



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

Case Number: 2024-071086

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
19 August 2025	
DATE	SIGNATURE

In the matter between:

NOMVULA ELIZABETH MPHUTHI

Applicant

and

**MERCEDES BENZ FINANCIAL SERVICES
(PTY) LTD**

Respondent

JUDGMENT

VIVIAN AJ

Introduction

- [1] The applicant applies under Rule 42(1) to rescind a default judgment that was granted against her on 12 October 2023 by Phahlane J.
- [2] The judgment was irregularly sought because the notice in terms of Section 129 (1) of the National Credit Act (Act 34 of 2005) was delivered to the wrong email address. I have little doubt that, had Phahlane J's attention been drawn to this fact, she would not have granted default judgment and would have granted an order in terms of Section 130(4)(b) of the Act.

Background facts

- [3] The applicant and the respondent entered into a written instalment sales agreement on 26 January 2018. In terms of the agreement, the applicant purchased a Mercedes Benz motor vehicle from the respondent. She undertook to repay the purchase price in instalments. The respondent retained ownership of the vehicle until payment of the last instalment.
- [4] The applicant provided an email address in the application for credit (which formed part of the agreement). She elected this as her preferred method of communication. I refer to this as the chosen address. Both parties accepted that this constituted the applicant's appointed address in terms of Section 129(6).
- [5] On 2 May 2023, the applicant received an email from Smit Jones and Pratt Inc ("SJP"). It was sent to the chosen address. They advised her that she was in arrears and asked when she would pay the arrears. Importantly, they sent the email to the same email address that the applicant appointed in the agreement.

- [6] The applicant responded on the same day. She explained that the vehicle was in the possession of her ex-husband. The attorneys advised her to discuss the matter with the respondent and to obtain legal assistance. She engaged with the respondent, but received no response.
- [7] On 22 May 2023, SJP sent a further email to the applicant. They said that they had been instructed to collect the arrears. The applicant again responded promptly. She explained that she had attempted to contact the respondent and that she had received no response. SJP supplied direct contact details for certain employees of the respondent, including the email for the relevant team leader.
- [8] The applicant immediately sent an email to the team leader. She again explained that the vehicle was in her husband's possession and asked if the respondent could assist in recovering the vehicle. There was no response to this email.
- [9] On 17 July 2023, the applicant sent an email to SJP. She said that the team leader had not responded to her email and asked them to forward her email to the person that they were corresponding with at the respondent. SJP responded by telling her to contact the respondent. They gave the names of two persons who she could contact, together with a telephone number.
- [10] The applicant then appointed an attorney to assist her. On 17 August 2023, the applicant issued an application against her ex-husband in the Johannesburg Seat of this Division in which she sought return of the vehicle. However, the Sheriff was not able to locate her ex-husband in order to serve the application.

- [11] Eventually, on 9 February 2024, the applicant managed to track the vehicle. She found that it was at the premises of an auction house. The applicant and her attorney went to the auction house. They were told that the vehicle had been repossessed.
- [12] The applicant's attorney then wrote to SJP asking for, *inter alia*, a copy of the relevant court order. SJP responded saying that they did not have instructions in the matter and that the applicant should liaise with Strauss Daly ("SD").
- [13] The applicant's attorney then sent a letter to SD. He followed this up with a telephone call, but was informed that SD was not dealing with the matter.
- [14] The applicant's attorney then sent a letter to the respondent, again asking for a copy of the court order. The respondent did not reply to this letter or to a follow-up letter.
- [15] However, on 24 February 2024, the applicant's attorneys were copied on an internal email which confirmed that the vehicle was "in stock".
- [16] The following day, the applicant's attorneys received an email from the respondent. The email recorded that, because the contract "had reached maturity", it could not be reinstated. The respondent attached copies of the order, the warrant of attachment and a letter from the respondent addressed "to whom it may concern". In the letter, the respondent demanded settlement of the full amount outstanding. They said that, against payment of the full amount, they would instruct the auctioneers to release the vehicle.

- [17] From this information, the applicant's attorneys learnt that MacRobert Inc (MacRobert). were the respondent's attorneys. They contacted Macrobert and, on 28 February 2024, were granted access to the Court Online file.
- [18] It then became apparent that the Section 129 notice had been sent by email on 9 June 2023. It was not sent to the chosen address but to a different Gmail address. The applicant says that she did not receive the email. Because the applicant was actively engaging with SRP at the time, I consider it probable that if she had received the notice, she would have responded to it.
- [19] The Section 129 notice demanded payment of the arrear instalments. It threatened cancellation if the arrears were not paid within 10 business days.
- [20] Summons was issued on 19 July 2023. In the particulars of claim, the respondent recorded that it "hereby cancels" the agreement.
- [21] The respondent uploaded an affidavit on 26 September 2023. In that affidavit, the respondent said that it had complied with Section 129 because the notice had been delivered to the post office serving the chosen address of the applicant and collected by the applicant or on her behalf by a relative. The deponent referred to the Track and Trace report as confirmation of this. None of this was true. On the respondent's own version, it sent the notice by email, not by post.
- [22] The same deponent deposed to the answering affidavit in this application. She asked that the application be dismissed with costs on the scale as between attorney and client.

[23] According to the deponent, she was advised that the respondent duly dispatched the Section 129 notice. She said that this was the address which the respondent had used to correspond with SD. As proof of this, she attached email correspondence between MacRobert and the respondent, which included what is presumably an email from the applicant to SD in January 2023.

[24] The respondent does not explain why MacRobert used the Gmail address and not the chosen address. It does not explain why it appears to have instructed two firms of attorneys at the same time.

Non-compliance with Section 129

[25] The respondent's counsel submitted that the delivery of the Section 129 notice to an email address used by the applicant at the relevant time constituted compliance with Section 129.

[26] Section 129(5) provides:

"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."

[27] Section 129(6) provides that the consumer must indicate the preferred method of delivery in writing. Section 129(7) provides the requirements for proof of delivery. In the case of delivery in terms of Section 129(5)(b), the proof is the signature or identifying mark of the recipient.

- [28] The purpose of the Section 129 notice is both to bring the default to the consumer's attention and to provide her with an opportunity to rectify the default in order to avoid legal action. It is the credit provider's only gateway to be able to institute legal action.¹
- [29] The clear intent of the legislature is that the consumer must elect a method of delivery and a place of delivery. Having done so, the risk of non-receipt is on the consumer's shoulders.²
- [30] In its present form, Section 129 plainly requires the delivery of the notice to be by the method and at the address chosen by the consumer. The failure to do so constitutes non-compliance.
- [31] I will assume, without deciding, that delivery to an email address chosen by the consumer constitutes compliance with Section 129(5)(b) because of the provisions of Section 19(4) of the Electronic Communications Act (Act 25 of 2002).
- [32] The applicant chose delivery of the notice to her chosen address. The respondent did not comply with this.
- [33] As a result, it was irregular for the applicant to seek a default judgment. Had this non-compliance been brought to the Court's attention, it would have been obliged in terms of Section 130(4)(b) to adjourn the matter and to make an appropriate

¹ Amardien and Others v Registrar of Deeds and Others 2019 (3) SA 341 (CC) at para 56

² Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South Africa Ltd) 2010 (6) SA 439 (SCA) at para 31

order setting out the steps that the credit provider must complete before the matter may be resumed.

[34] In **Williams**, Bishop AJ held that if there is an error that precluded the granting of the default judgment, the judgment was erroneously sought and granted and rescission must follow. He said that the absence of a defence is irrelevant and the Court has no discretion to refuse to grant rescission.³

[35] It appears that Bishop AJ overlooked the decision of the Constitutional Court in **Zuma v Secretary**, in which it held that the Court indeed has a discretion to refuse to rescind an order once the jurisdictional requirements of Rule 42(1)(a) have been met. Justice Khampepe held:

*"However, when a rescission application is brought, a litigant must meet the jurisdictional requirements for rescission, set out in rule 42(1)(a) or the common law, before a court can exercise its discretion to rescind an order. Even if the specific pre-requisites are met, it must still be in the interests of justice for a court to exercise its discretion to entertain the matter."*⁴

[36] The learned Judge continued:

"It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a 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

³ *Williams v Shackleton Credit Management (Pty) Ltd* (10771/2020) [2023] ZAWCHC 279; 2024 (3) SA 234 (WCC) at para 60

⁴ *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* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at para 50

*and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."*⁵

[37] In a footnote in **Zuma v Secretary**, the following is said:

*"One of the most important factors to be taken into account in the exercise of discretion, so the Court in Chetty found at 760H and 761E, was whether the applicant has demonstrated "a determined effort to lay his case before the court and not an intention to abandon it" for "if it appears that [an applicant's] default was wilful or due to gross negligence, the court should not come to his assistance."*⁶

[38] I accordingly have a discretion to refuse rescission despite the jurisdictional requirements of Rule 42(1) having been met.

[39] In **Williams**, Bishop AJ said that he would in any event have exercised his discretion in favour of the applicant. He cited the opportunity to negotiate a settlement and the fact that the applicant said that he would have referred the matter to arbitration.⁷

[40] In this matter, the applicant's default cannot be said to be wilful or due to gross negligence. The summons was served by affixing it to her door. She says she did not receive it, and her subsequent conduct confirms this assertion. Rescission of the order will enable her to take the steps contemplated in the

⁵ *Zuma v Secretary*, *supra* at para 53; See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) at para 5

⁶ *Zuma v Secretary*, *supra* at footnote 20. The reference is to *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A)

⁷ *Williams*, *supra* at para 65

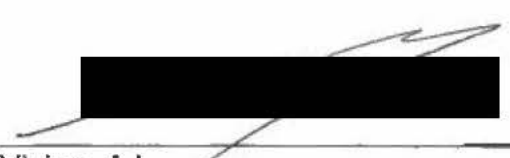
Section 129(1) notice. It will place her in a better position to reach a settlement with the respondent.

- [41] In the notice of motion, the applicant sought an order for return of the vehicle. The applicant's counsel did not press for this order. That approach was sensible. The applicant was not in possession of the vehicle at the time when the order was made. Her only right to possession derives from the agreement. The respondent contends that it has cancelled the agreement. Whether that is correct is a matter that cannot be resolved in these proceedings.

Conclusion

- [42] The applicant has made out a case for rescission of the default order.
- [43] Because the respondent has not complied with the provisions of Section 129, I must adjourn the matter. I must further provide for the manner in which the respondent is to comply with Section 129(1). I consider it appropriate in the circumstances that the notice should be delivered by email to the chosen address and by hand to the applicant's attorneys.
- [44] The applicant's counsel sought an order for counsel's fees on scale B. In my view, such order is appropriate.
- [45] I accordingly make the following order:
- 45.1. The default judgment entered on 6 October 2023 is rescinded.
- 45.2. The action is adjourned.

- 45.3. The respondent is directed to deliver a notice in terms of Section 129(1) of the National Credit Act (Act 34 of 2005; "the NCA") to the email address chosen by the applicant in the application for credit and by hand to the applicant's attorneys.
- 45.4. The matter may be resumed if at least 10 days have elapsed since delivery of the said notice and the applicant has either not responded to the notice or responded to the notice by rejecting the respondent's proposals contained in the notice. In such event, the respondent is to give notice to the applicant's attorneys that it intends to proceed with the matter and affording the applicant 10 days within which to enter an appearance to defend. The date of delivery of that notice will be the date of resumption of the action.
- 45.5. The provisions of section 86(2) of the NCA will not be applicable for the period up until the resumption of the main action as envisaged in paragraph 45.4 above, i.e., the respondent may exercise the rights afforded to her in terms section 129(1)(a) of the NCA up until the date of resumption of the main action.
- 45.6. The respondent is to pay the costs of this application, including the fees of counsel on scale B.



Vivian, AJ
Acting Judge of the Gauteng Division
of the High Court of South Africa

Appearances

For the Applicant:	BM Khumalo Instructed by Dlamini Legal Inc.
For the Respondents:	S Webster Instructed by MacRobert Inc.
Date of hearing:	15 August 2025
Date Delivered:	19 August 2025

MODE OF DELIVERY: *This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hearing are deemed to be 10h00 on 19 August 2025*