IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21026/2019

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

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4 December 2023 **EJ FRANCIS**

In the matter between:

SEPEDI CHRISTOPHER MAHLAKWANA Applicant

and

POTPALE INVESTMENTS (RF) (PTY) LTD Respondent

In re: the matter between:

POTPALE INVESTMENTS (RF) (PTY) LTD Plaintiff

and

SEPEDI CHRISTOPHER MAHLAKWANA Defendant

JUDGMENT

FRANCIS J

1. The applicant brought an application in terms of rule 42(1)(a) of the uniform Rules of Court (the rules) alternatively in terms of the common law to rescind

the default judgment order that was granted against him on 22 October 2019. He sought costs only in the event that the application was opposed.

2. The rescission application is brought in terms of rule 42(1)(a) of the Uniform Rules of court on the basis that the it was erroneously granted in the absence of the applicant.

3. The application is dated 25 February 2021 and was only served on the respondent on 6 April 2021.

4. The applicant case is that on 26 November 2016 and at Polokwane he and the respondent entered into a written sale/lease agreement in terms of which the respondent would sell or lease to him a Toyota Quantum 2.5D-4D Sesifikile 16s (the vehicle) for the total purchase price or rental amount R429 748.03 excluding other necessary charges. He would pay a deposit of R28 000.00 and 72 monthly instalments of R10 927.95 commencing from 6 January 2019. The vehicle would be free of latent defects and fit for use on a public road. The vehicle would be reasonably suitable for the purpose for which it was generally intended and would be useable and durable for the reasonable period of time having regard to the use to which it would normally be used, and to all surrendering circumstances of its supply. Ownership of the vehicle would remain vested with the respondent until all amounts have been paid by him.

5. In pursuance of the agreement he paid the required deposit of R28 000.00 and the vehicle was delivered to him on 28 November 2018 at its business place in

Polokwane.

6. It is the applicant's case that the respondent's agent/representative had not at the time of conclusion of the agreement disclosed to him that the vehicle had latent defects which *inter alia* were water leakage on the engine; production of substantial smoke; and defective/improper body alignment. The aforesaid defects were of such nature that the vehicle could not be used on a public road, and/or the vehicle could not be used for the purpose it was purchased for, as he bought the vehicle to be used as a taxi to convey commuters, and to make income therefrom. Had the respondent's agent disclosed to him the aforesaid defects, he would not have entered into the agreement with the respondent.

7. It is the applicant's case that on 28 March 2019 he had returned the vehicle to the respondent at its business in Polokwane for it to be diagnosed and cured of the aforesaid defects. He was requested to drive/take the vehicle to the respondent's mechanic agent call CV World Drive Shaft Centre, Polokwane, and did as requested. Upon his arrival there the said respondent's agent was instructed/informed by the assistant(s) thereof to leave the vehicle at the said agent's business premises for the vehicle to be properly diagnosed and repaired. He was told by the assistant that he would be notified telephonically when the vehicle would be diagnosed and cured, for him to come and fetch it.

8. It is the applicant's case that the respondent or its agent, had refused or failed or neglected to diagnose and/or cure the said defects, and the vehicle was never released to him.

9. On 10 April 2019 the applicant's attorney of record addressed a letter to the respondent requesting that the applicant be provided with a proper vehicle alternatively to refund him the purchase price within seven days of receipt of the letter. The respondent failed to comply with the demand and the agreement was consequently duly cancelled.

10. On 25 October 2019 the applicant instituted action proceedings in the Limpopo Division of the High Court under case number 7535/2019 seeking confirmation of the cancellation of the agreement and payment of the sum of R429 748.03 with interest. The applicant also sought relief in the alternative.

11. On 13 March 2019 the respondent served a plea in the Limpopo action and stated that the summons was served on one Michel Mahlakwana who was alleged to be the applicant's wife and he did not enter an appearance to defend. On 22 October 2019 the Registrar of this division had granted default judgment for *inter alia* for the return of the vehicle.

12. It is the applicant's case that he only became aware of the action and default judgment referred to by the respondent in its plea after a warrant for delivery was issued on 24 October 2019 and was executed by the sheriff on the presence of his drive Mr Pedi.

13. The applicant contended that the default judgment in this matter was erroneously sought and or granted for the following reasons:

13.1 The respondent is a credit provider as defined in the National Credit Act 34 of 2005 (the Act);

13.2 In terms of the provisions of section 129(1) read with section 130 of the Act, the respondent was in the event that he defaulted with the monthly instalments, obliged to notify him in writing of such default before it could institute the action proceedings against him and had failed to notify him of his default to pay as it is statutory required;

13.3 The statutory notice in terms of section 129 was sent and received by the Burgersfort Post Office and should have been sent to the Driekop Post Office;

13.4 The applicant denied that the sheriff had served the summons on him or at his chosen address. According to the return of service on 26 June 2019 it was served upon a certain person named Michel Mahlakwana, who is alleged to be his wife. His wife is Mamokgotlopo Johanna Kopa and she denied that the summons was served on her and he referred to her confirmatory affidavit. He does not know the person on whom the summons was served.

13.5 The summons was not properly served at all as required in terms of the Rules.

13.6 At the time when the default judgment was granted he had already cancelled the agreement and the action proceedings were pending in the Limpopo Division and the respondent had maliciously withheld that fact and did not disclose it to the court.

13.7 This court has no jurisdiction since he never resided nor was employed or had business in the jurisdictional area of this court. The agreement

was concluded in Polokwane as is seen on page 12 of the agreement. The respondent did not plead in its particulars of claim that the court has jurisdiction because the concluded and breached within its jurisdiction. The averment is made in the summons that the agreement was concluded within the jurisdiction of this court in Midrand but the agreement shows that it was signed in Polokwane.

14. The rescission application was opposed by the respondent. It denied that this court lacked jurisdiction and referred to the credit agreement that was signed by the parties and contended that it was concluded at Midrand. The applicant had breached the agreement in having failed to pay the amounts in terms of the agreement. There was compliance with sections 129 and 130 of the Act and the letter were sent to the applicant chosen address. The summons was issued and on 14 June 2019 and was served on 26 June 2019 on the applicant's wife Michel Mahlakwana according to the return of service and his chosen address. After no notice of intention to defend was served default judgment was granted on 19 September 2019. On 14 November 2019 the sheriff executed a writ and attached the vehicle was which was repossessed and sold on 11 August 2020.

15. The respondent stated that on 15 January 2020 the applicant served a summons on the respondent's office in Polokwane out of the Polokwane High Court. The action is being defended and the respondent has filed a plea.

17. The applicant is not entitled to a rescission. Upon receipt of the rescission application the applicant's attorney was informed that the vehicle had been sold and requested them to withdraw the application.

18. The respondent said that the applicant is required to show good cause before an order rescinding the default judgment will be granted. An applicant is required to both explain his default in defending the action and to provide grounds that would be *bona fide*. The applicant offers no explanation for not defending the action namely that service of the summons was improper and this explanation must fail in the face of the return of service.

19. In addition the applicant has no *bona fide* defence to the judgment against him. He has not paid the amounts due in terms of the agreement and was in arrears at the time when the summons was issued and when judgment was granted. The respondent cancelled the agreement and is entitled to the return of the vehicle and the applicant cannot rely on rule 31(2)(b).

20. The respondent said that the applicant states that the rescission application is brought within the ambit of rule 41(2)(a) and that the default judgment was erroneously sought which is not the case. He was in default of his obligations, and the respondent gave due notice of its intention to take action against the applicant in terms of section 129 of the Act. The respondent was entitled to enforce the credit agreement and the default judgment order was not erroneously sought and granted.

21. The applicant's rescission application is brought in terms of rule 41(2)(a) which deals with variation and rescission of orders. It provides that the court , in addition to any other powers it may have, *mero motu,* or upon 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.

22. The applicant had denied having that the summons was served on him. The return of service indicates that it was served one one Michel Mahlakwana who informed the sheriff that she was the applicant's wife. The applicant denied that he knows the said person and his wife Mamogotlopo Johanna Mahlakwana deposed to confirmatory affidavit and confirmed what the applicant alleged about service. A copy of their marriage certificate was also filed which supports the applicant's version. The respondent did not file any confirmatory affidavit by the sheriff to deal with the issue of service and no reason was provided for its failure to do so. It is therefore clear that the registrar who had granted the default judgment was misled about the return of service.

23. The respondent had alleged in paragraph 3 of the particulars of claim that the cause of action arose within the jurisdiction of this court namely at Midrand. This is not correct since the written agreement that the respondent relied upon is misleading. It indicates that the credit agreement was signed by the applicant at Polokwane on 26 November 2018. It was also signed by one Rudzani E Mahlangu a financial insurance member also on 26 November 2018. The word Midrand was typed and next to it the words Polokwane was

written in. Immediately after that signature words are inserted that the agreement was signed by one SN Matloga at Midrand. This discrepancy has not been explained by the respondent and the applicant version that the agreement was concluded at Polokwane is not contradicted.

24. It is clear therefore that the agreement could not have been signed both at Polokwane by the applicant and the financial insurance member and then at Midrand by S N Matloga.

25. The registrar of this court based on what had been placed before him or her could not have found that this court had jurisdiction and should not have granted default judgment against the applicant.

26. I am satisfied therefore that the applicant has proven that the order was erroneously granted in his absence by the registrar when it first of all had not been served and did not have jurisdiction to hear the matter.

27. The applicant stands to be granted and there is no reason why costs should not follow the result.

28. In the circumstances the following order is made:

28.1 The default judgment granted by the registrar of this court on 22 October 2019 is rescinded in terms of rule 42(1)(a) of the Uniform Rules of court.

28.2 The respondent is to pay the costs of the application on a party and party scale.

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FRANCIS J

JUDGE OF THE HIGH COURT

FOR THE APPLICANT	:	P F PHASHA OF PHOKOANE PHASHA ATTORNEYS
FOR RESPONDENT	:	J H MOLLENTZE INSTRUCTED BY MARIE-LOU BESTER INCORPORATED
DATE OF HEARING	:	11 APRIL 2023
DATE OF JUDGMENT	:	4 DECEMBER 2023

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to caselines. The date and time for hand-down is deemed to be 11h00 on 4 December 2023.