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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case number: 087487-2024

Date: 9 June 2025

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 09/06/2025

SIGNATURE

In the matter between:

AZWIDIVHIWI TSHIKOVHI

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA

First Respondent

THE SHERIFF OF PRETORIA, NORTH-EAST

Second Respondent

JUDGMENT

MINNAAR AJ.

Introduction:

[1] On 4 September 2024, default judgment was granted against the applicant in the following terms:

- a. Confirmation of cancellation of the agreement.

- b. An order directing the applicant to restore to the first respondent goods, being a certain 2017 Kia Rio 1.4 TEC 5DR with engine number G[...] and chassis number K[...] (“the vehicle”).
- c. Retention of all monies paid to the first respondent by the applicant.
- d. Leave is granted to the first respondent to apply for damages, if any.
- e. Costs of suit on the attorney and client scale.
(“the default judgment”).

[2] The applicant lodged an urgent application to rescind the default judgment and to seek the return of the vehicle. The urgent application was set down for 5 November 2024. After receipt of the answering affidavit, the application was removed from the urgent roll with costs reserved.

[3] The applicant, belatedly so, delivered a replying affidavit but has failed to deliver heads of argument. On the date of the hearing, there was no counsel in attendance on behalf of the applicant. Instead, the applicant’s attorney mandated two candidate attorneys to attend court and to make submissions as to the unavailability of counsel. Me Lepholletse, one of the candidate attorneys, was tasked to address the Court. After having heard the submissions from her, I stood the application down to afford the applicant’s attorney to attend court or to secure the attendance of counsel. When the application was recalled, there was still no appearance on behalf of the applicant. It is disturbing that the applicant’s attorney did not take any steps to make himself available to come to court to explain the position regarding the counsel. It is disrespectful to the Court and unfair to the candidate attorneys to saddle them with the responsibility to explain to the Court why counsel is not available. Absent a proper explanation from the applicant, I allowed the first respondent’s counsel to proceed with her submissions.

[4] An application for rescission of an order of court can be brought in terms of the provisions of Rule 31(2)(b) or Rule 42(1) of the Uniform Rules of Court, or in terms of the common law.

[5] In terms of the provisions of Rule 31(2)(b) a defendant may within 20 days after he has 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 to it seems meet.

[6] Rule 42(1)(a) provides that 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 an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[7] In terms of the common law, an order or judgment can be set aside premised on:

- a. Fraud;
- b. *justus error*;
- c. in certain exceptional circumstances when new documents have been discovered;
- d. where judgment had been granted by default, if good cause can be shown; and
- e. in the absence between the parties of a valid agreement to support the judgment, on the grounds of *justa causa*.

[8] In the applicant's founding affidavit, it is not specified in terms of which provision the rescission application is brought. There is no indication that the default judgment was erroneously sought and/or granted, and as such, it follows that the provisions of Rule 42(1)(a) do not find application. The only option available to the applicant is to seek a rescission premised on the provisions of Rule 31(2)(b). Save for judgment being granted by default, there is also no evidence by the applicant to support a rescission in terms of the common law.

The credit agreement:

[9] The applicant and the first respondent entered into an instalment sale agreement on 16 November 2017 to enable the applicant to purchase the vehicle (“the credit agreement”).

[10] In terms of the credit agreement, the applicant chose as her chosen domicile, 2[...] L[...], 1[...] L[...] Street, Pretoria (“the chosen address”). In terms of clause 22.3 of the credit agreement, there was an obligation on the applicant to inform the first respondent, in writing, should this address change.

[11] Payment in terms of the credit agreement consisted of 71 monthly instalments of R4 973.35 commencing on 15 January 2018 and a final payment of R82 557.40, payable on 15 December 2023 (“the balloon payment”).

The default judgment:

[12] Premised on the applicant’s breach, the first respondent proceeded to enforce the terms of the credit agreement. The summons was served by affixing it at the chosen address on 14 August 2024.

[13] The applicant did not defend the action, and on 4 September 2024, the default judgment was granted.

[14] Following the default judgment, a writ was issued. On 23 October 2024, the vehicle was attached and removed by the Sheriff.

Rule 31(2)(b):

[15] This subrule does not require that the conduct of the applicant for rescission of a default judgment be not wilful, but it has been held that it is clearly an ingredient of the good cause to be shown that the element of wilfulness is absent.¹

¹ *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA 801 (C) at 803J

[16] Hence, the element of wilfulness is one of the factors to be considered in deciding whether or not an applicant has shown good cause. The requirements for an application for rescission under the subrule have been stated to be as follows:²

- a. The applicant must give a reasonable explanation of the default. If it appears that his default was wilful or that it was due to gross negligence, the Court should not come to his assistance;
- b. The application must be *bona fide* and not made to merely delay the plaintiff's claim;
- c. The applicant must show that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. The applicant need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

[17] While wilful default on the part of the applicant is not a substantive or compulsory ground for refusal of an application for rescission, the reasons for the applicant's default remain an essential ingredient of the good cause to be shown.³

[18] Before a person can be said to be in wilful default, the following elements must be shown:⁴

- a. Knowledge that the action is being brought against him or her;
- b. A deliberate refraining from entering an appearance, though free to do so; and
- c. A certain mental attitude towards the consequences of the default.

[19] In the founding affidavit, the applicant states that she was not aware of the legal proceedings, as it was never brought to her attention. In the replying

² Erasmus Superior Court Practice, Volume 2 on D1-366 and the authorities referred thereto.

³ *Harris v ABSA Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529E-F

⁴ Erasmus Superior Court Practice, Volume 2 on D1-367

affidavit, the applicant elaborates hereon by stating that she moved to a different address on 30 November 2018 and, thereafter, on 1 September 2021, she moved to her current address. The applicant further attacks the return of service by stating that it is bogus and that no service was effected at the chosen address.

[20] What is of importance is that the applicant failed to provide any proof that she informed the first respondent of the change of the chosen address. This is what was required of the applicant in terms of clause 22.3 of the credit agreement. The applicant's failure to comply with this requirement had imminent consequences, as the first respondent was not aware that the applicant had relocated.

[21] In my view, the first respondent did what was expected of it on the service front. I do, however, find that the applicant was not in wilful default to defend the action.

[22] The absence of wilfulness to have defended the action is, however, not the only requirement the applicant has to satisfy. The next question to be asked is whether the application is brought *bona fide* and not merely to delay, and more importantly, whether the applicant has a *bona fide* defence to the first respondent's claim.

[23] The applicant alleges that the first respondent failed to comply with the provisions of sections 129 and 130 of the National Credit Act, Act 34 of 2005 ("the Act") as she never received the required notices to inform her of her rights in terms of the credit agreement.

[24] The notices were dispatched to the chosen address. As already alluded to above, the first respondent was not made aware of the applicant's new addresses, and as such, I am satisfied that the first respondent duly complied with the provisions of the Act. Actual receipt of the notices is not a

requirement.⁵ In the premises, this defence is not *bona fide*, and it would serve no purpose to allow this dispute to proceed to a trial court.

[25] On the applicant's breach, the applicant states in her founding affidavit that she was, as at 15 November 2023, unable to raise the amount of the balloon payment. In this regard, she did reach out to the first respondent to seek an amicable solution, but without any positive outcome.

[26] The Court is not without sympathy for the applicant's circumstances, but cannot turn a blind eye to the applicant's case that she only attempted to seek a resolution on the balloon payment in February 2024 when an email was addressed to the first respondent to request a refinance of the balloon payment. No explanation is provided that she acted proactively before the due date of the balloon payment, which was 15 December 2023.

[27] In the premises, the Court cannot find that the applicant has a *bona fide* defence to the first respondent's claim.

Common law:

[28] To succeed with an application for rescission of judgment in terms of the common law, an applicant must show good cause. What is generally expected in this regard is that an applicant should provide (a) a reasonable explanation for his or her default; (b) that the application is made *bona fide*; and (c) that he or she has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospects of success.⁶

[29] In line with the discussion of the requirements of Rule 31(2)(b), the Court equally finds that the applicant has failed to make out a case for rescission in terms of the common law.

Costs:

⁵ *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC)

⁶ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) par 11

[30] There is no basis to deviate from the normal approach that costs should follow the outcome. This will also apply to the reserved costs on 5 November 2024.

[31] The first respondent is seeking costs on an attorney and client scale, as it is alleged that both the urgent application and the application for rescission of judgment were ill-conceived, as they lacked any merits. The first respondent's counsel further submitted that the conduct of the applicant's attorney on the date of the hearing would justify a punitive costs order.

[32] Attorney and client scale costs was not contractually agreed upon, and as such, it remains for this Court to decide on what scale of costs would be reasonable.

[33] The discretion in granting costs is trite.⁷ I am not convinced that the applicant should be mulcted with a punitive costs order. It follows that the applicant will be liable to pay the costs on a party and party scale.

[34] The determination as to what scale of costs would be applicable under the party and party scale regime, is dictated by the provisions of Rule 67A of the Uniform Rules of Court. Rule 67A(3) provides that a court "shall", when making a party and party costs order, "indicate the scale in terms of rule 69, under which costs have been granted". Those scales have been inserted into rule 69(7) under the amendment that created rule 67A. They are scales "A", "B", and "C". Rule 67A(4) provides for the right to apply for an order determining which parts of the proceedings, if any, were urgent, and whether the costs of more than one counsel may be recovered. The effect of that subrule is, notionally, that a different scale could be assigned to the services of each counsel whose fees are allowed under the rule.⁸

⁷ *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO and Others* 1996 (2) SA 621 (CC) at paragraph 3

⁸ *Mashava v Enaex Africa (Pty) Ltd* (2022/1840) [2024] ZAGPJHC 387 (22 April 2024) at par 7 to 9

[35] The complex nature of a matter and how the case was presented to the court are among the factors to consider when setting a scale under the rule.⁹

[36] The application before this Court was not of such a complex nature and as such the Court finds that the first respondent is entitled to the costs catered for under Scale B.

Order:

[37] Consequently, I make the following order:

1. The application for rescission of the judgment order granted on 25 October 2024 is dismissed
2. The applicant is ordered to pay the costs of the application, including the costs reserved on 5 November 2024, on the scale as between party and party, scale B.

Minnaar AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

Heard on	: 2 June 2025
For the Applicants	: No appearance
Instructed by	: Vhonani Nematikanga Inc
For the First Respondent	: Adv. L A Pretorius
Instructed by	: Vezi & De Beer Inc
Date of Judgment	: 9 June 2025

⁹ *Mashava* at par 14