



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 116619/2023

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
	03 / 10 /2025
.....	
SIGNATURE	DATE

In matter between:

LINDESH TRADING ENTERPRISE (PTY) LTD AND ANOTHER First Applicant

LINDA MANYANE Second Applicant

THEPISO CHERITY ALLETTA MAWELA Third Applicant

and

NEDBANK LIMITED Respondent

JUDGMENT

STONE AJ

- [1] This is an application for the rescission of an order which was made on 27 September 2023 by Malatsi-Teffo AJ in the absence of the applicants.
- [2] The respondent's counsel conceded during argument that the order was erroneously sought and erroneously granted, as contemplated in rule 42(1)(a), as the order was applied for, and granted contrary to provisions of a pre-existing order that was granted on 8 May 2023 by Mogotsi AJ. Respondent's counsel however contends that, this notwithstanding, the court should still exercise its discretion to refuse the rescission of the judgment of 27 September 2023. The issue for decision is whether or not I should exercise my discretion to rescind the order of 27 September 2023.

BACKGROUND: COURT ORDERS

- [3] The respondent instituted an action against the first, second and third applicants under case number 2022/048534, based on a written variable rate instalment sale agreement in terms whereof the respondent sold a certain Hyundai vehicle to the first defendant. The total amount claimed in the summons against the first applicant was R389 965.87. The respondent's claim in the action against the second and third applicants is for an amount of R312 833.74, based on limited suretyships signed by them in favour of the respondent for debt of the first applicant.
- [4] The respondent subsequently applied for default judgment. The second applicant says she attended the court when, on 8 May 2023 Mogotsi AJ made an order by agreement between the parties, in the following terms:

- “1. The matter is postponed sine die for the respondents to pay the full arrears, and instalment amounts to date within six months from the date of this order.*
- 2. If the respondents fail to pay the full arrears and outstanding amount within six months, the applicant can approach the court on papers duly supplemented for an order for default judgment.*
- 3. The respondents are ordered to pay the wasted costs of the application.”*

[The respondents referred to in the order are the applicants in the present rescission application, and the applicant referred to in such order, is the respondent in the present application].

[5] Before the six-month period in paragraph 1 of the order of Mogotsi AJ had run out, the respondents’ attorneys however prematurely launched a further default judgment application, signed and dated 20 July 2023. It appears from a stamp of the Registrar that it was issued on 1 August 2023. The six months period mentioned in the order of Mogotsi AJ would only have expired on 7 November 2023. In terms of paragraph 2 of the order application could only have been made after the six months period had expired, if the applicant failed to make payment within the six months. The application was therefore premature, made contrary to the order of Mogotsi AJ, and it was therefore unlawful.

[6] The second default judgment application (under case number 2022/048534), served before Malatsi-Teffo AJ on 27 September 2023. The application was made on the basis that the applicants (defendants in the action) had failed to enter appearances to defend. No mention was made in such application of the

order of 8 May 2023. I have noted that the practice notes of counsel for the respondent who attended to the application, also did not mention the existence of the order of 8 May 2023. The default judgment application was not clear in all respects as it indicated in the first paragraphs thereof that an order would be sought (without indicating against which defendant it would be sought), for payment of estimated damages being the total of “payables not yet paid” minus the value of the vehicle from date of it being placed in possession of the respondent, return of the vehicle, interest and costs. After setting out some facts usually contained in a default judgment application such as allegations concerning service of the summons and the respondent’s opposition to mediation (without referring to the order of 8 May 2023), at the end of the application it was however stated that judgment would be sought against the first defendant (the first applicant *in case*), for confirmation of cancellation, the return of the vehicle, costs, and that the remainder of the relief be postponed *sine die*. It appeared from the record on Case lines that served before Malatsi-Teffo AJ on 27 September 2023 that no return of service in respect of this new default judgment application was filed on record, save for a return of service in respect of the third applicant.

- [7] Despite the order of Mogotsi AJ, the default judgement application was set down by the respondent’s attorney on 27 September 2023. Malatsi-Teffo AJ granted default judgment and made an order on such date against “the Defendant” for confirmation of the cancellation of the instalment sale agreement, restoration of possession of the vehicle and costs on an attorney and client scale. Malatsi-Teffo AJ also ordered that prayers for damages were postponed *sine die*.

THE RESCISSION APPLICATION

[8] Acting without legal representation, the second applicant subsequently filed the present rescission application. According to the electronic date indicated on the papers filed on Case lines, the application was filed on 09 November 2023. This was shortly after the second applicant became aware of the order in October 2023. The notice of motion was however not duly signed by the second applicant. The founding affidavit was signed but not commissioned under oath. As the first affidavit in support of the rescission application was not deposed to under oath, the affidavit is not admissible and I have not taken the contents thereof into account.

[9] A signed application, with founding affidavit commissioned under oath, was filed on 21 October 2024, and a “supporting affidavit” was filed a week later on 28 October 2024. It is evident therefrom that it was compiled by a lay person. The respondent’s answering affidavit was filed on 29 January 2025.

[10] At the inception of the hearing, I raised with both counsel the fact that the order of 27 September was at variance with the order of 8 May 2023, and I allowed counsel to provide me with their views thereon. Mr Lotter, who appeared for the respondent, conceded that the order was erroneously sought and erroneously granted, and he did not dispute that it was granted in the absence of all the applicants. Mr Lotter however submitted that I still have a discretion to refuse the rescission of judgment, as the granting of judgement is inevitable, and essentially will have no practical effect. I return to this later.

APPLICATION TO REMOVE THE MATTER FROM THE ROLL

- [11] It appears from the application documents that the applicant was acting throughout on her own behalf and on behalf of the first applicant. There is no indication that she acts on behalf of the third applicant, although such person is indicated as an applicant.
- [12] At the inception of the hearing, Mr Ensheathe appeared. I understood him to indicate that he appeared on behalf of the second applicant and the first applicant of which the second applicant is a director. He indicated that he was briefed to seek an order that the matter be removed from the roll or postponed. As it did not appear from the record that any attorneys have entered appearance on behalf of any of the applicants, I raised with Mr Ensheathe that he must satisfy the court that he was duly briefed to appear in the matter, as, from the inception of the application, no attorney had been on record for the applicants, and it appeared that the second applicant had been driving the application throughout, filing the application papers.
- [13] The matter stood down, and a notice of appointment of attorneys who briefed Mr was eventually produced. Mr Lotter accepted that such attorneys were duly on record. This issue having been resolved, Mr Netshiavha indicated that he was briefed late and that he and the attorney required more time to consider the matter. He indicated that the second applicant realised late that she would need to be represented, as reason for the request to remove the matter. However, no proper application was placed before the court for the postponement of the matter, nor even an affidavit from the attorney, and proper reasons were not provided in argument by Mr Netshiavha why the applicants have left it so late to apply for a postponement. As a properly

motivated and timeous application for postponement was not made, and in the absence of a tender of costs of a postponement, I exercised my discretion to refuse the request that the matter be removed from the roll or be postponed.

- [14] After my ruling as aforesaid, the matter stood down at the request of the applicants' counsel. After the adjournment, he informed me that he was unable to proceed, as he only had instructions to deal with the postponement application, and no more. He was instructed to withdraw. He indicated that his instructions were that the second applicant would proceed to argue the matter, in circumstances where she had been dealing with the matter unrepresented since the inception of the application. I indicated to Mr Netshiavha that I was willing to stand the matter down if he required time to prepare further. He however reiterated that he was instructed to withdraw, and that his instructions were limited to request the removal or postponement of the matter. The matter then proceeded with the second applicant appearing in person. She indicated that she was appearing on behalf of the first applicant, and on her own behalf. She explained that she and the third applicant are directors of the first applicant company, but she was not acting on behalf of the third respondent.

LOCUS STANDI

- [15] The court order of 27 September 2023 refers only to an order against a defendant, whereas the order of 08 May 2023 referred to "respondents". Mr Lotter however submitted that it can be accepted that the order of 27 September 2023 was granted against the applicants as a collective. The order

refers to judgment against “the Defendant”, without identifying which defendant. If regard is had to the default judgment application and the relief granted it appears that the order must have been intended as an order against the first defendant (first applicant)¹ Although it was only made against the first applicant, it does have implications for the principal debtor and the sureties.

[16] Mr Lotter initially contended that the second applicant was not entitled to appear on behalf of the first applicant². He however conceded that the second applicant at least have locus standi in her personal capacity. He abandoned the locus standi point later in his argument.

CONDONATION

[17] As a lay person, the second applicant has not clearly indicated in her affidavits whether she relies on the common law, Rule 31 or Rule 42.

[18] The respondent submitted that the applicants have failed to make application timeously within the 20 days period allowed in rule 31. Mr Lotter however in argument indicated that he would not persist to rely on the absence of a condonation application further in the interest of justice. I understood him to take this stance as the application was made by a lay person. I am also of the view that the failure to make the application timeously and to file duly signed

¹ As the order provides for confirmation of the cancellation of the agreement, and an order that the vehicle be restored,

² In view of the decision in Investec Securities (Pty) Ltd v Corail Investments Holdings (Pty) Ltd and Others, and Yates Investments (Pty) Ltd v Commissioner of Inland Revenue.

and commissioned papers in the correct format when the application was instituted, and only signed and commissioned papers in October 2024, and the filing of a further affidavit, should be and is hereby condoned. The respondent has had ample time to reply thereto. The court also has a discretion to grant relief *mero motu*.

FACTS AND SUBMISSIONS

[19] After her counsel withdrew, the second applicant indicated that she would proceed in person, and she made various submissions. She also presented evidence which were inadmissible as it was not on the papers . Submission which she made in argument, and factual allegations contained in her affidavits under oath, may be summarised as follows:

19.1 She relies on the fact that the six-month period had not run out when judgment was granted, and that the order was erroneously sought and granted. She indicated that even before the order of 8 May 2023, she wrote a letter to the respondent on 28 April 2023 requesting to make a payment arrangement. The intention of the postponement was to allow for an opportunity to pay or make a payment arrangement with the respondent. She avers that the order of 8 May was made to allow for engagement with the respondent to make arrangements about the payments to be made. After the order of 8 May 2023, she continued to correspond with the respondent. She mentions a letter dated 12 May 2023, requesting to make a payment arrangement, to which the respondent answered on 26 May 2023, requesting documentation

regarding the vehicle and financial details, and inter alia informing her that an immediate payment of 50% would be required of the arrears, for the bank to be willing to assist with a payment arrangement of the arrears over the remaining contract period which runs until 2026. She says that, according to the respondent's consultant, the purpose of the correspondence was to determine which payment arrangement would be most suitable for her. She avers that she provided information and the address where the vehicle was kept for evaluation, as requested by the respondent. However, she avers that whilst still waiting for the respondent to revert, she received a text message from a recovery expert on 17 October 2023 (still well within the 6 months period of the order of Mogotsi AJ), informing her of the court order of 27 September 2023, and a warrant for delivery of the vehicle. She was unaware of the default judgment application before 17 October 2023. The respondent did not produce further correspondence. She filed her rescission application as aforesaid in November 2023.

- 19.2 She submits that she was not in wilful default of the order of Mogotsi AJ. She was not aware of the default judgment application. She contends that she had good prospects, and was willing, to come to an arrangement with the respondent, and if the respondent's representatives had made contact with her, she would have adhered to an arrangement, essentially contending that she would have been able to pay in terms of an arrangement.

19.3 In argument she also relied on the fact that, as the order of 8 May 2023 made provision that she could make payment within six months, she intended to make arrangements with the respondent within such six months, but before arrangements could have been concluded, the respondent simply proceeded to obtain the court order.

19.4 She avers that the vehicle was repossessed on 3 October 2024. The statement of account relied on by the respondent shows storage fees debited from early December 2024, and the vehicle was therefore evidently repossessed whilst the rescission application was still pending. On 8 October 2024 she made a payment of R190 000.00 (this payment is not disputed by the respondent). She avers that it was paid from her pension. This payment substantially reduced the outstanding amount, yet it did not extinguish all the arrears. She also avers that she received correspondence from the respondent 8 October 2024 which stated that the vehicle was valued for only R56 000.00. I did not understand her to concede the value of the vehicle. She complains that, despite her willingness to make payment, the vehicle was still retained by the respondent.

[20] In its answering affidavit the respondent confirms that it indeed responded on 26 May 2023 to the second applicant's letter of 12 May 2023. From this letter, attached to the respondent's answering affidavit, it is evident that the particulars of the address where the vehicle was being kept were requested. However, it was indicated that an immediate payment of 50% would be required for an arrangement, as well as further documents which were

requested. The deponent on behalf of the respondent refers to this letter. The letter the letter indicates that if the information required were not received “we will be proceeding to finalise legal action”. No mention of the period of six months was mentioned in such correspondence.

[21] In the answering affidavit of the respondent reference is made to the order of 8 May 2023. It is states that the applicants’ failure to make payments within six months “*lead to the Respondent applying for default judgment*”. The deponent on behalf of the respondent submits that the respondent was “*legally and procedurally entitled to the order granted on 27 September 2023*” and that the application should consequently be dismissed. For reasons already mentioned, these statements are incorrect, and indeed misleading, as the application for default judgment was made well before the six months period had ran out.

[22] It appeared from the record on Case lines that no returns of service in respect of the default judgment application of 27 September 2023 were filed, except in respect of the third applicant. Returns of service in respect of the other applicants were not on record when the order of 27 May 2024 was granted. Returns of service filed in respect of the first and second applicants were dated in February 2023, before the default judgment application was even lodged in August 2023. Mr Lotter could not explain this and suggested that the respondent’s attorney be allowed an opportunity to file returns of service, if they exist, in respect of the other applicants, for purposes of the 27 September 2023 application. As I was of the view that it could possibly have a bearing on the exercise of my discretion, I issued directives to the limited effect that if

such returns exist, it could be submitted under oath, and I also afforded the second applicant an opportunity to respond thereto. Returns of service were produced by the respondent's attorney under oath. One return of service indicated that the default judgment application was served on the first applicant by affixing it to the premises at its *domicile* address, but a return of service produced in respect of the second applicant, also by affixing the application to the gate, indicated that it was served at her "registered address". The second applicant filed an affidavit and responded under oath that she never received service or notice of the application before the order, and that the respondent was aware of her actual address, which appears from correspondence received by her from the respondent. She provided copies of correspondence indicating that the respondent had her actual address of residence. There is no reason to doubt her evidence that she did not receive the application. It stands to reason that if she did, she would have attended to the matter as she did prior to the 8 May 2023 application. Her presence on 27 September 2023 was effectively precluded as she did not receive the application and did not have knowledge thereof. It remains unexplained why these returns were not filed on record when the judgment was granted on 27 September 2023, and why returns were on record showing service dates before the application was lodged. The issuing of the default judgment application and actions taken by the respondent pursuant to such application were in my view in any event unlawful and tainted as it was done contrary to a court order.

- [23] Mt Lotter submitted that available facts suggest that if a rescission is granted, it will merely delay the inevitable. He referred to the fact that the action was

not opposed, and the payment history which appeared from a statement (transaction history) which was not disputed by the second applicant, which indeed shows that the amount outstanding was in fact not paid within 6 months after the order of 8 May 2023. It shows that an amount of R190 000.00 was paid in October 2024, apparently after the vehicle was possessed, but a substantial amount still remains to be paid. I revert to this below.

[24] Consonant with his view that the order of 27 September 2023 was made against all the applicants, Mr Lotter also submitted that if a rescission is ordered, it should only be in respect of the second applicant.

RULE 42(1)

[25] In terms of Rule 42(1) the court may, in addition to any other powers it may have, *Mero motu* or upon the application of any party affected, rescind or vary an order erroneously sought and erroneously granted in the absence of a party affected thereby. It is not necessary to show good cause for this this subrule to apply.³

[26] An order will be erroneously sought and 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.

³ See for example *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (SA 466 € at 471 H; *Gassama v Mercedes-Benz Financial Service SA (Pty) Ltd* 2023 (1) SA SA141par [29].

- [27] As the respondent's counsel conceded during argument that the order of 27 September 2023 was erroneously sought and erroneously granted, and as it was not disputed that it was granted in the absence of the applicants, the jurisdictional facts are present for relief in terms of rule 42(1)(a).
- [28] In my view the concession was unavoidable, in view of the order of 8 May 2023. In my view the inference is justified that the learned judge would not have made an order on 27 September 2023 if she was aware of the order of 8 May 2023. Although the order was on record on Case lines, neither the default judgment application nor counsel's practice note alerted the learned judge to the pre-existing order. The learned judge may not have noted the order or have not considered the import of the 6 months period in the order of 8 May 2023. The fact that it was erroneously sought or erroneously granted is also supported by the fact that the order made on 27 September 2023 did not rescind or vary the order of 8 May 2023, and as the orders are contradictory.
- [29] In my view rule 42 (1)(b) may also be applicable as there exists an ambiguity created by the order of 27 September 2023. Although the order itself, considered on its own, is not ambiguous on the face of it, it does create an ambiguity to the extent that it was made in the 6 months period provided for in the order of 8 May 2023. The two orders are contradictory, if regard is had to the six months period. This is especially so as the order of 8 May 2023 was not rescinded or varied.

[30] It is trite that court orders should be adhered to. It is a well-established rule that once a court has duly pronounced a final judgment or order, it only has the power in limited circumstances to set aside or vary it.

[31] In **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**,⁴ the Constitutional Court observed:

“[97] ... There must be an end to litigation, and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made.

[98] There is a reason that rule 42, in consolidating what the common law has long permitted, operates only in specific and limited circumstances. Lest chaos be invited into the process of administering justice, the interest of justice requires the grounds available for rescission to remain carefully defined. In Colyn, the Supreme Court of Appeal emphasised that ‘the guiding principle of the common law is certainty of judgments. Indeed, a court must be guided by prudence when exercising its discretionary powers in terms of the law of rescission, which discretion, as expounded above, should be exercised only in exceptional cases, having ‘regard to the principle that it is desirable for there to be finality in judgments.’”

⁴ 2021 (11) BCLR 1263 (CC) at paras [97] – [98].

[32] In **Zuma**⁵ the Constitutional Court held that once an applicant has met the requirements for rescission, a court is endowed with a discretion to rescind its order. The wording of Rule 42 postulates that a court “may”, not “must”, rescind or vary an order. The Rule is merely an empowering section and does not compel the court to set aside or rescind anything. The discretion must be exercised judicially.

[33] The respondent’s counsel strongly relied on **Nkosi v ABSA Bank Ltd**⁶ where the court exercised its discretion against rescission despite the fact that the applicant has met all the jurisdictional requirements of Rule 42(1)(a), because a rescission would have had no practical effect and merely caused delay. In that matter the applicant was not given a notice as required in terms of section 129 of the National Credit Act, 34 of 2005. He however did receive the summons, and the notice and track trace reports attached. He entered an appearance to defend, failed to plead and was notified of hearings in court on three separate occasions before default judgment was granted against him. He failed to attend court, and he then waited until default judgment was entered to raise only one defence, namely a failure to be provided with a section 129 notice. In that matter he disputed neither his indebtedness nor his breach of the relevant loan agreements. He was also absent at the hearing of his application, but his application for rescission and his founding and replying affidavits were considered by the court.

⁵ *Supra* at para [53].

⁶ 2023 JDR 2070 (GP)

[34] Vivian AJ held that it could hardly be said that the applicant had made a determined effort to place his case before the court and held that he should exercise his judicial discretion against rescinding the order (as he was of the view that it will have no practical effect and merely cause delay). He pointed to the fact that the court's roll is notoriously busy, and that litigants who do not exercise their right to be heard when properly notified, cannot expect as of right to be granted rescission of judgment based on a defence which will in all likelihood only achieve a delay. He found the applicant did demonstrate a real intention to take advantage of any pause created by the notice, and he does not say that he would have done so had he received the notice. Vivian AJ was of the view that it would simply be another matter clogging the court's roll. He found that it would not be in the interest of justice to rescind the order.

[35] I have considered **Nkosi** and other cases where the failure to give notice in terms of section 129 of the National Credit Act was the basis of rescission applications. In **Mphuthi v Mercedes Benz Financial Services (Pty) Ltd**,⁷ Vivian AJ dealt with another matter where a section 129 notice in terms of the National Credit Act was not received by the applicant. The learned judge exercised his discretion to rescind a default judgment, in circumstances where the applicant's default could not be said to be wilful or due to gross negligence, and where the applicant said she did not receive summons which was served by affixing it to the applicant's door and her subsequent conduct confirmed this assertion. The court held that the rescission of the judgment would place the applicant in a better position to reach a settlement with the respondent.

⁷ 2025 JDR 3730 (GP).

[36] **Williams v Shackleton Credit Management (Pty) Ltd**,⁸ was also a case where a section 129 notice was not duly given to the applicant. Contrary to the finding in **Nkosi**, Bishop AJ held⁹ that the court had no discretion to decline rescission in circumstances where the requirements of Section 42(1)(a) have been complied with.¹⁰ Bishop AJ's expressed an understanding of Rule 42(1)(a) 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, and a rescission must follow. He opined that the absence of a defence is irrelevant, and that in such circumstances a court would not have a discretion to refuse a rescission. He did however not refer to **Zuma**¹¹.

[37] Although Bishop expressed sympathy for the pragmatic approach, rather the formal approach¹², he found that he was compelled to rescind where an error was evident on the papers which precluded a default judgment. He however stated¹³ that if he was wrong that he did not have a discretion, he would have exercised his discretion to rescind, as an opportunity to negotiate after judgment is not equivalent to negotiating after judgment, as a credit provider would understandably be hesitant to compromise on what is owed with a court order in its favour, and as the applicant indicated in its founding affidavit that he would have taken advantage of the opportunity presented by section 129.

⁸ 2024 (3) SA 234 (WCC) at para [60].

⁹ 2024 (3) SA 234 (WCC).

¹⁰ *Id* at para [59].and [60].

¹¹ *Supra* n 4.

¹² Williams, *supra* n6. Compare his discussion at par [58].

¹³ Williams, *supra* n6 par [65].

- [38] In **Nkosi**¹⁴ the learned judge also referred to **Sebola and Another v Standard Bank of South Africa Ltd**¹⁵ where the Constitutional Court held that a section 129 notice in terms of the National Credit Act should be interpreted with section 130 which makes it clear that an action instituted without prior notice, is not void, but the proceedings have life, and must be adjourned. The bar to proceedings is therefore not absolute in case of non-compliance with section 129 notice requirements, but only dilatory.¹⁶
- [39] In **Kgomo and Another v Standard Bank of South Africa and Others**¹⁷ Dodson J held that a judgment was erroneously sought and erroneously granted in the absence of compliance with the notice requirements in terms of section 129. The Court analysed the judgments of the Constitutional Court¹⁸ in **Ferris and Another v FirstRand Bank and Another**¹⁹, **Sebola and Another v Standard Bank of South Africa Ltd and Another**²⁰ and **Kubina v Standard Bank of South Africa**²¹, and came to the conclusion that strict compliance with section 129 remains the order of the day, and that section

¹⁴ *Supra*, n 4 par

¹⁵ 2012 (5) SA 142 (CC) par [53].

¹⁶ In *Nkosi*, *supra* n 6 Vivian AJ also referred to *Van der Merwe v Bon aéro Park* 1998 (1) SA 697 (T) at 709 D – Where a summary judgment application was served only 8 days before judgment. Maritz AJ refused to rescind the judgment as he was of the view that if referred back for hearing, summary judgement would still be granted.

¹⁷ 2016 (2) SA 184 (GP)

¹⁸ At paras [35] to [58] The Court analysed the judgments of the Constitutional Court in *Ferris and Another v FirstRand Bank and another*, *Sebola and Another v standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) and *Kubina v Standard Bank of South Africa* 2014 (3) A 56 (CC), and came to the conclusion that strict compliance with section 129 remain the order of the day, and that section 130(4)(b) peremptorily requires the court to adjourn the proceedings. The judgment was rescinded.

¹⁹ 2014 (3) SA 39 (CC)

²⁰ 2012 (5) SA 142 (CC)

²¹ 2014 (3) SA 56 (CC)

130(4)(b) peremptorily requires the court to adjourn the proceedings. The judgment was rescinded.²²

[40] In **Cohen N.O. and Another v Deans**,²³ the Supreme Court of Appeal referred to **Standard Bank of South Africa Ltd v Roestof**,²⁴ in which matter it was held that a technical defect due to some obvious and manifest error which causes no prejudice to the defendants, can be overlooked.

[41] The Supreme Court of Appeal also referred to the decision in **Shackleton Credit Management (Pty) Ltd v Macrozone Trading 88 CC and Another**,²⁵ where a different approach was followed. The court dealt with the suggestion that a defective summary judgment application could be cured if the defence dealt with the merits of the claim. Wallis J found that it was incorrect. The fact that a defence had been held out and argued, was found not to cure the defect in the particulars of claim or the summary judgment application.

[42] In **Macrozone**²⁶, Wallis J held as follows:

“[25] Insofar as the learned judge suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence. It

²² A similar approach was followed in *Buy's v Changing Tides 17 (Pty) Ltd* [2013] ZAWCHC150; 2013 JDR 2286 (WCC).

²³ 2023 JDR 1216 (SCA).

²⁴ 2004 (2) SA 492 (W) at 496 F – H.

²⁵ 2010 (5) SA 112 (KZP).

²⁶ *Id*, par 25

requires a defendant who wishes to contend that the application is defective to confine themselves to raising that point with the concomitant risk that if the technical point is rejected, they have not dealt with the merits. It will be a bold defendant that limits an opposing affidavit in summary judgment proceedings to technical matters when they believe that they have a good defence on the merits. The fact that they set out that defence does not cure the defects in the application and to permit an absence of prejudice to the defendant to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective, then cadet quaestio. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons.”²⁷

[43] In **Cohen** the court held that whether one follows the approach in **Roest of or Microzone**, the defect in the particulars of claim, the reliance on an incorrect trust deed, was not merely a technical defect, but went to the heart of the claim.

[44] In **Pienaar N.O. v Nano Inks KZN (Pty) Ltd and Others**,²⁸ the courts held that the failure to comply with Rule 28(2) was a fundamental procedural flaw that cannot be overlooked. The defendant was not provided with the requisite notice of an intended amendment, and the defendant was thereby denied the

²⁷ See also **Cohen N.O. and Others v Deans** supra at paras [24] – [26].

²⁸ *Supra* at para [41].

opportunity to object. In that matter the court held that there would be no prejudice if the rescission is granted and the default judgment was set aside.

[45] Mindful of the approached followed in the aforesaid decisions, in my view the facts and considerations in the present matter are substantially different from matters where the absence of compliance with a notice requirement was the reason for rescission, or where a requirement such as service was not complied with. The matter is also not in the nature of summary judgment proceedings. I refer to the following:

45.1 In the first place, I am of the view the non-compliance with a court order is on a different footing than a mere technical defect such as a notice requirement or service. Court orders are not mere technical stumbling blocks to relief. Court orders are enforceable and should be complied with²⁹. The applicants obtained rights in terms of the order of 8 May 2023, and they could rely thereon that the court would be adhered to.

45.2 The default judgment application was made contrary to clear provisions of the 8 May 2023 order. In my view the application was unlawful. The respondent and its attorneys were well aware of the order, yet they proceeded with a default judgment application which did not even mention the existence of the order of 8 May 2023. The application was signed on 20 July 2023 and filed early August 2023, with the date of set-down already indicated as 27 September 2023. It

²⁹ Vantage Goldfields SA (Pty) Ltd and Others v Aromantic (PTY) Ltd 2023 (4) SA 568 (SCA) par [18].

was launched prematurely, from the outset, without any reasonable explanation for such conduct on its papers. This was done despite the fact that the order of 08 May 2023 only allowed for an application to be made if no payment was received after the period of six months

45.3 The order of 8 May 2023 was made by agreement. The default judgment application and the order of 27 September were made contrary to an agreement between the parties. The respondent acted in breach of such agreement when making the application at variance with the order of 8 May 2023.

45.4 The court order makes no provision for any circumstances which would have justified the judgment before the expiration of the six-month period. The court order cannot be reasonably understood in any other way than that it provided the applicants with a six-month period for payment and that an application could only be made thereafter. The applicants cannot be blamed for accepting that they would have had six months to make payment or engage with the respondent to perhaps make a payment arrangement. They were also entitled to rely thereon that no steps would be taken against them within the 6 months period, or contrary to the order of 8 May 2023.

45.5 The order of 8 May 2023 was never rescinded or varied. When the order of 27 September was granted, it created an untenable situation that there existed two conflicting orders. This is not comparable to the

mere non-compliance with a technical requirement such as in **Nkosi** and **Bon aero Park**.

45.6 The order of 27 September 2023 had the effect that it denied the applicants' rights in terms of the court order of 8 May.

45.7 As appears from **Sebola**³⁰ a failure to adhere to a court order has different consequences than a failure to comply with the section 129 notice requirements.

45.8 The second order created an ambiguity or contradiction in respect of the same subject matter.

45.9 There is no proof that the first and the second applicants actually received notice of the default judgment that resulted in the order of 27 September 2023. The second applicant says it was not received.

45.10 It is evident from the circumstances that the court would not have granted the order of 27 September 2023 if it was aware of the order of 8 May 2023. The application for default judgment did not mention the order of 8 May 2023.

45.11 As indicated above it appears from the record that no returns of service were on record before the court in the application on 27 September 2023 in respect of first and second applicants.

³⁰ *Supra* n 16.

45.12 If the order of 27 September 2023 is left to stand, there will be two conflicting orders on record in the same matter.

45.13 In the present matter it cannot be said that the judgment of 27 September was granted whilst the applicants 's were in wilful default or that they were guilty of gross negligence. This is evident from the order of 8 May.2023. The second applicant said she did not receive knowledge. The second applicant's conduct rather show a willingness and desire to engage with the respondent to make arrangements for payment.

EFFECT OF A RESCISSION

[46] Mr Lotter requested that if a rescission is granted, it should only be in respect of the second applicant. In my view the order of 27 September 2023 was granted against the first applicant. However, due to the suretyships of the second and third applicants, and the accessory nature thereof, they do have an interest in the proceedings against the first applicant, and any outcome will affect their rights. In my view it is not desirable to let the order stand in respect of one applicant, and not the other.

[47] The respondent's counsel submitted that if the order is rescinded, the respondent will simply proceed again to apply for default judgment, as the six months period had now elapsed, and the result would simply be that the court would grant default judgment again, as the applicants are unable to make payment of the amount claimed. He also argued that this should be considered against the background that the applicants have not disputed that

they owe amounts to the respondent and have not defended the action. The applicant's complaint is essentially that they should have been allowed the full six months to negotiate a payment arrangement, as they were willing to pay and would have been successful to achieve an arrangement. Mr Lotter also relied on the fact that the vehicle had already been repossessed and that if the order is rescinded, the vehicle would have to be returned, if it has not already been sold.

- [48] The respondent presented me with a statement containing the payment history. The correctness thereof was not disputed. It appears therefrom that the payments were not exemplary. A conspectus of the papers filed shows that an amount of approximately R190 000.00 was actually paid shortly after the vehicle was repossessed in 2024. But it still left a substantial balance, due to interest. However, it must be borne in mind that the applicants were not afforded the full opportunity to make payment within the 6 months period. A huge amount of R190 000.00 was paid, according to the second applicant from her pension monies in 2024. This at least illustrates a willingness to make payment, and she has also averred in her papers and provided proof of attempts to engage with the respondent before and within such six-month period. She has also expressed the desire and willingness in argument to engage further with the respondent and to make payment or arrange for payment. Although the payment history may suggest that the applicants would have difficulty to make the full payment due, it is in my view not excluded that the applicants would have been able to pay a negotiated amount or that they could have been able to negotiate payments or make payments within

the six-month period. The amount of R190 000.00 which was paid, is at least an indication of a willingness to make payment.

[49] The matter must be considered against the background that the applicants were denied the opportunity to act in terms of the court order of 8 May 2023. The payment of R190 000.00 was made well after the order of 27 September 2023. However, if regard is had to the statement of account (transaction history) on which the respondent relies, the arrear balance on the first applicant's account was about R117 000.00 on 5 September 2023, and around R124 000 .00 on 20 October 2023. If it is considered that the second applicant was willing and able to pay an amount of R190 000.00 from her pension, it cannot be excluded that the applicants would have been able to pay a substantial amount within the six months period, negotiate terms of payment, or could bring the arrears up to date, if the respondent had not acted prematurely. She did not ignore the issue but actively engaged with the respondent.

[50] As to the legal consequences of the removal of the vehicle, I am of the view that this in itself cannot serve as a reason why a rescission should not be granted *in case*. As indicated, it appears that the removal took place whilst the application was pending. The present application may not have complied with applicable rules in all respects, but it could not simply have been ignored. The respondent took no steps in terms of rule 30. The respondent was responsible for the order of 27 September 2023, and it collected the vehicle whilst the present application is pending.

- [51] To allow the order of 27 September 2023 to stand, would be tantamount to allowing the respondent to escape the consequences of its own unlawful conduct in violation of a court order. In my view it is not in the interest of justice that a creditor such as the respondent be allowed to act in contravention of a court order, and then later say that its conduct must be left to stand as it has now become a *fait accompli*.
- [52] The fact that an order was granted on 27 September 2023 created uncertainty, and after such judgment, it can be assumed that the respondent would have been less willing to negotiate and come to an arrangement.³¹ If the judgement is rescinded, it will offer the applicants a further opportunity to negotiate a settlement or payment terms, and a further default judgment application may well be unnecessary.
- [53] In my view, a failure to rescind the judgment of 27 September 2023 would be undesirable, and the court guard against setting a precedent that creditors could apply to court at variance with that was agreed between the parties, and then, after judgment was granted in error, simply contending that the order should be left to stand on the basis that the debtor is not in a position to make payment. This, in my view would not be in the interest of justice.

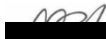
³¹ See for example Williams *supra* par 65.1 and Phuti *supra* par [41] where the possibility of negotiations after a rescission order was taken into account when exercising the court's discretion to rescind.

[54] Considering all the circumstances of this matter, and mindful of the authorities mentioned herein, I am of the view that the I should exercise my discretion to rescind the default judgment.

[55] As to the question of costs, the appearance on behalf of applicants was in person, and I am of the view that the legal representatives briefed by the second applicant are not entitled to costs. The respondent was not successful in avoiding the rescission. In the circumstances I make no order as to costs.

An order is made in the following terms:

1. The default judgment granted by Malatsi-Teffo AJ on 27 September 2023 is rescinded.




STONE AJ

ACTING JUDGE OF THE HIGH COURT

On behalf of the first/second applicants: Adv Ensheathe / In person

On behalf of the respondent: Adv Lotter

Date of hearing: 9 May 2025.

Date of Judgment: 3 October 2025