



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

Case No: 47143/2020

- (1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/ NO
(3) REVISED

[Signature]

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SIGNATURE

.....12 July 2022.....
DATE

In the matter between:

REYAKOPELE TRADING 117 CC

APPLICANT

and

VELOCITY FINANCE (RF) LTD

RESPONDENT

JUDGMENT

MOLEFE J

[1] This is an application for rescission of the judgment granted against the applicant (the defendant in the main action) on 22 December 2020, on the ground that such order was granted in the absence of the applicant, and that pending the outcome

of the rescission application, the execution or operation of the default judgment be stayed and/or suspended.

[2] The application is brought in terms of the provisions of rule 31(2), alternatively rule 42(1)(b) of the Uniform Rules of Court, alternatively the common law.

[3] The requirements that a rescission application in terms of rule 31(2)(b) must satisfy are well established in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*:

“...the courts generally expect an applicant to show good cause *by (a) giving a reasonable explanation of the default; (b) showing that his application is made bona fide; and (c) by showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospects of success.*”¹

[4] Rule 42(1) of the Uniform Rules of Court provides that the court may in addition to any other powers it may have, *mero moto* or upon application of any party affected, rescind or vary:

- 4.1 an order or judgment erroneously granted in the absence of any party affected thereby;
- 4.2 an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- 4.3 an order or judgment granted as a result of a mistake common to the parties.

An order is erroneously granted as a result of a procedural irregularity² or if it was not legally competent for the court to have granted such an order.³ Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order, and it is not necessary for a party to show good cause.⁴

¹ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1(SCA) (2003) ZA11 SA 113 at para 11. The court in *Colyn* was concerned with an application for rescission in terms of rule 42(1)(a). This applicable approach is the same.

² *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038D.

³ *Athmaran v Singh* 1989 (3) SA 953D.

⁴ *Rossiter v Nedbank Ltd* SCA unreported 96/2014 dated 01 December 2015.

[5] For a rescission of an order in terms of the common law, sufficient cause must be shown; which means that:

- 5.1 there must be reasonable explanation for the default;
- 5.2 the applicant must show that the applicant is made *bona fide*; and
- 5.3 the applicant must show that he has a *bona fide* defence which *prima facie* has some prospects of success.

Background

[6] The factual background is common cause. On 07 November 2018, the applicant and Volkswagen Financial Services (SA)(Pty)(Ltd) (VW) entered into a written instalment sale agreement in terms of which the applicant purchased a 2016 Volkswagen Amarok motor vehicle from VW. Thereafter, VW ceded all its rights, title and interest in the instalment sale agreement to the respondent, Velocity Finance (the plaintiff in the main action). The terms of the agreement are not disputed. The applicant fell in arrears with its payment obligations, and the respondent instituted legal action for cancellation of the instalment sale agreement, the attachment of the motor vehicle and the return thereof to the respondent due to the applicant being in breach of the agreement. The sheriff served summons at the applicant's chosen *domicilium* on 01 October 2020.

[7] The applicant contends that he learned of the legal action in January 2021 and became aware of the default judgment on 26 January 2021. It is the applicant's submission that:

- 7.1 he was not aware of the summons/legal proceedings as the sheriff did not serve the summons on him;
- 7.2 no section 129 notice as envisaged in the National Credit Act, 34 of 2005 ('the NCA') was served by the respondent;
- 7.3 there was an oral agreement between the applicant and the respondent which varied the repayment terms of the agreement.

Point in limine

[8] The applicant in its replying affidavit raised a *point in limine* that the deponent to the respondent's answering affidavit had no authority to depose to the affidavit on behalf of the respondent.

[9] The legal principle is that a deponent to an affidavit does not need to be authorised to depose to an affidavit. Rule 7(1) of the Uniform Rules of Court provides that:

“(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need to be filed, but the authority of anyone acting on behalf of a party, may, within 10 (ten) days after it has come to the notice of a party that such person is so acting or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

[10] Since the inception of the above-mentioned rule 7(1), any issue with the authority of a party representing another in legal proceedings held in the High Court should be raised in the context of rule 7(1). If the legal practitioner is duly authorised, it follows that the legal proceedings are authorised, and any witness (or affidavit) relied upon by the legal practitioner in such proceedings is so relied upon at the behest of the legal practitioner. As such, any challenge to the authority of a party begins and ends with the authority of the legal practitioner, and is in this case, not in the replying affidavit or heads of argument.⁵ Only a legal practitioner needs authority to act on behalf of a party. There is therefore no merit in the *point in limine* and it should fail.

Service of the summons

[11] The highwater mark of the application for rescission of judgment is that the applicant did not receive the summons nor the notice of set down for the default judgment application. Counsel for the applicant submitted that according to the sheriff's return of service the applicant's business premises are kept locked and the applicant's business is no longer at the given address, and service was therefore

⁵ Eskom v Soweto City Council 1992 (2) SA 703 (W) at 705A-706G.

effected by affixing. It is therefore argued that the sheriff should have made a return of non-service as the applicant's business is no longer at the given address.

[12] Rule 4 of the Uniform Rules of Court provides for different manners in which summons may be served. Rule 4(1)(a)(iv) states that:

“(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manner-

...

(iv) if the person so to be served has chosen a domicilium citandi; by delivering or leaving a copy thereof at the domicilium so chosen,”

[13] The applicant's chosen *domicilium citandi* in the instalment sale agreement is 82 Edwards Avenue, Office no 2, Westonaria, and this is the address where the sheriff effected service of the summons on 01 October 2020, in terms of rule 4(1)(a)(iv). Our courts have held that if the debtor was not there at the chosen *domicilium citandi* address, it does not alter the fact that there was adequate service.⁶ Even if the defendant did not get knowledge of the summons, service would be proper if the rules of service were followed.⁷

[14] I am satisfied that the sheriff *in casu* properly served the summons in terms of the rule 4(1)(a)(iv), and the default judgment was properly granted even without the applicant's knowledge. It cannot be argued that there existed a procedural irregularity in terms of rule 42(1) and in my view, the rescission application cannot succeed on this basis.

[15] Furthermore, in terms of the instalment sale agreement, the applicant must immediately notify the respondent in writing of any change to the chosen *domicilium* address and failure to do so the respondent will for all purposes use the address it has even if the applicant is no longer there. Although the judgment was granted in the applicant's absence, it is not in my view a default judgment as envisaged in rule 31,

⁶ *Gerber v Stolze and Others* 1951 (2) SA 166 (T) at 170G.

⁷ *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) at 580G.

and such judgment cannot be rescinded in terms of rule 31(2)(b) of the Uniform Rules of Court.

Section 129 notice

[16] Section 129 read with section 130 of the NCA stipulates that a credit provider should deliver a section 129(1)(a) notice to a consumer, informing such consumer of their rights under NCA prior to taking legal action. Counsel for the respondent however submitted that the respondent is exempt from such obligation as the instalment sale agreement does not fall within the ambit of the NCA by the workings of section 4(1) of the NCA.

[17] Section 4(1) of the NCA states that:

“Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm’s length and made within or having an effect within the Republic except-

(a) a credit agreement in terms of which the consumer is-

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of Section 7(1) ...

(b) a large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1) ...”⁸

[18] It is the respondent’s submission that the instalment sale agreement falls within the scope of section (4)(a)(i) of the NCA, causing the agreement to fall outside the ambit of the NCA, making section 129 (1) redundant to this matter. Therefore, there is no requirement to send out a section 129 notice to the applicant.

[19] In interpreting section 4(1) of the NCA, the Supreme Court of Appeal held that:

⁸ The Minister determined the “turnover” threshold to be R1 000 000.00 and the “large credit agreement” to be R250 000.00 or above.

“If Clear Creek [a juristic person] had an asset or annual turnover greater than the threshold set by the Minister under the Act [NCA], it was excluded in terms of s4(1)(a)(i). If it had an asset value or annual turnover below that threshold, s4(1)(b) made s9(4) applicable and mortgage bonds [large agreements] were excluded. So, regardless of the asset value or annual turnover of Clear Creek, the Act did not by law, apply to the agreement.”⁹

[20] Accordingly, the applicant *in casu* cannot rely on the provisions of the NCA for not receiving a section 129 notice in order to show a *bona fide* defence to the respondent’s claim as the NCA does not regulate the instalment sale agreement.

Oral agreement

[21] The applicant submitted that there was an oral agreement made between the parties varying the repayment terms of the instalment sale agreement. The respondent denied that such oral agreement and/or variation existed and argued that the applicant makes vague allegations of an oral agreement without any particularities of exactly when, where and with whom the oral variation was agreed. Counsel for the respondent submitted that the instalment sale agreement contains a ‘non-variation clause’ also known as a ‘Shifren clause’ which limits the parties’ ability to informally vary the terms of the agreement.¹⁰

[22] I agree with the submission made by the respondent’s counsel that in the absence of compliance with the non-variation clause, the oral agreement defence should fail since the parties are bound by clause 14 of the instalment sale agreement which has not been complied with in order to give effect to any variation to the agreement.

⁹ *Firststrand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* 2018 (5) SA 300 (SCA) at 302 para 2.

¹⁰ *SA Sentrial Ko-Op Graanmply Bpk v Shifren* 1964 (4) SA 760 (A).

[23] To rescind a judgment under common law, the 'sufficient clause' must be shown. In *Chetty v Law Society, Transvaal*, sufficient cause was described as having two essential elements:

23.1 that the party seeking relief must present a reasonable and acceptable explanation for his default.

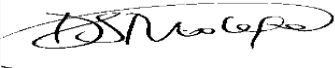
23.2 that on the merits such party has a *bona fide* defence which *prima facie* carries some prospects of success.¹¹

[24] I have already given reasons for dismissing the explanation given by the applicant that he defaulted because he was not aware of the service of the summons. Regarding the merits of the application, the applicant's defences are that the NCA section 129 notice was not complied with, and that there was an oral variation agreement of the repayment terms. As above-mentioned these defences have no merit. I agree with the respondent's counsel that covid-19 or other financial hardships are not *bona fide* defences. I have also noted that at no stage has the applicant denied that he was not in arrears with his payment obligations when default judgment was granted.

[25] I am not satisfied that the applicant's defences are sufficient to establish a *bona fide* defence that *prima facie* carries some prospects of success. The applicant has not made out a good case for the relief sought.

[26] In the premises the following order is made:

1. The application for rescission of judgment is dismissed with costs.



D S MOLEFE
JUDGE OF THE HIGH COURT

¹¹ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 at 764I- 765E.

This judgment by the Judge whose name is reflected herein, is delivered and submitted electronically to the parties/their legal representatives by e-mail. This judgment is further uploaded to the electronic file on this matter on Caselines by the Judge or his / her secretary. The date of the judgment deemed to be 12 July 2022.

APPEARANCES

Counsel for the Applicants:	Adv. L Matshidza
Instructed by:	Mr M Yokwe (in person)
 Counsel for the Respondents:	 Adv. R Carvalheira
Instructed by:	Glover Kannieappan Inc
 Date heard:	 04 May 2022
Date of Judgment:	12 July 2022