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

Case Number: 002384-2025

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
28 MAY 2026	_____
DATE	SIGNATURE

In the matter between:

REFILWE PAUL MOKHWESANA

Applicant

And

NEDBANK LIMITED

First Respondent

THE SHERIFF OF THE HIGH COURT

Second Respondent

JUDGMENT

MVUBU, AJ

Introduction

[1] This is an application for the rescission of an Order granted by this Court on 25 March 2025 per the Honourable Justice Makofane (**Court Order**). In terms of the said Court Order, the following Order was granted:

“1. Confirmation of Cancellation of the agreement.

2. Return of the goods

2021 NISSAN NAVARA 2.5 DDTi SE A/T D/C P/U

ENGINE NUMBER : Y[...]

CHASSIS NUMBER : A[...]

3. Retention of all monies paid to the Plaintiff by the Defendant.

4. Costs of suit"

- [2] As apparent from the Court Order, the Plaintiff (**Nedbank**) and the Defendant (**Mokhwesana**) had concluded an instalment sale agreement for the purchase of a 2021 Nissan Navara (as described in the Court Order). Mokhwesana was required to make monthly instalment payments into the account of Nedbank and which payments would be debited by Nedbank from Mokhwesana's nominated bank account.
- [3] It is common cause that the debited order mandate authorising Nedbank to access Mokhwesana's account was not and has not been cancelled. Indeed, Nedbank continued to debit Mokhwesana's account, specifically in the last 4 (four) months leading to the date of the Court Order. That is, at the time and date when the Court Order was obtained, Nedbank was receiving continuous payments from Mokhwesana. Nedbank, however, contends that payments notwithstanding, Mokhwesana was in arrears and therefore entitling Nedbank to the Court Order.
- [4] Now, then, if Nedbank was debiting Mokhwesana's account and was doing so successfully, how then was the account in arrears. Well, it is stated in the papers filed of record that Mokhwesana became a victim of fraud and this fraud resulted in a fraudulent reporting to Nedbank that Mokhwesana was in debt review. The debit order mandate was thus halted as a result of this alleged debt review process and there accumulated the arrears.

[5] Following investigations, it was unearthed that no lawful debt review process was in place and Nedbank re-submitted debit orders to Mokhwesana's bank. Those debit orders were successful.

Case for rescission

[6] Mokhwesana advances his case for rescission on Rule 42(1)(a) on the ground that the order was erroneously sought and/or erroneously granted in his absence. He invites this Court to set aside the said Court Order.

[7] Further and as evidenced by paragraphs 57 and 58 of the Founding Affidavit, Mokhwesana seeks rescission on the basis of Rule 31(2)(b). The two paragraphs read as follows:

"57. I am aware that for rescission of judgment to be granted the Applicant needs to prove the following:

57.1. showing good cause;

57.2. application for rescission of judgment must be made within a reasonable time;

57.3. a bona fide defence; and

57.4. unreasonable delay.

58. I respectfully submit that I meet all the of the above-mentioned requirements as will be shown below."

[8] The rest of the Founding Affidavit proceeds to demonstrate facts in support of the grounds set out in paragraph 57 (including subparagraphs). It is to this case that Nedbank answered and filed an Answering Affidavit in opposition.

[9] Cut to its bare, the thrust of the application is two fold:

9.1. Mokhwesana did not receive service of the process leading to Nedbank obtaining judgment against him.

9.2. He was paying on the account and ergo, there was no basis for Nedbank to obtain judgment.

[10] Nedbank contends:

10.1. Mokhwesana was personally served and having failed to demonstrate facts fully disputing the returns of service in his Founding Affidavit, no case has been made by Mokhwesana warranting vitiation of the Court Order.

10.2. In any event, Mokhwesana was in arrears and Nedbank was entitled to the Court Order.

[11] I shall consider the first issue – that of service. Where I reach the conclusion that there was no service, that would be the end of the matter and rescission would stand to be granted. On the contrary, I would be required to determine whether Nedbank was entitled to the Order on the merits.

[12] I shall call the issue relating to service as the “procedural ground for rescission” and the question whether Mokhwesana was in arrears and thereby entitling Nedbank to an Order as the “substantive ground for rescission”.

Procedural ground for rescission

[13] The contention relates to annexure N5 and N6, being the Sheriff’s returns of service. N5 and N6 read, in turn, as follows:

“On this 24th day of February 2025 at 11:50 I served the Combined Summons in this matter upon REFILWE PAUL MOKHWESANA personally at 1[...] T[...] STREET THE O[...] B[...] PRETORIA 0182 by handing to the abovementioned a copy thereof after explaining the nature and exigency of the said process. (Rule 4(1)(a)(i))”

And

“On this 24th day of February 2025 at 11:50 I served the NOTICE OF AGREEMENT TO MEDIATION in this matter upon REFILWE PAUL MOKHWESANA personally at 1[...] T[...] STREET THE O[...] B[...] PRETORIA 0182 by handing to the abovementioned a copy thereof after explaining the nature and exigency of the said process. (Rule 4(1)(a)(i))”

[14] When one has regard to the Sheriff’s returns of service and when considered with section 43(2) of the Superior Courts Act, 2013 as amended, one would be within legal whims in accepting that Mokhwesana received the process mentioned by Sheriff. Section 43(2) of the Superior Courts Act, 2013 provides that:

“The return of the sheriff or a deputy sheriff of what has been done upon any process of a court, shall be prima facie evidence of the matters therein stated.”

[15] The stated provision creates an evidentiary burden upon a party alleging that they did not receive process, to set out facts demonstrating that despite what the returns say, they in fact did not receive process. In ***Manqele and Another v SB Guarantee Company (RF) (Pty) Ltd***, it is said (albeit in regard to a return of service in a rule 46A application) that if a party wishes to impeach such evidence, the onus is discharged on an ordinary balance of probabilities.¹

[16] In this regard, the Applicant (Mokhwesana) stated in his Founding Affidavit:

“[35] I submit that I only became aware that default judgment had been granted against me on or about the 4th of April 2025 when the Second Respondent attached the said vehicle.

...

[38] I submit that I was not aware of the default judgment application granted against me on the 25th of March 2025, as I

¹ [2025] ZAGPJHC 381 paras 24-25.

was neither served the default judgment application nor the combined summons at my chosen domicilium executandi as purported by the Second Respondent on the return of service.

...

[62] It is not possible that the Return of Service was served on me as I never received the combined summons nor signed any receipts or documents to indicate that I was properly served.

...

[66] The Second Respondent mischievously made phantom service of the summons.”

[17] A wholistic reading makes it plain that Mokhwesana refuted ever receiving the combined summons and went as far as calling the service “phantom service”.

[18] To that Nedbank responded and included an explanation from the Sheriff. The Sheriff confirms (as supported by Nedbank) that the Sheriff served the combined summons personally upon Mokhwesana.

[19] To buttress this point, the Sheriff said, in his Confirmatory Affidavit as read with paragraph 4.17 of Nedbank’s Answering Affidavit:

*“I therefore confirm that personal service was effected in this matter. I therefore deny that personal service was not effected as the Applicant now attempts to convey in the Founding Affidavit. I say that the case by Applicant on that score that personal service was not effected and that he never became aware of the instituted action is simply misplaced and false. I annex hereto as **ANNEXURE “N7”** a Confirmatory Affidavit by the Second Respondent, the sheriff, being Nakide Rauwane, the sheriff who effected the personal service in this matter and he confirms that in fact the Combined Summons and the notice of mediation was properly and personally served upon the Applicant in this matter as proved with the returns of service, as the Applicant, together with his wife took receipt of the Combined Summons and the notice of mediation. Both the Applicant and the Applicant’s wife verbally confirmed to the sheriff that the Applicant is indeed Mr.*

Mokhwesana and as such he accepted personal service of the Combined and the notice of mediation.”

(my underlining. Bold in the original text)

[20] The underlined parts form the antithesis of the factual dispute and resultant challenge to the Sheriff's returns of service has was then elaborated by the Applicant in his Replying Affidavit.

[21] In that regard, the Applicant in his Replying Affidavit stated as follows, in retort:

“[8] I deny that I was personally served with the combined summons or the notice of mediation on 24 February 2025, as alleged by the First Respondent.

[9] The Sheriff's return of service and confirmatory affidavit are incorrect. At no time did I receive such document, nor did I verbally confirm my identity to the Sheriff.

[10] The First Respondent alleges that I was with my wife when I received personal service of the summons which averment cannot be truthful because my wife died in 2014.”

(my underlining)

[22] A death certificate was attached. Further, in the Instalment Sale Agreement concluded between Mokhwesana and Nedbank, Mokhwesana is recorded as a widow. I must thus resolve this apparent dispute and I do so.

[23] In ***Absa Bank Limited v Collier*** the Court held as follows:

*[37] Prima facie evidence calls for an answer and places an evidential burden on the respondent. It follows that where a respondent seeks to impeach a return of the sheriff this must be done on ‘the clearest and most satisfactory evidence’. It is not open to a respondent to impeach a return on flimsy grounds or when there exists no reasonable basis on which to do so. In *Sussman & Co (Pty) Ltd v Schwarzer* it was stated that:*

‘...If the respondent then wishes to impeach those facts then the onus shifts to him to show by clear evidence that although the return shows that the requirements of sec. 8(b) have been

*complied with they were in fact not complied with and that the return is not a proper return. Where, however, the return itself does not show that the requirements of the sub-section have been complied with, then the onus is not shifted and it rests on applicant to show that in fact the requirements have been complied with and that the return is in fact a nulla bona return.*²

[24] These being motion proceedings, it is trite law that motion proceedings are decided on the papers filed by the parties and in case where there is a dispute of fact which can only be resolved through oral evidence, it is appropriate that action proceedings should be used unless the factual dispute is not real and genuine. In our case, Nedbank says that there was personal service and Mokhwesana says he did not receive service.

[25] The 'principal ways' in which a dispute of fact may arise are set out as follows in **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd**:

25.1. When the respondent ***denies all the material allegations*** made by the various deponents on the applicant's behalf, and produces or will produce, ***positive evidence by deponents or witnesses to the contrary***. It must be emphasised that **the Third Respondent has not done this in its answering affidavit**.

25.2. When the respondent ***admits the applicant's affidavit evidence but alleges other facts which the applicant disputes***. This aspect, also, does not arise. ABSA has not admitted a single paragraph in its 27-page Answering Affidavit.

² (A 314/2014) [2015] ZAWCHC 26; 2015 (4) SA 364 (WCC) (12 March 2015) at para 37.

25.3. When the respondent concedes that she has **no knowledge** of the main facts stated by the Applicant, but denies them, putting the Applicant to the proof and herself gives or proposes to give **evidence to show that the Applicant and his or her deponents are biased and untruthful or otherwise unreliable**, and that certain facts upon which the applicant relies to prove the main facts are **untrue**. This, too, does not arise.

[26] In **Plascon-Evans Paints Ltd v Van Riebeeck Pants (Pty) Ltd** the Appellate Division concluded:

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact... if in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court ... and the Court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks... Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so farfetched or clearly untenable that the Court is justified in rejecting them merely on the papers.”³

³ 1984 (3) SA 623 (A) at 634H – 635C

[27] Further, the Supreme Court of Appeal in ***National Director of Public Prosecutions v Zuma*** added the following:

“if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”⁴

[28] In the circumstances, this matter stands to be resolved on Mokhwesana’s version and this ineluctably means that this Court finds there is clear and satisfactory evidence that Mokhwesana was not personally served. This conclusion is reached on the following grounds:

28.1. The Instalment Sale Agreement concluded between Nedbank and Mokhwesana records him as a widower.

28.2. The death certificate he enclosed to his Replying Affidavit evidencing the fact that Mokhwesana’s wife is deceased.

[29] It is not plausible that Sheriff could have served the process personally upon Mokhwesana in the presence of his wife (who died in 2014).

[30] In light of these facts Nedbank could not genuinely and seriously have believed that Mokhwesana was personally served. To harbour such belief, Nedbank would have to accept that it failed in its FICA verification and that the information they had regarding Mokhwesana was statutorily compliant. No such allegations have been made.

[31] What is more, a death certificate was provided to prove the fact of Mokhwesana being a widower. Still Nedbank persists with opposition.

⁴ 2009 (2) SA 277 (SCA) para 26

[32] To justify their opposition, Nedbank submitted that Mokhwesana failed to disclose the full basis of disputing personal service. The argument seems to suggest that Mokhwesana was aware of the contention that he was served in the presence of his late wife. That understanding only arose when Mokhwesana received the Answering Affidavit and when confronted with paragraph 4.17 thereof and the Second Respondent's Confirmatory Affidavit.

[33] The steps taken by Sheriff to effect service only came to light in the Answering Affidavit as accompanied by the Confirmatory Affidavit.

[34] I accordingly find that Mokhwesana was not served. The Court Order stands to be set aside on this ground alone. It is not necessary to deal with the substantive ground for rescission.

Costs

[35] Nedbank's agreement with Mokhwesana records Mokhwesana's marital status as a "widow". The deponent to the Answering Affidavit, one Christel Toweel is an employee of Nedbank and described as follows:

"[1.1] I am an adult female employed by the Respondent in the capacity as a Team Leader in the Respondent's Litigation and Defended/RBB Secured and Relationship Recoveries Department.."

[36] Significantly, at paragraphs 1.3 and 1.4 she goes on to state:

"[1.3] The files in this matter are under my direct supervision and control and I deal with this account on a day-to-day basis. I have once again read all the documentation in the file that is in my possession and I am fully conversant with the contents thereof and with the history of the matter, including the Applicant's non-payment to the First Respondent. I have personal insight into the history of the account which forms the subject matter of the action and of this application."

[1.4] I further perused all relevant documentation relating to the First Respondent's internal systems, as well as documentation in my possession and the hard copies of files in my possession, which documentation I annex to this affidavit and which documentation already served before the court as part and parcel of the court record in the court file."

[37] The above paragraphs are clearly not correct and amount misrepresentations, at best. She could not have read the papers or if she did read, then she deliberately sought to misrepresent to this Court in her paragraph 4.17 when she stated that the proceedings were served upon Mokhwesana *in the presence of his wife*. It is not possible to reconcile her paragraph 4.17 of the Answering Affidavit and the "documentation" she alleges to have read especially where Mokhwesana's marital status is recorded as "widow".

[38] In the result, when Nedbank obtained the explanation from Sheriff in the manner recorded in paragraph 4.17, it ought to have not opposed this application. This calls for a punitive cost order. I am inclined to granting costs on attorney and client scale.

Order

[39] In the premises, I make the following order:

1. The default judgment granted against Mokhwesana on 25 March 2025 is rescinded and set aside.
2. The Nedbank and the Second Respondent are ordered to restore to Mokhwesana possession of the goods being the 2021 NISSAN NAVARA 2.5 DDTi SE A/T D/C P/U motor vehicle with engine number **Y[...]** and Chassis Number **A[.]**

3. Nedbank is ordered to serve the Combined Summons upon Mokhwesana in terms of Rule 4 of the Uniform Rules of the High Court.
4. Nedbank is ordered to pay the costs of this application on attorney and client scale.

K. MVUBU
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on CourtOnline/CaseLines. The date for hand-down is deemed to be 28 May 2026.

Date of Hearing: 25 May 2026

Date of Judgement: 28 May 2026

For the Plaintiff: Adv. J. Eastes

Instructed by: Delberg Attorneys Inc.

For the Defendant: Adv. T. Ndaba

Instructed by: Nyapotse Inc.