

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 45056/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	
SIGNATURE	DATE
	31/3/2025

In the matter between

OGONE LESEDI RUTH MUDAU

APPLICANT

and

THE STANDARD BANK
OF SOUTH AFRICA LIMITED

FIRST RESPONDENT

SHERIFF: PRETORIA SOUTH-EAST

SECOND RESPONDENT

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 31 March 2025.

JUDGEMENT

MALI J

- [1] This is an application for rescission of judgment obtained by the first respondent against the applicant on 24 May 2023. On 7 June 2017 the applicant, Ms Mudau who is an Advocate of the High Court and the first respondent entered into an agreement regulated by the National Credit Act.¹
- [2] The applicant purchased a motor vehicle for the total amount of R1 570 678.61 including cost and charges and was obliged to pay off the purchase price in 71 consecutive monthly instalments of R17 453.51 commencing on 1 August 2017. She chose an address as her *domicilium citandi et executandi* for purposes of all notices and correspondence sent by Standard Bank in relation to the instalment sale agreement.
- [3] The application is brought in terms of Rule 42(1) of the Uniform Rules of Court, alternatively in terms of Common Law. Rule 42(1)(a) provides:
“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.
- [4] In order to satisfy this requirement, an applicant has to show on a balance of probabilities that at the time the orders were granted, there were material facts that the court was unaware of, and that had these facts been known to the court, the court would not have granted the order. In other words, the applicant has to show and demonstrate that there was a

¹ Act 34 of 2005.

deliberate and intentional non-disclosure and or withholding of crucial and material facts and information to the court, which induced the court to grant the order. This simply means that the court must have been misled into granting the order.

- [5] In *Bakoven Ltd v GJ Howes (Pty) Ltd*² the court explained the position as follows:

“An order or judgment is ‘erroneously granted’ when the court commits an ‘error’ in the sense of ‘a mistake in a matter of law appearing on the proceedings of a Court of record’. It follows that in deciding whether a judgment was ‘erroneously granted’ is, like a Court of Appeal, confined to the record of proceedings.”

In *Naidoo v Matlala No 3*³ Southwood J said the following:

“In general terms 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.”

- [6] The applicant's case is that the summons are defective because they were not served upon her. Should the court have known of defective summons it would not have granted the default judgment. The submission made on behalf of the applicant is that the summons could not have been served at her place, which is her chosen *domicilium*. In order for the Sheriff to gain access to her property which is in a gated complex, the applicant needed to be called to authorize the entry. She also placed before court the affidavit of her son confirming that the second respondent never attended to the applicant's place.

- [7] The version of the sheriff is recorded in the return of service, that the summons were served by affixing on the principal door. The applicant

² 1992 (2) SA 446 (ECD)

³ 2012 (1) SA 143 (GNP)

expects the sheriff to prove to her that the Sheriff indeed obtained the entry.

- [8] In the Sheriff's return of service, it is written "affixing it on the principal door." The courts are not obliged to probe beyond that statement. This is in particular where no judicial oversight needs to be exercised as it happens with service pertaining to the execution of immovable property.
- [9] I am inclined to accept the version of the Sheriff. The Sheriff is an officer of the court and is expected to be impartial. There is no reason for the Sheriff to lie about the service. In this regard it cannot be said that the court granted the judgment in error.
- [10] The applicant's further submission is that the first respondent did not comply with section 129 of the National Credit Act, in that the section 129 Notice was not served or posted to her. Section 129 (1) provides that

"If the consumer is in default under a credit agreement, the credit provider—

(a) may draw the default to the notice of the consumer 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 agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130."

- [11] The issue of service in relation to section 129 Notice has long been settled by the Constitutional Court in *Kubiyana v Standard Bank of South Africa Ltd*⁴ where the following was held:

“Second, one of the acceptable modes of delivery is by means of the postal service:

“[W]here the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential. . . . But the mishap that afflicted the Sebolas’ notice shows that proof of registered despatch by itself is not enough. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.”

When a consumer has elected to receive notices by way of post, the credit provider’s obligation to deliver thus ordinarily consists of (a) respecting the consumer’s election; (b) undertaking the additional expense of sending notices by way of registered rather than ordinary mail; and (c) ensuring that any notice is sent to the correct branch of the Post Office for the consumer’s collection.”

- [12] In the present matter the first respondent has proven that the Germiston Post office posted the section 129 notice to Mooikloof Post office. There was nothing further required from the first respondent. It was upon the applicant to collect same from the relevant post office.

- [13] In common law the applicant must prove a *bona fide* defence and prospects of success. The applicant decries reckless lending by the first respondent. The applicant submits that she was pressurized into concluding the instalment agreement by the bank official. This is despite

⁴ [2014] ZACC 1 at paragraph 32.

the applicant having declared a monthly income of R80 000.00 and monthly expenses of R7300.00 which meant she had an amount of R72 000.00 from which to pay the proposed monthly instalments. Standard Bank's credit assessment concluded that the applicant could afford the motor vehicle as she had a discretionary income of R41 753.14 from which she could pay the monthly instalments of R17 453.51. The copy of the report evidencing Standard Bank's credit assessment has been attached to the Standard Bank's answering affidavit.

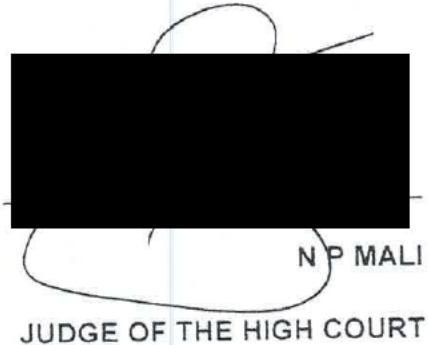
- [14] The applicant signed a written declaration which was part of the agreement wherein she confirmed, amongst other things, that (i) she could afford the credit advanced to her, (ii) she truthfully disclosed her income and expenses when she made the application for credit and (iii) she was not induced, harassed or forced to conclude the agreement.
- [15] The applicant avers, amongst other things, that when she concluded the Agreement, she already had vehicle finance from Standard Bank. According to the Applicant, this increased her monthly instalments to R27 452.51 for two vehicles. Furthermore, she contends that the fact that the final instalments payable in respect of the said debts were balloon payments indicates that she was over-indebted at the time of entering into the Agreement.
- [16] The applicant bears onus to prove that Standard Bank extended credit to her recklessly. In supporting her allegations, she refers to an estimated income and expenses which differ significantly from the expenses that she declared to Standard Bank. Moreover, the applicant cannot conclude that there was reckless credit when she does not know what her income was when she applied for credit.
- [17] The applicant cannot support the factual assertion that credit agreements that have balloon payments are indicative of reckless lending, particularly since the NCA recognises such agreements as valid. The applicant

cannot counter that this form or method of lending is based on Standard Bank's commercial practices.

- [18] From the above it is clear that the applicant has not demonstrated any *bona fide* defence. The application for rescission of judgment must not succeed. In the result the following order ensues,

ORDER

1. The application for rescission of judgment is dismissed with costs.



N P MALI
JUDGE OF THE HIGH COURT

Appearances

For the applicant:	Adv. S Mbhalati
Instructed by:	P.J. Sebetha Attorneys jack@pjsebethaattorneys.co.za
For the first respondent:	Adv. C Nkosi
Instructed by:	Findlay & Niemeyer Inc. philip@findlay.co.za vaf@findlay.co.za