponement and requested the court to decline any further delay and rather dispose of the matter. I agreed with Mr. Garces that another postponement would only endorse the reprehensible conduct of the attorneys. I therefore refused the postponement and proceeded to hear the matter on the merits.

The applicant's case in support of the rescission

13. The applicant's basis for the rescission of the judgement is not entirely clear. Although reliance is placed on a claim that the default judgment was erroneously granted in her absence and that there were procedural errors that should have precluded the Registrar from granting the judgment, it is not entirely clear what the procedural errors were. It seems as if the applicant relies on the fact that she was apparently under debt review at the time the default judgment was granted, and if that was the case default judgment should not have been granted. To support this proposition the applicant relies on not being properly served with the summons and the ss 86(10) termination of debt review notices.
14. It also seemed as if the applicant wants to rely on the fact that the registrar was not empowered to grant the default judgement. Lastly, the applicant also asserted that she has a *bona fide* defence against Nedbank's claim, which has good prospects of success if she can just be allowed to defend the action. She also claims that if the court does not rescind the judgement it would result in unfair prejudice against her.

Nedbank's grounds of opposition

15. Nedbank contended that the applicant was in wilful default in not defending the summons as she had personal notice of the summons. Nedbank emphasised that the judgment was not granted as a result of a procedural

error, as the applicant suggests, but was the result of her own failure to engage with the summons timely and appropriately.

16. Nedbank further argues that it had fully complied with the provisions of ss 86(10) of the NCA, which allowed it to terminate the debt review process. This termination notices were served via email, registered post, and service by the Sheriff. The notices were not only served on the applicant but also served on her debt counsellor, and the National Credit Regulator. The applicant's claim that she did not receive these notices is, according to Nedbank, unsubstantiated.
17. Additionally, Nedbank asserts that the applicant does not have a *bona fide* defence to its claim. It points out that the applicant does not dispute entering into the instalment sale agreement or her failure to make payments as required under the instalment sale agreement. Despite numerous communications from Nedbank advising the applicant of the action and the requirement to settle the arrears or reach an acceptable payment arrangement, the applicant failed to take substantive action to resolve the matter. This inaction, Nedbank argues, demonstrates the applicant's wilful default, and her attempt to rescind the judgment is merely a tactic to delay the enforcement of the judgment to which Nedbank is lawfully entitled.
18. In respect of the allegations of prejudice Nedbank contends that any prejudice claimed by the applicant is outweighed by the prejudice that would be suffered by Nedbank if the judgment is not enforced, particularly in light of the continued depreciation of the vehicle and the applicant's ongoing default under the credit agreement.

The legal principles

19. In a rescission of a judgment application, particularly where the applicant relies on an alleged error in the procedure, the law is well-established and provides specific grounds under which such an application may be brought. The rule governing rescission in this context is Rule 42(1)(a) of the Uniform

Rules of Court, which allows a court to rescind or vary an order or judgment that was: "*erroneously sought or erroneously granted in the absence of any party affected thereby.*"

20. For an applicant to succeed under Rule 42(1)(a), two fundamental requirements must be met. Firstly, the judgment must have been granted in the absence of the party seeking rescission. This requirement is generally straightforward, but our courts have emphasised that the "absence" must be unintentional or due to circumstances beyond the applicant's control. The rule is designed to protect parties who were precluded from participating in the proceedings, not those who deliberately chose not to participate⁴. Secondly, the judgement or order must have been erroneously sought or granted. This encompasses situations where there was a procedural irregularity that, had the court been aware of it at the time, would have precluded the granting of the judgment. The error could relate to the non-service of a required notice, the absence of a cause of action, or the failure to follow statutory procedures⁵. The error need not appear on the face of the record; it is sufficient if the error existed at the time of the judgment, making the order legally incompetent.
21. The case law is clear that the purpose of Rule 42(1)(a) is not to afford a litigant a second opportunity to contest the merits of the case, but rather to correct procedural errors that led to an unjust outcome. In *Freedom v Hassam*⁶ the court reiterated that an application for rescission based on procedural error must demonstrate that the judgment was erroneously granted due to a material fact that, if known to the court, would have prevented the judgment from being issued.
22. It is also important to note that Rule 42(1)(a) does not require the applicant to show "*good cause*" as is required under Rule 31(2)(b). However, the court retains a discretion and is not obliged to rescind the judgment merely because

⁴ *Van Vuuren v Jansen* 1977 (3) SA 1062 (T)).

⁵ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA)

⁶ *Freedom Stationery (Pty) Limited and Others v Hassam and Others* 2019 (4) SA 459 (SCA) ("*Freedom v Hassam*")

an error is shown. The discretion must be exercised judicially, considering the broader principles of fairness and justice⁷.

23. In situations where the applicant alleges not having received notices or the summons, the courts have emphasised the importance of proving that the error in service was material to the granting of the judgment. As articulated *Munien v BMW*⁸ the fact that a notice was not received does not automatically entitle the applicant to rescission if the notice was duly sent to the correct address and the applicant failed to act on it.
24. I will evaluate the applicant's rescission application by applying the principles foreshowed.

Evaluation

25. In considering the applicant's rescission application, I am confronted with a glaring and fundamental difficulty: the applicant has failed to identify a material procedural error in the granting of the default judgment. The cornerstone of her case—that the judgment was erroneously granted in her absence—is untenable given the clear evidence that she was personally served with the summons on 14 December 2023. In considering the returns of service by the Sheriff, the court is guided by the principle that such returns are considered prima facie evidence of the truth of their contents⁹. There is no substantive evidence to dispute the accuracy of these returns. As a result, I am constrained to accept the Sheriff's return as evidence of the service of the summons.
26. It is well-established that for a rescission to succeed under Rule 42(1)(a), the applicant must demonstrate both the absence of her participation in the proceedings and that such absence resulted from an error. In this case,

⁷ *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* [2021] ZACC 28

⁸ *Munien vs BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD) ("*Munien v BMW*")

⁹ *Van Vuuren v Jansen* 1977 (3) SA 1062 (T)

however, there is no procedural error to speak of, as the summons was duly served, and the applicant, having been personally served, had ample opportunity to defend the action but chose not to. There is also no error in the Court Registrar granting the judgment, as no notice of intention to defend was filed.

27. The timeline of events further undermines the applicant's proposition. Upon receiving the summons, she engaged in several communications with Nedbank between December 2023 and January 2024. She acknowledged her arrears and actively sought to negotiate a settlement. This is significant as it confirms that the applicant was not only aware of the legal proceedings but also knew of the potential consequences should the arrears remain unsettled. Despite these ongoing discussions, the applicant made no meaningful attempt to file a notice of intention to defend. As early as 3 January 2024, Nedbank made it clear that legal action would proceed unless the arrears were settled. Her inaction in these circumstances is indicative of wilful default, not an erroneous grant of a judgment.
28. Additionally, the applicant's claim of being under debt review does not provide a sufficient ground for rescission. Nedbank followed the process in terms of ss 86(10) of the National Credit Act, addressing multiple notices to the applicant and the relevant parties involved in the debt review process. As noted in *Lodhi v Bondev Developments*¹⁰ a judgment is not erroneously granted merely because a defence could have been raised but was not. The error must relate to the procedure, and in this case, there is no evidence of any procedural flaw.
29. The courts have consistently held that the protection offered under Rule 42(1)(a) does not extend to litigants who choose to remain inactive. The Supreme Court of Appeal made it clear in *Freedom Stationery v Hassam* that the rule serves to correct procedural errors that led to an unjust outcome but

¹⁰ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA)

does not allow a litigant to avoid the consequences of wilful action that results in non-compliance.

30. In respect of my discretion to grant rescission where fairness and justice dictate such an outcome¹¹ it would rather be fair considering the circumstances of this matter to exercise my discretion against granting a rescission.
31. Finally, it is worth noting that the mere assertion that the applicant was under debt review does not entitle her to the relief sought. As noted in *Munien vs BMW*¹², once the credit provider has complied with the termination procedures under ss 86(10) of the NCA, the onus shifts to the consumer to take action.

Conclusion

32. In light of the foregoing, the applicant has failed to identify any procedural error, nor has she provided a reasonable explanation for her failure to defend the action despite being personally served. Accordingly, I find that the judgment was correctly granted, and there is no basis for rescission.
33. In respect of costs, the conduct of Mr. Ramabu, warrants an award of costs *de bonis propriis*. The principle underlying such an award is that it is typically reserved for instances where a person acting in a representative capacity has conducted litigation in a manner that is negligent, unreasonable, or that lacked *bona fides*¹³. The actions of Mr. Ramabu in this case by failing to comply with a court order for the filing of papers and heads of argument, the last-minute withdrawal of counsel, the condonation of the submission of irrelevant heads of argument by the advocate, and the unprofessional manner in which the court appearance was handled, all point to a lack of diligence and unprofessional misconduct. Add to that the attempt to seek a postponement

¹¹ *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* [2021] ZACC 28]

¹² *Munien vs BMW Financial Services (SA) (Pty) Ltd and Another* 2010 (1) SA 549 (KZD)

¹³ *Vermaak's Executor v Vermaak's Heirs* 1909 TS 679 and reaffirmed in *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A).

via email on the day of the hearing, without ensuring proper representation for his client. Such conduct justifies an order for costs *de bonis propriis*. I therefore find that Mr. Ramabu's conduct was negligent and unreasonable and accordingly I am inclined to award costs against him personally, *de bonis propriis*, as a reflection of the court's disapproval of his conduct and as a reminder of the high standard of professionalism that the legal practitioners must uphold.

34. The rescission application is therefore dismissed with costs *de bonis propriis*, on an attorney and client scale granted against Mr. Ramabu, in his personal capacity.

A MONTZINGER
Acting Judge of the High Court

Appearances:

Applicants' counsel:	Mr. Garces
Applicant's attorney:	Kemp & Associates Attorneys
Respondent's counsel:	Absent
Respondent's attorney:	Absent