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**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: 10771/2020

In the matter between:

RYAN WILLIAMS

Applicant/Defendant

ID: 8[...]

And

SHACKLETON CREDIT MANAGEMENT

Respondent/Plaintiff

(PTY) LTD (Reg No 200[...])

Coram: Bishop, AJ

Dates of Hearing: 8 November 2023

Date of Judgment: 10 November 2023

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## JUDGMENT

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### BISHOP, AJ

[1] This is an application under rule 42(1)(a) and the common law for the rescission of a default judgment. It raises an interesting question: If a credit provider fails to deliver a notice in terms of s 129(1) of the National Credit Act 34 of 2005 (**NCA**), but default judgment is nonetheless granted, is that judgment erroneously sought and granted for the purposes of rule 42(1)(a)? If so, must a court order rescission, or does it have a discretion to refuse rescission? I hold that, while the practical value of rescission in these circumstances may often be minimal, where the s 129 notice was not delivered, and did not come to the consumer's attention before judgment, a court has no choice but to rescind.

### **The Facts**

[2] In October 2016, the Applicant entered into a loan agreement for R85 000 with Direct Axis. The Applicant chose as the address where he would receive "legal notices" under that agreement, the place he was then resident in Philadelphia in the Western Cape. It is common cause this was a credit agreement as defined in the NCA.

[3] From March 2017, the Applicant began defaulting on his loan. His last payment was on 3 September 2017.

[4] Sometime in 2018, the Applicant moved to the Eastern Cape. He did not alter his chosen address under the agreement.

[5] In 2019, Direct Axis ceded its rights under that agreement to the Respondent, which is based in Pietermaritzburg.

[6] On 15 July 2020, the Respondent sent a notice under s 129(1)(a) of the NCA to the applicant to inform him he was in default and afford him an opportunity to remedy the default. The notice was sent by registered post to the address he chose in the agreement. However, it does not seem to have ever left KwaZulu-Natal, where the Respondent is based. The last evidence of its whereabouts was that it was “in transit” at Durmail post office on 24 July 2020.

[7] On 11 August 2020, the Respondent issued summons against the Applicant for repayment of the debt, which was then R103 421.01 plus interest. The Sheriff served the summons at the Applicant’s chosen address on 25 August 2020. The return was provided to a Mrs West who informed the Sheriff that the Applicant “only rented at given address, but left long time ago”. The Applicant avers that he was not aware the summons was issued against him.

[8] Having received no opposition, on 26 January 2021, the Respondent applied for default judgment. It is not clear how that was served, but it was common cause it did not come to the Applicant’s attention. The Registrar granted default judgment on 15 February 2021.

[9] The Applicant remained blissfully unaware of what had occurred. He had, by this point, taken up residence in Gqeberha. He first learnt of the action and the default judgment on 12 April 2022 when his bank manager contacted him about an attachment order on his bank account. There was then a flurry of activity as he instructed his then attorney to find out what had happened. He ultimately obtained the court file on 25 April 2022.

[10] There followed a string of correspondence between the Applicant's and the Respondent's attorneys. Only one of those letters is before me. It was written by the Applicant's attorney on 15 June 2022. It disputes the amount owing, and whether there had been proper service. It does not deny that a debt is owed. It proposes settlement of R50 000, paid in instalments. It seems that offer was not accepted.

[11] From June 2022, the Applicant went dormant until 23 November 2022 when he instructed his current attorneys. There was some unexplained difficulty with his previous attorney. They then took until 10 January 2023 to launch this application for rescission of the default judgment.

[12] The application is brought in terms of rule 42(1)(a), alternatively the common law. It is not brought in terms of rule 31(2)(b). The Applicant argues that his late launching of the application should be overlooked because it was the result of his erstwhile attorney's negligence, not a reflection that he did not intend to bring a rescission application.

[13] He contends that the judgment was erroneously granted because he was no longer resident at the Philadelphia address, and this was made clear to the Sheriff when he served the summons. The result, he contends, is that there was no proper service, prescription was not interrupted, and he therefore has a bona fide prescription defence to the Respondent's claim.

[14] The Applicant also contends that the s 129 notice was not delivered to him in compliance with the requirements of the NCA. This, he argues, was a defence to the Respondent's action, which could not have proceeded until there was proper delivery of the s 129 notice. It also meant that the order was erroneously granted as envisaged in rule 42(1)(a).

[15] The Applicant raises two further defences he contends justify rescission:

[15.1] He claims that the Court lacks jurisdiction because he is no longer resident in the Western Cape; and

[15.2] He disputes the authority of Direct Axis to have ceded its rights under the credit agreement to the Respondent.

[16] For its part, the Respondent is willing to overlook the delay and does not oppose condonation. However, it claims that the delay supports a conclusion that the Applicant's defences are not raised bona fide, but with an intention to delay the inevitable. On the Applicant's four defences, the Respondent answers as follows:

[16.1] Service was at the Applicant's chosen *domicilium* and so his presence there was not required to interrupt prescription;

[16.2] The s 129 notice was not properly delivered, but it has since come to his notice and its improper delivery is not a reason to grant rescission under rule 42(1)(a);

[16.3] The Court has jurisdiction because the credit agreement was concluded in the Western Cape; and

[16.4] The complaint about authority to cede was not properly raised, and no evidence exists to support it.

[17] I first set out the relevant principles of rescission. I then dispatch the various arguments which, in my view, are without merit – prescription, jurisdiction and cession. Lastly, I address the failure to deliver the s 129 notice.

## **Principles of Rescission**

[18] There are three bases for rescission of a default judgment – rule 31(2)(b), rule 42(1)(a), and the common law. This matters because, on my understanding of the law, the substantive requirements for rescission are different under rule 42(1)(a) compared to rule 31(2)(b) and the common law.

[19] Under rule 31(2)(b) and the common law<sup>1</sup> a court has a general discretion to rescind. It will consider: (a) whether the applicant for rescission was in wilful default; (b) whether the rescission is brought in good faith; and (c) whether the defendant has a bona fide defence to the claim.<sup>2</sup> These are not formal requirements – the court retains a wide discretion.<sup>3</sup>

[20] But rule 42(1)(a) is different. To succeed in a rescission under this rule, an applicant must show that the judgment was “erroneously sought or erroneously granted in the absence of any party affected thereby”. An order will be 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.”<sup>4</sup> I deal below with the specific case law on whether the failure to deliver a s 129 notice means an order is erroneously granted.

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<sup>1</sup> *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9E–F.

<sup>2</sup> See, for example, *EH Hassim Hardware (Pty) Ltd v Fab Tanks CC* [2017] ZASCA 145 at para 12.

<sup>3</sup> *Wahl v Prinswill Beleggings (Edms) Bpk* 1984 (1) SA 457 (T).

<sup>4</sup> *Rossitter & Others v Nedbank Ltd* [2015] ZASCA 196 at para 15.

[21] Importantly, once an applicant establishes the judgment was erroneously granted, it is not necessary to show a bona fide defence. As the Court held in *Kgomo*: “the applicant for rescission [in terms of rule 42(1)(a)] is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).”<sup>5</sup> That is also the holding of the Constitutional Court in *Ferris*: “good cause (including a bona fide defence) is not required for rescission under rule 42(1)(a).”<sup>6</sup>

[22] Surprisingly, on my reading of the authorities, it remains unclear whether a court that concludes an earlier order was erroneously sought and granted has a discretion to refuse rescission. In *Tshivhase*, Nestadt JA held that “the Court has a discretion whether or not to grant an application for rescission under Rule 42(1).”<sup>7</sup> But later cases suggest that, if an order was erroneously granted, a court must rescind. Mbha JA, in *Rossiter*, wrote: “If the default judgment was erroneously sought or granted, a court

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<sup>5</sup> *Kgomo and Another v Standard Bank of South Africa and Others* 2016 (2) SA 184 (GP) at para 11.7.

<sup>6</sup> *Ferris and Another v FirstRand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC); 2014 (3) BCLR 321 (CC) at fn 19. It is also the position of the Supreme Court of Appeal. *Rossiter* (n 4 above) at para 16: “It is not necessary for a party to show good cause under the subrule.”

<sup>7</sup> *Tshivhase Royal Council and Another v Tshivhase And Another; Tshivhase and Another V Tshivhase and Another* 1992 (4) SA 852 (A) at 862J-863A. See also *Colyn* (n 1 above) at para 5 (“The Rule gives the Courts a discretion to order [rescission], which must be exercised judicially”).

should, without more, grant the order for rescission.”<sup>8</sup> *Herbstein & Van Winsen* notes the same tension in the authorities.<sup>9</sup>

[23] My view is that a court does not have a discretion. If an order was erroneously granted in the narrow meaning of rule 42(1)(a), it must be rescinded. The only exception, it seems to me, is that a court may not consider a rescission application that was brought an inordinate time after the applicant became aware of the judgment. But, as the legal position seems uncertain, I justify the order on both possibilities.

### **Prescription**

[24] The Applicant’s ingenious argument is this: The service on his domicilium did not come to his notice. Mrs West told the Sheriff he no longer resided there, who recorded that in the return of service. Therefore, there was not proper service. Therefore, it did not interrupt prescription. Therefore his claim has prescribed.

[25] The flaw lies in the second proposition that there was not proper service. Service at a chosen domicilium “is good service, whether or not the addressee is present at the time.”<sup>10</sup>

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<sup>8</sup> *Rossitter* (n 4 above) at para 16. The Constitutional Court’s judgment in *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) at paras 68-71 also seems to treat rescission under the common law as discretionary, but not rescission under rule 42(1)(a).

<sup>9</sup> A Cilliers, C Loots & HC Nel *Herbstein & Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* Vol 1 (5 ed, 2009) at 933 and the authorities cited in fns 137-9.

<sup>10</sup> *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) at 6A-D.

[26] That is the end of the prescription defence. If there was proper service on 25 August 2020, prescription was interrupted. It is still interrupted.

[27] Service interrupts prescription even if, as here, the s 129 notice was not properly delivered to the Applicant. The remedy for failing to properly deliver a s 129 notice lies in s 130(4) of the NCA – to which I return below. It does not undo service of the summons, nor displace the interruption of prescription.

### **Agency**

[28] In reply, the Applicant attempted to take the point that there had been no valid cession from Wesbank to the Respondent because there was no proof that, when it ceded the credit agreement, Direct Axis was indeed acting on behalf of Wesbank.

[29] The point is bad for two reasons. First, it was only taken in reply, affording the Respondent no opportunity to address it to demonstrate that Direct Axis was in fact authorised by Wesbank to cede the credit agreement. Second, the allegation that Direct Axis acted on behalf of Wesbank is clearly made in the summons. There was no obligation to prove that averment in the summons. That would have been a matter for trial, not for pleading. Absent some evidence from the Applicant that Direct Axis in fact lacked that authority – and there is none – the failure to prove it discloses no defence.

### **Jurisdiction**

[30] The third supposed defence is that this Court lacked jurisdiction to determine the action or to grant default judgment because the Applicant was not resident in the Western Cape when the summons was issued. He had decamped to Gqeberha.

[31] But, as the Respondent points out, that is not the only basis on which this Court can assert jurisdiction. It also has jurisdiction over causes of action that arise within its area of jurisdiction. Here, the application for credit, the consideration by Direct Axis, the offer of credit, and the acceptance of credit all occurred in the Western Cape. The contract which the Respondent sought to enforce was concluded in the Western Cape. That affords this Court jurisdiction, even if the Applicant is now resident elsewhere.

[32] The Applicant objected that these facts establishing that the contract was concluded in the Western Cape were not pleaded in the summons. That is so. The summons assumes jurisdiction on the basis that the Respondent believed the Applicant was resident at his chosen *domicilium*. But it does not matter. Jurisdiction is a question of fact. The Applicant did not dispute the facts giving rise to jurisdiction on the basis that the cause of action arose here. The failure to plead those facts would not deprive this Court of its jurisdiction.

### **Delivery of the s 129 Notice**

[33] Section 129(1)(a) of the NCA permits a credit provider to draw a consumer's default to their attention in writing and "propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date". Under s 129(1)(b)(i), a credit provider "may not commence any legal proceedings to enforce the agreement before - (i) first providing notice to the consumer, as contemplated in paragraph (a)".

[34] Section 130(4)(b) regulates what happens if a credit provider commences legal proceedings without complying with s 129. In those circumstances, “the court must- (i) adjourn the matter before it; and (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed”. This is important. In the absence of a s 129 notice, the court cannot grant judgment. Its only option is to adjourn, and order the credit provider to take the relevant steps.

[35] The Constitutional Court has held that the purpose of s 129 is threefold:

*(a) It brings to the attention of the consumer the default status of her credit agreement.*

*(b) It provides the consumer with an opportunity to rectify the default status of the credit agreement in order to avoid legal action being instituted on the credit agreement or to regain possession of the asset subject to the credit agreement.*

*(c) It is the only gateway for a credit provider to be able to institute legal action against a consumer who is in default under a credit agreement.<sup>11</sup>*

[36] The whole point is to avoid litigation, and resolve the consumer’s debt through an alternative mechanism. If the consumer does not receive the notice, he cannot use those mechanisms, and it cannot perform that purpose.

[37] Here, the Respondent sent a compliant s 129(1) notice by registered post to the Applicant. Did that suffice to “provide notice to the consumer” entitling it to commence litigation? No.

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<sup>11</sup> *Amardien and Others v Registrar of Deeds and Others* [2018] ZACC 47; 2019 (2) BCLR 193 (CC); 2019 (3) SA 341 (CC) at para 56.

[38] The law does not require that the notice in fact come to the consumer's knowledge. But it also does not permit the credit provider to merely dispatch the notice. What was required of credit providers was originally determined by the Constitutional Court in *Sebola*<sup>12</sup> and *Kubyana*.<sup>13</sup> *Kubyana* made it clear that a credit provider must at least establish that the s 129 notice was delivered by registered post to the post office that would send a delivery notice to the consumer.<sup>14</sup> The Legislature subsequently amended the NCA to bring it in line with *Sebola* (the amendments were not updated to address *Kubyana*, but the two largely align).<sup>15</sup> The requirements are set in NCA ss 129(5) – (7), which read:

- (5) *The notice contemplated in subsection (1) (a) must be delivered to the consumer-*
  - (a) *by registered mail; or*
  - (b) *to an adult person at the location designated by the consumer.*
- (6) *The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).*
- (7) *Proof of delivery contemplated in subsection (5) is satisfied by-*
  - (a) *written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or*

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<sup>12</sup> *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC).

<sup>13</sup> *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC).

<sup>14</sup> *Ibid* at para 54.

<sup>15</sup> National Credit Act Amendment Act 19 of 2014. For a discussion of the development of the requirements for delivery, see S Govender & M Kelly-Louw 'Delivery of the Compulsory Section 129(1) Notice as required by the National Credit Act of 2005' [2018] 21 *Potchefstroom Electronic Law Journal* 21.

(b) *the signature or identifying mark of the recipient contemplated in subsection (5) (b).*

[39] The notice in this matter was sent by registered mail on 17 July 2020, to the address chosen by the Applicant. But the Respondent has not complied with s 129(7)(a) or with the first requirement of *Kubyana*. The track and trace receipt attached to the summons was generated at 08:51 on 24 July 2020. It indicates that the last location of the registered letter, on 24 July 2020, was Durmail Post Office. The letter was still “in transit”.

[40] Durmail Post Office is in Durban. In accordance with the Applicant’s chosen address, the s 129 notice had to be sent to Philadelphina, which is north of Cape Town. While it was not clear which post office ought to have received the notice, it certainly was not Durmail. What happened to the registered letter after 24 July 2020, we do not know. The Respondent has not provided an updated track and trace report to demonstrate that, thereafter, the letter made its way to the “relevant post office”.

[41] Mr Du Preez, who appeared for the Respondent, accepted that his client had not delivered a s 129(1) notice as required by the NCA. But he argued that this did not disclose a substantial defence warranting rescission. All it would allow the Applicant would be the right to an adjournment under s 130(4), and the opportunity to take advantage of the options s 129(1) envisages. That would serve no purpose, he contended where the Applicant had been in possession of the s 129 notice since April 2022 (when he obtained a copy of the court file), and had unsuccessfully attempted to negotiate a settlement. He urged that s 129 does not disclose a substantive defence, and that I should exercise my discretion against rescinding the default judgment.

[42] Mr Laubscher pointed out that, in his founding affidavit, the Applicant claimed that, had he received the s 129 notice, he “definitely would have referred to mediation as I do not believe that I owe monies to the Respondent”. He argued that the Applicant was entitled to that procedural remedy.

[43] There is a significant amount of case law on the question of whether the failure to deliver a s 129 notice constitutes grounds for rescission. It starts with *Sebola*.

[44] *Sebola* was an appeal against the refusal of rescission of default judgment for non-payment of a mortgage. The Sebolas admitted that they had fallen behind on their mortgage payments. They sought rescission because they had not received the s 129 notice. Standard Bank had sent the notice, but it was inadvertently delivered to the wrong post office.

[45] The Constitutional Court held that Standard Bank had not complied with s 129, and therefore upheld the appeal against the refusal of rescission. Cameron J explained that the NCA obliged Standard Bank “to show that the notice actually reached the correct post office. That did not happen. The Sebolas were therefore entitled to rescission of the judgment granted against them. The proceedings against them should have been adjourned to allow the Bank to rectify the omission in regard to the notice.”<sup>16</sup> The Court granted rescission.

[46] This line of reasoning aligns with the holding of the Supreme Court of Appeal in *Blue Chip 2* that the delivery of a s 129 notice is not merely a procedural step, but an element of the cause of action:

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<sup>16</sup> *Sebola* (n 12 above) at para 81.

*In order to disclose a cause of action to enforce a claim emanating from a default of a credit agreement, an averment of compliance with s 129 must be contained in the summons and proved. Delivery of a s 129 notice forms part of the cause of action.<sup>17</sup> It is an essential component of a plaintiff's cause of action. It must occur before a cause of action can be said to have arisen. Absent compliance therewith, there would be no cause of action.<sup>18</sup>*

[47] It also aligns with s 130(4) – if the credit provider did not comply with s 129, the court “must” adjourn. It cannot grant judgment.

[48] The Constitutional Court in *Sebola* did not expressly consider whether, having concluded that the s 129 notice was defective, rescission must inevitably be granted. Cameron J appeared to assume that was the natural and inevitable consequence of finding there had not been delivery of the s 129 notice. But the High Court has. I begin with the position in Gauteng, and then consider the position in this Division.

[49] *Kgomo and Another v Standard Bank of South Africa and Others*<sup>19</sup> – like *Sebola* and this case – concerned a rescission application based on a defective s 129 notice. Dodson AJ considered the judgments in *Sebola*, *Kubyana* and a potentially divergent dictum in *Ferris*.<sup>20</sup> He held that, if the failure to deliver a s 129(1) notice was merely a

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<sup>17</sup> *Rossouw & another v First Rand Bank Ltd* [2010] ZASCA 130; 2010 (6) SA 439 (SCA) para 38 (original footnote).

<sup>18</sup> *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others* [2016] ZASCA 98; 2016 (6) SA 102 (SCA) at para 20.

<sup>19</sup> *Kgomo* (n 5 above).

<sup>20</sup> *Ferris* (n 6 above) at fn 19. The relevant dictum reads: “However, even if further notice were required, its absence is a purely dilatory defence — a defence that suspends proceedings rather than precludes a cause of action — and is not an irregularity that establishes that a judgment has been erroneously granted, justifying rescission under rule 42(1)(a).” (footnote omitted). Dodson J distinguished *Ferris* on the basis that it concerned a notice under s 86(10), not s 129(1). He pointed out that the statement was,

dilatory defence, it would not entitle a consumer to rescission. But the non-delivery was not merely dilatory, it was a required procedure. As he put it:

*The bank, as plaintiff, pleaded delivery of the notice to the applicants as defendants in its particulars of claim. Yet it is clear that its pleading was erroneous and that there was no such delivery. In terms of s 129(1)(b), the first respondent was precluded from commencing any legal proceedings without delivering a s 129(1) notice beforehand. In terms of s 130(1)(a), 10 business days had to have elapsed after any notice, before legal proceedings were commenced. That too was not complied with. The judgment was therefore erroneously sought.*<sup>21</sup>

[50] Mabuse J reached the same conclusion in an application for rescission in *More v BMW Financial Services*.<sup>22</sup> Although not in the context of rescission, this aligns with the approach taken in *African Bank Ltd v Myambo NO and Others*,<sup>23</sup> *Firststrand Bank Ltd t/a First National Bank v Moonsammy t/a Synka Liquors*<sup>24</sup> and in the Eastern Cape in *Wesbank v Ralushe*.<sup>25</sup> The bottom line of these judgments is that compliance with s 129 is compulsory. No judgment can stand when it is granted without a s 129 notice that was delivered in conformity with the requirements of ss 129(5)-(7), read with *Sebola* and *Kubyana*.

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in any event, *obiter dictum* and seemed to conflict with the finding in *Sebola*. *Kgomo* (n 5 above) at paras 42-52.

<sup>21</sup> *Kgomo* (n 5 above) at para 55.

<sup>22</sup> [2018] ZAGPPHC 583.

<sup>23</sup> 2010 (6) SA 298 (GNP).

<sup>24</sup> 2021 (1) SA 225 (GJ).

<sup>25</sup> 2022 (2) SA 626 (ECG).

[51] A Full Bench seemed to reach a different conclusion in *Benson and Another v Standard Bank of South Africa (Pty) Ltd And Others*.<sup>26</sup> Unterhalter J held that consumers were not entitled to rescission of judgment when they had not received the s 129 notice prior to the service of summons, provided they received it sufficiently long before the hearing in court that they could exercise their statutory rights.

[52] To my mind, *Benson* addresses a different issue. It concerns a situation where the s 129 notice is delivered to a consumer *before* judgment. *Sebola* and *Kgomo* – like this case – arose when the consumer saw first the s 129 notice *after* judgment. It is one thing to make use of s 129 opportunities after summons but before a court grants judgment. But those opportunities have little value after judgment has been granted in favour of the credit provider.

[53] What is the position in this Division? There seem to be two conflicting judgments. First, Mr Du Preez, who appeared for the Respondent, referred me in a note filed after the hearing to *Petersen*.<sup>27</sup> There, Binns-Ward J refused to grant rescission in terms of rule 31(2)(b). The credit provider had delivered a s 129 notice to the relevant post office, but the evidence suggested it had not been collected.<sup>28</sup> As in this case, it seems the consumer learnt of the s 129 notice only when he learnt of the default judgment.

[54] Binns-Ward J held that merely because the default judgment “might not have been lawfully granted does not, by itself and without more, afford good cause for it to

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<sup>26</sup> 2019 (5) SA 152 (GJ).

<sup>27</sup> *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC).

<sup>28</sup> The case was decided before *Kubanya* which established that delivery to the post office was sufficient.

be set aside.”<sup>29</sup> He ultimately concluded that, because it did not “appear probable that the defendant would have been in a position to avail himself effectively of the options in terms of s 129 of the NCA, even had notice been received by him”, any infringements of his rights “has not been established to have been material.”<sup>30</sup>

[55] *Petersen* must be contrasted with Ndita J’s judgment in *Buys*.<sup>31</sup> There the consumer sought rescission in terms of rule 42(1)(a). The s 129 notice had been sent by registered post, but there was no track and trace report at all, so it was impossible to know whether it had made its way to the relevant post office. Ndita J concluded that “failure to produce the requisite track and trace report indicating that the s 129 notice was dispatched to the relevant post office leads to the inescapable conclusion that the judgment was erroneously sought and erroneously granted.”<sup>32</sup> She granted rescission, without considering whether she had a discretion to refuse.

[56] Ndita J distinguished *Petersen* on two bases. First, Binns-Ward J had refused rescission because there was no good cause for the relief. Second, the s 129 notice had at least been delivered to the post office. She explained that she did not understand *Petersen* “to suggest that there must be good cause shown where the

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<sup>29</sup> *Petersen* (n 27 above) at para 23. The Court relied on *Gundwana v Steko Development and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) at para 58. The Constitutional Court had declared the rules permitting registrars to allow execution of residential immovable property unconstitutional with retrospective effect. Only a court, it held, could declare residential property executable (hence our current rule 46A). It explained this would not cause undue disruption in cases where execution had been granted because a debtor would have to bring a rescission application, explain her delay, and put up a defence. The implication was that the mere fact the default judgment had been granted by the registrar, and not a court, would be insufficient.

<sup>30</sup> *Petersen* (n 27 above) at para 29.

<sup>31</sup> *Buys v Changing Tides 17 (Pty) Ltd NO and Others* [2013] ZAWCHC 150.

<sup>32</sup> *Ibid* at para 15.

credit provider failed to comply with a statutory obligation.”<sup>33</sup> An additional ground is that *Petersen* was brought under rule 31(2)(b), while *Buys* was decided under rule 42(1)(a). As I explained above, the requirements and the extent of discretion differ markedly.<sup>34</sup>

[57] While there are differences in the particular facts in all these cases, in truth there is a debate of judicial philosophy. There is a formal approach and a pragmatic approach. The formal approach – followed in *Kgomo* and *Buys* – is that the failure to establish proper delivery of the s 129 notice taints the process and means judgment was erroneously granted, end of enquiry. The pragmatic approach – epitomised by *Petersen* but also present in *Benson* – is that there is no point rescinding a judgment solely for improper delivery of a s 129 notice when the consumer has, in fact, received it.

[58] This schism seems to align with the difference of opinion about whether a court has a discretion under rule 42(1)(a) to refuse rescission once it concludes a judgment was erroneously granted. The pragmatists say Yes, the formalists say No.

[59] I have great sympathy with the pragmatic approach. Rescission for the sake of rescission serves nobody. The creditor is put to additional time and expense to recover its debt when there is no good defence. The consumer may buy a few more months grace, but if he cannot pay up, settle or raise a good defence, he will only end up paying more in interest and costs in the long run. In this case, I am of the view that

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<sup>33</sup> Ibid at para 13.

<sup>34</sup> Binns-Ward J appeared to hold that it did not matter which rule was relied on. *Petersen* (n 27 above) at fn 1. For the reasons given above, I disagree. But if I do have a discretion, I would exercise it to grant rescission for the reasons that follow.

little is likely to be served by rescission. The Applicant has not yet identified any substantive defence. He has already had an opportunity to settle (albeit after judgment), and that has failed. It seems likely that rescission will merely delay the inevitable, at great cost to the parties' pockets and the court's time.

[60] And yet I find myself constrained to grant it. My understanding of rule 42(1)(a) is 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. Rescission must follow. The absence of a defence is irrelevant, and I have no discretion to refuse rescission.

[61] In this case, it was apparent from the summons itself, and the application for default judgment, that the s 129 notice had not been delivered to the relevant post office as s 129(7) and *Kubyana* require. Section 130(4) prohibited the registrar from granting the default judgment. The default judgment was, therefore, erroneously sought and erroneously granted.

[62] The position will be different where the papers show delivery to the relevant post office, but it emerges after judgment that the consumer did not receive the notice. There, delivery was properly made, and judgment was properly granted. Rescission cannot be sought under rule 42(1)(a). It will only be justified under rule 31(2)(b) or the common law if the consumer has a bona fide defence to the underlying claim, or the court otherwise exercises its discretion to allow rescission so the consumer can take advantage of the options provided for in s 129.

[63] The position may also be different when the facts show that the s 129 notice was subsequently provided to the consumer as an attachment to the summons or the application for default judgment, which the consumer in fact received, and that

occurred at least twenty days prior to judgment. In those cases, there *may* be room – I set it no higher than that – for the more pragmatic approach because the consumer in fact learnt of the s 129 notice *before* judgment, even if it was not delivered as required by law.

[64] But where, as here, the credit provider did not establish delivery to the relevant post office, and the consumer only learnt of the s 129 notice after default judgment, rescission sought in terms of rule 42(1)(a) must follow.

[65] If I am wrong, and courts do have a discretion to refuse rescission, even though judgment was erroneously granted, I would rescind in this case. There are two reasons.

[65.1] The opportunity to negotiate a settlement after judgment is not equivalent to negotiating before judgment. The credit provider, understandably, would be hesitant to compromise on what is owed to it when it has a court order in its favour. But it may be that, when there is no judgment, the parties will be able to reach a settlement.

[65.2] The Applicant did indicate, in his founding affidavit, that he would have taken advantage of the opportunity presented by the s 129 notice to refer the dispute to mediation. That option was practically closed once judgment was granted. It may have failed, but the NCA entitled him to a reasonable opportunity to seek mediation.

[66] Accordingly, with some hesitation, little sympathy for the applicant, and limited hope the rescission will achieve anything, I will grant the rescission.

### **Conclusion and Costs**

[67] The Applicant has ultimately been successful. But rescission remains an indulgence and the ordinary order when it is granted is that the successful applicant bears the costs, even in the face of opposition, if that opposition is reasonable.<sup>35</sup> In my view, the Respondent's opposition was reasonable. But the ultimate cause of rescission was its failure to establish proper delivery of the s 129 notice in the initial summons. I therefore hold it is just for each party to pay its own costs.

[68] Accordingly, I make the following order:

1. That the late filing of the application for rescission is granted.
2. That the application for rescission is granted, and the default judgment granted on 15 February 2021 is rescinded.
3. That each party shall pay its own costs.

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M J BISHOP  
Acting Judge of the High Court

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<sup>35</sup> *Phillips t/a Southern Cross Optical v SA Vision Care (Pty) Ltd* 2000 (2) SA 1007 (C) at 1015H.

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