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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: A6955/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

DATE: 19/03/2025

SIGNATURE:

In the matter between:

MANKURU PETER LATANE
(Identity Number:6[...])

APPLICANT

And

VELOCITY FINANCE(RF)LIMITED

RESPONDENT

In re:

VELOCITY FINANCE(RF) LIMITED

PLAINTIFF

and

MANKURU PETER LATANE

DEFENDANT

(Identity Number:6[...])

HEARD : 25 OCTOBER 2024

DELIVERED : 19 MARCH 2025

CORAM : KL PILLAY AJ

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date for hand-down is deemed to be on 19 March 2025.

JUDGEMENT

Pillay AJ

Introduction:

[1] This is an opposed application wherein the applicant seeks the following orders;

[1.1] Default judgement granted by the registrar of the court on 20 December 2021, be rescinded.

[1.2] Cost in case of opposition

[1.3] further and or alternative relief.

[2] The rescission of judgement is being sought, either in terms of Rule 42(1)(a) of the Uniform Rules of Court or in terms of the common law. The application was opposed on the basis that the applicant is still in arrears and continues to be in default.

Brief Background:

[3] On 21 August 2018, Volkswagen Financial Services South Africa (Pty)Ltd and the applicant entered into a written alternatively electronic, instalment sale agreement for the purchase of a Volkswagen Tiguan 2.0TDI Highline 4/MOT DSG in the amount of R720 410,11(including Vat). The express, alternatively implied, alternatively tacit terms of the agreement were inter alia as follows:

[3.1] The payment structure of the agreement and the instalments payable as were as follows;

[3.1.1] 71 consecutive monthly instalments of R13 430.90;

[3.1.2] The last payment to be made on 1st September 2024;

[3.1.3] A balloon payment of R174 000,00 payable on 1st September 2024

[3.2] The applicant would pay the purchase amount of the said agreement together with interest at a variable rate, linked to the prime rate, plus 3.75% per annum.

[3.3] Whenever Volkswagen is the seller, then the applicant acknowledged that when it took delivery of the vehicle, it did so on behalf of Volkswagen, and that the applicant had selected and approved the vehicle and that the vehicle was fit for the purpose for which the applicant intended using the vehicle.

[3.4] Volkswagen would remain the legal owner and titleholder of the vehicle until the applicant had paid all the amounts due under the agreement.

[3.5] Ownership in and to the vehicle would pass to the applicant when the applicant had paid Volkswagen all the amounts due under the instalment sale agreement in full.

[3.6] That should the applicant fail and /or neglect to comply with its obligations in terms of the agreement, or fail to pay any amount due to Volkswagen, or has made misleading statements to Volkswagen before signing the agreement, or the applicant allows any judgement that has been taken against it to remain unpaid for more than seven days, then Volkswagen will have the right without affecting any of its other rights to:

[3.6.1] claim from the applicant the amount which Volkswagen would have been paid had the applicant fulfilled all its obligations. To this end Volkswagen will be entitled to cancel the agreement, to take the vehicle back, sell the vehicle, keep all payments the applicant has made and claimed the balance (if any) from the applicant as damages; alternatively

[3.6.2] claim immediate payment of the full value of the amount that Volkswagen could claim in terms of the agreement as if it was immediately due by the applicant.

[3.7] Should Volkswagen not have insisted that the applicant follow any of the terms of the conditions strictly at a previous stage, the applicant may not assume that the terms and conditions have been altered. The terms and conditions set out in the agreement will still apply.

[3.8] Volkswagen may without notice to the applicant, transfer or cede any of the rights and/or obligations and the applicant agreed that he will recognise the respondent's rights.

[3.9] The applicant agreed further that the physical address that he provided on the quotation or cost of credit was the address that the applicant had selected as the address where Volkswagen must send all legal notices.

[3.10] The applicant agreed further to notify Volkswagen in writing by hand or registered mail of any change to either of the applicants addresses, or the applicant's email address, telephone or cellular numbers and if the applicant

failed to notify Volkswagen of a change of address the respondent may use the last known address of the applicant.

[3.11] The applicant agreed, he will be deemed to have received a notice or letter five business days after the posting of the letter to either the addresses provided by the applicant.

[4] On 18 July 2017, the respondent and Volkswagen entered into a written session agreement in terms of which Volkswagen ceded all its rights and obligations in terms of the agreement, and all rights to its claim, against the applicant to the respondent.

[5] The applicant breached the terms of the agreement in that the applicant failed to make payments of the monthly instalments. Summons was issued and served on the residential address personally on the applicant on 9 October 2021 at 10:49 AM. Judgement was granted on 20 December 2021 by default, wherein the cancellation of the instalment sale agreement and the return of the motor vehicle to the respondent was sought and granted.

[6] The applicant complied with the Court Order and the writ of execution and handed the motor vehicle over on 1 April 2022. According to the applicant the respondent sought payment of the legal cost to consent to the recession of the judgement. The applicant complied, but to date had not received the written consent, for the rescission of judgement and the return of the motor vehicle. The applicant, therefore sought an order in terms of Rule 42(1)(a) of the uniform rules of court alternatively in terms of the common law for the rescission of judgment obtained against the applicant based on the abovementioned refusal by the respondent.

Arguments before Court:

[7] It was common cause between the parties that the application was sought within a reasonable time, for the court to consider the application for the rescission of judgement. The applicant argued that the applicant did not receive the summons that

commenced the action nor the letter in terms s129 of the National Credit Act¹. The applicant indicated that there were negotiations between the parties, which provided, that if the applicant made payment of the arrears, the respondent would consent to the recession of the judgement, and return the vehicle.

[8] The applicant denied receiving the summons, moreover it was alleged that the summons was served on a Saturday and on that day, the applicant did not see the Sheriff or the Deputy Sheriff. The applicant argued that there should have been an affidavit attached, to the return of service, proving that the Sheriff or the Deputy Sheriff served the documents on him, and this was sufficient ground for the rescission of judgement. The applicant cited various case law in support of this argument.

[9] The applicant indicated that the s129 notice in terms of the National Credit Act was not complied with, as he had not received notification, that there was a registered document at the Post Office for him to collect.

[10] The applicant indicated that amidst the negotiations between the applicant and the respondent, there were undertakings made, that if he settled the arrear amount then the respondents would agree to the recession of judgement and release the vehicle to him. According to the applicant he complied but did not receive such consent for the recession of judgement. The applicant indicated that he was informed that there were outstanding amounts, which pertained to the storage of the vehicle, which had no bearing on the outstanding amount, that was needed to be paid and therefore as things stood, he was entitled to a recession of judgement by consent and return of the motor vehicle.

[11] The applicant argued that the judgement was granted in error for had the court noted that the summons was not served, default judgement would not have been granted. The fact that the applicant arranged to settle the arrears, legal fees and costs which was complied with, however the vehicle was not returned and the consent for the rescission of judgement was not granted. It was in the interest of

¹ Act 34 of 2005

justice that the application be granted on account of the payments made by the applicant. The storage costs were part of additional claims by the respondent which was unnecessary sought and was unnecessarily incurred by the respondent. It was not part of the arrears nor formed part of legal fees claimed, before the rescission could be granted and as agreed telephonically between the applicant's attorney and Ms Salter. The applicant alleged that the respondent negotiated in bad faith, by hiding the issue of the storage cost, until the last minute, to disadvantage the applicant, in his negotiations and that the applicant had made out a proper case for the relief sought, which must be granted. The applicant sought costs in respect of the application.

[12] The respondent argued that in order to obtain a recession under Rule 42(1)(a), the applicant must show, that the prior order was "erroneously sought" or "erroneously granted", in the absence of any party affected thereby. Reference was made to various cases illustrating the types of errors that could be remedied when sought in terms of this rule.

[13] The Respondent indicated that when an affected party invoked the provisions of Rule 42(1)(a) the question was whether the party that obtained the order, was procedurally entitled to it. If so, the order could not be said to have been erroneously granted, in the absence of the affected party. An applicant or plaintiff would be procedurally entitled to an order, when all affected parties were adequately notified of the relief, that may be granted in their absence, the relief need not necessarily be expressly stated, it suffices that the relief granted can be anticipated, in the light of the nature of the proceedings, the relevant disputed issues and the facts of the matter. The respondent argued that procedurally the application for default judgement by the respondent was valid and correctly granted by court. The respondent sought that the application be dismissed with costs.

The Issues to be adjudicated:

[14] The following issues needed ventilation:

[14.1] Whether the applicant discharged the onus in respect of Rule 42(1)(a) alternatively the common law.

[14.2] Whether the applicant proved that the default judgement was erroneously sought and granted.

[14.3] Whether the applicant was able to establish that was a *bona fide* reasonable explanation existing for the default, and that the applicant had a bona fide defence which *prima facie* had some prospect of success.

The Legal Principles and Applicability:

[15] An order or judgment may also be rescinded or varied under Rule 42(1)(a)², which reads:

"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;

[16] To succeed in a rescission under Rule 42(1)(a), an applicant must show that the judgment was "erroneously sought or erroneously granted in the absence of any party affected thereby". An order will be erroneously granted "if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment."³

[17] The applicant relies on Rule 42(1) (a) based on the allegation that the applicant was not served with the summons and as such judgment by default, should not have been granted. In the case of **Matseke v Maine**⁴ the court noted,

² Rule 42 of the Uniform Rules of Court

³ See *Rossitter & Others v Nedbank Ltd* [2015] ZASCA 196 at para 15.

⁴ (M198/2020) [2024] ZANWHC 13 (26 January 2024)

"It is trite that an applicant who places reliance on rule 42 (1) (a) for rescission, must show and prove firstly that the order sought to be rescinded, was granted in their absence, and secondly, that same was erroneously sought or granted. Once the two requirements are met, that is not the end of the enquiry. The court will then be entitled to exercise its discretion, and in doing so take into account considerations of fairness and justice. In other words, therefore, a court is not compelled to rescind an order or judgment, but has a discretion, which discretion must be exercised judicially."

[18] In the case of **Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others**⁵, the Constitutional Court summarised the position concerning whether the applicant had met and satisfied the requirements for rescission of judgment either in terms of rule 42 (1) (a) or the common law as follows:

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

[19] The applicant highlighted that the s129 notice was not received in support for the court to find that the judgment was granted in error and as such the rescission of judgment was merited. Regard was had to the provisions of s129(1)(a) of the National Credit Act⁶ which permits a credit provider to draw a consumer's default to their attention in writing and "propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the

⁵ 2021 (11) BCLR 1263 (CC)

⁶ Act 34 of 2005

agreement or develop and agree on a plan to bring the payments under the agreement up to date". Under s129(1)(b)(i), a credit provider "may not commence any legal proceedings to enforce the agreement before (i) first providing notice to the consumer, as contemplated in paragraph (a)".

[20] Section 130(4)(b) gives direction to a credit provider who commences legal proceedings without complying with s 129 by noting the following, "the court must- (i) adjourn the matter before it; and (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed". In the absence of a s129 notice, judgment cannot be granted. The matter will be postponed, and the credit provider will be required to take the relevant steps in terms of s129.

[21] The Constitutional Court ruled that the purpose of s129 is threefold:

(a) *It brings to the attention of the consumer the default status of his/her credit agreement.*

(b) *It provides the consumer with an opportunity to rectify the default status of the credit agreement to avoid legal action being instituted on the credit agreement or to regain possession of the asset subject to the credit agreement.*

(c) *It is the only gateway for a credit provider to be able to institute legal action against a consumer who is in default under a credit agreement.*⁷

[22] The applicant made a bold averment that the s129 notice was not brought to the applicant's attention. In response it was argued by the respondent that the s129 notice was duly sent by registered post, to the applicants chosen *domicilium citandi et executandi*, postal address and email address. At the time judgement was granted by default, the court was satisfied that the necessary track and trace record of the notice to the applicant, indicated that the GA-KGAPANE Post Office issued a "first

⁷ *Amardien and Others v Registrar of Deeds and Others* [2018] ZACC 47; 2019 (2) BCLR 193 (CC); 2019 (3) SA 341 (CC) at para 56.

notification to the recipient". Moreover, the s129 notice was sent also by email to the applicant's email address. The respondent therefore complied with the provisions of s129 of the National Credit Act and the court was satisfied of there being compliance to grant judgment by default. The applicant failed to rebut the respondent's averments with specific reference to same. The applicant failed to grapple with the allegation that the *domicilium* address and email address were as contained in the sale agreement. The main contention by the applicant was in respect of the proceedings, following the negotiations with the respondent, concerning the consent to the rescission of judgment.

[23] The applicant denied receiving the summons, based on the allegation that same was served on a Saturday and he did not see the Sheriff or his Deputy. The return of service reflects that the applicant was personally served with the summons on the date in question. Section 36(2) of the Superior Courts Act⁸ provides that "*a return of service constitutes prima facie proof of the content thereof*" Regard was had to Rule 4 of the Uniform Rules of Court, when considering the applicants allegation concerning service of the Summons.

Rule 4(1) (a) "Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners- (i) by delivering a copy thereof to the said person personally: ;

Rule 4(1)(b) Service shall be effected as near as possible between the hours of 7:00 and 19:00.

Rule 4(1)(c) No service of any civil summons, order or notice and no proceedings or act required in any civil action, except the issue or execution of a warrant of arrest, shall be validly effected on a Sunday unless the court or a judge otherwise directs.

Rule 4(6) Service shall be proved in one of the following manners- (a) Where service has been effected by the sheriff; by the return of service of such sheriff;"

[24] The return of service indicates that the Summons was personally served on the applicant on 9th October 2021, a Saturday at 10h49 at the physical address of

⁸ Act 10 of 2013

the applicant, being house no 2[...] GA-KGAPANE. This was sufficient proof for the Court to find that the Summons was personally served on the Defendant and with all the relevant documents attached could grant judgment by default as per the court order.

[25] The applicant in response makes issue that the Summons was served on a Saturday and denies receiving same and seeks further proof by way of affidavit from the Sheriff, which according to the applicant was supposed to be attached to prove that the said Summons was served. As highlighted above this was not necessary in terms of the Uniform Rules of Court and the return of service was *prima facie* proof of the applicant, having received the Summons concerning this matter. There was no error on the part of the court in granting judgment as the application with the accompanying documents sufficed for the court to grant the aforesaid order.

[26] For rescission of judgement to be granted in terms of the common law the applicant must show sufficient cause by providing a reasonable explanation for the default. The applicant must indicate that the application is made bona fide and that there is a *bona fide* defence which *prima facie* had some prospect of success. This can be described as the "good cause" principle which has been applied in relation to applications for the rescission of judgement in terms of common law.

[27] In Zuma (supra) the Constitutional Court emphasized the onus rests upon an applicant seeking the rescission to satisfy the court as follows,

"Requirements for rescission of a default judgment are twofold. First, applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospects of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in the refusal of the request to rescission."

[28] The applicant bemoans the circumstances flowing from the vehicle having been attached by the Sheriff as per the court order and the writ of execution on the 1st April 2022. The applicant conceded that he had defaulted in the monthly

obligations in respect of the debt. He disputed the amount and highlighted that he was up to date with his payments and that the agreement still subsisted and he was committed to proceeding with servicing the instalments. It was not disputed that at the time default judgement was sought and granted, the applicant was in arrears in respect of payment in the amount of R 81 234,34 as per the certificate of balance.

[29] On the applicant's version payment of R52 500,00 was made in respect of the amount due, as settlement of the arrears, for the purpose of the recession of judgement, which was to be consented to by the respondent, and for the vehicle to be returned to the applicant. On the applicant's own version, the amount paid in May 2022 was insufficient in respect of the arrears owing, at the time default judgement was granted, which was utterly inadequate to settle the arrears nearly six months later. Moreover, prior to payment and at the time of negotiations as per the statement of account the amount in arrears was R152 480,34. The certificate of balance on the 27th July 2022 was R107 322,84. The agreement between the parties, provided that this was prima facie proof of the applicant's indebtedness.

[30] The applicant further relied upon a document FA8 as proof in support of the allegation of the agreement concerning the outstanding balance and consent to rescission of judgement. This document is essentially an email sent by the applicant containing the above-mentioned averments, which does not strengthen the applicant's case. In respect of the application itself for the rescission of judgement, the applicant has placed no *bona fide* defence to the claim, to warrant the court to find that there was "good cause" shown for the rescission of judgement.

[31] Both the s129 and the Summons were duly served on the applicant in accordance with the provisions of the National Credit Act⁹ and the Uniform Rules of Court. Outside of the bald allegations of not receiving the aforementioned documents the applicant has placed no evidence before this court in rebuttal of same. As highlighted above, the payments made by the applicant was insufficient to expunge the arrears and legal costs. The applicant has failed to put forward evidence in rebuttal of the certificate of balance which stands as prima facie proof of the

⁹ See 6 above

applicant's indebtedness to the respondent. In light of the aforesaid with specific regard to the discretion afforded the court when considering an application for rescission of judgement the applicant has failed to show good cause, a reasonable explanation for his default, that he has a *bona fide* defence to the respondent's claim which *prima facie* has some prospect of success and that the applicant is bona fide and seeking the application for the recession of the judgement obtained by default against him. It is for the above-mentioned reasons that the application is dismissed.

Costs:

[32] The Counsel appearing for the applicant sought costs in respect of the application on a party and party scale including cost of Counsel on scale B. The respondent's Counsel argued that cost be awarded also on a party and party scale including cost of Counsel on scale B. This court found no reason to deviate from the general rule that the cost follows the successful party. The respondent was successful and should be awarded cost as prayed.

Ruling:

[33] It is for the above reasons after considering all the evidentiary material, the applicable legal principles, as well as the relevant case law, the applicant has failed to prove, all the elements and the requirements, for the rescission of judgment, either in terms of Rule 42 (1) (a) or at common law. The application is therefore dismissed.

Order:

[34] In the result the following order is made: -

[34.1] The Application for Rescission of Judgment is Dismissed

[34.2] The Applicant is ordered to pay the taxed costs of the application on a party and party scale including cost of Council on scale B.

PILLAY KL
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR THE APPLICANT : Advocate R Baloyi
INSTRUCTED BY : Kgatla Attorneys

FOR THE RESPONDENTS : Adv S Hanekom
INSTRUCTED BY : Fabricius Attorneys

DATE OF HEARING : 11 November 2024

DATE OF JUDGEMENT : 19 March 2025