

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

Case No: 16593/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

In the rescission application between:

CHARL VILJOEN

Applicant

[Identity Number: 9[...]]

and

FIRSTRAND BANK LIMITED T/A WESBANK

Respondent

IN RE:

The action between:

FIRSTRAND BANK LIMITED T/A WESTBANK

Plaintiff

and

CHARL VILJOEN

Defendant

[Identity Number: 9[...]]

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the handing down of the judgment shall be deemed to be 13 June 2025.

JUDGMENT

LG KILMARTIN, AJ:

A. INTRODUCTION

[1] This is an opposed application for the rescission of an order granted by default by the Honourable Mr Justice Van der Westhuizen ("Van der Westhuizen J") on 11 October 2023 against Charl Viljoen ("the applicant"), the defendant in the main action, in favour of FirstRand Bank trading as Wesbank ("the respondent"), the plaintiff in the main action.

[2] The matter stems from a written *alternatively* electronic Instalment Sale Agreement (hereinafter referred to as "the agreement") in terms of which the respondent sold to the applicant a Pajero vehicle ("the vehicle"), details of which are provided in Van der Westhuizen J's order quoted below.

[3] The order of Van der Westhuizen J reads as follows:

"Having read the summons and other documents filed, judgment by default is hereby granted against the defendant for:

- 1. Confirmation of Cancellation of the agreement;*
- 2. That the Defendant be ordered to return the following motor vehicle to the Plaintiff:*

2011 MITSUBISHI PAJERO SPORT 3.2 DI-D GLS A/T

ENGINE NUMBER: 4[...]

CHASSIS NUMBER: M[...]

3. *An order authorising the Plaintiff to apply to the Court on the same papers, supplemented insofar as may be necessary, for judgment in respect of any damages and further expenses incurred by the Plaintiff in a repossession of the said vehicle, which amount can only be determined once the vehicle has been repossessed by the Plaintiff and has been sold;*
4. *Forfeiture of all monies paid to the Plaintiff by the Defendant; and*
5. *That the Defendant be ordered to pay R200.00 plus Sheriff fees."*

[4] The application is brought in terms of Rule 31(2)(b), Rule 42(1)(a) and the common law.

[5] According to the applicant, the main issues arising in this application are whether:

- [5.1] the applicant had, in terms of the agreement, notified the respondent that his *domicilium* address had changed;
- [5.2] even if the applicant's *domicilium* address was not changed in terms of the agreement, the summons initiating the main action was not properly and effectively served on the applicant and the sheriff's return of service is defective;
- [5.3] the section 129 notice in terms of the National Credit Act, 34 of 2005 as amended ("the NCA"), was not properly delivered in accordance with established authority and, as a result, the cause of action of the respondent was incomplete and the order was thus erroneously sought and granted; and
- [5.4] insofar as the Court is of the view that the applicant ought to have sought condonation for bringing the rescission application several months after the order was granted by Van der Westhuizen J, condonation ought to be granted.

[6] During argument, focus was placed on the failure of the respondent to properly deliver the section 129 notice and what the impact of this was. In essence, the questions which arise are: (i) Where a section 129 notice was not properly delivered and judgment by default is granted, was the judgment erroneously sought and granted?; and (ii) Whether the Court has a choice to rescind the judgment in

terms of Rule 42(1)(a) when the common cause facts demonstrate that the section 129 notice was not properly delivered.

[7] Before dealing with the relevant legal provisions and authorities and the merits of this matter, I deem it necessary to set out the relevant background facts as this will set the fundamental backdrop against which this dispute must be adjudicated.

B. RELEVANT BACKGROUND FACTS

[8] On or about 15 June 2016 and at or near Pretoria, the respondent (duly represented by an authorised employee) and the applicant, entered into the agreement.

[9] The relevant express, *alternatively* implied, further *alternatively* tacit terms of the agreement were *inter alia* as follows:

[9.1] the instalments payable were to be paid in 72 consecutive monthly instalments of R5,541.82, with the last payment to be made on 1 July 2022;

[9.2] the applicant would pay the purchase amount set out in the agreement, together with interest at a variable interest rate of 13.15% per annum;

[9.3] the respondent would remain the legal owner and titleholder of the vehicle until the applicant has paid all the amounts due under the agreement;

[9.4] ownership in and to the vehicle would pass to the applicant when the applicant paid the respondent all amounts due under the agreement in full;

[9.5] should the applicant have failed and/or neglected to comply with his obligations in terms of the agreement, or have failed to pay any amounts due to the respondent, or had made misleading statements to the respondent before signing the agreement, or the applicant had allowed any judgment that was taken against him to remain unpaid for more than 7 days, then the respondent would have the right, without effecting any of his other rights, to:

[9.5.1] claim from the applicant the amount which the respondent would have been paid had the applicant fulfilled his obligations. To this end the

respondent would be entitled to cancel the agreement, take the vehicle back, sell the vehicle, keep all payments the applicant has made and claim the balance (if any) from the applicant as damages; *alternatively*

[9.5.2] claim immediate payment of the full value of the amount that the respondent could claim in terms of the agreement as if it was immediately due by the applicant;

[9.6] the applicant agreed that the physical address that he provided on the Quotation/ Costs of credit documents was the address that the applicant has selected as the address where the respondent was obliged to send all legal notices. The *domicilium* address recorded in the Quotation / Cost of credit documents was 6 Valley Road, Mnandi, 0157 (“the *domicilium* address”). Mnandi is in Centurion;

[9.7] the applicant agreed to notify the respondent in writing, by hand or registered mail of any change to either of the applicant’s addresses or the applicant’s email address, telephone, or cellular numbers and if the applicant failed to notify the respondent of a change of address the respondent could use the last known address of the applicant; and

[9.8] the applicant agreed that he will be deemed to have received a notice or letter 5 (five) business days after the posting of a letter to either of the addresses provided by the applicant.

[10] From the respondent’s database and the applicant’s updated bank statements, it appears that:

[10.1] the applicant defaulted in his obligations to make payment of the monthly instalments in terms of the agreement;

[10.2] the applicant periodically fell in arrears and failed to keep the account up to date;

[10.3] the applicant fell into arrears during February 2021;

[10.4] the respondent engaged with the applicant with regards to arrears and possible payment arrangements;

[10.5] on 29 July 2021, the respondent caused an SMS to be sent to the applicant informing the applicant that his account had been handed over to an external agent and requested that payment be made on his account;

[10.6] on 11 August 2021, an agent of the respondent made telephonic contact with the applicant regarding the arrears on his account whereafter he allegedly abruptly dropped the call and refused and/or failed to answer the agent's call in an attempt to continue the discussion;

[10.7] on 24 November 2021, a field agent of the respondent attended the premises of the applicant and stated the reasons for the visit in response to which the applicant became defensive and stated that the payment would be made once he regained employment and drove off;

[10.8] on 28 December 2021, the respondent caused an email to be sent to the applicant informing him that his account was in arrears in the amount of R76,029.37 and all attempts made to contact him had been unsuccessful, ultimately resulting in the respondent instituting legal action.

[11] The agreement is governed by the provisions of the NCA.

[12] The respondent confirmed under oath that a notice in terms of section 129, read with section 130 of the NCA was, "*delivered to the applicant via registered post as well as by way of e-mail to v[.]., being the chosen e-mail address*".

[13] Copies of the notice in terms of section 129, together with the covering email dated 1 March 2022, and post office "track and trace report" were attached to the answering affidavit. As is explained below, these documents demonstrate that there was, in fact, no proper service of the section 129 notice and there is no evidence that email to the applicant was received or delivered. There is also no email address recorded on the quotation in the place provided.

[14] In paragraphs 9.1 and 9.2 of the particulars of claim, the following is alleged:

"9.1 A notice in terms of section 129(1)(a) of the National Credit Act, 34 of 2005, has been delivered by the Plaintiff to the consumer, being the Defendant, by registered post to the Defendant's chosen address. The notice has been delivered to the post office responsible for delivering of post to the Defendant's address. The post office would, in the normal course, have secured delivery of a registered item notification slip, informing the Defendant

*that a registered article was available for collection. The Plaintiff believes that the registered item, notification of the arrival slip reached the Defendant and that the Defendant, as a reasonable entity, would have retrieved the notice from the post office. The Plaintiff is not aware of any circumstance to show the contrary. A copy of the notice in terms of Section 129, proof of postage and the “track and trace” report from the website of the post office is attached hereto and marked as **Annexures “E” and “F”**.*

9.2. *A period of ten (10) days have elapsed since the abovementioned Notice was delivered to the Defendant, and the Defendant did not pay the full outstanding amount or made suitable payment arrangements to date.” (sic).*

[15] The summons was issued on 17 March 2022 but the post office tracking record confirming compliance with section 129 refers to the letter being “*in transit*” and having been accepted at Garsfontein post office on 26 February 2022 (which is the wrong post office as it should have been delivered to the Centurion post office).

[16] The allegations made in paragraphs 9.1 and 9.2 of the summons are clearly incorrect.

[17] The respondent attached an updated “*track and trace*” report to the answering affidavit which indicates that the notice was dispatched on 7 July 2022 from Tshwane Mail Centre and was delivered to one “*K Sebothoma*” on 20 July 2022 and not the applicant.

[18] According to the respondent, the summons was duly served on the applicant at his chosen *domicilium citandi et executandi* on 4 May 2022 at 6 Valley Road, Mnandi, 0157. The return of service indicates that the summons was served at “*the registered address*” (which is clearly an error) by affixing it to the gate.

[19] on 28 June 2022, the respondent applied for default judgment and subsequently the order was granted by Van der Westhuizen J on 10 October 2023.

[20] The applicant alleges that he was first made aware of the order of Van der Westhuizen J during or about November 2023.

[21] As a result of the granting of the default judgment order, the vehicle was repossessed in terms of a Warrant of Execution on 19 January 2024 by the Sheriff, Sandton North.

[22] According to the respondent, on 22 January 2024, it caused a notice in terms of section 127 of the NCA to be sent to the applicant informing him that the vehicle had been valued and that he had the right to object to the valuation and to obtain a third-party valuation.

[23] The respondent also alleges that the applicant failed to respond to the notice and failed to object to the valuation and as a result the vehicle was registered and sold at an auction on behalf of the respondent on 22 February 2024 for an amount of R105 800.00.

[24] The respondent states that, subsequent to the above, on 29 February 2024, it caused a further notice in terms of section 127 of the NCA to be sent to the applicant informing him that the vehicle was sold for an amount of R105,800.00 which had been credited to his account.

[25] The applicant claims he never received any notices and that the only communications he received were sms's, one of which had no contact details of the person he was required to contact and one confirming his vehicle had been sold.

[26] This rescission application was served on the respondent's attorney on 8 April 2024, i.e. over 4 months from when the applicant alleges he became aware of the order.

C. RELEVANT LEGAL PROVISIONS AND AUTHORITIES

[27] Rules 31(2)(a) and (b) fall under the heading “*Judgment on confession and by default and rescission of judgments*” and provide as follows:

“(2)(a) *Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.*

(b) 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.”

[28] Rule 42 is titled “*Variation and rescission of orders*” and Rules 42(1)(a), 42(2) and 42(3) provide 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;

...

(2) Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interest 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.”

[29] In order to succeed with an application based on Rule 42(1)(a), there are 3 requirements that must be met, namely:

[29.1] The judgment must have been erroneously sought or erroneously granted;

[29.2] The judgment must have been granted in the absence of the applicant; and

[29.3] The applicant's rights or interests must be affected by the judgment.

[30] Once the three requirements of Rule 42(1)(a) are established, an applicant would ordinarily be entitled to succeed and would not be required to show good cause in addition thereto.¹

[31] The Constitutional Court has confirmed that Uniform Rule 42 is an empowering provision for the Court to rescind a judgment. In *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*,² the Constitutional Court stated the following:

"It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with the discretion to rescind its order. The precise wording of Rule 42, after all, postulates that a 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."

[32] As far as rescission under the common law is concerned, the requirements which need to be met were described in *Hetty v Law Society, Transvaal*.³ In this regard, there are two requirements that need to be met, namely:

[32.1] The applicant must furnish a reasonable and satisfactory explanation for its default; and

[32.2] It must be shown that on the merits it has a *bona fide* defence which *prima facie* carries some prospects of success.

[33] A judgment is erroneously granted if there existed, at the time of its issue, a fact of which the Court was unaware, 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.⁴

¹ *Hard Road (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) at 578 (G).

² [2021] ZACC 28, para [53].

³ 1985 (2) SA 756 (A) at 765 A-E.

⁴ *Occupiers, Berea v De Wet* NO 2017 (5) SA 346 (CC) at 366 E – 367 A.

[34] An order or judgment was erroneously granted where:

[34.1] There was an irregularity in the proceedings;⁵ and

[34.2] If it was not legally competent for the Court to have made such an order.⁶

[35] Section 129 is titled “*Required procedures before debt enforcement*” and appears in Part C of the NCA. Debt enforcement by repossession or judgment are dealt with in sections 129 to 133.

[36] Section 129 of the NCA reads as follows:

“129 Required procedures before debt enforcement

(1) *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.*

(2) *Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.*

(3) *Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue,*

⁵ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038 D.

⁶ *Athmaram v Singh* 1989 (3) SA 953 (D) at 956 D and 956 I.

together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

(4) *A credit provider may not reinstate or revive a credit agreement after-*

(a) *the sale of any property pursuant to-*

(i) *an attachment order; or*

(ii) *surrender of property in terms of section 127;*

(b) *the execution of any other court order enforcing that agreement; or*

(c) *the termination thereof in accordance with section 123.*

(5) ***The notice contemplated in subsection (1)(a) must be delivered to the consumer-***

(a) ***by registered mail; or***

(b) ***to an adult person at the location designated by the consumer.***

(6) *The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).*

(7) ***Proof of delivery contemplated in subsection (5) is satisfied by-***

(a) ***written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or***

(b) ***the signature or identifying mark of the recipient contemplated in subsection (5) (b).***"

(My emphasis).

[37] The remedies available to the applicant in terms of section 129(1)(a) of the NCA are:

[37.1] The applicant may refer the credit agreement to a debt counsellor, *alternatively* dispute resolution agent, consumer court of ombud with jurisdiction, with the intent that the parties resolve any dispute under the credit agreement; or

[37.2] Develop and agree on a plan to bring payments under the credit agreement up to date.

[38] In *Amardien and Others v Registrar of Deeds and Others*⁷ (“*Armadien*”) it was confirmed that the purposes of section 129 of the NCA are three-fold, namely:

“[56] *The purposes of s 129 of the NCA are as follows:*

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

(b) It provides the consumer with an opportunity to rectify the default status of the credit agreement in order 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.”

[39] In *Amardien*⁸ it was also stated that:

“[58] *There are two statutory conditions which must be met before the credit provider may institute litigation under s 129. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before (a) providing notice to the consumer; and (b) meeting further requirements set out in s 130.*

[59] *The reference to s 130 reveals a strong link between the two provisions hence they are required to be read together. When a credit provider seeks to enforce the agreement by means of litigation, it must first show compliance with s 130, which, by extension, refers back to s 129. The application of these sections is triggered by the consumer's failure to repay the loan. These sections suspend the credit provider's rights under the credit agreement until certain steps have been taken. The credit provider is not entitled to exercise its rights immediately under the agreement. It is first required to notify the consumer of the specific default and demand that the arrears be paid. If the consumer pays up the arrears, then the dispute is settled.*

...

[65] *Since the cancellation of the instalment sale agreements and the cancellation of the recordals are invalid, it follows that the instalment sale*

⁷ 2019 (3) SA 341 (CC), at para [56].

⁸ 2019 (3) SA 341 (CC), at paras [58], [59] and [65].

agreements are extant and the applicants have payment obligations pursuant thereto, arising from the date of recordal. The fifth respondent will have to calculate the amounts and inform the applicants accordingly.”

[40] The respondent’s counsel referred me to section 130 of the NCA and, in particular, section 130(4)(b) thereof which deals with where there has been non-compliance with section 129. Section 130 provides, *inter alia*, as follows:

“130 Debt procedures in a Court

(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(10), or section 129(1), as the case may be;

(b) in the case of a notice contemplated in section 129(1), the consumer has-

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider’s proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

(2) In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if-

(a) all relevant property has been sold pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127; and

(b) the net proceeds of sale were insufficient to discharge all the consumer’s financial obligations under the agreement.

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court-

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having-

(aa) surrendered property to the credit provider, and before that property has been sold;

(bb) agreed to a proposal made in terms of section 129 (1)(a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129(1)(a); or

(dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).

(4) In any proceedings contemplated in this section, if the court determines that-

(a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c) 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;

- (c) *the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may-*
 - (i) *adjourn the matter, pending a final determination of the debt review proceedings;*
 - (ii) *order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85 (b); or*
 - (iii) *if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85 (b);*
- (d) *there is a matter pending before the Tribunal, as contemplated in subsection (3) (b), the court may-*
 - (i) *adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or*
 - (ii) *order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or*
- (e) *the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter.”*
(Emphasis added).

[41] The law does not require that the section 129 notice must come to the consumer's knowledge but it also does not permit the credit provider to simply dispatch it.

[42] In *Sebola and Another v Standard Bank of South Africa and Another*⁹ Standard Bank had sent the notice but it was delivered to the wrong post office, as in *casu*, Cameron J upheld the appeal against the refusal of the rescission and explained that the NCA obliged Standard Bank to show that the notice had reached the correct post office. The Constitutional Court confirmed that the Court ought to have adjourned the proceedings to allow Standard Bank to rectify its failure to comply with section 129 of the NCA. The Court therefore granted the rescission.

⁹ 2012 (5) SA 142 (CC), para [81].

[43] In *Kubyana v Standard Bank of South Africa Limited*¹⁰ (“Kubyana”) it was confirmed that a credit provider must at least establish that the section 129 notice was delivered by registered post to the post office that would send a delivery notice to the consumer. The Constitutional Court stated the following in this regard:¹¹

“[54] The Act prescribes obligations that credit providers must discharge in order to bring s 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that —

(a) the s 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;

(b) the Post Office issued a notification to the consumer that a registered item was available for her collection;

(c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the F consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and

(d) a reasonable consumer would have collected the s 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a) – (c), which inference may, again, be rebutted by a G contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.”

[44] In *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others (National Credit Regulator as amicus curiae)*¹² (“Blue Chip”), the SCA stated that:

“[20] In order to disclose a cause of action to enforce a claim emanating **B** from a default of a credit agreement, an averment of compliance with s 129 must be contained in the summons and proved. Delivery of a s 129 notice forms part of the cause of action. It is an essential component of a plaintiff's

¹⁰ 2014 (3) SA 56 (CC), para [54].

¹¹ Kubyana, para [54].

¹² 2016 (6) SA 102 (SCA), para [20].

cause of action. It must occur before a cause of action can be said to have arisen. Absent compliance therewith, there would be no cause of action.”

[45] What the SCA said in *Blue Chip* is in line with section 130(4) of the NCA as the Court must adjourn the proceedings where there has been non-compliance with section 129 and, hence, may not grant judgment.

[46] In *Kgomo and Another v Standard Bank of South Africa and Others*¹³ (“*Kgomo*”) Dodson AJ held that the failure to deliver a section 129(1) notice was not merely a dilatory defence and was a required procedure. In the judgment, the following was stated in this regard:¹⁴

“[55] The bank, as plaintiff, pleaded delivery of the notice to the applicants as defendants in its particulars of claim. Yet it is clear that its pleading was erroneous and that there was no such delivery. In terms of s 129(1)(b), the first respondent was precluded from commencing any legal proceedings without delivering a s 129(1) notice beforehand. In terms of s 130(1)(a), 10 business days had to have elapsed after any notice, before legal proceedings were commenced. That too was not complied with. The judgment was therefore erroneously sought.

[56] The flawed s 129(1) notice, reflecting the incorrect address for the applicants, was an annexure to the particulars of claim. That the address was incorrect was apparent by comparing it with the correct address reflected in the particulars of claim. That address reflected a street number that did not coincide with the erf number. The error was thus apparent on the record when default judgment was granted. In any event, it is not necessary for compliance with the requirements for rescission in rule 42(1)(a) that the error be apparent on the record. In those circumstances the court was required to proceed in terms of s 130(4)(b)(i) and (ii) of the NCA by adjourning the proceedings and directing what steps the bank must take before the proceedings were resumed. It did not do so. The judgment was thus erroneously granted within the meaning of rule 42(1)(a).

¹³ 2016 (2) SA 184 (GP).

¹⁴ *Kgomo*, paras [55] to [58].

[57] *The judgment was granted in the absence of the applicants.*

[58] *On that basis the applicants are entitled to rescission of the judgment granted against them.”*

D. DISCUSSION OF THE MERITS

[47] In the respondent’s supplementary heads of argument and, in particular, paragraph 2.1 thereof, the following was stated:

“2.1 *It is conceded that the track and trace does not specifically reflect that a first notification was sent to the applicant, although it is disputed by respondent that the applicant did not receive knowledge of the s 129 notice by way of email. In terms of the provisions of the National Credit Act, 34 of 2005, the appropriate steps to be taken is to re-serve the s 129 notice in terms of s 130(4)(b).”*

[48] The difficulty I have with this argument is that the Court is already *functus officio* in that it has made a decision in the matter. The matter is not at this stage where orders can be made in terms of section 130(4)(b) of the NCA.

[49] The reference to *ABSA Limited Bank v Peterson*¹⁵ is distinguishable as in that case the notice was returned unclaimed after being held a few days at the correct post office. In this matter the letter was not even at the correct post office.

[50] In *ABSA Bank Limited (Pty) Ltd v Raletabo*¹⁶ the Court was also asked to grant an order in terms of section 130(4)(b) after no delivery of the section 129 notice. The Court determined that it cannot adjourn that which has not yet commenced and refused to adjourn the proceedings in terms of section 130(4).

[51] In the light of the above facts and authorities, I am of the view that the section 129 notice was not properly delivered.

¹⁵ 2013 (1) SA 481 (WCC).

¹⁶ (2021/35830) [2023] ZAGPJHC 278 (Judgment delivered on 8 March 2023).

[52] No legal proceedings could commence without the service of the section 129 notice on the applicant. Thus the request to adjourn what does not exist and should have not been initiated is not possible. Therefore, the proceedings cannot be adjourned in terms of section 130(4)(b) since they commenced before the service of the section 129 notice.

[53] It is most unfortunate that, in these circumstances, the applicant's vehicle was sold as there was blatant non-compliance with the NCA. The applicant may have a claim in this regard but his attorneys can advise him of remedies possibly available to him in law.

[54] Insofar as costs are concerned, I am of the view that the incorrect allegations made in the particulars of claim (which are clearly not supported by the attachments thereto) warrant costs on a punitive scale.

ORDER

In the circumstances, I make the following order:

1. The judgment of Vander Westhuizen J, granted on 11 October 2023, is hereby rescinded; and
2. The respondent is ordered to pay the costs of this application on the attorney-and-client scale.

LG KILMARTIN
 ACTING JUDGE OF THE HIGH COURT
PRETORIA

Dates of hearing:	19 March 2025
Date of judgment:	13 June 2025
For the applicant:	Adv S Venter
Instructed by:	Elliott Attorneys Inc.
For the Defendant:	Adv E Muller
Instructed by:	Fabricius Attorneys