REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 40796/2019

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

21 July 2022

In the matter between:

MANYAN, CHERMELLE DANIELLE **Applicant**

and

NEDBANK LIMITED **Respondent**

JUDGMENT

Mdalana-Mayisela J

1. This is an opposed application for rescission of a default judgment granted by Matsemela AJ against the applicant in favour of the respondent on 3

September 2020. The application is brought in terms of Rule 42(1)(a) of the Uniform Rules of Court.

Background

2. In August 2016 the parties concluded an instalment sale agreement ("Instalment sale agreement"), in which the applicant purchased a KIA Picanto motor vehicle from the respondent ("the motor vehicle"). When the instalment sale agreement was concluded, the applicant chose 20 Belloc street, Farramere, Benoni as her *domicilium citandi*.

3. The applicant defaulted on her payment obligations under the instalment sale agreement. The respondent issued the summons on 10 December 2019 for confirmation of cancellation of the instalment sale agreement, return of the motor vehicle and costs. The summons was served by the sheriff at the chosen *domicilium citandi.* The applicant did not file a notice of intention to defend the action. The respondent applied for a default judgment. The default judgment application was also served at the chosen *domicilium citandi*. The default judgment application was granted against the applicant.

The ground for rescission

4. The applicant states that the summons and default judgment application did not come to her attention as they were served at incorrect address where she does not reside. She submits that the default judgment was erroneously sought and/or granted in her absence.

Discussion

5. The applicant brought this application under the provisions of Rule 42(1)(a) which provides as follows:

> *(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*

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

6. The court has a discretion whether or not to grant an application for rescission under this subrule. The applicant must show that she has a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the court *(United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd 1972 (4) SA 409 (C*)). The applicant is clearly a party affected by the judgment, as it was sought and granted against her, in her absence.

7. An application in terms of Rule 42 must be brought within a reasonable time. The respondent opposed the application also on the ground that it was brought out of time. Counsel for the applicant asked the court to exercise its discretion and condone the late filing of the application. Although the applicant has not brought a formal application for condonation of the late filing of the rescission application, she has explained the delay in bringing the application in her founding affidavit. In my view it was not an improper delay and the respondent will not be prejudiced by condoning the late filing of the application. In exercising my discretion in terms of Rule 27(3) of the Uniform Rules of Court, I condone the late filing of the rescission application.

8. In order to obtain a rescission under subrule (1)(a) the applicant must show that the judgment was erroneously sought or erroneously granted. A judgment is erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order (*Athmaram v Singh 1989 (3) SA 953 (D*).

9. It is common cause that the applicant's chosen *domicilium citandi et executandi* is 20 Belloc Street, Farramere, Benoni. This address was chosen by the applicant in accordance with clause 22 of the instalment sale agreement. It is also common cause that the summons and default judgment application were served at the applicant's chosen *domicilium citandi.*

10. The applicant submits that the default judgment was erroneously sought and or erroneously granted. She states that on or about 14 June 2019 she duly sent an updated comprehensive policy together with her new residential address which is shown on the policy document, annexure "**CM2**", to MFC, a division of the respondent ("policy document"). She states that she clearly and unequivocally notified the respondent of the change of her chosen *domicilium citandi.* Further, she avers that the respondent did not inform the default judgment court that her chosen *domicilium citandi* has changed, and that had the court been aware that the summons was served at an incorrect address, it would not have granted the default judgment.

11. The respondent disputes that it was clearly and unequivocally notified of the change of the chosen *domicilium citandi*. It contends that the summons and default judgment application were correctly served at a chosen *domicilium citandi* in accordance with Rule 4(1)(a)(iv) of the Uniform Rules of Court, which provides as follows:

> "(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 manners:
> (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;"

12. The policy document has a covering letter from Auto & general addressed to Mr CM Manyan. He is a policy holder. His postal and residential address is stated as 109 Buitekant street, Protea Heights, 7560. This address is not stated on the policy document as a chosen *domicilium citandi* of the applicant. The insured car is a 2016 KIA Picanto 1.0 LS CS205251. The applicant is mentioned in the policy as a regular driver of the insured car and a member of Mr Manyan's household.

13. The respondent contends that the notification relied upon by the applicant does not reflect the applicant's intention to change her chosen *domicilium citandi*, and also cannot objectively be considered as such, because the "written notification" in truth is an insurance policy confirming that the motor

vehicle is insured. The email sent to MFC by Mr Manyan dated 14 June 2019 ("**CM1**"), simply refers to an "attached policy for your records".

14. I find that the applicant has failed to prove that she delivered to the respondent a written notice of the change of a chosen *domicilium citandi* by hand or registered mail or electronic mail.

Conclusion

15. The respondent was procedurally entitled to the default judgment. The summons was served at the applicant's chosen *domicilium citandi* in accordance with Rule 4(1)(a)(iv). Where a *domicillum citandi* has been chosen, service there will be good even though the defendant is known not to be living there (*United Building Society v Steinbach 1942 WLD 3*). In my view had Matsemela AJ knew about the contents of the policy document sent to MFC by the applicant, he would still have granted the judgment in favour of the respondent. I find no irregularity in the default judgment application proceedings. The applicant has not made out a case for rescission of the default judgment under Rule 42(1)(a). The application for rescission must accordingly fail.

16. As to costs, I find no reason why costs should not follow the event.

17. Accordingly, the following order is made:

11.1 The rescission application is dismissed with costs.

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MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division

(**Digitally submitted by uploading on Caselines and emailing to the parties)**

Date of delivery: 21 July 2022

Appearances:

On behalf of the Applicant:	Adv M Rourke
Instructed by:	Cavanagh & Richards Attorneys
On behalf of the respondent:	Adv C Cothill
Instructed by:	Bezuidenhout Van Zyl Inc.