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

CASE NO: 2024/035843

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

In the matter between:

BERNICE DE BEER

Applicant

And

**BMW FINANCIAL SERVICES SOUTH AFRICA (PTY)
LIMITED**

Respondent

In Re:

**BMW FINANCIAL SERVICES SOUTH AFRICA (PTY)
LIMITED**

Plaintiff

And

BERNICE DE BEER

Defendant

JUDGMENT

INTRODUCTION

1. This is an application for the rescission of a default judgment granted on the 1st of July 2024.
2. The applicant, who is an admitted attorney, seeks the rescission of that judgment principally, if not solely, on the basis that the judgment had been erroneously granted. It was erroneously granted because, so the argument went, the respondent had failed to satisfy the requirements of Section 129 of the National Credit Act (*“the NCA”*) by ensuring that its notice of default in terms of that section had been sent to the applicant's correct postal address.
3. Although the applicant does not identify whether her application for rescission is one brought in terms of Rule 31 or one brought in terms of Rule 42, Mr Marais, who appeared on behalf of the applicant, submitted that the application was one brought in terms of Rule 42 by virtue of the following allegation contained in the applicant's founding affidavit:

“It need [sic] to be pointed out that from the respondent's court papers it appear [sic] that their attorneys sent the undated Section 129(1) by registered post to me. The Vereeniging Postal Services had been non-functional for an extended period

and I never had any postal facility at Vanderbijlpark. I therefore never received same. I therefore question the validity of the Section 129(1) notice which was a pre-requisite to the institution of the action against me.”

4. I shall, for present purposes, adopt a benevolent view of the applicant's founding affidavit and will accordingly deal with the application as though it were brought in terms of Rule 42.

5. That Rule, provides as follows:

“42(1) The court may, in addition to any other powers it may have, meri moto or upon the application of any party affected, rescind or vary –

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity or a patent error or omission but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.”

6. The applicant submitted that in terms of this Rule, all that is required is for the applicant to demonstrate that the judgment had been erroneously sought and granted. It was consequently not necessary

for the applicant to also show good cause for the subrule to apply.¹

BACKGROUND

7. The applicant had concluded an instalment sale agreement with the respondent in respect of a 2018 BMW 118i Edition, Sport Line Shadow 5 DR motor vehicle on 10 December 2018.
8. The applicant had breached the instalment sale agreement on 31 January 2024 by failing to make payment of the instalments due in terms thereof.
9. On 1 February 2024 and 13 February 2024, the respondent delivered a default notice in terms of Section 129 of the NCA read with Section 130 to the applicant by registered email and registered mail to her chosen *domicilium citandi et executandi* addresses.
10. The applicant did not respond to these notices with the result that the respondent then instituted action claiming the arrear amounts together with the cancellation of the instalment sale agreement.
11. The respondent received notice of the Summons and the action institution by the respondent and consequently made payment of the arrear amount reflected in the respondent's Section 129 default notice. She did not however make payment of the full arrears amount that was due as at the date on which she made such payment.

¹ See: Topol v LS Group Management Services (Pty) Limited 1988 (1) SA 639(W) at 650D-J. See however: Zuma v Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector [2021] ZACC 28.

12. Despite knowledge of the action, she failed to enter an appearance to defend with the result that the respondent proceeded to obtain default judgment on 1 July 2024.
13. It was only after judgment was obtained and the Sheriff instructed to remove the motor vehicle, that the applicant reacted by launching an urgent application to stay the execution of the warrant pending the outcome of this rescission application.

WAS THE JUDGMENT ERRONEOUSLY SOUGHT OR GRANTED

14. The applicant's case in summary is the following:
 - 14.1. clause 15.1 of the installment sale agreement contemplated that the address at which the respondent would be required to send all notices, correspondence, statements and documents was the following:

[...] D[...] N[...] Street, U[...] P[...], Vereeniging being the applicant's physical address, and

P O Box 7[...], Vereeniging being the applicant's postal address;
 - 14.2. the respondent delivered its Section 129 notice to the Vanderbijlpark Postal Service which was the wrong postal service in that it should have been the Vereeniging Postal

Service.

- 14.3. the Vereeniging Postal Service was, according to the applicant, non-functional;
 - 14.4. she consequently did not receive the Section 129 notice;
 - 14.5. in the result, the respondent's failure to have ensured that its Section 129 notice had been sent to the Vereeniging Postal Service and not the Vanderbijlpark Postal Service, meant that the respondent had not complied with Section 129 of the NCA;
 - 14.6. compliance with Section 129 of the NCA was peremptory and in the absence of such compliance, the respondent could not have instituted action against the applicant;
 - 14.7. The respondent's claim was accordingly defective and judgment could not have been granted thereon. Consequently, the judgment had been erroneously sought and obtained.
15. The applicant's entire case rests on the fact that the respondent had forwarded its Section 129 notice to the Vanderbijlpark Postal Service.
16. The difficulty with this, is several fold:
- 16.1. the Section 129(1) notice reflected the applicant's address as follows:

“Bernice De Beer
[...] D[...] N[...] Street
U[...] P[...]
AH Vereeniging
1943”

- 16.2. it is common cause that that was the applicant’s *domicilium* address and which she had provided in terms of the installment sale agreement;
- 16.3. the tracing results of the Vanderbijlpark Post Office, which was attached to the respondent’s summons, reveals that on the 13th of February 2024, the respondent’s Section 129 notice was received at the Vanderbijlpark Hub Sorting Centre and that it was dispatched at 10h19 a.m on the same day and that a first notification to the applicant had been given at 13h33 p.m, on the same day;
- 16.4. the fact that the respondent’s Section 129 notice had been sent to the Vanderbijlpark’s Post Office to be forwarded on to the applicant, does not appear to have resulted in the section 129 notice being rejected by that Postal Service. On the contrary, that Post Office acted thereupon and sent a notification to the applicant of the letter.
- 16.5. the registered slip from the Vanderbijlpark Post Office reveals that the Section 129(1) notice had been dispatched for delivery to the applicant at her chosen physical *domicilium* address.

17. It follows that there had in fact been compliance by the respondent of the requirements of Section 129 of the NCA.

18. It follows further that the applicant's reliance on the *dicta* in Blue Chip 2 (Pty) Limited t/a Blue Chip 49 v Ryneveldt and Others² and Kgomo and Another v Std Bank³ and Kubyana v Std Bank of South Africa Limited⁴ is misplaced.

19. In Kubyana, the Constitutional Court held as follows:

“(a) The Act does not require proof that the Section 129 notice came to the subjective intention of the consumer. Instead, the Act requires the credit provider to “make averments that will satisfy a court that the notice probably reached the consumer”. Indeed, the Act must not be interpreted so as to impose obligations that are impossible to fulfil.

(b) When a consumer has elected to receive notifications through the postal service, the credit provider must show that –

(i) the Section 129 notice was sent by registered mail and delivered to the correct branch of the post office, generally to be deduced from a track and trace report;

(ii) the post office informed the consumer that a registered item was available for collection;

² 2016 (6) SA 102 (SCA).

³ 2016 (2) SA 184 (GP).

⁴ 2014 (3) SA 56 (CC).

- (iii) *the notification from the post office reached the consumer which may generally be inferred if the notification was sent to the correct postal address unless there is an indication to the contrary; and*
- (iv) *a reasonable consumer would have ensured retrieval of the registered item from the post office.”⁵*

20. Importantly, the Constitutional Court in Kubyana further held that if a consumer had elected to receive notices by way of registered mail, the consumer must respond to notifications from the post office requesting her to collect registered items unless in the circumstances a reasonable person would not have responded.

21. In the present instance, the applicant herself contends that the postal office that she had elected to receive notifications from, was dysfunctional. She made no attempt to advise the respondent of this. In addition, the applicant did not engage with whether or not she had received the notifications from the Vanderbijlpark Post Office and if so, why she elected to ignore them. It was incumbent upon her in the circumstances to have engaged with the track and trace report that had been attached to the respondent’s summons in her founding affidavit and to have said that she did not receive the first notification that was referred to in the track and trace report. She did not do so. On the contrary, her founding affidavit was rather coy. She claimed

⁵ Para 43.

not to have received the section 129 notice but did not bother to take this court into her confidence by dealing with what the track and tracing slip in fact said.

22. In her replying affidavit,⁶ she did no more than assert that her address fell within the Vereeniging jurisdictional area and that notifications were supposed to be served by that postal office as the Section 129 notice was sent to the Vanderbijlpark post office, it was a jurisdictional area where she does not receive notifications. But that of course did not explain that the track and trace report in fact reflected a notification to her.
23. On the applicant's version, the Section 129 notice should have been sent to the dysfunctional Vereeniging postal office. If it had, then despite it being dysfunctional, it would have satisfied the requirements of the installment sale agreement and consequently the NCA. This is a form over substance argument that is contrary to the objectives of the NCA and the purpose behind Section 129 thereof.
24. Given the track and tracing report and the applicant's lack of candidness, the respondent was entitled to assume that she had received notification and that she elected to ignore it.
25. This is consequently not a case where the notification was returned

⁶ At the end of the hearing of the application, it transpired that the replying affidavit that had been uploaded onto Caselines, was a replying affidavit in an urgent application that had been launched by the applicant for the stay of execution. The applicant's proper replying affidavit was not on Caselines and neither counsel for the respondent nor the court had sight thereof. It was subsequently furnished by Mr Marais after the hearing had ended and judgment reserved. Its contents have however been taken into account.

to sender or where the evidence on the affidavits demonstrate that the notification did not come to the attention of the applicant.

26. It is on these peculiar facts that the decision in Sebola v Std Bank of South Africa Limited and Another⁷ is to be distinguished. In that matter, the Section 129 notice had been diverted from Mr and Mrs Sebola's nominated postal address namely Northriding, Johannesburg, to the Halfway House Post Office with the result that they did not receive any notification or the Section 129 notice.
27. In this matter, however, the track and trace report reflects that the Section 129 notice was dispatched by the Vanderbijlpark Post Office to the applicant's nominated physical address and that she had received notification thereof. Apart from contesting that the incorrect post office was utilised, there is in fact no denial by the applicant that that post office nevertheless dispatched the Section 129 notice to her and that she received notification of it.
28. It may be that the applicant did not receive the Section 129 notice because she failed to retrieve it when she had been given notification thereof. But as both Sebola and Kubyana point out, there is no requirement on the part of a credit provider to ensure that the notice be brought to the consumer's subjective attention or that personal service is necessary.
29. In light of this conclusion, it would be unnecessary to consider

⁷ 2012 (5) SA 142 (CC).

whether, had the application had been brought in terms of Rule 31, the applicant would have demonstrated good cause. Suffice it to say, that the applicant had failed to demonstrate any good cause. Being an admitted attorney and having become aware of the summons prior to the application for default judgment, she elected not to enter an Appearance to Defend. She did so notwithstanding having been warned by the respondent that her failure to make payment of her entire outstanding arrear amount, meant that she remained in breach of the installment sale agreement and that the respondent would proceed with legal action.

30. Finally, the applicant had also raised the typical dilatory defence that the respondent's affidavit had not been properly commissioned and should therefore have been struck out. At the hearing of the application, Mr Marais did not forcefully persist with this defence and rightly so. The failure by the Commissioner to have scratched out the "*he*" before the "*she*", did not result in the affidavit having not been properly deposed to or the Commissioner having failed to comply with Regulations 3 and 4 of the Justices of the Peace and Commissioners of Oath Act, 16 of 1963, regulations governing the administering of an oath or affirmation, published under GNR1258 in GG3619 of 21 July 1972.

31. In the result, I make the following order:

31.1. the application is dismissed;

31.2. the applicant is to pay the costs of the application on an attorney client scale.⁸

M A CHOCHAN

ACTING JUDGE OF THE GAUTENG LOCAL DIVISION

10 October 2025

DATE OF HEARING: 06 October 2025

DATE OF JUDGMENT: 10 October 2025

APPEARANCES:

FOR THE APPLICANT: A.S Marais
H W Smith & Marais Attorneys

⁸ The agreement provides for attorney client costs to be paid by the applicant.

FOR THE RESPONDENT:

Adv. T. Mirtle

Instructed by: Mooney Ford Attorneys