

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

Case No.: 26041/21

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 15/08/2025

MNGQIBISA-THUSI J

In the matter between:

EDWARD BOITUMELO MAFOKO

1st Applicant

and

SUPERDRIVE INVESTMENT (PTY) LTD

1st Respondent

**SHERIFF/DEPUTY SHERIFF ROODEPOORT
SOUTH/DOBSONVILLE/KAGISO**

2nd Respondent

JUDGMENT

MNGQIBISA-THUSI J

[1] In his notice of motion the applicant seeks the following relief:

- 1.1 That the judgement and/or order granted 14 June 2022 be rescinded and set aside.
- 1.2 That any action and/or further step taken by the respondent pursuant to the above-mentioned order be declared invalid and set aside.
- 1.3 That the first respondent's seizure of applicant's motor vehicle bearing registration BMW 335i M Sport with engine number 0[...] chassis number W[...] be declared unlawful.
- 1.4 That the respondents be hereby restrained and prohibited from selling or dealing in any manner with the applicant's motor vehicle pending finalisation of this application.
- 1.5 That the warrant of delivery of goods issued on 25 November 2022 by the Registrar of this Division under case number 26041/21 at the instance of the first respondent be set aside.
- 1.6 That the sheriff/deputy sheriff acted without jurisdiction in violation of section 3 of the Sheriff's Act 90 of 1986 and his conduct and ensuing upliftment of the vehicle was therefore unlawful.
- 1.7 That the respondents be ordered to forthwith return the motor vehicle mentioned in para 1.3 to the applicant.
- 1.8 That the respondents be ordered to pay costs of this application on a punitive scale.

[2] It is common cause that:

- 2.1 the applicant and the respondent concluded an instalment sale agreement on 8 February 2017 in order for the applicant to buy a BMW 335i M Sport motor vehicle;
- 2.2 the applicant chose as his *domicilium* address, 3[...] A[...] V[...], Rooihuiskraal, Extension 2[...], Centurion to which summons, legal documents and notices must be sent.
- 2.3 the applicant did default on his instalments towards the motor vehicle.

[3] The following facts are common cause.

- [4] On 8 February 2017, the applicant and the first respondent entered into an instalment sale agreement for the purchase of a motor vehicle. As appears from a copy of the written instalment agreement, the applicant chose 3[...] A[...] V[...], Rooihuiskraal Extension 2[...], Centurion as his *domicilium* address. Consequent to the applicant defaulting on his motor vehicle instalments, on 12 August 2020 the first respondent dispatched a letter of demand and a section 129(1)(a) (section 129(1)(a) of the National Credit Act 34 of 2005) notice with address 3[...] F[...] Street, Rooihuiskraal, Centurion. Even though a registered slip is attached to the first respondent's answering affidavit, no track and trace receipt is attached as per the requirements as set out in *Sebola & another v Standard Bank of South Africa Ltd & another* 2012 (5) SA 142 (CC). On 27 October 2021 the first respondent served summons by affixing at the applicant's correct *domicilium* address. On 14 June 2022 the first respondent obtained a default judgment against the applicant.
- [5] It is not in dispute that during the period of June/March 2022 and December 2022, the applicant and the first respondent were engaged in various communications in an effort to remedy the applicant's default and come to some arrangement with the first respondent to settle his arrears. At no stage during these communications was the applicant made aware that a default judgment in respect of his arrears was granted against him in June 2022. It was only on 30 December 2022 that copies of the summons, the default judgment and other relevant documents were sent to the applicant by the first respondent after the applicant had requested same after informing the first respondent that he had not been served with the summons.
- [6] On 4 January 2023 the applicant informed the first respondent that he was prepared to surrender the motor vehicle and inquired about the timeline for the vehicle to be put on auction. On 6 January 2023, the day scheduled for the upliftment of the vehicle, the applicant sent an email to the first respondent which reads in part as follows:

“Kindly note that I am dismayed by the process that has been followed up to obtaining the warrant of delivery and subsequent thereof as

follows:

...

It is against the background that my cooperation in this matter should not be construed as accepting any liability nor voluntarily handing over the vehicle as my rights have not been observed in the status quo legally challengeable. I have been put under pressure but only cooperate because I have respect for the law. I have formulated an impression that the process followed to obtain the warrant of delivery and its execution is/was unprocedural and/or unlawful.

I therefore came to the conclusion that this matter was handled unfairly, reserve my rights and contemplate to apply to court for a rescission of judgement, *mandament van spolie* if the vehicle is uplifted and lodging a complaint with the Ombudsman for Banking Services.”

- [7] The vehicle was uplifted by a representative of the first respondent who presented himself as a ‘sheriff’ at the Reeds, Pretoria.
- [8] It is the applicant’s contention that the order upon which the warrant of delivery was obtained was a nullity in that the section129(a) notice was not effectively served on him, a jurisdictional requirement for the first respondent to initiate legal proceedings against him due to his default.
- [9] The first respondent has raised a point *in limine* in that the applicant has acquiesced to the order granted on 14 June 2022. It is the first respondent’s contention that by agreeing to surrender the vehicle, the applicant acquiesced to the order granted and has no basis to seek the rescission of that order.
- [10] It was submitted on behalf of the applicant that until the 30 December 2022 he was unaware that a default judgment had been granted against him. Further that even though he had voluntarily handed over the vehicle to the first respondent’s agent, he had made it expressly clear in his email to the first

respondent, dated 6 January 2023, that he reserved the right to institute legal proceedings as the order enabling the first respondent to recover and sell the vehicle was erroneously granted as the pre-requisite for instituting default judgment proceedings had not been complied with.

[11] In *Gentiruco AG v Firestone (Pty) Ltd* 1972 (1) SA 589 A the court held that:

“The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal shows that he acquiesces in the judgment or order.”

[12] The court in *Dabner v South African Railways and Harbours* 1920 AD 583 emphasised that before such acquiescence can be inferred the court must be satisfied that the litigant against whom an adverse judgment or order was made has acquiesced unequivocally in the judgment.

[13] I am of the view that the applicant by handing over the vehicle to the first respondent's agent had not acquiesced to the judgment as at that stage he did not have the full knowledge of the process the first respondent undertook in obtaining the judgment. At the time the applicant was negotiating with the first respondent for the settlement of the arrears, he was not aware that a judgment had been obtained against him and that the necessary procedures had not been followed.

[14] The applicant seeks the rescission of the order granted on 14 June 2022 in terms of Uniform Rule 42(1).

[15] Rule 42(1)(a) of the Uniform Rules of Court provides that a court may, in addition to any other powers it may have, *mero motu* or upon 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.

[16] Distilling the principles set out in *Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape)* [2003] 2 All SA 113 (SCA) and *Lodhi 2 Properties Investments CC and another v Bonde Developments (Pty) Ltd* 2007 (6) SA 87 (SCA), in *Kgomo and another v Standard Bank of South Africa and others* 2016 (2) SA 184 (GP) the court held in relation to the application of rule 42(1)(a) that:

- “[11.1] the rule must be understood against its common law background;
- [11.2] the basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio*, but subject to certain exceptions of which rule 42(1)(a) is one;
- [11.3] the rule caters for a mistake in the proceedings;
- [11.4] the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;
- [11.5] a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;
- [11.6] the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and
- [11.7] the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).”

[17] This means that the applicant has to show that the court in granting the default judgment had committed an error “in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record. *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD). If the applicant can prove the error committed by the court, it is not necessary for him to explain his default. This means that the applicant has to show that the court in granting the default judgment had committed an error “in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record. If the applicant can prove

the error committed by the court, it is not necessary for him to explain his default.

[18] The applicant alleges that he only got knowledge of the default judgment at the end of December 2022. He soon thereafter made a proposal in which he undertook to surrender the vehicle, a proposal accepted by the first respondent. In explaining his default the applicant alleges that he did not receive the section 129 notice as the letter was not delivered at his *domicilium* address, contrary to the provisions of the instalment sale agreement. Applicant further alleges that, although the summons were delivered at his correct domicilium address, he did not receive it. It was submitted on behalf of the applicant that since the respondent had not complied with the provisions of section 129(1) read with section 130, the default judgment was erroneously sought and erroneously granted. Counsel submitted that had the court which granted the default judgment at the time the letter of demand and the section 129 notice was delivered; and at the time the summons were served, he was not residing at the *domicilium* address but at a different address. As a result, the letter and the notice and the summons did not come to his knowledge.

[19] It was submitted on behalf of the first respondent that the applicant has not sufficiently explained his default. Secondly, that by surrendering the vehicle, the applicant had waived its right to have the judgment rescinded. Thirdly that the applicant has not shown that he has a bona fide defence to the first respondent's claim as he was aware of his default and was negotiating a settlement. No substantive submission was made on behalf of the first respondent with regard to the non-service of the section 129(1) (a) notice to the applicant's chosen domicilium address.

[20] Section 129(1) of the NCA reads:

‘(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 section 86(10), as the case may be; and

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

[21] In *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others* 2016 (6) SA 102 (SCA) the court stated the following:

“[17] It is clear from s 129(1)(a) and (b) that prior to commencing legal proceedings to enforce an agreement, the credit provider must deliver a written notice to the consumer wherein attention is drawn to the default in repayment, setting out various options open to him or her whereby the pressure of the default could be alleviated. In other words, it is a mandatory requirement which must be satisfied before judgment can be granted for recovery of the outstanding debt.¹ In *Sebola v Standard Bank*, para 74 it was held that given the significance of the s 129 notice, ‘the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer’.

[22] The applicant’s contention that the respondent has not complied with the procedural terms of section 129(1)(a) of the National Credit Act has substance. As alluded to above there is no need for the applicant to show that he has a bona fide defence to the respondent’s claim. Had the court granting the default judgment been made aware or been alert to the fact that the procedural aspects of section 129(1)(a) had not been complied with in that service of the notice was not effected at the applicant’s chosen domicilium address, it would

¹ Although the word ‘may’ is used in s 129(1)(a), the notice is a mandatory requirement. See *Nedbank Ltd & others v National Credit Regulator & another* [2011] ZASCA 35; 2011 (3) SA 581 (SCA) para 8.

have adjourned the default judgment proceedings until there was compliance and would not, at that stage have granted the order. I am satisfied that the applicant has satisfied the requirements for the rescission of the default judgment granted on 14 June 2022.

[23] In light of the conclusion the court has reached with regard to the rescission of the default judgment, taking cognisance of submissions made by the parties, including Mr I D Mahomed, sheriff, Roodepoort South, Dobsonville & Kagiso, any further steps taken consequent to the default judgment are null and void. I am of the view that, even though the applicant has raised the unlawfulness of the process of the upliftment of the vehicle, it is not necessary to deal in detail with the issues relating to the events surrounding the recovery of the vehicle and the lack of jurisdiction the alleged sheriff.

[24] With regard to the costs, as suggested by applicant the circumstances of this case justify the imposition of punitive costs.

[25] In the result the following order is made:

- 1.1 That the judgement and/or order granted 14 June 2022 be rescinded and set aside.
- 1.2 That any action and/or further step taken by the respondent pursuant to the above-mentioned order be declared invalid and set aside.
- 1.3 That the first respondent's seizure of applicant's motor vehicle bearing registration BMW 335i M Sport with engine number 0[...] chassis number W[...] be declared unlawful.
- 1.4 That the respondents be hereby restrained and prohibited from selling or dealing in any manner with the applicant's motor vehicle pending finalisation of this application.
- 1.5 That the warrant of delivery of goods issued on 25 November 2022 by the Registrar of this Division under case number 26041/21 at the instance of the first respondent be set aside.

- 1.6 That the sheriff/deputy sheriff acted without jurisdiction in violation of section 3 of the Sheriff's Act 90 of 1986 and his conduct and ensuing upliftment of the vehicle was therefore unlawful.
- 1.7 That the sheriff/deputy sheriff acted without jurisdiction in violation of section 3 of the Sheriff's Act 90 of 1986 is unlawful.
- 1.8 That the respondents be ordered to forthwith return the motor vehicle mentioned in para 1.3 to the applicant.
- 1.9 That the respondents be ordered to pay costs of this application on a punitive scale.

NP MNGQIBISA-THUSI
Judge of the High Court

Date of judgment : 15 August 2025

Date of hearing : 29 October 2024

Appearances:

For Applicants: Adv E B Mafoko (personal appearance)

For Respondent: Adv S Swiegers (Instructed by Maynard Menon Govender Inc)