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

CASE NO: 2022-021553

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED: ✓	
	<u>20 November 2024</u>
SIGNATURE	DATE

In the matter between:

TREVOR THABANG MOKOENA

APPLICANT

and

THE STANDARD BANK OF SOUTH AFRICA

RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

[1] The applicant, Trevor Thabang Mokoena has applied for rescission of a judgment granted by this court against him in his absence. The order was granted in favour of

Standard Bank of South Africa Limited, the respondent herein, granted on 14 November 2022. The parties to the litigation are collectively referred to as “the parties”.

[2] By way of a brief factual background, on or about 17 August 2018 the applicant and the respondent entered into an Instalment Sale Agreement in terms of which the respondent sold a 2018 Audi RS6 Quattro Avant motor vehicle to the applicant. It was agreed that the applicant would pay the purchase price, together with interest, fees and costs by way of 71 consecutive monthly instalments of R30 059.93 each, commencing on 3 October 2018 and a final instalment of R360 288.72 was to be payable on 3 September 2024.

[3] The Instalment Sale Agreement provided, *inter alia*, that:

- 3.1. The principal debt, amounted to R1 724 031.07;
- 3.2. Ownership of the vehicle would vest on the respondent and would pass to the applicant upon him fulfilling all the obligations set out in the agreement;
- 3.3. The applicant will honour his repayment obligations as provided for in the agreement;
- 3.4. In the event of the applicant breaching the agreement, the respondent would be entitled to among others, cancel it and claim return of the vehicle.

[4] The applicant defaulted on his monthly instalments and his account fell into arrears. The respondent caused a letter in terms of section 129(1) of the National Credit Act 34 of 2005, to be dispatched to the applicant firstly by registered mail and thereafter by way of service by the sheriff. When there was no response on the part of the applicant, the respondent caused summons to be issued. The summons was served by way of affixing to the principal door at the applicant’s chosen domicile address.

[5] The applicant did not enter an appearance to defend the action. The respondent then applied for judgment by default which was granted on 14 November 2022 by Malungana AJ. The following orders were made;

1. Confirmation of cancellation of the Agreement;

2. An order directing the Defendant to restore to the Plaintiff possession of the Goods, being a 2018 AUDI RS6 QUATTRO AVANT motor vehicle with Engine Number: C[...] and Chassis Number: W[...];
3. Retention of all monies paid to the Plaintiff by the Defendant;
4. Leave is granted to the Plaintiff to apply on the same papers, duly amplified where necessary, for: -
 - (a) Damages, if any, in an amount to be calculated by subtracting the current market value of the goods (as well as a rebate on unearned finance charges from the balance outstanding if applicable);
 - (b) Interest on the said damages at the rate of 9.000% per annum from 13 MAY 2022 to date of payment;
5. Costs of suit.

[6] On 13 December 2022 a writ was issued authorising the attachment of the motor vehicle. On the applicant's version, he was contacted on 12 January 2023 by a collection agent of the respondent who wanted to collect the vehicle. It was as a result of such contact that he later came to know of the summons, default judgment as well as the writ, after requesting to be furnished with same. He further indicates that was not aware of the action and the judgment obtained by default and that as soon as he became aware, he launched this application for rescission of judgment.

[7] As I follow the applicant's case, he contends firstly that there was no wilful default on his part in that the summons was not served on him or on any other person. Further, that had he been served or had the summons come to his attention, he would have defended the matter. Secondly, that he has a *bona fide* defence to the summons in that there was failure on the part of the respondent to deliver to him a notice of cancellation of the agreement. Consequently, it is submitted, the judgment was erroneously granted. Thirdly, that judgment was granted erroneously in that there was non-compliance with the National Credit Act on the part of the respondent.

[8] The assertion by the applicant that judgment was erroneously granted means the application is brought in terms of Rule 42(1)(a) which provides as follows;

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

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

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

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

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed”.

[9] It is worth keeping in mind that the fact that an application is specifically brought in terms of one Rule does not mean it cannot be entertained in terms of another Rule or under common law provided the requirements thereof are met. As stated above, the requisites in terms of Rule 42(1)(a) for granting rescission are that the judgment must have been erroneously sought or granted, the judgment must have been granted in the absence of the applicant and the applicant's rights or interests must be affected. Once those requirements are shown to exist, an applicant is ordinarily entitled to rescission and is not required also to show good or sufficient cause as is required for rescission in terms of Rule 31(2)(b) or under the common law¹.

[10] The Supreme Court of Appeal confirmed that the question whether an order is 'erroneously granted' relates to the procedure followed to obtain that judgment in the absence of another party and not the existence of a defence to the claim. In *Lodhi*² at paragraph 24, the court held;

¹ *De Wet v Western Bank Ltd* 1977(4) SA 770 (T) at 780H-781A; *Mutebwa v Mutebwa* 2001(2) SA 193 (TkHC) at paras 11 and 12

² *Lodhi 2 Properties Investments CC v Bondev Developments* 2007 (6) SA 85 (SCA)

“...Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the Sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings.”

[11] Rule 31 is entitled 'Judgment on confession and by default and rescission of judgments'. Rule 31(2)(a) provides for default judgment and Rule 31(2)(b) provides the protection of rescission in the following terms: 'A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.'

[12] Under the common law, a court is empowered to rescind a judgment obtained on default of appearance provided sufficient cause is shown. The requirement for good cause under Rule 31(2)(b) and for sufficient cause under the common law is the same³. But it is clear that in principle and in the long-standing practice of our courts, two essential elements of “sufficient case” for rescission of a judgment obtained by default are:

- (i) That the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) That on the merits such party has a bona fide defence which, prima facie, carries some prospects of success.

[13] The applicant is taking issue with the service, by the sheriff, of the summons at his chosen domicilium address by way of affixing to the principal door. It must be

³ *Chetty v Law Society, Transvaal* 1985(2) 756 (A) at 764J ('Chetty')

mentioned that it is permissible⁴ to serve process by affixing to the principal or main door, if personal service or service on a person old enough to receive process, (over the age of 16 years) cannot be achieved. Without more, the applicant is disputing that the sheriff served the summons at his chosen domicilium address. He asserts that a tenant of his, with whom he is often in contact, was present at the domicilium address around the time of service by affixing. He challenges the sheriff to say much more than what is contained in his return of service. The sheriff is a creature of instructions. He serves process as instructed or directed by the process itself and returns his findings to court. Besides, the applicant has not put up an affidavit from the tenant nor has he contacted the sheriff to dispute what the return of service suggests. He contends that more should have been done by the respondent, to bring the summons to his attention. Neither the sheriff nor the respondent have an obligation to reach out to the applicant and do much more than what is required, namely, to serve the summons on him. The hearsay statement that his tenant was present, is not evidence of the fact that the tenant was present nor is it evidence showing that the process was not served.

[14] The applicant has placed reliance on among others *Greeff v Firststrand Bank Ltd*⁵ (744/2010) [2011] ZANHC 8; 2012 (3) SA 157 (NCK) (20 May 2011) for the proposition that lack of proper service is fatal to the respondent's case. In *Greeff* a clear distinguishing factor is that the parties had concluded a loan agreement in respect of immovable property which was the primary residence. The applicant claimed to not have received summons and that she only became aware of default judgment, which had been obtained when notice of sale was served on a 10 years old girl. Regarding service of the summons, the sheriff's return had indicated that the summons was served on the principal door. The applicant in that matter had pointed out that the summons could not have been served in the stipulated manner because the house had a gate which had been locked. Thus, the sheriff could not have accessed the principal door. Despite being challenged in that manner, counsel for the respondent simply repeated what was contained in the return of service, which

⁴ Rule 4 (1)(a)(iv) of the Uniform Rules of Court.

⁵ *Greeff v Firststrand Bank Ltd* (744/2010) [2011] ZANHC 8; 2012 (3) SA 157 (NCK) (20 May 2011)

on the facts of that case could not be correct, as mentioned above. The court correctly found that the manner of service, in light of the applicant's contention was not good and rescinded the judgment.

[15] In *Absa Bank v Mare and Others*⁶, on which counsel also relied it also has clearly distinguishable facts. The court dealt with a matter where a sale in execution had been held and the immovable property had been acquired by an innocent third party, who had taken registration of the property. In examining whether the summons was served in accordance with the Uniform Rules of Court – Rule 4(1)(a)(iv), the court had regard to how the summons was served. The summons had been served by “affixing a copy thereof on the grass”. The court made the point that there is a duty upon the sheriff to serve process at a *domicilium citandi et executandi* by delivering or leaving a copy thereof in a manner by which in the ordinary course the process would come to the attention and be received by the intended recipient, and to report to the court how the process was served and why it was served in that manner. The section 129(1) letter read with section 130 of the National Credit Act, had been served by affixing to the gate and summons were affixed to the grass. Clearly on both scores service was not satisfactory hence the rescission of judgment.

Lex commissoria

[16] The applicant attacks the legal action taken against him with reference to clause 19.3.2. of the Instalment Sale Agreement. The applicant argues that provision is made in the agreement that in the event of a breach of the agreement, a clear cancellation of the agreement should be communicated to him. Absent such a cancellation the case by the respondent is doomed. Thus, it is submitted that the respondent has failed to comply with the *lex commissoria* when the applicant failed to remedy the breach. The purported cancellation mentioned in the section 129 letter as well as the particulars of claim is ineffective and not in accordance with the agreement, it was submitted.

⁶ *Absa Bank v Mare and Others* [2020] ZAGPHHC 372; 2021 (2) SA 151 GP (20 August 2020) at para 19

[17] Clause 19.3.2, which contains the cancellation clause should not be read in isolation and out of context. Some of the clauses should be read together starting with clause 19.2, which reads follows;

“19.2. If you are in default of this agreement we may give you a written notice of such default, requesting you to rectify the default within 10 (ten) business days and propose that you refer this agreement to a debt counsellor, alternatively dispute resolution agent, consumer court or an ombud with jurisdiction, with the intent that the parties resolve any disputes under this agreement or develop or agree on a plan to bring repayment up to date.

19.3. If you fail to respond to us or reject our proposals set out in the written notice referred to in 19.2. and/or you remain in default for 20 (twenty) business days after the date of the written notice referred to in 19.2., we may commence legal proceedings against you for;

19.3.1. Claim payment of all repayments and any other amounts whether due or not, provided however that if you do not make immediate payment, we may, notwithstanding the election to claim immediate payment in terms of this sub-clause claim the relief set out in 19.3.2 below;

19.3.2. Cancel this agreement and claim return of the goods. If we sell the goods after having obtained an attachment order (i.e. the goods are repossessed by us) and the net proceeds of the sale is insufficient, to discharge all of your obligations in terms of this agreement we may, subject to clause 9.4.2. to 9.7., commence with further legal proceedings to enforce all of our remaining legal obligations under this agreement. If we do not obtain possession the value of the goods will be nil;

9.4. We may exercise our rights in terms of this default clause and if you dispute our right to do so you must continue the repayments. Our acceptance of such amounts will not affect any of our rights in terms of this agreement or in law.” (The underlining is my emphasis.)

[18] The contention that the respondent was under obligation in terms of clause 19.3.2., to cancel the agreement does not accord with the rest of the above clauses when read together. Clause 19.3.2, flows from 19.3.1 which flows from 19.3. The reading of clause 19.2. suggests that a letter will be written as set out in the clause, in the event of there being a default, warning of the default and setting out the options that are available to the defaulter, for redress. The section 129 letter is such a letter. I will deal with the section 129 letter in detail below. Clause 19.3.1. goes further to state all repayments may be claimed notwithstanding the election to claim immediate payment, the respondent may still cancel the agreement. The proposition therefore that there should have been a formal cancellation letter is not in line with the reading of the rest of the clauses.

The section 129(1) letter

[19] The applicant in the founding affidavit challenges the manner in which the section 129(1) letter was served. He states therein that service through affixing by the Sheriff on 31 August 2022 at the applicant's chosen domicilium address, is not prescribed in the National Credit Act and that as a result, the respondent has failed to comply with the National Credit Act. The two methods of serving the letter that are prescribed, is personal service to the consumer or on an adult person at the indicated address as well as through registered mail. I pause to observe that the applicant does not at all deny receipt of the section 129(1) letter. He only asserts that it ought not to have been served through affixing and by the sheriff. While the applicant is correct that service by the sheriff through affixing is not mentioned in the NCA, in this matter there was another form of service which is prescribed in the National Credit Act.

[20] In the respondent's answering affidavit it is disclosed that the section 129(1) letter was also dispatched to the applicant by registered mail. The service by the sheriff only took place thereafter. In fact, the track and trace report reveals that the sender as Hannes, Goes & Vennote, a firm of attorneys which I understand to be the erstwhile attorneys of the respondent. The track and trace report from the Post Office traces the movement of the registered letter with the address of the applicant. The letter left Menlo Park on 01 July 2022 through to Tshwane Mail Center, then to WITS

Mail Center and eventually mended in Bryanston Post Office where on 13 July 2022 a first notification of the registered was sent to the recipient (applicant). Only on 31 August 2022 was the section 129 letter served by the sheriff. I hasten to add that the applicant did not depose to a replying affidavit but resorted to raising issues for the first time in the heads of argument.

[21] In the heads of argument the applicant attacks for the first time the process of the dispatch of the section 129 letter through the Post Office. Relying on *Sebola*⁷ counsel argued that;

“44. Therefore, it was not sufficient for the credit provider to simply allege and provide proof that the notice had been sent by registered mail to the address chosen by the defaulting consumer. A credit provider also had to prove that the notice was also received by the correct post office. Thus, a mere dispatch was not enough and at the very least, the credit provider “must obtain a post-dispatch ‘track and trace’ print-out from the website of the South African Post Office”, to show that the notice was delivered to the relevant post office.

45. Failing compliance with the peremptory requirements of the said sections, the above Honourable Court does not have jurisdiction to determine the matter, the Constitutional Court has ruled.”

[22] While *Sebola* and many other judgments much more recently dealt with the issue of the section 129 letter, its dispatch and what amounts to proper notification as well as proper delivery, I consider the Constitutional Court judgment of *Kubyana*⁸ to be decisive and I quote from it quite generously, for it went into detail to analyse *Sebola* and to point out among other things, its misinterpretation as well as the potential pitfalls that flowed from it. Justice Mhlantla had this to say having identified the issues for discussion in the judgment;

“[31] These statutory provisions were comprehensively treated in *Sebola* and I agree with what was stated there. For present purposes three features merit emphasis. First, there is no general requirement that the notice be brought to

⁷ *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC)

⁸ *Kubyana v Standard Bank of South Africa Ltd* (CCT 65/13) [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) (20 February 2014)

the consumer's subjective attention by the credit provider, or that personal service on the consumer is necessary for valid delivery under the Act. I am minded to agree with the High Court that, had the legislation meant either of these aspects to be a necessary condition for delivery, express provision would have been made for them. Thus, while the section 129 obligation on the credit provider is to "draw the default to the notice of the consumer in writing", this obligation is discharged, in the words of section 65(2), by "[making] the document available to the consumer". This accords with section 130(1)(b)(i), which provides that a credit provider may seek to enforce its rights if a consumer has not responded to a section 129 notice. While a credit provider must take certain steps to ensure that a consumer is adequately informed of her rights, such a credit provider cannot be non-suited or hamstrung if the consumer unreasonably fails to engage with or make use of the information provided. In other words, it is the use of an acceptable mode of delivery – the taking of certain steps to apprise the consumer of the notice – which the statute requires of the credit provider, not the bringing of the contents of the section 129 notice to the consumer's subjective attention."

The Constitutional Court continued;

"[33] Third, the steps that a credit provider must take in order to effect delivery are those that would bring the section 129 notice to the attention of a reasonable consumer. This requirement is premised on the "especial importance" and the "pivotal significance" of the notice as understood in the light of the Act's objectives regarding consumer protection. In order to give effect to that importance and achieve those objectives, the Legislature has elected to impose on credit providers obligations that would not otherwise arise. Indeed, if "delivery" is interpreted to mean that a reasonable consumer would still not receive the section 129 notice, that interpretation would undermine the Act's "innovative entrenchment of court-avoidant and settlement-friendly processes" and would only provide protection for exceptional consumers. As the Court explained in *Sebola*, for there to have been delivery under the Act it must be the case that *'it may reasonably be assumed . . . that notification of [the] arrival [of the section 129 notice at the Post Office] reached the consumer and that a reasonable consumer would have ensured retrieval of the item'*."

[34] I now consider the purpose of the section 129 notice and the obligations of a reasonable consumer. Section 129 aims to establish a framework within which the parties to the credit agreement, in circumstances where the consumer has defaulted on her obligations, can come together and resolve their dispute without expensive, acrimonious and time-consuming recourse to the courts. However, this form of dispute resolution is possible only if both parties come to the table: the credit provider must avoid hasty recourse to litigation and the consumer must seek to rectify her default in a reasonable and responsible manner.

[35] If the credit provider complies with the requirements set out in [31] to [33] above and receives no response from the consumer within the period designated by the Act, I fail to see what more can be expected of it. Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement. It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a “harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.” Indeed, if the consumer has unreasonably failed to respond to the section 129 notice, she will have eschewed reliance on the consensual dispute resolution mechanisms provided for by the Act. She will not subsequently be entitled to disrupt enforcement proceedings by claiming that the credit provider has failed to discharge its statutory notice obligations.

[36] As set out earlier, even if the section 129 notice has been dispatched by registered mail and the Post Office has delivered the notification to the consumer’s designated address, valid delivery will not take place if the notice would nevertheless not have come to the attention of a reasonable consumer. But if the credit provider has complied with the requirements set out above, it will be up to the consumer to show that the notice did not come to her attention and the reasons why it did not.

.....

.....

.....

[53] Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour."

[23] In a separate but nevertheless concurring judgment Justice Jafta dealt with the often repeated and imposed extra requirement, which the applicant repeated in the heads of argument, that there should be proof that the section 129 notice went to the right Post Office. He had occasion to say the following which I again quote generously;

"[96] As shown earlier, the dispatching of a notice by registered mail, and showing that it has reached the correct Post Office, are facts which do not form part of the interpretation. As facts, ordinarily they are peculiar to certain cases and not universal to all cases in which the Act finds application. But the interpretation is universal. The section carries the same meaning in all cases.

[97] Therefore, the ratio of *Sebola*, as I see it, is that the words "providing notice to the consumer" are synonymous with the phrase "delivered a notice to the consumer", which appears in section 130. Both of them mean that the notice must be taken to the consumer. It must reach the consumer but this does not mean that the notice must actually be viewed by the consumer.

Proof of delivery

[98] The determination of the facts that would constitute adequate proof of delivery of a notice in a particular case must be left to the court before which the proceedings are launched. It is that court which must be satisfied that section 129 has been followed. Therefore, it is not prudent to lay down a general principle save to state that a credit provider must place before the court facts which show that the notice, on a balance of probabilities, has reached a consumer. This is what *Sebola* must be understood to state. It follows that the interpretation of *Sebola* in *Binneman*⁹ was incorrect.

[99] While it is true that in the quoted paragraphs the majority went to the extent of saying that, where delivery is by registered mail, proof of the fact that the notice reached the correct Post Office would constitute compliance, that is not part of the ratio. The facts in *Sebola* were different in that the notice was sent to the wrong Post Office. Consequently, it was not necessary for this Court to determine whether in circumstances where the notice has reached the correct Post Office, nothing more needs be proved to show that, on a balance of probabilities, the notice has reached the consumer. The view expressed there was obiter. What is binding in *Sebola* is the interpretation given to section 129. That interpretation is endorsed in this judgment.”

[24] When regard is had by this court to case law and the facts of this case in so far as the section 129(1) read with action 130 is concerned, I find that the default notice as well as the section 129 letter was in accordance with the provisions of sections 129 and 130, and in so far as delivery of the notice is concerned, I am satisfied that it was in accordance with the National Credit Act. The contention by the applicant that there was failure on the part of the respondent, to comply with provisions of the NCA, is without merit.

Bona fide defence

⁹ *Nedbank Ltd v Binneman and Thirteen Similar Cases* [2012] ZAWCHC 121; 2012 (5) SA 569 (WCC)

[25] The applicant in the founding affidavit under the rubric; *'Bona fide defence to the respondent's summons: failure to deliver a notice to cancel the agreement'*, raised the following issues in summary form; that the judgment was granted erroneously; that the applicant failed to adhere to the cancellation clause (19.3.2), of the Instalment Sale Agreement and the procedure set out therein; that whereas the contents of the section 129 letter are consistent with clause 19.3.2, it is not compliant with *lex commissoria* and finally that since no cancellation of the agreement took place, it should not have been prayed for in the summons.

[26] Under the rubric; *"Judgment granted erroneously: non-compliance with the NCA,"* the following issues are raised in paragraphs 27 and 28;

"27. I am advised, which advice I accept, that it does not become necessary for this Honourable Court to determine whether the Applicant (as Defendant) has disclosed a *bona fide* defence in this Application because, once a Court arrives at a conclusion that there is a reasonable possibility that the Respondent/Plaintiffs case is defective, the application for Default Judgment ought to have been dismissed.

28. Further, am advised that the Applicant is not required to deal exhaustively with the facts and the evidence, provided that it discloses the material facts upon which it is based with sufficient particularity to enable this Honourable Court to determine that the Applicants have a *bona fide* defence."

[27] The applicant then deals with service of the section 129 letter by the sheriff by way of affixing to the principal door of the chosen domicilium address; the discrepancies on the return of service in that it makes reference to the High Court in Johannesburg and also deals with the manner of service prescribed in the National Credit Act.

[28] Other than what is summarised above, nowhere in the founding affidavit does the applicant deal with the cause of action set out in the summons notwithstanding the fact that there were substantial arrears and that for some time he has been enjoying use of the vehicle. This begs the question whether the application is brought *bona fide*.

[29] I return to the question whether the judgment was erroneously sought or granted as argued by the applicant. Rule 42(1)(a) empowers the court to rescind an order or judgment that is erroneously sought or erroneously granted in the absence of a party affected thereby. There is no requirement that good cause be shown. Default judgment was entered in the absence of the Applicant. If the jurisdictional requirements of the rule are met, the court still has a discretion whether or not to rescind the judgment or order.

[30] The section 129 letter was sent by registered mail. The movement of the letter is apparent in the ‘track and trace’ report. The letter ended up at Bryanston Post Office from where a notice was sent to the recipient, the applicant. The defence that the respondent failed to show the court that the letter was delivered to him and in particular that it was sent to the correct Post Office is bad in law, regard being had to both *Sebola* and *Kubyana*. It must therefore fail.

[31] The defence that the respondent failed to adhere to the *lex commissoria* in particular clause 19.3.2 and that the respondent failed to cancel the agreement is equally not meritorious when clause 19.3.2 is read with context and in particular the fact that the respondent can make an election about what to do following default by the applicant and that notice of cancellation of the agreement is but one of several options. The defence must fail.

[32] Before concluding, I am compelled to say something, if only briefly about *Lodhi* which was referred to by both this court as well as the applicant. It might not be on all fours with the facts of this case but there are very striking similarities worth highlighting.

32.1. The parties in that matter had an agreement which the applicants did not adhere to.

32.2. The respondent served a notice as provided for in the agreement at the erstwhile auditors of the applicants. They changed auditors and had failed to inform the respondent of the change of address. The respondent after the letter, served an application and obtained judgment;

32.3. The applicants only became aware of the application after judgment had been obtained. They applied to have the judgment set aside in terms of Rule 42(1)(a) on the basis that it was erroneously sought and granted;

32.4. They applied for rescission of judgment at the High Court, Johannesburg but did not succeed. They also applied for leave to appeal but were unsuccessful;

32.5. They then approached the Supreme Court of Appeal for leave to appeal;

32.6. The basis of their application was that judgment was erroneously sought and granted. They advance two reasons. Firstly, that in terms of the agreement between the parties, a letter calling on them to rectify their breach was required before the respondent proceeds by way of a court application. Secondly, that there are facts which had the judge been made aware of, he would not have granted default judgment.

[33] The applicants also failed at the Supreme Court of Appeal in that their application for rescission of judgment was denied with costs, hence *Lodhi*. In the course of arriving at the order, Streicher JA among other things analysed numerous principles and case law. Some of the principles were referred to as aforesaid. He also said the following;

“[17] In any event, a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the judge who granted the judgment....

...

...

[26]...In *Stander* the plaintiffs who obtained an order in their favour was, unlike the *UDF* in *Theron*, procedurally entitled to the order when it was granted and the fact that it subsequently transpired that the defendants were not in willful default could not transform that order, which had validly been obtained, into an erroneous order.

[27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which

grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment".

[28] It is my finding that the applicant was properly served with a compliant section 129 notice through a registered letter which was delivered at the post office. That the election of the respondent to proceed by way of summons as they did, was in accordance with the Instalment Sale Agreement. That the judgment granted was not granted because the applicant did not have a defence. It was granted because on the facts before court, the respondent before court was notified of the proceedings in accordance with the law and therefore procedurally the respondent was entitled to judgment. The presence of a defence is an irrelevant consideration.

Conclusion

[29] The sum total of all the findings I make above is that the defences whether viewed individually or cumulatively do not amount to *bona fide* defences, on a *prima facie* basis and carry no prospects of success on the merits. The defence as was held by Justice Cameron are dilatory. Despite the lapse of time, the applicant disputes neither the indebtedness nor his breach of the agreement. On the applicant's own version, when he was contacted by the respondent's agent it was communicated to him that he should make contact with the view to resolving the dispute and avoiding the incurrence of legal costs. He did not take up the invitation in January 2023. He instead opted to instruct attorneys to apply for the judgment to be rescinded in circumstances where he knew he was in breach of the agreement and was indebted to the respondent. I find therefore that the application has not been brought in good faith. To exercise the discretion that the court has, in favour of the applicant would not be in the interest of justice. The application must therefore fail.

[30] The respondent has requested the court to award cost on attorney and client scale. The conduct of the applicant attracts a dim view from this court. This court is of the view that costs on a punitive scale are warranted.

[31] The following order is made;

1. The application for rescission of judgment is dismissed;
2. The applicant is to pay the costs of the application on attorney and client scale.

**SA THOBANE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For Applicant: Mr. Ndobe,
Instructed by: Ndobe Incorporated,
Nieuw Muckleneuk, Pretoria

For Respondent: Adv. Nkosi,
Instructed by: Findlay & Niemeyer Incorporated,
Hatfield, Pretoria.

Date of the hearing: 10 June 2024
Date of judgment: 20 November 2024

This judgment was handed down electronically by circulating to the parties' legal representatives by e-mail, by being uploaded to the CaseLines platform of the Gauteng Division and by release to SAFLII. The date and time of hand down is deemed to be 10:00 on 20 November 2024.