Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 47915/2021

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

21/04/23

…….. **……....**

Date **ML TWALA**

In the matter between:

RODNEY JOHNNY MELLA
APPLICANT

(ID NO: […])

And

FIRST RAND BANK LIMITED t/a WESBANK

AND ISUZU FINANCE
(REGISTRATION NUMBER: 1929/001225/06) RESPONDENT
Neutral Citation: *Rodney Johnny Mella V First Rand Bank Limited T/A Wesbank And Isuzu Finance* (Case No. 2021/47915) [2023] ZAGPJHC 359 (21 April 2023)

JUDGMENT

Summary: Rescission of judgment in terms of Rule 42(1) (a) and the common law — default judgment granted in terms of Rule 31(5) of the Uniform Rules of Court— the principles governing rescission restated – Application dismissed with costs on attorney and client scale.

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 21st of April 2023.

TWALA J

[1] This is a rescission application in which the applicant seeks an order rescinding the default judgment granted against him by the Registrar. The order for rescission is sought either in terms of Rule 42(1) (a) of the Uniform Rules of Court or the common law. The applicant seeks an order in the following terms:

1.1 that the order granted by the Honourable Court on the 5th day of May 2022 is hereby rescinded and set-aside;

1.2 that the applicant is hereby granted leave to defend the abovementioned action issued against him; alternatively

1.3 that the applicant be ordered to refrain from attaching the vehicle mentioned in the order until finalisation of the matter;

1.4 that the respondent is hereby directed to pay the costs of this application on attorney and client scale, only in the event of opposition.

[2] The genesis of this case arises from an instalment sale concluded between the applicant and the respondent on the 21st of January 2019 when the applicant purchased a motor vehicle described as a Dodge Journey 3,6 V6 R/T A/T for a purchase consideration of R249 900. The applicant undertook to pay 72 instalments of R5 969.49 each in order to settle his indebtedness to the respondent under this instalment sale agreement. However, the applicant failed to pay the instalments as agreed and fell into arrears. As a result, the respondent instituted action proceedings for the cancellation of the agreement and recovery of the vehicle which is the subject of the instalment sale agreement. It is further common cause that the respondent was granted judgment by default on the 26th of May 2022.

[3] It is contended by the respondent that the application refers to a judgment of the 5th of May 2022 whereas there is no such judgment pertaining to the dispute between the parties. However, the applicant has refused to amend its notice of motion to correct the error of referring to a judgment of the 5th of May 2022 instead of the 26th May 2022. Since there is no such judgment regarding the dispute between the parties, the application should be dismissed.

[4] When the applicant was confronted by this error and its failure to apply for the amendment of its notice of motion, the applicant contended that it has stated the correct date of the judgment in its founding affidavit. It was contended further that if the Court was not inclined to allow it to continue with the matter in its present state, then it requested the matter to be removed from the roll and tendered the costs of the postponement.

[5] However, the respondent opposed the postponement of the matter on the basis that the delay in finalising the matter was unnecessary since the applicant on its papers has failed to meet the requirements of an application for rescission of judgment. It was contended that the applicant has failed to show that good cause exists in that it has failed to disclose the grounds and basis of its defence contending that it will disclose same at the trial of the matter. The applicant, so it was contended, is not bona fide with the application but has launched same only for the purposes of delaying the finalisation of the matter. Default judgment was entered against the applicant after it was in wilful default, having been barred from pleading and has since not even applied to uplift the bar nor apply for condonation for the late filing of its plea.

[6] In response to the respondent's averments, the thrust of the applicant's contentions, except for the technical defences were that he filed his plea on the 5th of May 2022 and judgment was granted on the 26th of May 2022. Therefore, so the argument went, the Registrar had no authority to enter judgment by default against him. Furthermore, the respondent failed to attach the written instalment sale agreement to its particulars of claim. It was contended further that the Registrar is not empowered to grant such an order

since the claim of the respondent is not a liquidated amount or based on a liquid document.

[7] As indicated above, the applicant made a vain attempt for the postponement of the matter when it was confronted with the issue that its application related to a judgment of the 5th May 2022 and not of the 26th of May 2022. Once the respondent opposed the postponement, I allowed the applicant in its reply to deal with the merits of the case.

[8] It is not in dispute that the notice of motion refers to a judgment of the 5th May 2022 instead of the 26th May 2022. However, "like all things in life, litigation must, at some point, come to an end". I am of the view that the respondent has not suffered any prejudice by being furnished with a wrong date in the notice of motion since it is fully aware of the judgment it obtained regarding the dispute between the parties. I am therefore of the view that it would not be in the interest of justice to postpone the matter and or to dismiss this application on this basis.

[9] It is trite that for the applicant to satisfy the requirements of Rule 42(1), it must establish the existence of both the requirements that the order or judgment was granted in his or her absence and that it was erroneously granted or sought. Furthermore, the applicant must show that he has a defence to the claim of the respondent which is prima facie sustainable and would stand in court and that the application is not launched for the purposes of delaying the respondent from obtaining the relief it is entitled to. However, the Court retains its discretion in whether to grant or refuse the rescission of the judgment.

[10] In *Infinitum Holding (Pty) Ltd and Another v Hugo Lerm and Others (26799/2017) (18 May 2022) (GJ)* the Court stated the following:

> *"Paragraph 15: To satisfy the requirements of rule 42(1) (a) of the Rules, the applicant must show the existence of both the requirements that the order or judgment was granted in his or her absence and that it was erroneously granted or sought. However, the court retains the discretion to grant or refuse to rescind an order having regard to fairness and justice".*

[11] It is opportune at this stage to restate the provisions of the Uniform Rules of Court which are relevant to the discussion that will follow below which provide as follows:

> *"Rule 31*
> *Judgment on Confession and by Default*
> *(1)……*
> *(2)……..*
> *(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.*
> *(b) The registrar may –*
> *(i) grant judgment as requested;*

(ii) grant judgment for part of the claim only or on amended terms;

(iii) refuse judgment wholly or in part;

(iv) postpone the application for judgment on such terms as he or she may consider just;

(v) request or receive oral or written submissions;

(vi) require that the matter be set down for hearing in open court;

Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.

(c) ……

Rule 42 (1)

Variation and Rescission of Orders

(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;

(b) 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;

(c) An order or judgment granted as the result of a mistake common to the parties;

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

[12] In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including organs of State and Others [2021] ZACC 28* the Constitutional Court stated the following:

"Paragraph 53: It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court "may", not "must", rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."

[13] It cannot be disputed that the order was granted by the Registrar in the absence of the applicant. However, the Registrar has the power, in terms of Rule 31 of the Rules of Court, to grant default judgment in the absence of a defendant who chooses to absent himself and or does not participate in the proceedings. The applicant was served with the summons on the 21st of January 2021 and he entered appearance to defend the action of the respondent on the 9th of February 2021. The respondent filed a notice in terms of Rule 26 calling upon the applicant to file its plea within 5 days of service of the notice, failing which he shall be barred from pleading. The applicant did not heed that notice – hence on the 21st of April 2022 the respondent applied for judgment by default to the Registrar. The inescapable conclusion is that the Registrar was empowered to grant the default

judgment against the applicant who was in wilful default in participating in the proceedings.

[14] In *Nedbank Ltd v Mollentze 2022 (4) SA 597 (ML)* the Full Court of the Mpumalanga Division stated the following:

> *"Paragraph 1: A judgment by default may be granted and entered by the Registrar of a Division in the manner and in circumstances prescribed in the rules, and judgment so entered is deemed to be a judgment of a court of the Division. The heading in section 23 of the Superior Courts Act referred to in the footnote above, is 'Judgment by default'. Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar, a written application for judgment against such defendant: provided that when the defendant is in default of a plea, the plaintiff shall give the defendant not less than 5 days of his or her intention to apply for default judgment".*

[15] Nothing turns on the contention that the applicant filed its plea on the 5th of May 2022 and judgment was entered against him on the 26th of May 2022. At the time judgment was entered, the applicant was barred from participating in the proceedings. Once the applicant was barred from participating in the proceedings, it can only be entertained or allowed to participate if he applies to Court for an order to uplift the bar and for condonation of the late filing of his plea. The applicant was given notice of the case against him and was given sufficient opportunity to participate, but

elected to be absent or not to participate. He did not even apply to Court for an order to uplift the bar and therefore the Registrar was empowered to enter judgment by default against him. The ineluctable conclusion is therefore that the judgment was not granted in error and the applicant is not entitled to the protection of Rule 42(1) of the Uniform Rules of Court.

[16] The applicant has failed to demonstrate that the judgment was erroneously sought to meet the requirements of rule 42(1)(a). An applicant who seeks to rely on this requirement must show that the judgment against which he seek a rescission was erroneously granted because there existed some fact at the time of its issue which if it came to the notice of the Registrar would have precluded the Registrar from granting the judgment. The applicant has failed to demonstrate any error that occurred which resulted in the Registrar erroneously granting the judgment.

[17] The applicant does not dispute that it concluded an electronic instalment sale agreement but avers that he signed a written agreement when he collected the vehicle. The respondent attached an unsigned cost of credit for a large instalment agreement with the details of the applicant and the ensuing debt together with a signed delivery note that was signed by the applicant when he collected the vehicle from the dealership. This is, in my view, sufficient proof of the contract that was concluded between the parties and which is foundational to the claim of the respondent. I am therefore of the respective view that the respondent has complied with the provision of rule 17 of the rules of Court.

[18] For the applicant to succeed in a rescission application under the common law, he is required to prove that there is sufficient or good cause to warrant rescission. This must be done, first by furnishing a reasonable and

satisfactory explanation for its default. Secondly, it must show that it has a bona fide defence which prima facie carries some prospect of success on the merits. Thus, proof of these requirements is taken to be establishing that there is sufficient cause for an order to be rescinded. However, failure to meet one of these requirements may result in the refusal of the request to rescind the judgment.

[19] The applicant has, as indicated above, wilfully opted to be absent by not participating in the proceedings. Despite having claimed that he filed his plea on the 5th of May 2022, the applicant has not proffered any or reasonable explanation for the delay in filing his plea within the 5days period afforded to him in terms of the rule 26 notice. In his founding papers, the applicant testified that he received the summons from his tenants and thereafter he instructed his attorneys to defend the matter. The applicant has failed to take the Court into his confidence and state why he did not file his plea on time. The unavoidable conclusion is therefore that he does not have a reasonable explanation for his delay in filing his plea which has resulted in him being precluded from participating in the proceedings.

[20] The applicant further failed to prove that he has a bona fide defence which prima facie carries the prospects of success at the trial. All what the applicant state in his founding affidavit is that the judgment was erroneously granted against him, that he was not served with the notice of set down and was not advised of the date of hearing. These reasons are, in my view the reasons which have been advanced for the rescission application and have been dealt with hereinabove. What the applicant is required to demonstrate is the facts upon which he relies which when are proved in the ensuing trial will carry the prospects of success. The applicant need not state his defence with precision as he would in his plea but it must be facts which prima facie

carries the prospects of success at the ensuing trial. Except the technical defences as indicated above, the applicant does not have a defence to the respondent's claim.

[21] The applicant contended in general terms that if it is not granted an order rescinding the judgment it will suffer prejudiced. I do not agree. It is the respondent who, as it is now, suffers prejudice in this case for the applicant is in possession of and uses the motor vehicle which is the subject of this action without paying for it. The vehicle is depreciating every day whilst in the possession of the applicant and by the time it is recovered would be worth far less than the outstanding capital including the arrears and accumulated interest. Hence I found it to be fair and in the interest of justice to bring this matter to finality rather than to postpone it for a trivial error. I am of the respectful view that the applicant has failed to meet the requirements of rule 42 and the common law. The unavoidable conclusion is therefore that the application for rescission of judgment falls to be dismissed.

[22] In the circumstances, I make the following order:

1. The application for rescission of judgment is dismissed;
2. The applicant is to pay the costs on the scale as between attorney and own client.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: **17th April 2023**

Date of Judgment: **21st April 2023**

For the Applicant: **Mr T Faku**

Instructed by: **T Faku Incorporated**
Tel: 067 958 1656
fakuincorporated@gmail.com

For the Respondent: **Adv. MS Patel**

Instructed by: **Kannigan Attornesy**
Tel: 010 500 1777
info@kanniganattorneys.com