REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNEBURG

CASE NO: Case No. 22/12536

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

[18 OCTOBER 2022] **……..**
SIGNATURE

In the matter between:

STEPHAN DALLAS MATHEBULA **APPLICANT**

And

FIRSTRAND AUTO RECEIVABLES (RF) LTD **RESPONDENT**

J U D G M E N T

MUDAU, J:

[1] This is an application in which the applicant seeks rescission of judgment. The application is not brought, in terms of rule 31(2), nor rule 42(1) of the Uniform Rules of Court, but under the common law.

The background facts

[2] The applicant and respondent entered into an instalment sale agreement on 6 February 2017, in respect of which the applicant bought a 2016 Hyundai motor car. The applicant agreed to pay 72 monthly instalments of R4, 731.27 to the respondent but later defaulted. A written notice in terms of section 129(1)(a) of the National Credit Act, 34 of 2005 was sent to the applicant by registered mail at the address nominated by the applicant as his *domicilium citandi et executandi* per “annexure AA5”.

[3] The applicant was as at 5 September 2021, in arrears in the amount of R28, 624.47 as per a statement of balance, “annexure AA6". Summons were issued on 20 September 2021 and served on the applicant on 10 November 2021 at 103 Waterford View, Bloubosrand, the address being the chosen *domicilium citandi et executandi* by affixing a copy to the principal door. The applicant however failed to enter notice of intention to defend the action. Consequently, the respondent applied for default judgment application and was granted an order for default judgment on 02 December 2021 under case No, 2021/45060.

[4] Subsequently, the applicant issued an urgent application against the respondent on 24 March 2022, in respect of which the applicant sought an order to have the respondent restore possession of the motor vehicle to the applicant. The urgent application was withdrawn by the applicant with costs in the cause. Inexplicably, the urgent application was issued under a different case number 2022/11353. The application for rescission of judgment is issued under case number 2022/12536, which is different from the case under which the judgment by default was obtained. This practice must be deplored.

[5] An applicant for rescission of judgment taken by default against him is required to show good cause.[1] Whilst the courts have consistently refrained from circumscribing a precise meaning of the term ‘good cause’[2],generally courts expect an applicant to show ‘good cause’ (a) by giving a reasonable explanation of his default; (b) by showing that his application is *bona fide*; and (c) by showing

[1] *Colyn v Tiger Food Industries Ltd t/a Meadow Feeds Mills (Cape)* 2003 (6) SA 1 (SCA) at para 11.
[2] *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300-301B.

that he has a *bona fide* defence to the plaintiff's claim which, *prima facie,* has some prospect of success.

[6] The applicant alleges that he knew for the first time that the respondent has taken legal action against him on 21 February 2022, when he was contacted by the Sheriff of the Court, yet the notice of motion was only issued on 31 March 2022 outside of the 20 days' period for late filing contrary to the applicable rule in respect of which he seeks condonation.

[7] The high water mark of his purported defence is that, the arrears amount was not substantial to justify cancellation of the agreement. It is clear from reading of his affidavit that the applicant does not dispute and/or aver that he was not in arrears.

[8] The applicant also contends that, the summons should have been issued and the matter heard in the Magistrate's Court as it falls within its jurisdiction in that the instalment sale agreement involved a sum of money amounting to R340, 651.44 and the current monetary jurisdiction in the Magistrate court is R400, 000.00. However, Clause 22.8 of terms and conditions of the instalment agreement state that: 'In terms of section 45 of the Magistrate's Court Act 32 of 1944 and at our option, any claim that may arise may be recovered in any magistrate's court having jurisdiction and you hereby consent to the jurisdiction of the Magistrates Court'. My emphasis.

[9] Moreover, it is settled law that the high court has concurrent jurisdiction with any magistrate's court in its area of jurisdiction and that National Credit Act does not oust the jurisdiction of the high court.[3] In *Standard Bank v Mpongo*[4], the SCA confirmed that a plaintiff who initiates litigation proceedings has the right, as *dominus litis*, to decide in which court he or she wishes to enforce his or her rights. It was also pointed out that it is law of long standing that when a High Court has a matter before it that could have been brought in a magistrates' court, it has no power to refuse to hear the matter. Accordingly, this court does not have inherent jurisdiction to refuse to hear a litigant in a matter within its jurisdiction, properly brought before it.

[3] *Standard Bank of South Africa Ltd and Others v Mpongo and Others* 2021 (6) SA 403 (SCA).
[4] Note 3 above.

[9] The applicant's complaint that he did not receive a copy of the summons as it was served by affixing to the principal door is without merit. As a place chosen by a person where process in judicial proceedings may be served upon such person, a *domicilium citandi*[5], the general approach by courts is that the *domicilium* so chosen must be taken to be the person's place of abode within the meaning of the rules of court which deals with the service of a summons, even though the defendant is known not to be living there.[6] In this instance service was accordingly good and in compliance with Subrule 4(1)(a)(iv) of the Uniform Rules.

[10] According to the applicant, a written notice in terms of section 129(1)(a) of the National Credit Act to the applicant by registered mail at the address nominated by the applicant as his *domicilium citandi et executandi* as per "annexure AA5'' preceded the summons. This aspect is not seriously challenged.

[11] In applying the above legal principles to the facts of the instant application, it is plain that the applicant failed to meet the requirements for the rescission of the default judgment under the common law, or under the rules of court even if condonation was to be considered in his favour. At the time of the default judgment being granted, he was in breach of the loan agreement. The respondent had a valid cause of action against them. Counsel for the applicant was constrained to concede in that regard in closing arguments. The application for rescission of judgment is entirely without merit and falls to be dismissed with the attendant scale of the costs order in terms of the agreement.

[12] Order

12.1. The applicant is liable for the costs of this application on the attorney and client scale as well as reserved costs on the same scale.

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[5] *Muller v Mulbarton Gardens (Pty) Ltd* 1972 (1) SA 328 (W) at 331H; *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 847D.
[6] Note 5 above.

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MUDAU J

[Judge of the High Court]

APPEARANCES

For the Applicant:	Mr Peter Zwane
Instructed by:	Peter Zwane Attorneys
For the Respondent:	Adv. Humbulani Salani
Instructed by:	Ross Esie Inc.
Date of Hearing:	3 October 2022
Date of Judgment:	18 October 2022