



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

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

SIGNATURE

DATE: 9 February 2023

Case No. 942/2018

In the matter between:

SASHWIN SINGH

Applicant

and

NEDBANK LIMITED

First Respondent

HYUNDAI WELTEVREDEN PARK (PTY) LTD

Second Respondent

JUDGMENT

WILSON J:

- 1 The applicant, Mr. Singh, wishes to rescind an order this court granted in his absence on 27 January 2020. That order dismissed an application to rescind an earlier judgment given against Mr. Singh in favour of the first respondent, Nedbank.

2 To succeed in this rescission application, Mr. Singh must show that he has an arguable case that stands some prospect of success in the main rescission application. He must also advance a reasonable explanation for his failure to appear on 27 January 2020 (see *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765A-D). Finally, he must show that this application is brought in good faith, and not merely to delay or frustrate the exercise of the respondents' rights. In my view, Mr. Singh has satisfied these requirements, and the order of 27 January 2020 must be rescinded. These are my reasons for reaching that conclusion.

An arguable case in the main application

3 The initial rescission application was based on the proposition that Nedbank had simultaneously sold a faulty motor vehicle to Mr. Singh, and financed Mr. Singh's purchase of that vehicle. Mr. Singh argues that Nedbank was not entitled to the judgment it obtained, because it did not supply the vehicle it financed in effective working order. Mr. Singh's case is that the credit agreement that financed the sale ought to have been cancelled, and the vehicle ought to have been returned to the second respondent, Hyundai, from which Nedbank sourced the vehicle. Nedbank ought to have retained the capital balance advanced to Mr. Singh, and Mr. Singh ought to have been given his deposit back.

4 In essence, Mr. Singh's case in the main application is for restitution: that the parties ought to be returned to the position they would have been in had the finance and sale agreements not been concluded and performed upon. Mr. Singh's case rests on the proposition that Nedbank was both the seller and

the financier of the sale of the vehicle. Nedbank's case, however, is that it merely financed the transaction, and it was Hyundai that actually sold the vehicle. Nedbank accordingly has no responsibility for the defective vehicle, and Mr Singh's claim, if any, is against Hyundai. The mere fact that the vehicle turned out to be defective does not affect Mr. Singh's obligations under his credit agreement with Nedbank.

5 The outcome of the main application depends on the interpretation to be given to a range of provisions in the National Credit Act 34 of 2005, and in the Consumer Protection Act 68 of 2008. Mr. Reyneke, who appeared for Nedbank before me, did not suggest that Mr. Singh's case in the main rescission application was frivolous or brought in bad faith. Indeed, it seems to me that Mr. Singh's case in the main rescission application is at least arguable, if somewhat novel and complex.

A reasonable explanation for default

6 This rescission application accordingly turns on the quality of Mr. Singh's explanation for being in default of appearance on 27 January 2020. Here, the facts are not seriously disputed. The notice setting down the main rescission application went astray between Mr. Singh's Johannesburg correspondent attorney and his Durban attorney, because Mr. Singh's Durban attorney's email system malfunctioned at around the time the notice was sent. An affidavit from a computing expert was placed before me confirming that the malfunction could have resulted in Mr Singh's Durban attorney never having received the notice of set down.

- 7 Mr. Singh's Durban attorney confirms that he did not receive that notice, and that it came as a surprise when he had word, on 27 January 2020, that the matter was about to proceed in Johannesburg. He asked for the matter to be stood down to 30 January 2020, when Mr. Singh's counsel could make himself available to argue the matter. For reasons that have not been explained, Nedbank's attorney apparently refused to agree to that proposal, and an order dismissing the application in Mr. Singh's absence was made.
- 8 It is a matter of concern to me that an attorney of this court would summarily refuse to agree to stand a case down for three days in these circumstances, but I need not explore whether the refusal to stand down was the result of sharp dealing, or, as Mr. Reyneke submitted, possibly the result of a directive given by the presiding Judge. The bottom line is that there has been a full, honest and good faith explanation for Mr. Singh's default. Added to the facts that Mr. Singh's case in the main application is one of some merit, and that there is no indication that this application has been brought in anything other than good faith, this is more than sufficient to grant the relief Mr. Singh seeks.
- 9 Nedbank will pay the costs of the rescission application, because its opposition was plainly unreasonable. Nedbank disputed neither Mr. Singh's good faith, nor that his case in the main rescission application was arguable, nor the content and adequacy of the explanation for his default. In these circumstances, it ought not to have opposed the application.
- 10 For all these reasons, I make the following order –

- 10.1 The order of 27 January 2020 granted in this court dismissing the applicant's rescission application is rescinded and set aside.
- 10.2 The first respondent will pay the costs of this application.

S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 9 February 2023.

HEARD ON: 25 January 2023

DECIDED ON: 9 February 2023

For the Applicant: HP Jeffreys SC
Instructed by Rajesh Hiralall Attorneys, Durban
and Hannelie Swart Attorneys, Johannesburg

For the First Respondent A J Reyneke (Heads of argument drawn by M Amojee)
Instructed by Uys Matyeka Schwartz Attorneys