



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

CASE NO: 2021/1135

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

A handwritten signature in black ink, appearing to be "Mg".

DATE: 21 NOVEMBER 2022

In the matter between:

PRECIOUS TENJIWE SIBANDA

Applicant

And

FIRSTRAND BANK LIMITED

Respondent

JUDGMENT

VILJOEN AJ

[1] This is an application, apparently, for the rescission of a judgment granted by default against the applicant on 9 February 2021.

- [2] I was granted access to the CaseLines file on 28 September 2022. I downloaded the entire content of the CaseLines bundle and used the downloaded bundle for my preparation. When the matter came before me on 10 October 2022, Mr Govender, counsel for the respondent, pointed out to me that the CaseLines bundle that I had downloaded underwent significant modification.
- [3] According to the CaseLines audit trail, on 4 and 5 October 2022, the applicant created, uploaded and/or deleted several of the component parts of the CaseLines bundle as it had existed when I first accessed it. Most importantly, the applicant appears to have replaced her notice of motion and founding affidavit. The notice of motion, dated 31 August 2021, was replaced with a document dated 10 August 2021. The “supporting affidavit”, dated 3 September 2021, was replaced with a “founding affidavit”, dated 10 August 2021.
- [4] Mr Govender pointed out that the respondent's answering affidavit was drafted in answer to the “supporting affidavit”. The respondent did not have the opportunity to deal with the applicant’s amended papers.
- [5] When I questioned the applicant about the amendments to the papers, she disavowed knowledge of any alteration to the CaseLines bundle or to the documents upon which her application was premised. No amendment of the notice of motion had been effected in accordance with the Uniform Rules and no application had been made to allow the supplementation of the founding affidavit.

- [6] In the circumstances and considering the apparent absence of any intention to amend her papers on the part of the applicant, I ruled that the matter would proceed on the papers as they stood before the alteration to the CaseLines bundle on 4 and 5 October 2022.

The relief sought

- [7] The default judgment in question confirmed the cancellation of an instalment sale agreement concluded between the applicant and the respondent. The order declared the instalment sale agreement cancelled and directed the applicant to return the vehicle, the subject of the instalment sale agreement, to the respondent.
- [8] The applicant's notice of motion is not a model of clarity. I quote the relief sought in full:

"BE PLEASED TO TAKE NOTICE that, on a date to be arranged with the Registrar of this Honourable Court, the Applicant intends to make application to this Court for a rescission order in the following terms:

- 1. Reviewing and setting aside the DEFAULT JUDGMENT made by the Honourable Court in favour of the Respondent taken on 16 February 2021 and/or 19 February 2021 as filed in the case file of the founding affidavit of the Respondent (Annexure 014-3) and (Annexure 014-4) respectively.*
- 2. The Honourable Court to compel the respondent to fulfil its first decision and redirect the respondent to court [sic] of first instance.*
- 3. Reviewing evidence presented and setting aside the warrant to deliver as well as the orders consequently granted as result of a Default Judgement. As it remedies the prejudice that might be occasioned by the outcome of the application to the applicant, and*

that the applicant believes the respondent mislead this honourable court as shown on the affidavit by the applicant.

4. *That a suitable remedy or arbitration be instituted to resolve according to the contractual agreement:*

- 4.1 *the Complaint resolution procedures; and*

- 4.2 *the court of first instance.*

5. *Directing the Second Respondent to take such steps as are necessary to conform to the statutes of the vehicle finance agreement in question (Annexure C on the founding affidavit of the Respondent).*
6. *Condoning the late filing of this application in terms of section 9(2) of the Promotion of Administrative Justice Act No. 3 of 2000.*
7. *Ordering the Respondent that oppose [sic] the relief sought by the Applicant, to pay the costs of this application jointly and severally, the one paying the other to be absolved.*
8. *The Honourable Court re-instate and render the said contract valid and effective.”*

[9] References in the notice of motion *inter alia* to review, the *Promotion of Administrative Justice Act, 2000*, and “a suitable remedy” are misplaced in the context of this matter. I intend to proceed to consider whether the applicant has made a case for the rescission of the default judgment.

[10] Rule 31(2)(b) permits the rescission of a judgment granted by default “*upon good cause shown*”.

[11] To show good cause, it is trite, an applicant must:

- 11.1. give a reasonable explanation of her default;

11.2. show that she has a *bona fide* defence to the claim; and

11.3. show that the application is *bona fide* and not made merely to delay the claim.¹

[12] It is equally trite that an applicant's explanation for her default must be sufficiently full so that the Court is able to understand how it came about and to assess the applicant's *bona fides*.²

[13] Rule 42(1)(a) is an aid to a judgment debtor to rescind a judgment granted in her absence to which the judgment creditor was procedurally not entitled.³ The subsequent disclosure of a defence does not transform a judgment, which had been validly obtained, into an erroneous order.⁴

The grounds for rescission

[14] One can distil four discernible grounds for rescission from the supporting affidavit:

14.1. the applicant did not receive service of the summons;

14.2. the applicant was not invited to the CaseLines file;

14.3. the respondent chose not to refer the matter to mediation; and

14.4. the respondent's statements of account are inaccurate.

¹ *Grant v Plumbers* 1949 (2) SA 470 (O) at 476

² *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 353A

³ *Freedom Stationery (Pty) Ltd and others v Hassam and others* 2019 (4) SA 459 (SCA) at [18]

⁴ *Lodhi 2 Properties Investments CC and another v Bondev Developments* 2007 (6) SA 87 (SCA) at [27]

Receipt of the summons

- [15] The sheriff's return of service indicates that he served the summons at the applicant's place of residence on a Mr Colin Mncube on 20 January 2021.
- [16] The return of service of a sheriff is *prima facie* proof of the contents thereof.⁵ A party may challenge the content of a return but to succeed, such a challenge needs to be supported by clear and convincing evidence of the incorrectness of the return.⁶
- [17] In her founding affidavit, the applicant states that she was at home at the time the summons was served and that she would accordingly have received it personally had the sheriff in fact attempted service. Her allegation is purportedly supported by her E-Toll account and a detailed trip log obtained from her car tracking company.
- [18] The E-Toll account does not, in my view, take the matter any further than to confirm the registration number of the vehicle that is the subject of the instalment sale agreement. Further, the date of the car tracking data is problematic. The report indicates that it sets out movements of the applicant's vehicle on 3 September 2016. The tracking data thus offers the applicant no assistance.
- [19] The applicant denies knowing Mr Mncube, upon whom the sheriff states that he served the summons. The applicant suggests that none of the other three residents at the premises knows Mr Mncube. The applicant does not name

⁵ S 43(2) of the *Superior Courts Act*, 2013

⁶ *Radebe v Mokoena* 2014 JDR 0650 (GJ) at 20.3

these residents, nor does she provide affidavits from them confirming this hearsay evidence. The papers contain an affidavit of a Mrs Albertinah Nthabeleng Nenzinane, reportedly a neighbour of the applicant. The affidavit, however, does not mention Mr Mncube.

- [20] If indeed the sheriff did not serve the summons that would constitute a basis for the rescission of the summons. However, the applicant failed to adduce clear and convincing evidence indicating the sheriff's return of service to be incorrect.

Invitation to CaseLines

- [21] I do not view the absence of an invitation to the CaseLines files as an irregularity under circumstances where a defendant has not entered an appearance to defend. Be that as it may, the CaseLines audit trail shows the applicant to have been invited to the CaseLines file on the same day that the application for default judgment was uploaded, 4 February 2021. The applicant does not appear to have accessed the CaseLines file until 2 June 2022, a fact which can hardly be laid at the door of the respondent.

Mediation

- [22] The mediation process set out in rule 41A is entirely voluntary. The court is not empowered to direct the parties to subject the dispute between them to mediation.⁷ It follows that a party's election not to engage in mediation does not impact upon the validity and correctness of a judgment granted.

⁷ *Erasmus Superior Court Practice* at D1-560C (RS18)

Inaccuracies in the statements of account

- [23] The sole defence the applicant puts up to the merits of the respondent's claim is that the respondent levied impermissible charges. The applicant specifically refers to an "NCA Service Fee", "VAP Premium Cover" and various interest charges. The applicant contends that she queried these charges with the respondent but received no feedback. Crucially, the applicant admits that she "*defaulted during this dispute, as the weight weighed heavily*". The applicant does not suggest that she kept her payments but for the disputed charges up to date.
- [24] The applicant's admission of default places her within the ambit of clause 13 of the instalment sale agreement. That clause empowers the respondent, upon breach by the applicant, *inter alia* to take possession of the vehicle in terms of an attachment order. Defaulting on her payment obligations constitutes a breach of the agreement. The amount in which the applicant was in arrears is immaterial to the present process; the respondent sought and obtained only the cancellation of the agreement and the return of the vehicle. The respondent acted within its rights in doing so.

Conclusion

- [25] It follows that the applicant has not shown good cause for the rescission of the default judgment against her. She offers neither a satisfactory explanation for her default in entering an appearance to defence nor a *bona fide* defence. Further, there is no basis to conclude that the default judgment was in any erroneous sought or granted.

[26] In these premises, I make the following order:

The application is dismissed with costs.



H M VILJOEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Delivered: This judgement 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 email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 November 2022.

Date of hearing: 10 October 2022

Date of judgment: 21 November 2022

Appearances:

The applicant in person

Attorneys for the respondent: SMITH VAN DER WATT INC

Counsel for the respondent: ADV J GOVENDER