IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION

CASE NO: 24898/18

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED. YES

13/4/2022

SIGNATURE DATE

In the matter between:

MILLY LERATO RANGAKA Applicant

and

FIRST RAND BANK LIMITED

Coram: Sardiwalla J

Rescission application - ***existence or non- existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment in terms of requirements of 42(1)(a).***

JUDGMENT

Sardiwalla J;

Introduction[1]:

[1] This is an application for rescission brought in terms of Uniform Rules 42 (1) alternatively common law of an order granted against the Respondent on the 21 June 2018 by this honorable court.

[2] The Rule 42 (1) provides that a court may *mero motu* or on application, rescind or vary;

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) An order or judgment in which there is an ambiguity, error or omission;

(c) An order or judgment granted as a result of a mistake common to the parties.

Background

[3] The Respondent defaulted on her mortgage payments owing to the Applicant.

[4] The Applicant served a letter in terms of Section 129 (1) of the National Credit Act (hereinafter referred to as the "Notice") per registered post to the Respondent's elected *domicillium* for letters and as well as her traced address. However, no notification slip for collection was obtained for the Respondent's traced address and as a result the Applicant also served the Section 129 (1) Notice by way of Sheriff to the Respondent's traced address on 12

[1] *In the interests of brevity, the parties will be referred to as they were in the court a quo.*

March 2018.

[5] On 30 April 2018 the Applicant issued and served summons against the Respondent at her elected *domicilium*. The Sheriff's return confirms that the summons was placed on the outer principal door of the Respondent's elected *domicilium*. On 21 June 2018 default judgment was granted against the Respondent. It is this default judgment that the Respondent seeks to have rescinded.

[6] On 9 July 2018 the Sheriff visited the traced address of the Respondent to attach movable property of the Respondent to satisfy the default judgment but none could be secured.

[7] On 16 August 2018 the Applicant made an application in terms of Uniform Rule 46(1) and 46A (8) to have the Respondent's home especially executable and was set down for hearing on 13 September 2018.

[8] The Respondent served and filed for a rescission in October 2018.

Respondent's Submissions

[9] The Respondent in her founding affidavit submitted that she launched this application for rescission in terms of Rule 42 and the common law which requires such application to be brought within a reasonable time and as the application was brought within 29 days of her becoming aware of the default judgment, it should be considered reasonable time. Of significance it must be noted that the Respondent vaguely implied that she did not bring her application in terms of Rule 31 due to the 20-day time limit and therefore was making her application in terms of Rule 42 instead on the basis of a reasonable time.

[10] The crisp question is whether in these circumstances that an order can be properly being rescinded in terms of Rule 42 (1) (a), (b), (c) of the Uniform Rules of Court. The issue is also whether the facts on which applicant relies give rise to any sort of error for which the rule provides and, if so, whether the order was erroneously sought or erroneously granted because of it.

[11] It is clear from the Respondent's founding affidavit that the error on which the application is based on is that the letters of demand and summons were not properly served on her and therefore there was non-compliance with the National Credit Act.

[12] It is trite that in order to succeed in an application for rescission of judgement taken by default, an applicant must show good cause.

> *"This generally entails that the applicant must:*
>
> *(i)* *Give* a reasonable *(and obviously acceptable) explanation for his default.*
>
> *(ii)* *Show that his application is made bona fide; and*
>
> *(iii)* *Show that on the merits he has a* bona *fide defence which prima faice carries some prospects of success"*[3].

[13] Moseneke J in *Harris v Absa Bank Ltd t/a Volkskas*[4] commented as follows:

> *"The test whether 'sufficient cause' has been shown by* a *party seeking relief, is dual in nature, it is conjunctive and not disjunctive. An acceptable explanation of the*

default must co-exist with the evidence of reasonable prospects of success on the merits".

[14] In *casu,* the letters of demand and the summons were served on the Respondent's elected *domicilium* and the Applicant even went a step further to ensure compliance by tracing the Respondent's address to serve the Notice in terms of Section 129 (1) of the National Credit Act. The Respondent although alleges that it no longer resides at the elected *domicilium* as it was her parental address before the home was purchased, does not deny that the traced address was incorrect. In fact, the Respondent in her affidavit clearly states that the Sheriff was able to place her at the traced address when the Sheriff attempted to satisfy the default judgment by executing movable property. It is clear from this statement that the Notice served on the traced address should have reached the Respondent and she should have reasonably been aware of it. In any event she admits that her mother resides at her elected *domicilium* and therefore it is implausible that the summons or the letters of demand would not have been brought to her attention. The Respondent's founding affidavit does not give an explanation that is acceptable for her delay in attending to this matter. It is my opinion that she is disingenuous with the truth and simply avers that she did not have knowledge.

Applicant's submission

[15] It is the applicant's submission that the Respondent has failed to meet the requirements for rescission or variation under rule 42 and does not even set out clearly on which specific sub-rule she relies on to justify the order being granted in error in her absence. Further that it has failed to put up a defense that has good prospects of success.

[16] I turn now to deal with Rule 42. This rule is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error, or omission[5].

16.1 Rule 42 (1) (a) - an order resulting from a mistake common to the parties; or erroneously sought or granted in the absence of a party affected thereby[6].

16.2 Rule 42 (1) (b) and (c) has no application in the present case.

[17] In the dictum from Streicher JA in Lohdi *2 Property Investments CC* & Another *v Bonder Development (Pty) Ltd*[7] dealing with a Rule 42 (1) (a) application remarked as follows:

> *"Similarly, in a case where a plaintiff is entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants judgment by default does not grant judgment on the basis that the defendant does not have a defence: it grants judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rules, that the defendant not having given notice of intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non- existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment".*

[18] In the circumstances of the case before me, no mistake on the part of anyone of the parties or the court has been established. It follows therefore that no basis has been shown to

exist for the application of Rule 42 1 (a). Further that the circumstances of the case before this court are clearly not in line with the requirements Rule 42 (1), (a), (b), (c) or even common law.

[19] I therefore make the following order:

19.1 The application for rescission of the order dated 21 June 2018 is dismissed with costs.

SARDIWALLA J
JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing	**:**	**20 August 2020**
Date of judgment	**:**	**13 April 2022**
Applicant's Counsel	**:**	**ADV.: M SKHOSANA**
Applicant's Attorneys	**:**	**M T RASELO ATTORNEYS INC**
Respondent's Counsel	**:**	**ADV.: L PRETORIUS**
Respondent's Attorneys	**:**	**VEZI & DE BEER ATTORNEYS INC**