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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA**

GAUTENG DIVISION, JOHANNESBURG

Case No: 2025-040031

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

In the matter between:

THINAWANGA ERNAH MUSHASHA

Applicant

and

**MERCEDES-BENZ FINANCIAL
SERVICES SOUTH AFRICA (PTY) LTD**

First Respondent

**THE SHERIFF OF THE HIGH COURT:
HALFWAY HOUSE**

Second Respondent

JUDGMENT

ROBERTSON, AJ

Introduction

[1] This is an application for rescission of a default judgment granted against the applicant on 15 July 2025.

[2] The application served before me as Part B of the proceedings. Part A had previously been struck from the roll for lack of urgency.

[3] I have considered the papers filed of record, including the founding affidavit, the first respondent's answering affidavit and the annexures thereto. No replying affidavit was filed by the applicant in relation to Part B. No heads of argument were delivered by the applicant in relation to the rescission application. The first respondent relied on the portions of its earlier heads of argument dealing with rescission.

[4] I also heard argument from counsel for both parties.

Preliminary Issue: request for removal or postponement

[5] At the outset of the hearing, counsel for the applicant submitted that the matter was not ripe for hearing because no heads of argument had been delivered by either party specifically in relation to Part B, and because the applicant wished to place further authorities before the Court.

[6] In the alternative, during argument on section 129 of the National Credit Act,¹ counsel for the applicant sought a postponement in order to deliver a replying affidavit dealing with allegations in the answering affidavit.

[7] I declined to remove or postpone the matter.

[8] The applicant had been served with the first respondent's answering affidavit and had ample opportunity thereafter to deliver a replying affidavit. The applicant did not do so. The applicant also did not deliver heads of argument on Part B, did not engage meaningfully with the proposed joint practice note, and did not itself take steps to enrol the rescission application for determination.

[9] The applicant was also not precluded from referring the Court during oral argument to any authorities upon which it wished to rely.

[10] The first respondent, which had obtained judgment and sought finality, set the

¹ Act 34 of 2005

matter down. The applicant did not, before the hearing, indicate that it would seek a postponement or that it contended that the matter was not ripe.

- [11] In those circumstances, the applicant could not rely on its own failure to advance the matter procedurally as a basis for postponement or removal. The first respondent was entitled to have the rescission application determined. The matter was ripe for hearing.

The basis for rescission

- [12] The applicant seeks rescission of the default judgment. The principal basis advanced is that the judgment was erroneously sought or erroneously granted within the meaning of rule 42(1)(a), because there had allegedly not been proper compliance with section 129 of the National Credit Act before summons was issued.
- [13] The applicant also contends that the agreement was not validly cancelled, alternatively, that the first respondent's acceptance of payments after cancellation and after judgment is inconsistent with cancellation and indicates that the agreement was revived or remained operative.
- [14] To the extent that the application is also to be understood as one for rescission at common law, the applicant must show a reasonable explanation for the default, that the application is bona fide, and that it has a bona fide defence which carries prospects of success.

Section 129

- [15] The applicant's case in the founding affidavit is that the section 129 notice was not properly delivered. The applicant accepts that the *domicilium* address under the agreement was 1[...] G[...] Street, K[...] Estates 1684.
- [16] The first respondent's answering affidavit deals directly with section 129. Its evidence is that the section 129 notice was sent by registered post to the applicant's chosen *domicilium* address. The notice was dispatched on 27 January 2025. The documentary material attached to the answering affidavit reflects dispatch by registered post, receipt at the relevant post office, and a

notification to the recipient. The Post Office track-and-trace record reflects that the registered item was received at the Sunninghill post office and that a first notification to the recipient was generated on 17 February 2025.

- [17] The first respondent also relies on electronic delivery. On the papers, that appears to have been additional to, and not in substitution for, the registered-post delivery to the chosen *domicilium* address. The e-registered mail certificate annexed to the answering affidavit reflects delivery to the applicant's nominated email address on 3 February 2025.
- [18] The applicant did not file a replying affidavit dealing with those allegations or with the documents relied upon by the first respondent. That is material.
- [19] The first respondent's evidence is therefore not answered on affidavit. This Court must determine the matter on the affidavits as they stand. The applicant cannot, through submissions from the bar, create a factual dispute which it elected not to raise in reply. In motion proceedings, the Court cannot reject the first respondent's factual allegations in circumstances where they stand unanswered on affidavit.²
- [20] On the papers before me, I am satisfied that the first respondent has shown compliance with section 129. The applicant has not established that the judgment was erroneously sought or erroneously granted on that basis.
- [21] In this regard, the evidence relied upon by the first respondent is consistent with the requirements discussed in *Sebola and Another v Standard Bank of South Africa Ltd and Another*³ and as refined in *Kubyana v Standard Bank of South Africa Ltd*.⁴ Where the credit provider elects to deliver the notice by registered post to the consumer's chosen *domicilium* address, what must be established is despatch to that address, receipt of the registered item at the post office serving the address, and the generation by the Post Office of a notification to the consumer. The credit provider is not required to prove that the notice actually came to the consumer's personal attention. That is what

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C

³ 2012 (5) SA 142 (CC)

⁴ 2014 (3) SA 56 (CC)

the first respondent has shown on the papers before me.

Service and cancellation

[22] It is common cause, or at least not disputed on the papers, that the summons was served by the sheriff at the applicant's chosen domicilium address by affixing the process to the principal or outer door at that address on 9 April 2025.⁵

[23] The particulars of claim pleaded cancellation, alternatively, cancellation by service of summons.

[24] In those circumstances, even if there were any anterior dispute concerning cancellation, the agreement was cancelled, at the latest, when summons was served at the chosen *domicilium* address.

[25] In addition, on the first respondent's version, which is not disputed on affidavit, the agreement had, in any event and by the time of the hearing, run its course by effluxion of time on 7 September 2025.⁶ The applicant therefore no longer had any contractual entitlement to retain possession of the vehicle under the agreement.

[26] It is also not disputed on the papers that the applicant was in arrears at the relevant time.

Payments after cancellation

[27] The applicant also relies on the fact that the first respondent continued to accept payments after cancellation and after judgment. That does not establish that the default judgment was erroneously granted. Nor does it establish, on these papers, that the agreement was revived or reinstated.

[28] The first respondent's evidence is that it was entitled to accept payments after cancellation, and that any such payments would be taken into account in reduction of the outstanding indebtedness or any shortfall after recovery and sale of the vehicle.

⁵ CaseLines 001-24

⁶ CaseLines 001-10

- [29] The first respondent also relied on clause 17.8 of the standard terms and conditions of the agreement annexed to the particulars of claim. That clause expressly regulates the position where the agreement has been terminated but the applicant remains in possession of the vehicle and disputes the termination. In those circumstances, the agreement provides that the applicant must continue making payments and that the first respondent does not lose any of its rights under the terminated agreement merely because it accepts such payments.⁷
- [30] The applicant filed no replying affidavit dealing with those allegations or disputing the first respondent's reliance on the contractual provision.
- [31] In any event, as a matter of principle, the acceptance of payments after cancellation does not, without more, revive a cancelled agreement. Nor can the Court make a new agreement for the parties by restructuring the payment obligations in circumstances where the original agreement has been cancelled.
- [32] In addition, section 129(4) of the National Credit Act limits reinstatement after enforcement has reached the stage contemplated in that subsection. The applicant's submissions concerning continued payments do not overcome that statutory position.
- [33] The applicant's argument based on continued debiting therefore does not establish a bona fide defence to the claim, nor does it establish that the judgment was erroneously granted.

Rule 42 and common law rescission

- [34] Rule 42(1)(a) is concerned with a judgment erroneously sought or erroneously granted in the absence of a party affected by it.
- [35] On the papers before the Court when default judgment was granted, there was proof of service at the chosen *domicilium* address, evidence of arrears, and material showing compliance with section 129. The applicant has

⁷ CaseLines 001-14

therefore not demonstrated that the order was erroneously sought or erroneously granted in the procedural sense contemplated by rule 42(1)(a).

[36] The applicant has not shown that the Court which granted default judgment was unaware of a fact which would have precluded the grant of judgment.

[37] The applicant has therefore not established a basis for rescission under rule 42(1)(a).

[38] To the extent that rescission is sought at common law, the applicant has also not established a bona fide defence carrying prospects of success. The section 129 complaint is not made out. The cancellation complaint is not made out. The continued-payment complaint does not provide a defence to the first respondent's entitlement to judgment.

[39] The application must therefore fail.

Costs

[40] Clause 26 of the agreement provides for costs on the attorney and client scale in proceedings arising from the agreement. Although clause 26.1.3 references taxation by the Magistrate's Court, clause 25.2 expressly preserves the first respondent's right to institute proceedings in the High Court, and the costs clause is to be read consistently with that election.

[41] There is no reason not to give effect to that contractual provision. The applicant persisted with a rescission application which was procedurally deficient and substantively weak.

[42] The appropriate order is therefore attorney and client costs.

Order

[43] The following order is made:

1. the application is dismissed;
2. the applicant is directed to pay the costs of the application on the scale as between attorney and client.

CL ROBERTSON
Acting Judge of the High Court
Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by upload to CaseLines. The date for hand-down is deemed to be 2 June 2026.

Date of hearing: 12 May 2026

Date of judgment: 2 June 2026

APPEARANCES:

For the Applicant: Adv Granova

Instructed by: Verster Roos Attorneys

For the First Respondent: Adv CJ Welgemoed

Instructed by: Strauss Daly Incorporated