

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2022/1496

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

DATE 18 OCTOBER 2023      SIGNATURE

In the matter between:

JAMES NJETO

Applicant

and

JACK ERNEST TREVENA N.O.

First Respondent

NICOLAAS BURGER KOTZE N.O.

Second Respondent

SHERIFF SOWETO EAST

Third Respondent

*In re:*

JACK ERNEST TREVENA N.O.  
NICOLAAS BURGER KOTZE N.O.

First Plaintiff  
Second Plaintiff

and

JACK NJETO

Defendant

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## JUDGMENT

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**KORF, AJ**

*Introduction*

- [1] This is an opposed application for rescission of a default judgment granted against the applicant at the behest of the first and second respondents. On the face of the founding, answering and replying affidavits, the application seems to be on par with rescission applications that courts commonly entertain. However, and as will be explained below, a deeper consideration of the papers raises issues that set this matter out of the ordinary.

*The Parties*

- [2] The first and second plaintiffs in the main action, i.e. the first and second respondents in the rescission application, were cited in their official capacity as trustees of the “*Velocity Trust*”. I shall elaborate on the description of the plaintiffs below.
- [3] The defendant was the purchaser of a 2016 Volkswagen Polo motor vehicle from Volkswagen Financial Services (Pty) Ltd (“Volkswagen”) in terms of an Instalment Sale Agreement concluded on 29 July 2016.
- [4] In terms of an alleged written cession agreement concluded on 3 November 2016, Volkswagen ceded all rights, title and interest in and to the aforesaid Instalment Sale Agreement to the plaintiffs.

[5] I shall refer to the parties as described in the main action, i.e., to the applicant (in the rescission application) as the defendant and to the first and second respondents as the plaintiffs.

#### *Litigation History*

[6] On 5 February 2022, the combined summons was served on the defendant's wife at his *chosen domicilium citandi et executandi*, i.e. 6006 [...] Diepkloof. According to the Sheriff's return of service, the defendant's address was at number "6006A". I pause to state that this discrepancy is immaterial because, in the defendant's founding affidavit, *firstly*, he describes his residential address as number 6006, and *secondly*, he confirms having received the summons as served on his spouse.

[7] After the expiry of the *dies induciae* on 21 February 2022, and absent a notice of appearance to defend, the plaintiff applied to the registrar for default judgment under Uniform Rule 31(5)(a) in terms of a notice dated 22 March 2022. This application was granted on 18 May 2022 in the following terms:

- "A. *Cancellation of the Agreement on date of the Judgment;*
- B. *An Order directing the defendant to return to the Plaintiff the 2016 Volkswagen Polo [...] with CHASSIS NUMBER...ENGINE NUMBER...;*
- C. [the contents of paragraph C. was redacted];
- D. *The defendant is ordered to pay the plaintiff's text costs of suit and Sheriff's costs in the amount of R343.28."*

[8] The application for rescission of judgment was delivered on 26 July 2022, in which the defendant seeks an order for the rescission of the default judgment, the stay of the warrant for the delivery of the motor vehicle, and costs in the event of opposition. The plaintiffs opposed the defendant's application on the grounds to be alluded to below.

#### *Defendant's case*

[9] The defendant stated that a week or two after receipt of the summons, he attended the office of the plaintiffs' attorneys, where he met with an unidentified person. The defendant stated that he and the plaintiffs' representative agreed that the legal action would be suspended and that he would resume the payment of monthly instalments and insurance premiums in respect of motor vehicle purchased as stated.

[10] However, on 30 June 2022, the defendant became aware that default judgment had been granted against him. He avers that he delivered the rescission application within the period of 20 days after acquiring knowledge of the judgment, as is required by Uniform Rule 31(2)(b).

[11] The defendant cites the following main grounds in support of the rescission application:

- a. he was not in wilful default;
- b. the plaintiff's notice in terms of section 129(1)(a) of the National Credit Act, 34 of 2005 ("NCA") never reached him, that the plaintiffs failed to "*draw the default to the notice of the consumer in writing*", that the legal proceeding instituted by the plaintiffs' was irregular or unlawful, and that the same fate of irregularity or unlawfulness struck the default judgement;
- c. the plaintiff's breached the procedural requirements set in clauses 13.3 and 13.4 of the Instalment Sale Agreement;
- d. the default judgment should not have been granted in view of the agreement to stay legal proceedings; and,
- e. the paltry arrears of R 12,322.79 (which arrears were admitted), weighed against the due payment by the defendant of R 238,445.71, did not warrant the granting of default judgment.

[12] The defendant contended that the application is brought in terms of rules 31(2)(b) and/or 42(1)(a) of the Uniform Rules of Court and/or under the common law.

*Plaintiffs' case*

[13] The following provides a summary of the main grounds of plaintiffs' opposition to the rescission application:

- a. The plaintiffs do not know when the defendant gained knowledge of the default judgment, and they do not contend that the application was delivered out of time.
- b. The plaintiffs dispute that the defendant was not in wilful default, contending that there is no cogent reason why the defendant failed to enter an appearance to defend. The plaintiffs contend that the defendant's wife (on whom the summons had been served) would have informed the defendant thereof.
- c. The plaintiff denied any agreement between the plaintiff's attorney and the defendant to suspend the proceedings and, in any event, contended that no agreement has been reduced to writing and signed on behalf of both parties as is required by the so-called "non-variation clause" (clause 22.6 of the Instalment Sale Agreement).
- d. As of 17 January 2022, the defendant's arrears amounted to R 20,612.94, with an outstanding balance of R106,947.34.
- e. The plaintiffs contended that it was not required, as a matter of law, to bring the section 129(1)(b)(i) notice to the subjective knowledge of the defendant.

[14] The plaintiffs accordingly seek an order dismissing the application with costs.

*The Issues*

[15] According to the papers exchanged, the main disputes as formulated by the parties are **first** whether the defendant was in wilful default; **second** whether the plaintiffs failed to satisfy the requirements of section 129(1)(b)(i) of the NCA, and the failure to have issued a demand in terms of clause 13 of the Instalment Sale Agreement; and **third**, whether the parties concluded an enforceable agreement for plaintiff to suspend its legal action pending the resumption of monthly instalments (and not to seek and obtain default judgement against the defendant).

[16] During oral argument, I raised the following issue with Mr Peter, the plaintiffs' counsel: Given that the plaintiffs' cause of action was based on an Instalment Sale Agreement concluded between Volkswagen and the defendant, and given that, on the plaintiffs' pleaded case, the said agreement is subject to the provisions of the NCA, whether or not it was required of the plaintiffs to allege in their particulars of claim that Volkswagen was a registered credit provider as at the conclusion of the said agreement? If so, whether the plaintiffs' failure to have made an allegation(s) to this effect provides a basis to rescind the judgment as having been erroneously sought and granted as envisaged by Uniform Rule 42(1)(a) of the Uniform Rules of Court. Mr Peter assisted the court by providing supplementary submissions on this issue, to which I shall refer more fully below.

[17] It is trite that once a court holds that an order or judgement was erroneously sought or granted, it should, without further consideration, rescind or vary the order.<sup>1</sup> For this reason, I shall first deal with the question of whether the default judgment ought to be rescinded in view of the absence of an allegation that Volkswagen was a registered credit provider as envisaged by the NCA.

*Was the application brought within a reasonable period?*

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<sup>1</sup> *Rossiter & others v Nedbank Ltd* (96/2014) ZASCA 196 (1 December 2015) at paragraph [16].

[18] An application for rescission brought under Uniform Rule 42 must be brought within a reasonable period of time.<sup>2</sup>

[19] As stated above, the defendant stated that he had a meeting with the plaintiffs' attorney, at which occasion an agreement was reached to suspend proceedings. The plaintiffs denied the meeting and the conclusion of any such agreement and, in any event, contended that even if the alleged suspension agreement had been concluded, it would not have been of any legal force or effect by virtue of the non-variation clause in the Instalment Sale Agreement.

[20] Although details of the meeting are scant, it cannot be found that the defendant's version is patently false or that it lacks credence. Even if the suspension agreement was unenforceable as contended for by the plaintiffs, the events surrounding the meeting and agreement (whether of legal force or effect or not) do explain the defendant's failure to have entered an appearance to defend the action.

[21] The plaintiffs do not dispute the date on which the defendant alleges that he had learnt of the judgment, i.e. 30 June 2022. The rescission application was delivered some 18 court days after that.

[22] In view of the above, it cannot be found that the rescission application was not brought within a reasonable period of time.

*The requirement of registration as a credit provider*

[23] There are a multitude of statutes that require members of specific professions or trades to be registered with their relevant regulatory body. Failure to be registered has various unwanted consequences, including that the performance of specific conduct is prohibited, a contract concluded by him/her/it would be unlawful, void or criminalised, or disempowering such professional or tradesperson

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<sup>2</sup> *First National Bank of Southern Africa Limited v van Rensburg N.O.: in re First National Bank of Southern Africa Limited v Jurgens* 1994 (1) SA 677(T) at 681B-G; *Promedia Drukkers and Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411(C) at 421G.

to claim remuneration. Amongst these by way of example resort architects<sup>3</sup>, estate agents (property practitioners) who are required to hold a fidelity fund certificate<sup>4</sup>, legal practitioners<sup>5</sup>, home builders<sup>6</sup>, and many others.

[24] Various sections of the NCA deal with the registration of credit providers. In section 40(1), the NCA obliges credit providers to apply for registration<sup>7</sup>. Section 40(3) prohibits a person obliged to be registered under subsection 40(1) but who failed to register from offering, making available or extending credit<sup>8</sup>. Section 40(4)<sup>9</sup> provides that a credit agreement concluded by an unregistered credit provider obliged, despite his/her/its obligation to be registered, shall be unlawful and void to the extent provided for in section 89. Under section 89(2)(d), unless excluded under section 89(4)(a) or (b)<sup>10</sup>, a credit provider must be registered at the time of concluding the credit agreement, failing which that credit agreement shall be unlawful<sup>11</sup> and the credit provider's conduct constitutes an offence<sup>12</sup>. Section 52(3) provides that a valid certificate

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<sup>3</sup> Architectural Professions Act, 44 of 2000, sections 18(1) and (2), read with section 41(3).

<sup>4</sup> The Property Practitioners Act, 22 of 2019, section 48(1).

<sup>5</sup> Legal Practice Act, 28 of 2014, sections 24(1), and 33(1), (2), and (3).

<sup>6</sup> Housing Consumers Protection Measures Act, 95 of 1998, section 10(1) read with *Cool Ideas 1186 CC v Hubbard and Another* (CCT 99/13) [2014] ZACC 16; 2014 (4) SA 474 (CC) at [37].

<sup>7</sup> Section 40(1): "A person must apply to be registered as a credit provider if the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1)."

<sup>8</sup> Section 40(3): "A person who is required in terms of subsection (1) to be registered as a credit provider, but who is not so registered, must not offer, make available or extend credit, enter into a credit agreement or agree to do any of those things."

<sup>9</sup> Section 40(4): "(4) A credit agreement entered into by a credit provider who is required to be registered in terms of subsection (1) but who is not so registered is an unlawful agreement and void to the extent provided for in section 89."

<sup>10</sup> Section 89(4) provides that:

"Subsection (2) (d) does not apply to a credit provider if—

(a) at the time the credit agreement was made, or within 30 days after that time, the credit provider had applied for registration in terms of section 40, and was awaiting a determination of that application; or

(b) at the time the credit agreement was made, the credit provider held a valid clearance certificate issued by the National Credit Regulator in terms of section 42 (3) (b)."

<sup>11</sup> Section 89(2): "Subject to subsections (3) and (4), a credit agreement is unlawful if... (d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered."

<sup>12</sup> The intentional conclusion of a credit agreement by an unregistered credit provider, or a person intentionally portraying him/her/itself as a registered credit provider while not registered as such, is an offence subject to the provisions of sections 157B and 157C.



or duplicate certificate of registration, or a certified copy of it, is *prima facie* proof that the credit provider is registered in terms of this Act.

[25] At common law, an unlawful contract is generally considered to be void *ab initio* (from the outset) and of no effect, as it is a nullity and cannot be enforced. Thus, no party can acquire rights under it, and if a party fails to perform in terms of such an agreement, the other cannot compel him/her to do so by way of a contractual claim for specific performance or damages. This is expressed in the maxim *ex turpi causa non oritur actio*: no action arises from a cause that is turpitudinous. The exception to this principle is where it is apparent from the language of a statutory injunction from which the unlawfulness originates that an agreement or act performed contrary to it will not be invalid.<sup>13</sup>

[26] It follows that the status of a credit provider as registered or unregistered at the time of the conclusion of a credit agreement is determinative, in part, of the lawfulness and validity of that agreement and the enforceability of its claim against the debtor.

[27] The defendant did not mount the rescission application on the plaintiffs' failure to have made allegations in their particulars of claim regarding Volkswagen's status as a registered credit provider. As will be explained below, the absence of those allegations concerns the defendant's right to a fair hearing under section 34 of the Constitution.

[28] I am of the view that the court is obliged to consider and uphold the defendant's rights to a fair hearing and to consider the relevant provisions of the NCA, even though the defendant did not raise this issue as a ground for rescission. In any event, as will be demonstrated below, the absence of allegations regarding Volkswagen's status as a registered credit provider appears from the papers before the court. It would not be in the interest of justice for this court to ignore this *lacuna* in the plaintiffs claim because the defendant did not raise the issue.

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<sup>13</sup> *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) BCLR 170 (CC); 2013 (2) SA 1 (CC) at paragraphs [14] to [17].

*The absence of allegation(s) regarding Volkswagen's registration as a credit provider*

[29] It is a trite principle of our law that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. As such, a plaintiff is obliged to plead all allegations necessary to sustain a cause of action.

[30] Rule 18(4) of the Uniform Rules of Court requires that “[E]very pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his or her claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

[31] The obligation to plead a cause of action, as described above, is a fundamental principle of fairness in the conduct of litigation. It promotes the parties' rights to a fair hearing, which is guaranteed by section 34<sup>14</sup> of the Constitution.<sup>15</sup> In my view, the same can be said in relation to the requirements of Uniform Rule 18(4): a clear and concise statement of the material facts on which the pleader relies, adequately particularised for the other party to reply, will promote the parties' rights to a fair hearing.

[32] Applied to the facts *in casu*, the question of whether Volkswagen was registered as a credit provider at the time of conclusion of the Instalment Sale Agreement on or about 29 July 2016 is determinative, in part, of the lawfulness and validity of the Instalment Sale Agreement and enforceability of the plaintiffs' claim as the alleged cessionary of all Volkswagen's rights, title and interest under the Instalment Sale Agreement.

[33] In my view, an allegation that Volkswagen was a registered credit provider at the time of the conclusion of the Instalment Sale Agreement is essential to the

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<sup>14</sup> Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.

<sup>15</sup> *South African Police Service v Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC) at paragraph [202].

plaintiffs' cause of action. Consequently, the inquiry turns to whether or not the plaintiffs have made the necessary/required allegations in their particulars of claim regarding the registration of Volkswagen as a credit provider at the conclusion of the agreement mentioned above.

### *Analysis*

[34] The following allegations in the plaintiffs' particulars of claim or portions of the annexures to it are pertinent to the question concerning the description of the credit provider's registration required by section 40 of the NCA:

- a. The plaintiffs are cited as *"trustee[s] of the Velocity Trust being a duly registered credit provider with its registration [number] being NCRCP7024 in terms of the National Credit Act 34 of 2005, as per NCR Certificate annexed hereto marked "A1").... A copy of the Letter of Authority of The Velocity Trust is annexed hereto marked "A2"..."*. Annexure "A1".
- b. Annexure "A1" appears to be a certificate issued by the National Credit Regulator on 1 August 2021, certifying that *"THE VELOCITY FINANCE ISSUER TRUST IT20747/2014...NCRCP7024 (National Credit Regulator registration number) ... HAS BEEN REGISTERED AS A CREDIT PROVIDER IN TERMS OF THE NATIONAL CREDIT ACT 43 OF 2005, AS AMENDED ..."*.
- c. The allegation concerning the conclusion of the Instalment Sale Agreement reads as follows: *"[O]n ... 29 July 2016, Volkswagen Financial Services South Africa (Pty) Ltd, represented by a duly authorised employee... and the defendant...entered into an Electronic Instalment Agreement.... A copy of the Agreement, concluded under account number ... with the defendant, as annexed hereto marked **Annexure "B"**..."*.

- d. The National Credit Act, 34 of 2005, applies to the Instalment Sale Agreement.
- e. On or about 3 November 2016, Volkswagen ceded to the plaintiffs all its rights, title and interest in and to the Instalment Sale Agreement, including ownership of the vehicle.
- f. Annexure “B” to the particulars of claim comprises various documents including the “*QUOTATION / COST OF CREDIT FOR AN INTERMEDIATE INSTALMENT AGREEMENT (VARIABLE) [...] In terms of Section 92(2) of the NCA [...] NCR NUMBER: NCRCP6635*”, a Debit Order Authorisation, a Delivery Receipt, an E-Sign Cover Page and the signature page.
- g. Towards the upper-left corner of the first five pages of Annexure “B”, the following is displayed: “*NCRCP6635*”.

[35] The credit provider envisaged by the Instalment Sale Agreement was Volkswagen, not the “*Velocity Trust*”. As stated, it is required of the plaintiffs to plead and prove that Volkswagen was a registered credit provider when it concluded the Instalment Sale Agreement with the defendant.

[36] It is apparent from the foregoing that the author of the particulars of claim deemed it necessary and apt to plead, in considerable detail, that the “*Velocity Trust*” was a registered credit provider and its NCR registration number, which allegations incorporated an annexed Credit Provider Certificate issued by the National Credit Regulator.

[37] These allegations, inasmuch as they relate to the registration of “*Velocity Trust*” as a registered credit provider, in my view, are irrelevant to requisite allegations pertaining to the registration status of Volkswagen as the credit provider, as at the conclusion of the agreement mentioned above.

- [38] The allegations pertaining to the registration of the Velocity Trust are, in any event, flawed. The provisions of the NCA referred to above regarding the registration as a credit provider make it clear that a credit provider must be registered at the time of the conclusion of the credit agreement. No such allegations are made pertaining to the “*Velocity Trust*”. Further, in Annexure “A1” to the particulars of claim, the “*Credit Provider Certificate*” of “*The Velocity Finance Issuer Trust*” was dated 1 August 2021 and expired on 31 July 2022. The date of conclusion of the Instalment Sale Agreement (29 July 2016) precedes the validity period of Annexure “A1”.
- [39] In his supplementary submissions, Mr Peter referred to authorities both in support of his contentions and others that do not support his case. This approach by counsel is proper and commendable.
- [40] Relying on *Telematrix (Pty) Ltd v Advertising Standards Authority SA*<sup>16</sup>, Mr Peter contended that the particulars of claim and the annexures thereto are to be read as a whole, and where the particulars of claim lacked averments which are fleshed out in annexures, the contents of the annexures should be read into particulars of claim. Further, one should not be overly technical when considering whether a pleading is excipiable.
- [41] In *Telematrix*, the judgment focused on various legal aspects related to the delictual liability of officials for making incorrect and negligent decisions. However, it cannot be gainsaid that the contents of annexures are to be incorporated into pleadings and, further, that an overly technical approach at the exception stage is inappropriate.
- [42] An important feature of *Telematrix* is that the contents of the annexures, as incorporated into the pleadings, thwarted the factual basis of two of the complaints that the plaintiff in that matter had relied on in its claim. Borrowing from the judgment itself, “[T]he case does not therefore have to be decided on *bare allegations only but on allegations that were fleshed out by means of*

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<sup>16</sup> *Telematrix (Pty) Ltd v Advertising Standards Authority SA* (459/2004) [2005] ZASCA 73; [2006] 1 All SA 6 (SCA); 2006 (1) SA 461 (SCA).

*annexures that tell a story...*".<sup>17</sup> It speaks for itself that the incorporation of contents of the annexures into the pleading must at least be meaningful, relevant and material. In my view, *Telematrix* suggests that incorporating information from annexures into a pleading that is not meaningful and relevant and that lacks substance would either be valueless or prejudicial.

[43] Based on *Sasfin Bank Ltd and Another v Melamed and Hurwitz Incorporated and Another*<sup>18</sup>, Mr Peter argued that it must be shown i) that absent an amendment, an exception would have succeeded, and the claim would have been dismissed, ii) that a court would not have observed any of the defects *mero motu* when considering granting default judgment, and therefore, that the judgment was not erroneously granted. Mr Peter argued that the annexures prove that Volkswagen and, for that matter, the plaintiffs, were registered as credit providers, and further aspects can be covered by evidence.

[44] In *Sasfin*, the applicant in the application for rescission of a default judgment contended that the particulars of claim were excipiable because the cessions on which the respondent had relied to establish their claims had not been properly pleaded, that a lost document referred to in the particulars of claim had not been properly dealt with in the pleadings and that as regards the suretyship under which the second applicant was held liable there was an error on the face of the suretyship document that created uncertainty as to the identity of the creditor, leaving the suretyship agreement "open to interpretation".<sup>19</sup> The court found that none of the matters raised by the applicant were matters which a court would ordinarily have been expected to observe *mero motu* in deliberating on whether or not to grant a default judgment, and for that reason, it cannot be said that the judgment was erroneously granted. Regrettably, the court did not mention any authority for or the reasoning underpinning the test

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<sup>17</sup> *Telematrix (Pty) Ltd v Advertising Standards Authority SA* at [2].

<sup>18</sup> *Sasfin Bank Ltd and Another v Melamed and Hurwitz Incorporated and Another* (31948/19) [2022] ZAGPPHC 620 (24 August 2022), unreported.

<sup>19</sup> *Sasfin Bank Ltd and Another v Melamed and Hurwitz Incorporated and Another* at paragraph 15.

that it applied in that matter, i.e., what a court would ordinarily have been expected to observe.

[45] In the instant case, the plaintiffs had applied to the registrar for default judgment under Uniform Rule 31(5)(a), and a judge did not grant it. In my view, it cannot reasonably be expected of the registrar to consider whether a pleading claim is excipiable before granting default judgment. Therefore, the test applied in *Sasfin*, assuming that it is authoritative, would not apply to judgments applied for under Uniform Rule 31(5)(a) and granted by the registrar, as occurred in the instant matter.

[46] In *Silver Falcon Trading 333 (Pty) Ltd and Others v Nedbank Ltd*<sup>20</sup>, the court referred, with approval, to the approach adopted by Coetzee J in *Marais v Standard Credit Corporation Ltd* (2002 (4) SA 892 (W)). In that matter, he rescinded a default judgment granted on a claim subject to the Credit Agreements Act, 75 of 1980, where the summons failed to aver that s 6(5) of that Act had been complied with. He held that this was an essential averment absent which the summons was excipiable as not disclosing a cause of action. This was because he held s 6(5) of that Act imposed by law a suspensive condition in respect of contracts subject to that Act and that a suspensive condition and its fulfilment must be pleaded. Dealing with the application of Uniform Rule 42(1)(a) he said:

*'In terms of Rule 42(1)(a) I can rescind the judgment on application by the party affected. In my view the word "erroneously" covers a matter such as the present one, where the allegation is that for want of an averment there is no cause of action, i.e. nothing to sustain a judgment, and that the order was without legal foundation and as such was erroneously granted for the purposes of Rule 42(1)(a).'*

[47] In *Silver Falcon*, the court further concluded in paragraph 5 that if there are insufficient averments to sustain a cause of action, it follows that the judgment must have been erroneously granted within the meaning of the wording of

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<sup>20</sup> *Silver Falcon Trading 333 (Pty) Ltd and Others v Nedbank Ltd* 2012 (3) SA 371 KZP at 373F-375E.

Uniform Rule 42(1)(a) because there can have been no legal basis for granting the default judgment.

[48] As indicated above, the first five pages of Annexure “B” display the descriptions “NCR NUMBER: NCRCP6635” and/or “NCRCP6635”. This method of numbering by the National Credit Regulator often appears in documents that serve before courts. The question is whether this data or information is i) meaningful, relevant and material to the particulars of claim; and ii) capable of being understood as an allegation that Volkswagen was registered as a credit provider at the time of the conclusion of the Instalment Sale Agreement.

[49] In my view, the answer to both questions is in the negative. The display of this information where it appears has no evidentiary value. It is further meaningless, irrelevant and immaterial absent averments to the effect that Volkswagen, as at the conclusion of the Instalment Sale Agreement, was a registered credit provider in terms of the NCA, and “NCRCP6635” has reference to Volkswagen’s registration status at the relevant time.

[50] In the absence of the latter allegations, the particulars of claim (including its annexures) lacks the necessary allegations to sustain a cause of action. This *lacuna* rendering renders the plaintiffs’ claim excipiable. Additionally, the particulars of claim (including its annexures) lacks a clear and concise statement of a material fact (i.e. Volkswagens’ registration as a credit provider as at the conclusion of the credit agreement) upon which the pleader relies for his or her claim, with sufficient particularity to enable the defendant to reply thereto. As such, the particulars of the claim does not satisfy the provisions of Uniform Rule 18(4), which constitutes an irregularity as envisaged by Uniform Rule 30.

[51] These deficiencies in the pleaded case go to the root of the plaintiffs’ case against the defendant.



[52] Lastly, Mr Peter urged me to take into account that an unknown individual assisted the defendant in preparing papers on the defendant's behalf. While there appears to be merit in Mr Peter's contention, there is no evidence on the identity or qualifications of this person and the extent of his/her "assistance". It follows that this court cannot deviate from applying the law because the defendant was possibly "assisted" by an unqualified advisor. It would certainly not be unfounded for the plaintiffs to have this aspect investigated by the Legal Practice Council.

*Obiter*

[53] It appears that the plaintiffs' particulars of claim or annexures may be defective in other regards. My views are *prima facie*; I make no findings on the aspects mentioned below, and these aspects are not taken into account in arriving at the ultimate my ultimate conclusion and order. I highlight the following aspects:

- a. The first and second plaintiffs are cited as trustees of the "*Velocity Trust*". The referenced Letters of Authority ("A2") mentions the name of five trustees. There does not appear to be an explanation why the five trustees stated in the Letters of Authority have not been cited in the combined summons;
- b. The particulars of claim mentions the "*Velocity Trust*" while the referenced Annexures "A1" and "A2" refer to "*THE VELOCITY FINANCE ISSUER TRUST*";
- c. In paragraphs 11 to 14 of the particulars of claim, reference is made to a written cession agreement without attaching the agreement or the relevant portion thereof. This may fall short of the requirements of Uniform Rule 18(6);
- d. The plaintiffs plead that the Instalment Sale Agreement was concluded on 29 July 2016, and the cession of Volkswagen's rights, title, interest and ownership took place on 3 November 2016. The section 129 notice was

issued on behalf of the Trustees of The Velocity Finance Issuer Trust on or about 23 November 2021. However, according to the Certificate of Balance dated 2 December 2021, the creditor was “*Volkswagen Financial Services*” and not “*The Velocity Finance Issuer Trust*”, as one would have expected in view of the alleged cession.

### *Conclusion*

[54] For the reasons stated above, the default judgment has been erroneously sought and granted and falls to be rescinded under Uniform Rule 42(1)(a).

[55] As has been explained above, given the above finding, the court does not consider the application inasmuch as it relates to the provisions of Uniform Rule 31(2)(b) or rescission of default judgment under the common law.

[56] The relief sought for the stay of the warrant for the delivery of the motor vehicle is superfluous in view of the order for the rescission of the default judgment.

### *Costs*

[57] I take into account that the below order means that the application would have succeeded. However, the outcome of the application is not by virtue of the reasons advanced by the defendant. In any event, it does not appear from the record that an admitted and enrolled attorney has represented the defendant.

[58] I believe that the costs of this application should be costs in the cause.

### *Order*

Accordingly, the following order is made:

[1] The default judgment granted against the defendant on 18 May 2022, as it appears at Caselines 021-2, is hereby rescinded.

[2] The defendant shall deliver his plea within 20 (twenty) days from the date of this order.

[3] The costs of this application shall be costs in the cause.

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**C.A.C. KORF  
ACTING JUDGE OF THE HIGH COURT  
JOHANNESBURG**

For the Applicant: **In Person**

For the First and Second Respondent: **ADV L PETER, instructed by  
ROSSOUWS, LESIE INC.**

Date of hearing: 11 April 2023

Date of judgment: 18 October 2023