

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2024-056955

DATE: 19 November 2025

In the matter between:

BMW FINANCIAL SERVICES (SOUTH AFRICA) (PTY) LIMITED

Plaintiff

and

BHEKIFA SIMON NKOSI

Defendant

Neutral Citation: *BMW Financial Services (South Africa) v Nkosi* (2024-056955) [2025] ZAGPJHC --- (19 November 2025)

Coram: Adams J

Heard: 17 November 2025

Delivered: 19 November 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 19 November 2025.

Summary: Practice and Procedure – application for rescission of default judgment – whether defence *prima facie* established – application for rescission granted

ORDER

- (1) The defendant is granted condonation of the late filing of his application for rescission.
- (2) The defendant's application for rescission succeeds.
- (3) The judgment granted by default by this court on 9 July 2024 is rescinded and set aside.
- (4) The defendant shall deliver notice of appearance to defend within ten days from date of this order.
- (5) The costs of the application for rescission shall be in the course of the main action.

JUDGMENT

Adams J:

[1]. I shall refer to the parties as referred to in the main action in which the plaintiff sued the defendant, on the basis of an instalment sale agreement concluded between the parties during July 2014 ('the agreement'), for damages for breach of contract. The amount claimed by the plaintiff from the defendant in the said action was the sum of R342 052.42, which amount, according to the plaintiff, represented at the time of issue of the summons the balance outstanding, owing, due and payable by the defendant to the plaintiff under the agreement.

[2]. On 9 July 2024, this Court (per its registrar) granted judgment by default in favour of the plaintiff against the defendant for payment of the sum of R342 052.42, together with interest thereon and costs of suit on the scale as between attorney and client.

[3]. In this application, which came before me in the opposed motion court on 17 November 2025, the defendant applies for a rescission of the said default judgment. The plaintiff is the respondent in this rescission application.

[4]. In terms of and pursuant to the agreement between the parties, the plaintiff had sold to the defendant a 2014 BMW 320i motor vehicle ('the vehicle') for the purchase price of R694 420.28, payable in 59 monthly instalments of R8 430.58 each and a final instalment of R197 016.06 payable on 1 August 2019. During 2017 the defendant defaulted by falling into arrears with his monthly instalments, prompting the plaintiff to 'call up' the agreement, cancel the contract and to sell the vehicle for an amount of R224 580, leaving a balance outstanding under the agreement of the sum of R209 002.92. In a written letter of demand dated 10 August 2017, the plaintiff demanded payment from the defendant of this outstanding balance.

[5]. It bears emphasising that, according to the particulars of his claim, the plaintiff's claim is based on the agreement between the parties. I revert to this aspect of the matter later on in the judgment.

[6]. In his rescission application the defendant explains his default simply by stating that service of the summons on his *domicilium* never came to his attention. He also explains that he advised the plaintiff's legal representatives that he had moved from his *domicilium* address during 2017. The first time he became aware of the default judgment obtained against him was during September 2024, when enquiries were made on his behalf with a Credit Bureau, who advised him that the said judgment was issued on 9 July 2024.

[7]. The foregoing is not disputed by the plaintiff and I therefore accept, as a fact, that the defendant did not receive notice of service of the summons despite the fact that service was effected at the *domicilium* address nominated by him in the agreement. This appears to be confirmed by the contents of the sheriff's return of service which reads as follows:

'Mr Booth (occupant) refused to accept document as the defendant is unknown.'

[8]. I accept, as reasonable, the explanation proffered by the defendant for his default, as I do his explanation for the delay in filing the rescission application.

[9]. As regards his defence to the plaintiff's claim, the defendant contends that the judgment was erroneously applied for and granted because he had never received the notice prescribed in terms of section 129 of the National Credit Act 34 of 2005 ('the NCA'). The said notice, so the defendant alleges, was clearly sent to an incorrect address. He never received same and, accordingly, there has been non-compliance with the mandatory requirements prescribed by section 129 of the NCA. The plaintiff's summons was therefore premature and irregular, so the submission on behalf of the defendant is concluded.

[10]. The defendant also alleges that by the time the plaintiff instituted legal proceedings against him, the claim had already become prescribed.

[11]. The central issue in this application for rescission is whether the defendant disclosed a *bona fide* defence to the plaintiff's claim in the sense of setting out averments, which, if established at trial, would entitle him to a dismissal of the plaintiff's claim. The question is this: has the defendant established such a defence. If so, then the application should succeed and conversely, if not, then the application stands to be dismissed.

[12]. The plaintiff disputes the defendant's defence. It denies that its claim had become prescribed. It alleges in its answering affidavit that up and until 28 July 2021 the defendant made payment in instalments on account of his indebtedness to the plaintiff. So, by way of explanation, the plaintiff provides proof of payment on 28 July 2021 of an amount of R500 by the defendant to the plaintiff. This payment, so it is contended by the plaintiff, 'is a clear and unequivocal acknowledgement of indebtedness and as such, prescription would begin to run afresh from 28 July 2021'. This means, so the contention is concluded, that, with the summons having been served on 28 May 2024 –

within the three-year prescription period, the claim had not become prescribed by the time legal proceedings were instituted against the plaintiff.

[13]. There are two difficulties with the plaintiff's case in that regard.

[14]. Firstly, that is not the case pleaded in the particulars of plaintiff's claim, which is based on the instalment sale agreement, which, according to the particulars of claim, was cancelled by the plaintiff during 2017. This means that the plaintiff's cause of action arose during 2017, which means, in turn, that the plaintiff's claim would have become prescribed during 2020.

[15]. Secondly, payment of an amount on account of supposed indebtedness cannot possibly in and of itself amount to an unequivocal acknowledgement of indebtedness which translates into prescription running afresh. At the very least, this is a triable issue, which should be ventilated by evidence.

[16]. The defendant's application for rescission of the default judgment granted against him, is in terms of Uniform Rule of Court 31(2)(b) and the common law.

[17]. Rule 31 (2) provides as follows: -

- '(2) (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.
- (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.'

[18]. In terms of Rule 31(2)(b) and the common law, the court has a discretion, upon good cause shown, to set aside a default judgment. 'On good cause

shown', and the requirements for an application for rescission have been stated to be as follows:

- (a). The applicant must give a reasonable explanation for his default. If it appears that his default was wilful or that it was due to gross negligence, the court should not come to his assistance.
- (b). His application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.
- (c). He must show that he has a *bona fide* defence to plaintiff's claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He needs not deal fully with the merits of the case, and produce evidence that the probabilities are actually in his favour.

[19]. The authority for the foregoing trite legal principle is *Grant v Plumbers (Pty) Ltd*¹, which has been confirmed by numerous subsequent cases.

[20]. Generally, an applicant will establish good cause by giving a reasonable explanation for his default and by showing that he has a *bona fide* defence to the claim of the respondent which *prima facie* has some prospect of success.

[21]. As regards the defendant's explanation for his default, I have already indicated, for the reasons alluded to *supra*, that I am of the view that such an explanation is reasonable, in addition to being satisfactory. Factually, service of the summons never came to his attention. It therefore follows that he could hardly have been expected to deliver notice of appearance to defend if he did not know of the service of the summons.

[22]. The defendant also applies for condonation of the late filing of the application for rescission, which was lodged during November 2024, when he had become aware of the judgment against him during September 2024. As indicated above, I accept the defendant's explanation for the late filing of the

¹ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O).

said application. In any event, the delay was not excessive at all. I am of the view that the defendant did not delay, more than was reasonable, the launching of the application for rescission following the granting of the judgment. Furthermore, in view of my findings relating to the prospects of success of the main application for rescission, I am of the view that the condonation should be granted.

[23]. That brings me back to the most important issue before me, that being whether or not a triable issue has been raised by the defendant. I have already answered this question in the affirmative. As indicated above, at the very least and all things considered, the prescription issue the defendant has raised is a triable one. It cannot be said, with any conviction, that the defendant's version on that aspect can and should be rejected out of hand.

[24]. I am therefore of the view that the defendant has complied with all of the requirements for the granting of an order for the rescission of the default judgment. The application for rescission should therefore succeed.

Costs

[25]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*².

[26]. In applications for rescission, like the one presently before me, it would only become clear whether the application was justified once the issues are finally ventilated at trial. The answer to the question whether the defendant has a defence to the plaintiff's claim will only definitively be answered after all of the evidence have been heard and a judgment given on the merits of plaintiff's claim.

² *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[27]. In the exercise of my discretion, I therefore intend ordering the costs of this application for rescission to be in the course of the main action. Such an order, in my view, is just, fair and in the interest of justice.

Order

[28]. In the result, I make the following order:

- (1) The defendant is granted condonation of the late filing of his application for rescission.
- (2) The defendant's application for rescission succeeds.
- (3) The judgment granted by default by this court on 9 July 2024 is rescinded and set aside.
- (4) The defendant shall deliver notice of appearance to defend within ten days from date of this order.
- (5) The costs of the application for rescission shall be in the course of the main action.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	17 November 2025
JUDGMENT DATE:	19 November 2025 – Judgment handed down electronically
FOR THE PLAINTIFF:	S McTurk
INSTRUCTED BY:	DRSM Attorneys Incorporated, Illovo, Sandton
FOR THE DEFENDANT:	L Sebako
INSTRUCTED BY:	Sebako Attorneys Incorporate, Ferndale, Randburg