



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

**CASE NUMBER: 4558/2019**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
28/05/2021	<i>Mulani</i>
DATE	SIGNATURE

In the matter between:

**LETSHOLO TERENCE TSHEPO**

Applicant

and

**GMG TRUST COMPANY (SA) (PTY) LIMITED**

First Respondent

**WILLEM HERMANUS SWANEPOEL N.O**

Second Respondent

**BRENDAN HARMSE N.O**

Third Respondent

**WESSEL GIETZMANN STADTLANDER N.O**

Fourth Respondent

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**JUDGMENT**

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**MATSEMELA AJ**

1. The Applicant seeks rescission of the default judgement granted against her by this Court on 18 April 2019 and ancillary relief. To this end the Applicant relies on the provisions of Rule 42 (1) (a) of the Uniform Rules of Court, alternatively Rule 31 (2) (b), further alternatively common law in support of her application. The Respondent is opposing the application and seeks that it be dismissed with costs.

## **FACTUAL BACKGROUND**

2. On or about 19 November 2015, the Applicant and Volkswagen Financial Service South Africa (Pty) Limited entered into an instalment sale agreement for the financing of the 2012 Audi A4 multitronic motor vehicle.<sup>1</sup> The Applicant had breached an instalment sale agreement by her failure to make payment of the monthly instalments agreed to therein. By the 30<sup>th</sup> of April 2017, the Applicant was in arrears and has remained in arrears ever since.<sup>2</sup>

3. As at 2 January 2019, the Applicant was in arrears in the sum of R54 896,80.<sup>3</sup> During or about January 2019, the First Respondent despatched a section 129 letter to the applicant.<sup>4</sup> No response was received and as it was entitled to. The First Respondent, which had received cession of the credit agreement, launched this action under the above the case number during March 2019. Summons was properly served.<sup>5</sup>

4. Several days later on 11 March 2019, the Applicant approached a debt counsellor, (hereinafter referred to as Summit) for debt review. Summit then contacted the First Respondent and requested copy of the summons,<sup>6</sup> as the Applicant was no longer in

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<sup>1</sup> Annexure "TTL 10", pp 28-30

<sup>2</sup> Annexure "SS2", p 74

<sup>3</sup> P 45 par 4.1, and p 11, par 37

<sup>4</sup> Annexure "TTL 15", pp 36-37

<sup>5</sup> Annexure "TTL 4", p 35

<sup>6</sup> P 51, par 10.3

possession thereof. Du Bruyn on behalf of the First Respondent arranged that to be done by the legal secretary in the employ of the First Respondent's attorneys on 24 April 2019.<sup>7</sup> Several days later the First Respondent was informed by Summit Financial Planner (hereinafter referred to as the Summit) that the Applicant's application for debt review could not be accepted because summons had already been issued and served.<sup>8</sup>

5. Thereafter the applicant requested that she be "*given time to clear the outstanding arrear amount*" and stating that "*I am willing to surrender my beautiful and loved car to Wesbank*", yet he was informed by Du Bruyn on behalf of the First Respondent by way of email dated 9 May 2019 that the First Respondent had already applied for judgement.<sup>9</sup>

## LEGAL ISSUES

6. In his founding affidavit the Applicant has raised the contention that the judgement was erroneously granted in that:

(a) She did not receive the summons herein.<sup>10</sup> She further states that if this Court has proper regard to her founding affidavit and the Respondent's answering affidavit it will be clear that the relief sought should be granted by virtue of there have been an irregularity in the proceedings (no proper service) and the knowledge of that irregularity would have precluded this Court from granting the default judgement against the Applicant.

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<sup>7</sup> Annexures "SS9" and "SS10", PP 89 and 90

<sup>8</sup> Annexure "TTL11", pp 31-32

<sup>9</sup> P 52, par 10.5

<sup>10</sup> P 52, par 10.5

7. The Applicant further contends that the First Respondent has failed to comply with notices in terms of section 129 of the National Credit Act.

## THE LAW

8. Rule 42 (1) (a) provides:

“The court may, in addition to any powers it may have, *mero mutuo* or upon application of any party affected, rescind or vary:

(a) an order or judgement erroneously granted in the absence of any party affected thereby”

9. In *Mutweba v Mutweba and Another*<sup>11</sup> Jafta J (as he then was) says the following in paragraph 16

*“Firstly, the judgement must have erroneously sought or erroneously granted: secondly, such judgement must have been granted in the absence of the applicant: and lastly, the applicant’s rights or interests must be affected by the judgement. Once those three requirements are established, the applicant would ordinarily be entitled to succeed, cadit quaestor. He is not requested to show good cause in addition to thereto.”*

10. The Court in *Promedia Drukkers and Uitgewers (Edms) Bpk v Kaimowitz and Others*<sup>12</sup> at paragraph 417 G-I says the following:

“Relief may be granted under this Rule if:

(i) the court which made the order lacked competency to do so;

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<sup>11</sup> [2001] 1 All SA 83 (Tk)

<sup>12</sup> 1996 (4) SA 411 (C )



- (ii) at the time of the order was made the court was unaware of the facts which if then known to it, would have precluded the granting of order; or
- (iii) there was an irregularity in the proceedings.”

## **ANALYSIS OF THE FACTS**

11. The return of service of service supplied by the Respondents appears<sup>13</sup> in the record of the proceedings as annexure “K” and is dated 7 March 2019. It is recorded by the sheriff that:

“I served the combined summons with the particulars of claim and annexures, by affixing a true and exact copy thereof to the outer principal door as the premises were locked, thus prevents the sheriff from serving in any other manner. No other service possible after diligent search and inquiry.”

12. However, the terms of the instalment sale agreement were clear an explicit, the relevant summons and attachments were served by the Sheriff to the Applicant’s chosen *domicilium* address. It is my view that the First Respondent has demonstrated in his answering affidavit that the summons was properly served at the chosen *domicilium executandi*. The Applicant had at some stage had requested a copy via Summit and it was forwarded to them. This demonstrate that the Applicant had knowledge of the summons.

13. The purpose of serving the summons by the sheriff is to bring to the attention of the other of the institution of legal proceedings. The Applicant cannot be heard to saying that she did not receive the summons and therefore does not have any

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<sup>13</sup> P 84 of Indexed Bundle

knowledge of the legal proceedings when Summit did request the copy of the summons from the First Respondent.

14. I am of the view that Applicant's statement that she is willing to surrender the vehicle, does amount to an indication that she was aware of the proceedings was prepared to terminate the credit agreement in terms of clause 11.1 of the credit agreement. Therefore, I cannot agree with the argument by the Applicant that she was simply prepared to surrender the vehicle to the First Respondent until she was afforded time to clear the outstanding arrears. Therefore, the Applicant's legal argument on this issue had to be dismissed.

#### **FAILURE TO COMPLY WITH NOTICES IN TERMS OF SEC 129**

15. The First Respondent states<sup>14</sup> that the track and trace report of South African Post Office (annexure J to the First Respondent particulars of claim) reflected that the First Notification to the recipient was dated 21 January 2019 to the domicilium executandi. It is my view that the formal notice in terms of section 129 of the National Credit Act was compliant with the legal requirements and applicable case law. It is further my view that the First Respondent has amply demonstrated that he has complied with the rules of court and the National Credit Act throughout. Accordingly, the Applicant's contentions in this regard must also be rejected.

#### **Bona Fide Defence**

16. It was argued on behalf of the Respondents that even if the Court would grant rescission of the judgement at the end of the day the Applicant does not have a bona fide defence. The counter argument by the Applicant is that the First Respondent has

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<sup>14</sup> Answering affidavit page 009-18 paragraph 23.1

violated the Credit Agreement by denying the Applicant the opportunity to settle the arrears.

17. The threshold that had to be crossed by the Appellant is the one set in the matter of *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at page 423 which is as follows:

[a] Whether the Respondent has disclosed the nature and grounds of his defence,  
and;

[b] Whether on the facts so disclosed, the Respondent appears to have, as to either  
the whole or part of the claim, a defence which is bona fide and good in law.

18. It is common cause that the applicant attempted to make payment and settlement arrangements with the First Respondent as set out in his email dated 21 November 2018, and the First Respondent trust accepted the applicant's proposal.<sup>15</sup> Despite the First Respondent having afforded indulgence to the applicant, he failed to make any payment whatsoever in terms of his proposed settlement. The First Respondent thereafter required the services of tracing agents to recover possession of the vehicle.<sup>16</sup>

19. The Applicant further alleges that the First Respondent failed to comply with the credit agreement and yet she herself has failed in numerous ways to comply with his contractual obligations and continues to retain possession of the vehicle agreement and the arrears. She has failed to pay even one cent since she fell into arrears.

20. The Applicant has revealed no defence whatsoever to the First Respondent's claims. I am of the view that the sole reason for the Applicant's application for

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<sup>15</sup> Pp 47 and 48

<sup>16</sup> P 49, pars 5.4, 5.5 and 5.6

rescission is to avoid the relief granted against him by the court on 18 April 2019 and to further delay finalisation of this matter.

I therefore make the following order.

1. The Applicant's application is dismissed with costs.

  
**MOLEFE MATSEMELA**  
**ACTING JUDGE OF THE GAUTENG LOCAL DIVISION**  
**OF THE HIGH COURT, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 May 2021.

**APPEARANCES:**

For the Applicant                      Adv. K S Matlala

Instructed by                          Tony Tshivhase Inc.

For the Respondent                  Adv K Meyer

Instructed by                          Smit Jones and Pratt