

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

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



20 August 2025

Case No: 001998/2022

In the matter between:

NICOLE ERASMUS

APPLICANT

and

BMW FINANCIAL SERVICES (SOUTH AFRICA)

(PTY) LTD

t/a ALPHERA FINANCIAL SERVICES

RESPONDENT

JUDGMENT

GOUWS, AJ

INTRODUCTION

- [1] The applicant seeks the rescission of a default judgment granted against her on 27 November 2023 where the respondent obtained an order for (i) confirmation of cancellation of an instalment sale agreement and the return of a 2015 Jeep Wrangler Unlimited 3.6 V6 AT (“the vehicle”). The order included an order for interest and costs, with a provision for a damages claim that was postponed *sine die*.
- [2] The applicant, in the replying affidavit, indicates that the rescission application is brought in terms of Rule 31(2)(b), alternatively Rule 42, and further alternatively the common law.
- [3] The applicant contends that it was presented with 2 refinancing options by the respondent during 2021. It elected the option reflecting the lower repayment amount of R5 523.98, signed this instalment sale agreement, and proceeded to authorise the respondent to deduct this amount from its bank account on a monthly basis.
- [4] The applicant contends in the founding papers that it had made a multitude of payments since commencement of the credit agreement, that have been disregarded by the respondent.
- [5] In contradistinction, the respondent contends that there was no option between 2

agreements, that the applicant entered into an instalment sale agreement that carried a monthly instalment of R7524.27, and the applicant had failed to pay almost every instalment since inception up to date of cancellation.

[6] In the answering affidavit, the respondent provided the court with a payment history, alleging that only three payments had been made in the account since its inception: 1 September 2021- R7532.98; 1 August 2022- R80.00; 1 September 2022- R7881.42. In dealing with the applicant's version of events, the respondent went so far as to accuse the applicant of fabricating the payment history and the bank statement that the applicant relied upon.

[7] In the replying affidavit the applicant however concedes that she might have inadvertently signed the incorrect agreement reflecting the higher instalment (despite allegedly only paying the lower monthly instalment in sporadically varying amounts) . She doesn't explain how this error might have come about, nor is the assertion made that this agreement that was incorrectly signed does not bind the applicant. The point is not developed and the applicant does not assert any defined legal conclusion in this regard.

[8] Against the backdrop of allegations of administrative shortcomings with the respondent, confusion relating to instalments due, and a multitude of alleged engagements with the respondent, I find no allegation in the affidavits filed of record that the applicant was not in arrears with the instalments due when the agreement was ultimately terminated. The closest to such an allegation is the repeated contention that the applicant authorised the monthly debit order, and

that the respondent was obligated to deduct the correct amount due each month.

- [9] During argument, and at the outset of the applicant's address, her legal representative indicated that it was only persisting, as a ground for rescission, with the proposition that there had been non-compliance with the provisions of s129 of the NCA, in that the s129 notice never came to the attention of the applicant.
- [10] What follows is accordingly a consideration of whether the respondent complied with the provisions of s129 of the NCA. In addition, regard must be had to the implications of such a finding, when considered against the backdrop of the available mechanisms that may be employed in order to obtain a rescission of judgment.

SECTION 129(1)(a) OF THE NCA

- [11] Section 129(1)(a) of the NCA permits a credit provider to draw a consumer's default to their attention 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". Under s 129(1)(b)(i), a credit provider "may not commence any legal proceedings to enforce the agreement before - (i) first providing notice to the consumer, as contemplated in paragraph (a)".
- [12] The applicant contends never having received this s129(1)(a) notice.

- [13] The applicant does not deny that the section 129 notice was sent to her chosen *domicilium citandi et executandi* address, but contends that she did not receive the notice to collect the registered item from the post office. The applicant similarly denies having received the summons, which was also served on this *domicilium* address.
- [14] The summons that was issued and served in the matter, and which served before the court that granted the default judgment, contained proof of despatch to the Pyramid post office (the relevant post office), and contained a track and trace report that confirmed the first notification to the consumer on 11 January 2022.
- [15] In the replying affidavit, the applicant provides additional tracking information that purports to illustrate that the notice was at the post office for approximately one day before it was sent to the Tshwane Mail Centre, and ultimately to the Wits Mail Centre. The applicant accordingly contends that the notice was at the correct post office for only approximately a day before it was again despatched elsewhere. This, so the argument goes, did not afford her a reasonable opportunity to collect the notice.
- [16] The applicant, again in reply, also contends that the Pyramid post office had been dysfunctional since the advent of COVID-19, and that it was not despatching notices to houses since the lockdown restrictions were lifted. This was confirmed by an e-mail from a counsellor of the City of Tshwane, that was annexed to the replying affidavit. The e-mail was not under oath, nor did it disclose the source of the information, save for a reference to a google search that indicated that the

post office was listed as “closed”.

[17] The law does not require that the s129 notice come to the consumer’s knowledge. But it also does not permit the credit provider to merely dispatch the notice.¹ What is required of credit providers was originally laid down by the Constitutional Court in **Sebola**² and **Kubyana**.³

[18] In *Sebola*, the constitutional court held that:

“The credit provider’s summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence of contrary indication, and the credit provider may credibly aver, that notification of its arrival reach the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office”.⁴

[19] *Kubyana* made it clear that a credit provider must at least establish that the s 129 notice was delivered by registered post to the post office that would send a delivery notice to the consumer.⁵

[20] S129 was subsequently amended to address *Sebola*. The relevant provisions read:

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

¹ *Williams v Shackleton Credit Management* 2024 (3) SA 234 (WCC) at [38].

² *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC).

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

⁴ At [77].

⁵ *Kubyana* at [39].

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).*

DID THE RESPONDENT COMPLY WITH THE PRESCRIPTS OF S129?

- [21] It has now become settled law that a credit provider is not required to provide proof that the statutory notice in fact came to the knowledge of the consumer. Such a stance would perforce impose an undue burden on a credit provider. The import of s129(7) is plain. Proof of delivery of the statutory notice is satisfied by a written confirmation by the postal service of delivery to the relevant post office.
- [22] Although the applicant contends not having received the s129 notice, it is not denied by the applicant that the post office where the s129 notice was sent was the correct post office.
- [23] From the track and trace report, which was annexed to the summons, it appears that the section 129 notice was delivered at the post office on 20 December 2021, and a first notification to collect the registered item was sent to the respondent on 11 January 2022.

- [24] The applicant claims never having received this notification.
- [25] In accordance with section 130 of the NCA, the applicant was in default under the agreement for at least 20 business days and at least 10 business days had elapsed since the respondent delivered the notice to the applicant on 11 January 2022, which was prior to the issuing of the summons.
- [26] When the track and trace report that was annexed to the summons is considered in isolation, the respondent appears to have complied with the prescripts of the NCA.
- [27] The question that requires further consideration, is the impact of the applicant's evidence in reply, that the full track and trace report in fact indicates that the notice was available for collection at the post office for only a single day before it was despatched elsewhere, and that the post office in question had in any event not been delivering parcels to houses since the COVID-19 pandemic.
- [28] It is apposite to first deal with the second of these allegations. The applicant relied on an e-mail by a certain Mr. Mark Surgeon, alleged to be a Tshwane councillor. The e-mail conveys that the Pyramid post office never continued with house deliveries after the lifting of the COVID-19 restrictions, and that a google search indicates that it is permanently closed. The information conveyed in the e-mail by Mr. Surgeon has not been confirmed under oath. The source of the information (and whether Mr. Surgeon has personal knowledge of the facts stated) also remains unknown. There is also no reason stated why Mr. Surgeon could not

depose to an affidavit. This evidence amounts to inadmissible hearsay. I do not take this evidence into account in what follows.

[29] The remaining issue, namely that the section 129 notice was only available for collection for one day, may conveniently be addressed on 2 fronts.

[30] First, the applicant's case was that it never received the first notification from the post office, and by extension that it never received the s129 notice. It was simply never the case put forward by the applicant in the founding papers that the period that the notice would be available at the post office was unreasonably short. No case has been advanced that a longer period would somehow have resulted in the notice, in fact, coming to the attention of the applicant before judgment.

[31] The applicant alleges never having received the first notification at their *domicilium* address; accordingly, they would not have known of the notice's availability even had it remained at the post office longer. The real difficulty is not the brevity of the availability period, but the absence of actual knowledge of the notification itself. The relatively short period that the parcel lay available for collection is immaterial against this background. This essentially nullifies the point raised.

[32] On the second front, it seems to me that this aspect may also adequately be addressed through considering the proper attribution of risk in cases where a consumer does not in fact receive a notice that has otherwise been duly dispatched.

[33] Our courts have long recognised that the National Credit Act does not guarantee actual receipt of the notice, but rather requires the credit provider to take steps reasonably designed to bring it to the attention of the consumer. This foundational principle is manifested clearly in both *Sebola* and *Kubyana*.

[34] Once the credit provider shows that the notice was correctly sent to the consumer's chosen *domicilium* address and that the post office issued a notification, the risk that the consumer does not become aware of the notice thereafter lies with the consumer.

[35] This principle was explicitly affirmed in ***Binneman v Standard Bank of South Africa Ltd* 2012 (5) SA 637 (WCC)**, where the Court held that if the minimum requirements for dispatch are met, the consumer bears the risk of non-receipt. I can do no better than to restate relevant excerpts from the dictum of Griesel, J:

“[3] *In Munien v BMW Financial Services*, the interpretation of the provisions of ss 129 and 130 of the Act were exhaustively dealt with by Wallis J (as he then was). He came to the conclusion that 'provided the credit provider delivered the notice in the manner chosen by the consumer in the agreement and such manner was one specified in s 65(2)(a), it is irrelevant whether the notice in fact came to the attention of the consumer. As the consumer has the right to choose the manner in which notice is to be given, it is for the consumer to ensure that the method chosen will be one that is reasonably certain to bring any notice to his or her attention'.

...

[6] *I do not read the judgment of the majority in Sebola as having overruled these principles. What it did do, was to clarify that 'despatch' per se is insufficient; there must, in addition, be proof that the notice reached the appropriate post office: 'Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery.'*

[7] It is not immediately apparent what exactly is meant by the phrase 'in the absence of contrary indication' in the present context. However, it is not necessary for purposes of this judgment to speculate as to its meaning. In the present case the defendant, in terms of clause 11 of the mortgage bond, chose the mortgaged property as the domicilium citandi et executandi and agreed that '... any notice or other document or legal process to be given, sent or delivered under this bond shall be regarded as sufficiently given, sent or delivered to the Mortgagor if delivered at that mortgaged property or sent by prepaid registered post to that mortgaged property, in which latter case it shall be presumed to have been received on the third day following the date of posting unless the contrary is proved'.

[8] Here, the available evidence shows that the letter in terms of s 129 was sent by registered post to the mortgaged property and that it actually reached the appropriate post office, namely Kraaifontein. In accordance with settled authority, I accordingly hold that the plaintiff has duly provided notice to the consumer as required by s 129(1) of the Act. The risk of non-receipt therefore rests squarely with the defendant."

[36] Applied here, the fact that the notice was only retained at the post office for a day before being returned does not undermine the credit provider's compliance.

[37] On this analysis, and provided formal minimum compliance with s129(7), the law attributes the risk of such non-receipt to the consumer.

[38] The respondent demonstrated the minimum compliance required by the Act, and it cannot be saddled with the consequences of the post office's operational decision to retain the item for only a day.

[39] Consonant with the decision of *Binneman*, I accordingly agree with the respondent's proposition that there was compliance with the obligation imposed by s129(1)(a) of the NCA.

[40] Once an applicant makes this evidentiary threshold, the risk of non-receipt rests squarely with the consumer, and the non-receipt of the s129 notice cannot

constitute a ground for rescission of the default judgment.

PARTICULAR GROUNDS UPON WHICH RESCISSION IS SOUGHT

- [41] The authorities are harmonious on the proposition that compliance
- [42] compliance with s129 notice provisions under the NCA could constitute grounds for rescission of judgment under both Rule 31(2)(b) and 42(1)(a).⁶ This carries the necessary implication that non-receipt of this notice could constitute a *bona fide* defence pursuant to the broader consideration of good cause.⁷
- [43] I have already found that the respondent has complied with the prescripts of s129. Accordingly, there is no *bona fide* defence raised, and resultantly there is no basis to rescind under Rule 31(2)(b) or the common law.
- [44] Under rule 42(1)(a), an applicant must show that the judgment was “erroneously sought or erroneously granted in the absence of any party affected thereby”. An order will be erroneously granted “if there existed at the time of its issue a fact which the court was unaware of, 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.”⁸
- [45] Importantly, once an applicant establishes the judgment was erroneously

⁶ *Sebola, Kubyana, Binneman infra*.

⁷ *In casu*, it would have to, because the applicant has abandoned reliance on any defense other than non-receipt of this notice. The proposition may also be extended to include cases for rescission under common law.

⁸ *Rossitter & Others v Nedbank Ltd* [2015] ZASCA 196 at para 15.

granted, it is not necessary to show a bona fide defence. As the Court held in *Kgomo*: “the applicant for rescission [in terms of rule 42(1)(a)] 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).”⁹ That is also the holding of the Constitutional Court in *Ferris*: “good cause (including a bona fide defence) is not required for rescission under rule 42(1)(a).”¹⁰

[46] The dictum of **Bishop, AJ, in Williams v Shackelton Credit Management** ¹¹ is instructive in this regard:

“My understanding of rule 42(1)(a) is that if there was an error that is evident from the papers that precluded the grant of default judgment, then the judgment was erroneously sought and erroneously granted. Rescission must follow. The absence of a defence is irrelevant, and I have no discretion to refuse rescission.

In this case, it was apparent from the summons itself, and the application for default judgment, that the s 129 notice had not been delivered to the relevant post office as s 129(7) and Kubyana require. Section 130(4) prohibited the registrar from granting the default judgment. The default judgment was, therefore, erroneously sought and erroneously granted.

⁹ *Kgomo and Another v Standard Bank of South Africa and Others* 2016 (2) SA 184 (GP) at para 11.7; *Williams v Shackleton Credit Management* 2024 (3) SA 234 (WCC) at [21].

¹⁰ *Ferris and Another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC).

¹¹ 2024 (3) SA 234 (WCC).

The position will be different where the papers show delivery to the relevant post office, but it emerges after judgment that the consumer did not receive the notice. There, delivery was properly made, and judgment was properly granted. Rescission cannot be sought under rule 42(1)(a). It will only be justified under rule 31(2)(b) or the common law if the consumer has a bona fide defence to the underlying claim, or the court otherwise exercises its discretion to allow rescission so the consumer can take advantage of the options provided for in s 129.”¹²

- [47] I fully align myself with the dictum of Bishop AJ. The court granting default judgment was presented with sufficient proof of compliance. The subsequent discovery that the item was retained for only one day does not retroactively render the judgment erroneous. As such, there can be no rescission under Rule 42(1)(a).
- [48] I also have no reason to exercise any discretion, such as the discretion referred to by my brother Bishop, AJ, to allow the consumer to take advantage of the options provided for in s129.
- [49] The applicant has conceded that it could have signed the incorrect contract that carried the higher instalment. It has not made out any case to escape its confines. Measured against the respondent's evidence, it appears clear that the applicant has substantially underpaid in respect of its monthly obligations, and at worst,

¹² At [60] through [62].

has only made three payments towards its credit agreement since inception.

[50] I have already indicated that I do not find any denial by the respondent that it was not in arrears with its payment obligations when the contract was terminated and the judgment subsequently granted.

[51] The applicant's concession that it would proceed only on the issue of non-receipt of the s129 in any event amounts to a capitulation on the payment defence.

[52] Although the applicant contends throughout that she would have wanted to make use of the remedial measures at her disposal under s129 had she received the notice, she nowhere remarks that she was unaware of this entitlement prior to judgment. There is no reason why a formal dispute could not be raised previously, especially when regard is had to the multitude of queries that the applicant allegedly raised with the respondent where it in fact raised disputes, without being afforded any redress on the version proffered. The applicant was made aware of the alleged arrears long before the summons was issued. She chose not to invoke the protection afforded in the NCA. There is no reason why the applicant ought to be allowed to invoke such measures now.

[53] I do not consider there to be any cogent reason for the favourable exercise of a discretion, if this court is in fact vested with such a discretion against the findings above (which I do not pronounce on).

[54] The application must fail.

[55] It is apposite to record that the credit agreement, at clause 14.2, makes provision for attorney-and-client costs.

[56] In the result the application for rescission of judgment is dismissed with costs on a scale as between attorney and client.



SG GOUWS

ACTING JUDGE OF THE HIGH COURT, PRETORIA

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