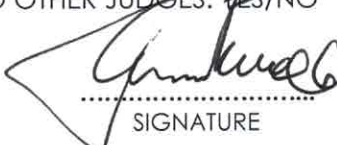




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 49439/2018

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>18/4/2019</u> DATE	 SIGNATURE

In the matter between:

MMALETSEKA VERONICA MAKINTA (MAHLATJI)

Applicant

and

FIRSTRAND BANK LIMITED t/a WESBANK

First Respondent

**THE SHERIFF OF THE HIGH COURT, TSHWANE-
NORTH**

Second Respondent

JUDGMENT

AVVAKOUMIDES, AJ

1. This is a rescission application brought in terms of Rule 42(1)(a) for the rescission of a judgment granted by the Registrar of this Court in terms of Rule 31(5)(d). In order to obtain a rescission under the aforesaid sub-rule the Applicant must show that the prior order, sought to be rescinded, was one that, "*was erroneously sought or erroneously granted*". Once it is established that an order or judgment was erroneously sought or granted, the court should, without further enquiry, rescind or vary the order and it is not necessary for any party to show good cause for the sub-rule to apply. I am guided by the judgments in *Tshabalala v Peer* 1979 (4) SA 27 (T) at 30D and *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471 (T).

2. Although the Applicant set out several grounds in the papers for the rescission of the judgment, at the hearing of the application, the Applicant's argument was limited to the failure by the First Respondent to comply with the requirements as set out *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) insofar as the notices in terms of Sections 129 and 130 of the National Credit Act 34 of 2005.

3. The Applicant has alleged that she did not receive the notices in terms of Section 129 and 130 of the relevant Act.

4. The Applicant submitted, with reference to *Silver Falcon Trading 333 (Pty) Ltd v Nedbank Ltd* 2012 (3) SA 371 (KZP) at 373F-375E, that the First Respondent's particulars of claim were excipiable in that the First Respondent, -vis-à-vis Sections 129 and 130 aforesaid, failed to plead such

facts held to be necessary in *Sebola* and consequently this failure founded the excipiability of the particulars of claim for want of necessary averments on which to found a cause of action. In *Silver Falcon Trading* the court specifically held that the mere averment that the provisions of Section 129(1) and Section 130 had been complied with was not sufficient.

5. In *Sebola*, Cameron J, summarised the requirements in respect of compliance with the section 129 and 130 notices as follows:


"The creditor provider's summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection, coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence of contrary indication, and the credit provider may credibly aver, that notification of its arrival reached the consumer in that the reasonable consumer would have ensured retrieval of the item from the post office".

6. It is clear that the First Respondent's particulars have not complied with this requirement in *Sebola* and accordingly, if this had been brought to the attention of the Registrar at the stage when default judgment had been requested, the judgment would not have been granted. I am accordingly satisfied that, on this ground alone, the judgment ought to be rescinded.
7. Counsel for the Applicant submitted that costs of senior counsel should be awarded to the Applicant. The usual order accompanying a rescission of judgment is that costs of the application are usually costs in the cause. However counsel for the Applicant submitted that the First Respondent's opposition of the rescission application was unreasonable because the First Respondent had known from an early stage what the Applicant's complaint

was and this notwithstanding proceeded with the opposition of the rescission application. I am inclined to agree, more particularly in that the action in respect of which default judgment was taken was preceded by a pending action and later withdrawn only after the Applicant had raised the issue of *lis pendens* in this application. Moreover, given the particular facts of this case. I am of the view that the employment of senior counsel was warranted and the Taxing Master is guided accordingly.

8. In the premises I make the following order:

- (a) The default judgment dated 5 June 2018 under case number 49439/2018 is hereby rescinded;
- (b) The First Respondent is ordered to pay the Applicant's costs.



G.T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT

Representation for Applicant:

Counsel: Adv. CA da Silva SC

Instructed by: Bopape MC Inc.

Representation for First Respondent:

Counsel: Adv. C Welgemoed

Instructed by: Strauss Daly Attorneys

Representation for Second Respondent:

Counsel: No Appearance