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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 3106/2023

Not reportable

In the matter between:

THUMEKA CETWAYO

APPLICANT

and

ABSA BANK LIMITED

RESPONDENT

JUDGMENT

Rugunanan J

[1] The applicant seeks rescission of a judgment granted by this court (Govindjee J) against her by default in her absence, on 7 November 2023 (the judgment).

[2] The application resorts under uniform rule 42(1)(a).

[3] The judgment was granted at the instance of the respondent when the applicant was in default of delivery of notice of intention to defend the action instituted by the respondent (as plaintiff). The respondent instituted action by summons issued on 31 August 2023 in which it claimed *inter alia* cancellation of a credit agreement it concluded with the applicant on 23 December 2021, and return of a Toyota Hilux motor vehicle (the vehicle).

[4] The ensuing order, granted along those terms, specifically directed the applicant to return the motor vehicle to the respondent.

[5] The agreement was at all times regulated by the National Credit Act 34 of 2005 (the Act) in terms of which the respondent is an authorised credit provider. On a reading of the agreement one is immediately struck by the fact that it is free of the legalistic jargon appearing in most agreements of this nature.

[6] The agreement:

- 6.1 Reserved ownership of the vehicle by the respondent as titleholder until all instalments were paid by the applicant;
- 6.2 Granted the applicant possession and use of the vehicle provided that she did not default in her instalment obligations;
- 6.3 Spelt out that the respondent may 'end' the agreement in the event of such default;
- 6.4 Stipulated that the applicant provides the respondent with 'a functioning email and cellphone number';
- 6.5 Specified the address at 3[...] T[...] Street, Ngangelizwe, Umtata Mouth, Umtata as the applicant's physical address;
- 6.6 Incorporated the following provision:
'You agree that we may use any of the contact details that you have last provided to us for all legal purposes'.

[7] The judgment was granted in circumstances when the applicant defaulted in her monthly instalments of R10 662.10 under the agreement and was in arrears amounting to R139 492.95. This amount is indicated in a notice in accordance with s 129 of the Act (the statutory notice).

[8] Subsequent to the judgment having been granted the sheriff at Cape Town, acting in accordance with a writ, attached and removed the vehicle from the applicant's possession on 31 May 2024.

[9] Rule 42(1)(a) provides that a court may rescind or vary an order or judgment 'erroneously sought or erroneously granted in the absence of any party affected thereby'. For present purposes the words 'judgment' and 'order' are used synonymously.¹ The words contemplated by a judgment granted 'in the absence of any party affected thereby' exist to protect litigants whose presence had been precluded and not those who had been afforded procedurally regular judicial process, but opted to be absent². Good cause is not a requirement for a rescission in terms of the rule. This aspect will be addressed later in this judgment but it is first necessary to deal with the antecedent issue whether the applicant has satisfied the requirements under the rule. In *Zuma*³ these were stated by the Constitutional Court to encompass two separate requirements (although one could give rise to the other in certain circumstances): (a) a party had to be absent; and (b) the error had to be committed by the court.

[10] It should be mentioned that once an applicant has met the requirements for a rule 42(1)(a) rescission, a court is merely endowed with a discretion to rescind its order. The precise formulation of the rule postulates that a court 'may', not 'must', rescind or vary its order. As such, the rule is merely an empowering provision which does not compel the court to set aside or rescind its order.⁴

¹ Van Loggerenberg, *Erasmus Superior Court Practice* at D1-568 [Service 17, 2021].

² *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* [2021] ZACC para 56.

³ *Zuma ibid* fn 2 paras 54 and 57. See also Van Loggerenberg *op cit* at D1-568 [Service 17, 2021].

⁴ *Zuma ibid* fn 2 para 53.

[11] The question that arises when an affected party invokes rule 42(1)(a) is whether the party that obtained the order was procedurally entitled thereto. If so, the order cannot 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 where an affected party was adequately notified of the relief that may be granted in their absence.⁵

[12] At the time of service of the summons the applicant resided in Cape Town but did not inform the respondent of the change in her physical address despite the duty to have done so in accordance with the Act.⁶ For present purposes her nomination of a physical address in the agreement must, in principle, be regarded as a *domicilium citandi et executandi* intended for service of process in legal proceedings.⁷

[13] The applicant's complaints are that: (a) delivery of the summons was not effected at her physical address; and (b) prior to the respondent's institution of the action the peremptory notice in terms of section 129 of the Act ought similarly to have been delivered at that address. The complaints are foundational to the applicant's protestation that because she was not notified of the proceedings, the respondent was not procedurally entitled to the judgment. Hence, her contention that the judgment was erroneously granted.

[14] It is not any error that would found a rescission in terms of rule 42(1)(a). As stated in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*⁸ the real issue to be determined is the nature of the error in question. In this instance the issue is directed at the adequacy of the manner in which the summons was served, and the adequacy of the manner in which the s 129 notice was delivered to the applicant. The analysis ultimately engages the procedure adopted by the court in granting the judgment against her.

Service of summons

⁵ *Freedom Stationery (Pty) Limited v Hassam* 2019 (4) SA 459 (SCA) para 25.

⁶ In accordance with s 96(2) of the National Credit Act 34 of 2005.

⁷ *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) at 6D.

⁸ 2003 (6) SA 1 (SCA) at 9A.

[15] It was said in *Lodhi 2 Properties Investments CC and another v Bondev Developments (Pty) Ltd*⁹ that:

‘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. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously. See in this regard *Fraind v Nothmann* 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant’s residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously.’

[16] Service of process at a *domicilium* address is regulated by rule 4(1)(a)(iv). The rule provides for service of any process ‘if the person so to be served has chosen a *domicilium citandi*, by delivering or leaving a copy thereof at the *domicilium* so chosen’. The rule does not prescribe the manner in which the process may be delivered or left at a *domicilium*. This will obviously depend on the prevailing circumstances in each case¹⁰.

⁹ 2007 (6) SA 87 (SCA) para 24.

¹⁰ *ABSA Bank Limited v Mare and others* [2020] ZAGPPHC 372 para 26.

[17] Despite the applicant's nomination of a physical address the provisions of the agreement do not prescribe the manner of delivery or of acceptance at the applicant's chosen physical address. It is the duty of a sheriff (as was in this instance), to serve process of court at a *domicilium citandi* by delivering or leaving the process 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.¹¹ In *Loryan (Pty) v Solarsh Tea and Coffee (Pty) Ltd*¹², it was observed that the delivery requirement at a *domicilium citandi*:

'... Presupposes delivery in any manner by which in the ordinary course the notice would come to the attention of and be received by the lessor. The obvious method would be by handing the notice to a responsible employee, or by pushing it under the front door, or by placing it in the mailbox.'

[18] For reasons to follow, I am unreservedly in agreement with the above sentiment.

[19] The sheriff's return of service relied upon by the respondent at the time it sought judgment reads:

'On 10 October 2023 at 14:14, I, Akhona Swartbooi, properly served this combined summons ... on Mzukisi Cetwayo (brother on behalf of the defendant), ostensibly responsible and not less than 16 years of age, and at the time in control at No. 3[...]2 T[...] Street Ngangelizwe, Mthatha, (place of residence), who accepted service on behalf of the defendant. After exhibiting the original documents and explaining the nature and exigency of the said matter I handed a copy thereof to him.'

[20] In opposition to this application the respondent placed before this court a supporting confirmatory affidavit by the sheriff in which he declared that the premises at 3[...] T[...] Street purporting to be the applicant's *domicilium* address is a non-

¹¹ *ABSA Bank Limited v Mare and others supra* para 26.

¹² 1984 (3) SA 834 (W) at 849A-B.

existent address and that the extant address of the premises is 3[...]2 T[...] Street. Although the affidavit is included in the material before this court, it is the return of service on which reliance was placed at the time that default judgment was sought and granted that stands to be considered for purposes of this judgment. Hence, the question is whether the return of service correctly reflects that service of summons occurred at the applicant's *domicilium* address, and whether for purposes of seeking rescission under rule 42(1)(a) the court erred in its acceptance thereof.

[21] The applicant maintains that the judgment was granted without proper service of the summons at 3[...] T[...] Street. Had the court been made aware that 3[...]2 T[...] Street at which service was effected is not her *domicilium* address, the court would not have granted judgment against her, and erred in doing so.

[22] A return of service, it is trite, is regarded as *prima facie* evidence of its content. In point, s 43(2) of the Superior Courts Act¹³ expressly provides that '[t]he return of the sheriff or a deputy sheriff of what has been done upon any process of a court, shall be *prima facie* evidence of the matters therein stated.' In *Manqele and Another v SB Guarantee Company (RF) (Pty) Ltd*¹⁴, it is said (albeit in regard to a return of service in a rule 46A application) that if a party wishes to impeach such evidence, the onus is discharged on an ordinary balance of probabilities.

[23] In her replying affidavit the applicant avers:

'6.2 The respondent is in possession of documentation that shows that my *domicilium* address is 3[...] T[...] Street ...

6.3 On 25 February 2016 the respondent sent its repossessing agent, whose full and further particulars are unknown to me, to my address to repossess me of the other motor vehicle, a Chevrolet Corsa utility ... which was financed by the respondent when I defaulted in paying its instalments.

6.4 The repossessing agent found me at 3[...] T[...] Street ... This is the address I used since I first opened my account with the respondent in 2003.'

¹³ Act 10 of 2013.

¹⁴ [2025] ZAGPJHC 381 paras 24-25.

[24] It is central to the character of application proceedings that the evidence is placed before the court in the form of affidavits containing factual allegations made under oath. Absent reference to a case number or identification of specific documentation manifest of the applicant's previous engagement or dealings with the respondent, the applicant's averments do not create a sustainable response to the answering affidavit read with the return of service. Her allegations in rebuttal are ineffectual, in my view.

[25] She denies, moreover, that Mzukisi Cetwayo, – the person on whom service was effected – is her brother. The denial is ineffective. It is unlikely that the sheriff would have conceived of such name and relationship by design.

[26] The combined summons to which the agreement was attached as well as the return of service was obviously before Govindjee J when he granted the judgment. The applicant has to show that at the time when the judgment was granted the learned judge was unaware of the typographical discrepancies between the address indicated in the return of service and the address appearing in the agreement, and that if he had been aware thereof he would not have granted the order sought by the respondent. This presupposes that the applicant can demonstrate that the court was unaware of those facts. She has not shown this to be the case, in my estimation.

[27] On the contrary, the learned judge must have been aware of the discrepancies. Plainly, the sheriff's return indicates that service of the summons was effected in terms of rule 4(1)(a)(ii). Although rule 4(1)(a)(iv) does not prescribe the manner in which process may be delivered or left at a *domicilium* address, the sheriff dutifully served the process of court in a manner by which in the ordinary course the process would come to the attention and be received by the intended recipient. Against the background of s 43(2) of the Superior Courts Act, I would regard the return of service as indicative of a report to the court disclosing how the process was served and why it was served in that manner. Substantiated by *Loryan supra*, the delivery requirement at a *domicilium citandi* presupposes delivery in any manner by

which in the ordinary course the process would come to the attention to the intended recipient.¹⁵

[28] From that perspective, the learned judge cannot be held to have granted the judgment in error since the discrepant addresses in particular, the facts in the return of service must have been known to him and condoned when he made the order which he did. Without the record of proceedings before this court to demonstrate the contrary, my sense is that he was procedurally entitled to do so.

[29] I am of the view therefore, that while rule 4(1)(a)(iv) allows for service at a *domicilium* address by delivering or leaving a copy of the process at such address, the rule does not preclude strict compliance with the rules governing proper and effective service. In my judgment the method of service indicated in the sheriff's return was sound.

The s 129 notice

[30] On 2 June 2023 the applicant corresponded with the respondent via email from the address t[...] and unequivocally requested that all future correspondence regarding the arrears on her vehicle account be sent to her at that address. The applicant's choice of electronic address accords with the agreement which required her to provide the respondent with a functioning email, the consequence of which is that the address may be used for all legal purposes.

[31] The respondent's statutory notice was dispatched to the applicant by email to the specified address on 12 July 2023.¹⁶ Confronted by the request contained in her communication to the respondent (which the respondent attached to its answering affidavit) the applicant in reply states:

¹⁵ Compare *Sandton Square Finance (Pty) Ltd and Others v Biagi, Bertola and Vasco and Another* 1997 (1) SA 258 (W) at 260C-D.

¹⁶ The notice drew her attention to the amount in arrears and that she had been in default of her payment obligations for more than 20 business days. It proposed that she may refer the 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 payments under the agreement up to date failing which the respondent would institute legal proceedings.

‘6.11 I admit the content of [the] annexure ... but I deny that that email represents my nomination of the email address to which the section 129 notice should be sent. The context from which I sent that email is that the respondent had contacted me on my work address about this matter which is personal to me and not work related. In that email I simply requested that my personal email address be used by the respondent to communicate my personal matters as opposed to my work address.

6.12 The facts placed before the court granting the order were incorrect and inconsistent with the agreement and had the court been made aware of that it would not have granted the order.’

[32] The extract accentuates glaring contradictions but it is obvious that the applicant nominated an electronic address for communicating with her. Tellingly, she does not deny delivery of the statutory notice by email.

[33] I should also mention that it is not the applicant's case that the notice, in its content, did not fully comply with the provisions of s 129 of the Act. At the time that judgment was granted, what was before Govindjee J – as annexures to the combined summons – were copies of the statutory notice, a registered communication certificate confirming successful delivery of the notice dispatched by email, and a screenshot of the respondent's electronic debt management system reflecting the applicant's email address as duly captured.

[34] Regard being had to the abovementioned items before him, it is unlikely that the learned judge could have entertained uncertainty that effective notice compliant with the Act was electronically delivered upon the applicant consequent to which he sanctioned a court-ordered cancellation of the agreement. For that reason the judgment could not have been granted in error.

Good cause

[35] An applicant for rescission under rule 42(1)(a) is not required show good cause. The fact that an application for rescission is brought under this subrule does

not mean that it cannot be entertained under rule 31(2)(b) or the common law, provided the requirements thereof are met.¹⁷

[36] To the extent, however, that this judgment may be wrong in holding that the applicant has not made out a case for rescission under rule 42(1)(a), I turn to consider the contention in her founding papers that there is good cause for the rescission. This encompasses a *bona fide* defence that *prima facie* carries some prospect of success.¹⁸ What this entails has been explained in *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd*¹⁹ as follows:

‘It is sufficient if [the applicant] makes out a *prima facie* defence in the sense of setting out averments which if established at trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour.’

[37] To support her contention for good cause the applicant advances defences founded on: (a) the entitlement to have the vehicle returned to her possession because the agreement was not cancelled; and (b) she is a victim of reckless lending.

Return of the vehicle

[38] This relief is not specifically mentioned in the notice of motion but is vaguely alluded to in the founding affidavit.

[39] In her communication with the respondent on 2 June 2023 which preceded the statutory notice the applicant avowed:

¹⁷ Van Loggerenberg *op cit* fn 1 at D1-562C [Service 20, 2022].

¹⁸ *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd* 1994 (4) SA 705 (ECD) at 708H-J; *Athmaram v Singh supra* at 957C. As to what is meant by the words ‘a *prima facie* defence’, the court in *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (WLD) at 575H-576A, stated: ‘It is sufficient if he sets out a *prima facie* defence in the sense of setting out averments, *which if established at trial*, would entitle him to the relief asked for. He need not deal fully with the merits of the case or produce evidence that the probabilities are actually in his favour.’

¹⁹ *Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980 (4) SA 573 (WLD) at 575H-576A.

‘Please allow me to explicitly and unambiguously express acknowledgment of my indebtedness and, further, my unreserved commitment to addressing the situation as expeditiously as possible. My financial circumstances have greatly improved ... and this has allowed me to put measures in place to address the admittedly disagreeable state of my vehicle account’

[40] The statutory notice which followed called upon the applicant to remedy her default of her payment obligations failing which the respondent intended to commence legal proceedings to enforce the terms of the agreement. The notice elicited no response from her.

[41] It is nowhere in her papers denied by the applicant that she remains in arrears with her instalments. It is also not in dispute that the respondent retains ownership of the vehicle.

[42] Since the applicant does not deny having received the statutory notice, the respondent’s intention to ‘end’ the agreement or to cancel it was clearly and effectively communicated to her.

[43] An agreement cannot be revived once it has been terminated in accordance with the provisions of the Act.²⁰ The applicant’s erstwhile possession of the vehicle was wholly dependent upon the existence of the agreement. The Act lays down a bar against reinstatement or revival of the agreement. For that reason there exists no basis in law in terms of which the respondent, as owner of the vehicle, may be ordered to restore its property to the applicant who clearly has no valid legal entitlement to its possession.

Reckless lending

²⁰ s 129(4)(c). The Act makes no provision for the reinstatement of an agreement at the instance of a consumer save for permitting a consumer to remedy their default before the credit provider has cancelled the agreement *vide* s 129(3).

[44] The applicant avers that the respondent acted recklessly in entering into the agreement with her despite the preponderance of information at the time which indicated that she would be over indebted.

[45] In her founding affidavit, she states:

‘33. The information available to the respondent at the time of entering into the agreement was that:

I was employed as a Team Leader Branch, Standard Bank, Lusikisiki;

I earned a monthly nett salary of R23 576.36;

My monthly expenses amounted to R18 976.44;

The residue of my monthly salary after expense deductions was R4 600.92;

The total monthly instalment under the agreement would be R10 662.10; and

My total monthly expenses including the monthly instalment under the agreement would amount to R34 239.46.’

[46] After servicing the agreement for some seven months she realised that she was over indebted ‘as a result of the monthly instalment due under the agreement’.

[47] In response to the above, the respondent’s authorised deponent to the answering affidavit states:

‘27.1 [P]rior to the conclusion of the agreement with the applicant the respondent conducted an assessment in terms of the National Credit Act (the NCA) ... and concluded on a reasonable basis that the agreement could be concluded with the applicant.

27.2 Prior to entering into the agreement the applicant provided the respondent with various information and documentation so that it could assess the applicant’s application for credit as envisaged in section 81 of the NCA. I attach hereto as AA4 the assessment conducted by the respondent as envisaged in section 81 of the NCA.

27.3 The information and documentation provided by the applicant to the respondent evidenced that her nett income was R23 500.00. This was verified by the applicant as correct.

27.4 The applicant claimed that she paid R300.00 per month in debt repayments and R800.00 per month on living costs and accordingly had disposable income of R22 400.00. As is apparent from the assessment conducted by the respondent in AA4 is that the applicant disclosed less than the minimum living expenses and accordingly the respondent applied the minimum living expenses of R3 839.00 per month to its assessment. The minimum living expenses applied by the respondent are contained in Regulation 23A(10) of the NCA. It is also apparent from AA4 that the respondent accessed a Transunion enquiry regarding the applicant's debt, and that during December 2021 the debt owed by the applicant was in the sum of R7 430.52 per month and accordingly this figure was used to calculate the affordability of the customer.

27.5 The respondent's assessment, using increased figures from that provided by the applicant for her monthly living expenses and debt, is that the applicant was able to make payment of the proposed monthly instalment of R10 662.10 for the purchase of the vehicle and that providing such credit to [her] was not reckless.'

[48] Although the respondent conducted an assessment using an amount representing a statutorily prescribed threshold (R3 839.00) that exceeded the amounts provided by the applicant, it concluded that she was able to afford the proposed monthly instalment of R10 662.10 and was eligible for credit. On this conspectus of the facts, I hold the view that the deponent's explanation supported by the mentioned annexure evinces a response with a sense of accuracy and fullness that seriously and unambiguously addresses the facts in dispute. Such evidence must be accepted as correct.

[49] Neither of the defences put up by the applicant advances her case for good cause. The applicant has not, *prima facie* set out averments which if established at trial, would entitle her to the relief contended for and it is doubtful if the probabilities are in her favour.'

Conclusion

[50] The applicant claimed the costs of the rescission application from the respondent irrespective of opposition. The applicant has been unsuccessful. There is no reason to depart from the usual principle that costs should follow the result.

[51] The following order is made:

1. The application is dismissed.
2. The applicant shall pay the costs of the application on the high court scale as between party and party.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: *C Mzamo*, Instructed by Yokwana Attorneys, Makhanda
(Ref: Mr Yokwana; Tel: 046-622 9928 Email: reception@yokwanaattorneys.co.za).

For the Respondent: *P Marias*, Instructed by McWilliams & Elliot Inc., c/o
Huxtable Attorneys, Makhanda (Ref: Mr Huxtable; Tel: 046-622 2692 Email
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Date heard: 15 May 2025.

Date delivered: 29 July 2025.