REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

9/12/2019
DATE SIGNATURE

CASE NO: 32725/2016

In the matter between:

MASINGITA MASUNGA MEDIA CC	FIRST APPLICANT
MASINGITA PAULETTE MASUNGA	SECOND APPLICANT

and

FIRST RAND BANK LIMITED t/a **LAND ROVER FINANCIAL SERVICES, A DIVISION OF WEST BANK**	RESPONDENT

JUDGMENT

DREYER AJ:

[1] In this matter the Applicants seek the rescission of the judgment granted on 24 April 2017 and that the Respondent be ordered to return to the First Applicant a

2015 Land Rover Evoque 2.2 SD4 Dynamic, with chassis number SALVA2AD0FH05157 and engine number DZ784208630224DT, in terms of the provisions of Uniform Rule 42(1) and/or the common law.

[2] The circumstances under which such rescission of judgment can be sought, terms of Rule 42 is limited to three distinct instances: (a) the rescission or variation of a judgement or order which was erroneously sought or granted in the absence of a party affected; (b) the rescission of an order or a judgment where there is an ambiguity, patent error or omission to the extent of such ambiguity, error or omission; and (c) the rescission or variation of an order granted as a result of a mistaken common to the parties. The Applicants rely on the first instance.

[3] The First Applicant, represented by the Second Applicant, its sole member, obtained secured loan finance from the Respondent to purchase a Range Rover, in terms of an instalment sale agreement ("the agreement"). The First Applicant made sporadic payments under the loan obligation and, as a consequence, the Respondent instituted legal proceedings in October 2016. The summons was served on 24 October 2016.

[4] The Second Applicant contends that in October 2016, she made payment arrangements with the Respondent. The Second Applicant was informed by the representatives of the Respondent, that summons had been issued, but, as she was communicating with the Respondent, she was led to believe that the Respondent would not continue with the action instituted. The First Applicant made payment of R29 000,00 on 1 November 2016, which amount settled the majority of the debt due

in October 2016. This is borne out by the Respondent's own papers.[1] On 6 April 2017 the First Applicant made a further payment of R40 000,00.

[5] Notwithstanding these payments and the arrangements that the Second Applicant states were concluded with the Respondent, the Respondent sought and was granted judgment on 24 April 2017 for cancellation of the agreement and the return of the motor vehicle. No monetary judgment was sought for an outstanding liability.

[6] The Applicants contend that on 7 August 2017, the parties entered into a reinstatement agreement, in terms of which the cancellation was set aside and the instalment agreement was reinstated. This contention is denied, by the Respondent. The facts indicate otherwise:

[6.1] The Applicants made a lumpsum payment of R95 000,00 on 21 July 2017, which settled the outstanding indebtedness on the cancelled contract, according to the Respondent's own papers [2].

[6.2] Thereafter, the Applicants made irregular instalments payments of [3]:

- R27 000,00 on 8 September 2017;
- R13 200,00 on 21 October 2017;
- R13 200,00 on 7 November 2017;
- R 3 200,00 on 30 November 2017;
- R13 000,00 on 4 January 2018;
- R 8 000,00 on 12 February 2018

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1 The First Applicant's statement of account records the outstanding liability after a payment of R15000 on 6 October 2016 as R29662,77 - see answering affidavit: annexure AA6, p. 93.

2 The First Applicant's statement of the account records a credit balance of R57.13.

3 These payments are recorded on the First Applicant statement of account with the Respondent, relied on by and annexed to the Respondent answering affidavit.

- R 4 000,00 on 16 February 2018;
- R14 000,00 on 3 April 2018;
- R10 000,00 on 6 June 2018;
- R20 000,00 on 4 July 2018;
- R14 000,00 on 2 August 2018; and
- R13 200,00 on 3 September 2018.

[6.3] The Respondent accepted all these payments.

[6.4] In August and September 2018, the Applicants made enquiries to the Respondent whether there were any outstanding arrears. No response was received. The Respondent does not deny that it did not respond to these emails.

[6.5] The Respondent did not execute on the court order, granted on 24 April 2017. The Respondent did not make demand on the Applicants for the return of the vehicle. The Respondent did not authorise and direct the sheriff to take the vehicle into its possession and return it to the Respondent.

[7] The Respondent took no further action against the Applicants until October 2018, some 18 months later, when the Respondent repossessed the motor vehicle, without notice to the Applicants.

[8] In argument, the Applicants did not dispute that they were in default of the agreement, entitling the Respondent to seek default judgment. This concession is correctly made. This concession put paid to the relief sought for a rescission of the judgement. The requirements for a such a rescission of judgement based either on rule 42 or the common law, are not present.

[9] The Applicants' real contention goes to the Respondent acting contrary to reinstatement agreement concluded in August 2017 by enforcing the 24 April 2017 court order, and taking possession of Range Rover.

[10] The Respondent's denies that it concluded a reinstatement agreement. It contends that the document purporting to the reinstatement agreement was not signed by it, consequently there was no agreement. The Respondent contends that Clause 14 of the agreement, which states that that agreement "*cannot be varied, except in writing and signed by both parties",* was not complied with. This argument misses the point. It is not the variation of that agreement, but its reinstatement, that is a new agreement, that the Applicants contend for.

[11] The Respondent contends that it was entitled to receive payment under the cancelled contract, notwithstanding its cancellation. There is no explanation for this on the papers. The respondent had not sought nor was the respondent granted judgement for a monetary sum on 24 April 2017. There is no explanation on the papers as to why the Respondent did not for a period of 18 months proceed with the repossession of the motor vehicle, in accordance with the court order. Only reasonable conclusion is that the parties did enter into the reinstatement agreement as contended by the Applicants.

[12] On the basis of the Plascon Evans [4] test, if I consider the evidence of the Applicants together with that of the Respondent it is clear that the parties did conclude a new agreement, reinstating the instalment agreement on the same terms as that which was cancelled by the court order of 24 April 2017.

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4 **Plascon Evans Paints (Pty) Ltd v van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A)

[12.1] The First Applicant settled its indebtedness (inclusive of all legal cost and charges) due to the Respondent as at 21 July 2017.

[12.2] The First Applicant signed the reinstatement agreement provided to it by the Respondent on 7 August 2017.

[12.3] The First Applicant made irregular payments to the Respondent for a period of 18 months on same terms as the cancelled agreement.

[12.4] The Respondent accepted all these payments made by the First Applicant.

[12.5] The Respondent did not enforce the judgment.

[13] The conduct of the Respondent over the 18 month period from the date of the judgement in April 2017 to October 2018 when it repossessed the motor vehicle, is consistent with the conclusion of a new agreement as contended by the Applicants.

[14] I am persuaded, on the evidence placed before me, that the parties did conclude a reinstatement agreement in August 2017.

[15] While this is not a prayer specifically framed in the notice of motion, I am persuaded that I am entitled to grant the relief as has been established satisfactorily on the papers.[5]

[16] As a consequence, the Respondent was not entitled to seek re-possession of the Range Rover in terms of the order granted on 24 April 2017. If the Respondent sought to contend that there had been a breach of the reinstatement agreement, it had to institute action afresh against the Applicants, which the Respondent did not do. The

[5] **National Stadium South Africa (Pty)Ltd & other v Firstrand Bank Ltd** 2011 (2) SA 157 (SCA); **Luwala & others v Port Nolloth Municipality** 1991 (3) SA 98 (C) @112 D-F

Respondent resorted to self -help [6] in taking possession of the Range Rover. Such conduct is unlawful.

[17] In the result, I make the following order:

1. *The Respondent is ordered to return to the Second Applicant the motor vehicle described as the 2015 Land Rover Evoque 2.2 SD4 Dynamic, with chassis number SALVA2AD0FH051517 and engine number DZ784208630224DT;*

2. *Each party to pay its own costs.*

C.J. DREYER
Acting Judge of the High Court of South Africa
Gauteng Local Division
Johannesburg

APPEARANCES:

Date of hearing:	20 August 2019
Date of judgment:	12 December 2019
Counsel for the Applicant: Instructed by:	ADV. L. MAKAPELA TSHIVHASE INC.
Counsel for the Respondents: Instructed by:	ADV. N.S. NXUMALO ROSSOUW LESIE INC.

6 "Self help,....is inimical to a society in which the rule of law prevails..." **Chief Lesapo v North West Agricultural Bank & another** 2000(1) SA 409 (CC) @ para [11]