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**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 5118/2017

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED: ~~YES~~/NO

DATE: 28/08/2025

SIGNATURE:

In the matter between:

MTHUNZI SHAKES DLAMINI

APPLICANT

AND

NEDBANK

FIRST RESPONDENT

**THE SHERIFF OF THE HIGH COURT,
POLOKWANE**

SECOND RESPONDENT

JUDGMENT

NGOBENI J

[1] The applicant is Mthunzi Shakes Dlamini, an adult male person with identity number: 7[...], residing at 7[...] A[...] Estate, Bendor within the district of Polokwane, employed by Limpopo Economic Development Agency Enterprise Development (Lebowakgomo).

[2] The first respondent is Nedbank Limited, a public company with limited liability duly registered and incorporated in accordance with the company laws of the Republic of South Africa with registration number: 1951/000009/06. The respondent trades as a bank and duly registered credit provider and registered in terms of the National Credit Act 34 of 2005, with its principal place of business at 6[...] H[...] Road, Corner Corobrick Road, Meadowdale, Edenvale, Gauteng Province.

[3] The second respondent is the sheriff of Polokwane, appointed in accordance with the laws of the Republic of South Africa governing the Sheriffs carrying on business at 6[...] P[...] street, Ladine, Polokwane, whose full and further particulars are to the applicant unknown.

[4] I have to state the history of this matter first, before I can state as to why is the matter before court at this stage so that the sequence can be well understood. The applicant and the first respondent entered into an agreement which is titled '*cost of credit to variable rate instalment sale agreement-Annexure A (Tax invoice)*' (agreement) dated 16 May 2014. The agreement was for the sale of a motor vehicle, described as a 2009 BMW X5 XDrive481 A/T9 (E70), for the total amount of R615 255-84. The said amount was to be paid back to the first respondent in 71 payments at an amount or rate of R8 545-22 per month.

[5] On 19 July 2017 the first respondent issued summons against the applicant, alleging that he was in arrear with his monthly repayments, and as at 19 June 2017 he was said to be in arrear with the amount of R62 130-97. The first respondent in its prayers in the summons prayed that there be confirmation of the cancellation of the agreement, return of the motor vehicle, the payment of pre-estimated liquid damages of R381 061-81 plus interest plus costs on attorney and client scale on the Magistrates' Court tariff.

[6] On 05 December 2017, the matter came before M.G. Phatudi J (as he then was), and granted the order as prayed for in the summons as outlined in the preceding paragraph 5 of this judgment, except that there was no order granted for liquid damages. It is important to state that in the first application for rescission of judgment which I'm currently dealing with, which was issued by Mpho Mokhithi Incorporated, the date of the judgment is reflected as 14 September 2017.

[7] I could not find such an order in this court file. The judgment that was issued by Phatudi J on 05 December 2017 is in line with the prayers that were prayed for by the first respondent in its prayers for the summons issued on 19 July 2017. When Mr Chidi addressed the court on 31 July 2025, he was very clear that they are seeking rescission for a default judgment that was granted on 05 December 2017.

[8] The heads of argument of the first respondent in reaction to the second rescission application clarifies on paragraph 2.5 on paginated page 147 of '*Index to the Second Rescission of Judgment Application: Bundle 2*' that the judgment to be rescinded was granted on 05 December 2017, not 14 September 2017.

[9] The first application for rescission of the judgment that was granted on 05 December 2017 was set down for hearing on the opposed roll on 08 June 2020. On 08 June 2020, the applicant was in default and his application for rescission of judgment was dismissed with costs on attorney and client scale. The applicant subsequently launched an application to rescind the judgment that was granted on 08 June 2020 by Kganyago J in his absence, dismissing the rescission application.

[10] On 19 January 2023, Kganyago J rescinded and set aside the judgment that he granted in default on 08 June 2020 in terms of Uniform Rule (Rule) 42. The effect of that is that the only judgment that was granted against the applicant is the one dated 05 December 2017, and that is the judgment the applicant seeks to rescind and set aside. That is the judgment which this court is dealing with in this judgment.

[11] The application by the applicant for rescission of judgment is governed by provisions of Rule 31. Rule 31(2)(b) reads as follows:

“(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”

The reading of the Rule indicates that all what is required by the court is that the applicant must show the court good cause. The court will then exercise its discretion after a proper consideration of all the relevant circumstances¹.

[12] In explaining the requirements as required by Rule 31(2) (b), the court in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*² on paragraph 11 said the following:

“...the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default, (b) by showing that his application is made bona fide, and (c) by showing that he has a bona fide defence to the plaintiff’s claim which prima facie has some prospect of success”

[13] The applicant in a rescission application under common law is required to furnish a reasonable and satisfactory explanation for its default and such applicant must also show that on the merits it has a *bona fide* defence which *prima facie* carries some prospect of success³. For this court to determine as to whether the applicant has a *bona fide* defence which *prima facie* carries some prospect of success I must examine the reasons that the applicant submits which led to the judgment having been granted in his absence.

[14] The appellant alleges that he never received summons commencing action in this case because the summons never came to his attention because it was affixed on the main door at number 2[...] C[...] street, Serala View by the sheriff, being the second respondent. The applicant states that he has no knowledge of that address

¹ Cairns’ Executors v Gaarn 1912 AD 181, Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A).

² 2003 (6) SA 1 (SCA).

³ Zuma v Secretary of Judicial of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of the State and Others 92021] ZACC 28, 2021 (11) BCLR 1268 (CC).

and he is even baffled that there is a cancellation of the address on the contract on page 18. He contends that at the time of entering into the contract with the first respondent he was renting at 7[...] C[...] street, Serala View, Polokwane.

[15] The applicant further alleges that the written agreement that he entered into with the respondent for the sale of the motor vehicle in installments was governed by the National Credit Act 34 of 2005 (NCA), which requires that he be served with a notice in terms of section 129 (1) of the NCA before action is commenced against the consumer or debtor. Section 129(1)(a) of the NCA states the following:

*“(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 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, ...”.*

[16] The applicant alleges that the notice in terms of section 129(1) of the NCA never came to his attention because it was couriered to 2[...] C[...] Street, Serala View, Polokwane, which is not his address, meaning that if one accepts his explanation, it will mean that the options that are there in terms of the said notice which a consumer can exercise were not brought to his attention.

[17] The provisions of the Rules require that good cause be shown as to why did the applicant not attend court to an extent that a judgment was obtained in his absence. From the explanation proffered by the applicant the court must determine whether he was in willful default or not. The crux of the explanation by the applicant is that the documents that he was supposed to receive were sent to the wrong addresses hence he did not receive them. It is clear that in this application the applicant is not claiming that the judgment was granted by mistake, but rather that he did not know that he was supposed to be in court or to defend an action because he was not notified.

[18] The cornerstone of the rules of natural justice are based on two concepts which are the '*audi alteram partem*' and '*nemo iudex in sua causa*' which when simply translated respectively mean '*hear the other side*' and '*no one should judge in their own case*'. The important one for purposes of this proceedings is the first one which demands that the other side must also be heard. When the judgment was granted against the applicant on 05 December 2017 he was not in court for the reasons that I have already explained. That simply means that the applicant was not given an opportunity to be heard.

[19] I do take into consideration that there is an address that appears on the contract which I believe the first respondent would not thumb suck it out of nowhere because the contract that the bank entered into with the applicant has serious financial implications. In all probability because of the implications thereof, details such as addresses would normally be details to which full attention is paid to, hence a person would even be expected to notify the creditors when one moves so that they can know where to find the debtor. The first respondent should have known where to find the applicant with the property that belongs to it until paid in full.

[20] It is also important to understand the circumstances that would generally result in a default judgment being granted. It is concisely and clearly explained in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*,⁴ Streicher JA held that:

"A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one."

⁴ (128/06) [2007] ZASCA 85; 2007 (6) SA 87 (SCA) (1 June 2007) at para 27

[21] The explanation of the applicant in this application is that he never received the summons from the first respondent because it was affixed on the main door at 2[...] C[...] street, whereas he was renting at 7[...] C[...] Street, Serala View, Polokwane. He was not aware of the summons and the judgment that was granted against him, he only became aware of the judgment when one JP, who is the tracer of the first respondent phoned him, and therefore he was not in willful default.

[22] The applicant states in his founding affidavit that had he received the summons he would have entered a notice of intention to defend as he has a *bona fide* defence to the claim. The applicant did not disclose as to what his defence is in the founding affidavit. I must make it clear that in this application there are no allegations by the applicant that judgment was granted by mistake as set out in Rule 42. The applicant accepts that he is in default as he had no knowledge about the summons.

[23] The court must then decide as to whether it accepts that the applicant was in willful default or not by not following the due processes that were expected of him after delivery of the summons. In *Matseke v Maine*⁵ on paragraph 46 of the judgment, the case of *Zuma, supra*, was referred to in order to show that a litigant may be absent from court for whatever reason, and also that a litigant despite having been notified may choose not to participate, like Mr Zuma. In the case at hand the applicant states that it was because of lack of knowledge that he was not in court but not willingly out of his own choice.

[24] The contention by the first respondent is that it was one of the terms of the contract that the applicant chose 2[...] C[...] Street, Serala View, Polokwane as his *domicillium* address. That address appears on the first page of the contract, inserted by hand after a typed number was deleted and there are signatures outside the block where the address is written, but the date of the handwritten insertion is not written next to the signature outside the box. The effect is that *ex facie* the document one

⁵ (M198/2020[2024] ZANWHC 13 (28 January 2024).

cannot say as to when was the handwritten insertion made. On paragraph 22 of what is titled '*contract for vehicle finance*', the following is written:

"You have chosen the address set out in the Annexure A as the place to which any notice or other correspondence must be sent to you. If your address changes, you must advise us in writing immediately by hand delivery or by registered or electronic mail. You are deemed to have received any notice from us seven business days after we have sent the notice to your chosen address by registered post or if delivered on delivery"

[25] The applicant says that at the time when he entered into a contract with the first respondent he was staying at 7[...] C[...] Street, Serala View, Polokwane, hence the summons never came to his attention as they were affixed on the main door at 2[...] C[...] Street, Serala View, Polokwane. The number 28 has been entered by hand on the sale agreement. In the absence of confirmation pertaining to what transpired pertaining to the insertion of number 28 by hand, I have to accept what the applicant has submitted to the court, or at least give the applicant the benefit of the doubt on what actually transpired with regard to that insertion by hand.

[26] The court is therefore, based on what I have said in the preceding paragraph about the issue of the handwritten insertion, bound to accept that the applicant did not know about the summons that were affixed at 2[...] C[...] Street, Serala View, Polokwane. It would have been different if there was no dispute with regard to the address, because if that was the case the applicant would have been deemed to have received the summons as he would have been bound by the contract to inform the first respondent about any movements from the given address, as per the contract.

[27] The banks or the creditors would operate at a loss if debtors would move around without informing them, and later on claim lack of knowledge. Service at a *domicilium citandi et executandi* is valid even if the recipient or debtor is not there, provided that the document is left at that address in a manner that would ordinarily

be brought to their attention⁶. The first respondent would ordinarily be protected by clause 22 of the contract or agreement with the applicant.

[28] The applicant and the first respondents are involved in litigation since 2017, and to date their issues have not been resolved. This kind of litigation involves costs on both sides. The applicant appears not to deny that to a certain extent he fell into arrears with his repayments. If that is the case the first respondent cannot be faulted to follow up on terms of the contract, if any between it and the applicant. To be quite frank the indulgence in these proceedings is sought by the applicant, and he should be paying the costs for that reason. On the other hand costs normally follow the result, but because of the kind of issues that are involved, that seem not to end, the court will exercise its discretion fairly by ordering that each party bears its own costs.

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

- (i) The judgment that was granted against the applicant by this court, dated 05 December 2017 is hereby rescinded and set aside;
- (ii) The applicant is granted leave to file his notice of intention to defend within 10 days of service of this order, thereafter the applicant is granted leave to file his plea within 20 days after filing of the notice of intention to defend;
- (iii) Each party shall pay its own costs.

J.T. NGOBENI
Judge of the High Court

⁶ Oliphant v Standard Bank (South Africa) Limited and Another (2023/061498) (2024) ZAGPJHC 885 (3 September 2024), Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd 1984 (3) SA 834 (W), Elia and Others v Absa Bank Ltd (19617/2017; A5083/2021) [2023] ZAGPJHC 649 (6 June 2023).

Appearances

Attorney for the Applicant : Mr. M. Chidi
Instructed by : Chidi Attorneys

Counsel for the Respondent : Adv. G.J. Lotter
Instructed by : Vezi De Beer Attorneys

Date of hearing : 31 July 2025
Date of judgment : 28 August 2025

Judgment transmitted electronically