



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION: PRETORIA)**

Case No. 57416/2020

In the matter between:-

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

DATE: 31st December 2022

SIGNATURE: _____

TERSIA NTIBANENG SEKOATI

APPLICANT

AND

VELOCITY FINANCE (RF) LIM

RESPONDENT

JUDGMENT

KHWINANA AJ

INTRODUCTION

[1] This is an application for rescission of judgment granted during April 2021.

- [2] That the writ of execution be stayed pending the finalisation of the rescission application and the respondent to pay costs in the event of opposition.
- [3] The respondent has opposed the application for rescission with costs.

BACKGROUND

POINT OF LAW

- [4] The applicant has raised a point of law being that the above honourable court lacks Jurisdiction to hear this matter as the whole cause of action arose in Johannesburg and the court that has the jurisdiction to hear this matter is that of Johannesburg Magistrate's Court.
- [5] The second point of law raised is that in the answering affidavit the commissioner of oaths failed to indicate the gender of the deponent. The applicant prays for the dismissal of the respondent's defence with costs.
- [6] The applicant brought a motor vehicle through financial assistance in the courtesy of the respondent. The applicant was paying a sum of R 2 798.00 until the end of July 2023. During April 2019 the applicant paid through her Capitec account and made direct deposits. The applicant says she did not change her phone numbers as submitted in her finance application.
- [7] The applicant says she received a telephone call from the respondent that judgment had been obtained against her for failure to pay her monthly instalments on the 22nd of September 2022. The applicant says she was shocked as she did not receive summons instituting the action. On or about October 2017 the applicant has since left the above-mentioned address and says she informed the respondent about the change of address. The applicant

says she did not receive a telephone call from the respondent regard being had to her default.

[8] The applicant submits that she did not wilfully default as she had personally informed the respondent of the change of address. The applicant says she has always been using the same phone numbers. The amount claimed is that of R 27 073.56 being arrears that have accrued. The applicant submits that she did not default on her payments and disputes the amount that is claimed against her.

[9] The respondent says the applicant was in arrears as at the time the letter in terms of section 129 was instituted. The summons were proceeded with and court order was granted. The applicant defaulted during January to August 2020. The payments that were made did not cover the arrear amount.

[10] The applicant failed to properly commission that affidavit and that should

LEGAL MATRIX

[11] Rescission of judgment – High Court – Uniform Rules of Court 31(2)(b), 42 A defendant may within 20 days after acquiring knowledge of a default judgment against him or her apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.

[12] 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:

- An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- 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;
– an order or judgment granted as the result of a mistake common to the parties.

- [13] 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. 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.

ANALYSIS

- [14] The applicant in this matter brought the application within the prescribed time of her coming to know of the judgment. The applicant says she did not receive the letter in terms of section 129 of the NCA. In terms of the proof of service filled same was delivered at her chosen domicilium. The applicant argues that she informed the respondent of her change of address when she went to service the motor vehicle with the respondent. The applicant fails to provide proof of the said changed address. It is trite that the address that will be used where a contract has been concluded is that of the chosen domicilium.
- [15] The applicant is opposed to the jurisdiction of this court and says the magistrate's court of Johannesburg is the one that has jurisdiction in this matter. The high court seating in Johannesburg would have been the proper court to hear this matter. The amount that is involved herein falls under the Magistrate,s court scale however in terms of the particulars of claim the respondent was merely asking for the cancellation of the agreement based on

the fact that applicant is in breach of the contract. However, nothing prevents the matter to be heard in this court. This court has jurisdiction over matters in Gauteng. The SCA has finally pronounced on this matter in the matter of *The Standard Bank of SA Ltd and Others v Thobejane and Others* (38/2019 & 47/2019) and *The Standard Bank of SA Ltd v Gqirana N O and Another* (999/2019) [2021] ZASCA 92 (25 June 2021).¹

[16] The court further said “It is the task of statute law, in this case, the SC Act and the Magistrates’ Court Act, to establish a system that is consistent with the guarantee. Nothing in either statute contradicts the provisions of s 34. Therefore, the invocation of s 34 as a basis for an interpretation of national legislation (or the common law) to conclude that one of the two courts with concurrent jurisdiction ought to be preferred over the other is misconceived. Where the statute offers alternative fora, it is a matter of sheer practicality that the initiating party may choose one or the other”.² The court further held that “it might be thought that where more than one court has jurisdiction, a particular court should have pride of place over the other. That policy choice cannot be informed by s 34³.”

[17] The court further said that “The High Court cannot by a purported exercise of inherent jurisdiction create a new legal right to contradict an existing legal right and thereby deprive a person of an existing legal right.” In this case,

¹ In my view, the reasoning of the Gauteng Court cannot be sustained. At its very root it is flawed. Anterior to the justifications offered by it in support of its thesis is the fundamental misconception that a High Court can decline to hear a matter which is within its jurisdiction. This finding is contrary to *Goldberg*, *21 Bester*²² and also contrary to *Agri Wire*²³ which, being a judgment of this Court that was on point, bound the Court a quo. *Agri Wire* confirmed the correctness of *Bester* on the point in issue. In the result, s 169 of the Constitution does not enable a High Court to refuse to hear a matter because a Magistrates’ Court also has jurisdiction to do so; and the cases cited above remain good law.

² [2021] ZASCA 92 (25 June 2021)

³ Constitution of RSA

depriving the respondent of the right to use the court that has jurisdiction to also hear the matter.

[18] The applicant does not deny having defaulted at some point however, says that she was able to make payments in order to pay off the arrears. The applicant has attached proof of payment and says that some payments were being made from a different bank account. The respondent has accounted for the said payments and says that despite the payments that have been made there were still arrears. The respondent has been requested to furnish the certificate of balance as at the date of hearing of this matter taking into account the payments that were made. The account shows that the applicant was not able to indeed pay off all the arrear amounts which would have reinstated the contract in terms of the National Credit Act.

[19] I have caused that the parties appear before me on the 22nd of December 2022 wherein the parties were requested to speak the statement of account that was filed by the respondent. Counsel for the applicant conceded that the applicant has not been able to pay off the arrears however his concern was that the particulars of claim did not depict an amount claimed, that this court does not have jurisdiction therefore the application for rescission should succeed. The respondent's objected to the applicant's address on jurisdiction which I overruled and alluded to the fact that the application was not for damages but for the cancellation of the agreement. The applicant was referred to the matter supra on jurisdiction and a copy was furnished after the hearing. The parties agreed that heads will be submitted by 22 December 2022 by counsel for the applicant and in the event, there is a need to reply counsel for the respondent will reply by the 31st of December 2022.

[20] Today is the 31st of December 2022 there has been no communication from the applicant's counsel nor from the respondent's counsel. I did inform the parties that my judgment will be finalised by the 31st of December 2022. I have taken into account that the amount involved is in the Magistrate's court scale which fact the counsel for the respondent conceded thereto. I have noted that the costs that have been requested are R 200.00 and the sheriff's costs. It was imperative upon the attorneys of the respondent to indicate the proper scale in this matter. It is therefore on those basis that order that the costs order be varied to mention that the Magistrate's Court scale be used for any further costs that will emanate from this matter.

[21] In the result, the application for rescission of judgment is granted in relation to costs only. I have considered the draft order, amended it, and marked X.

**ENB KHWINANA
ACTING JUDGE OF NORTH GAUTENG
HIGH COURT, PRETORIA**

APPEARANCES:

APPEARANCES For the Applicant: Attorney S. GAJU

Instructed by: SUDESHNEE NAIDOO ATTORNEYS

For the Respondents: Advocate Carvalheira

Instructed by: GLOVER KANNIEAPPAN INC

Date of Hearing	06 September 2022
Date of hearing	22 December 2022
Date of Judgment	31 December 2022

IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION,

PRETORIA

BEFORE HONOURABLE JUSTICE KHWINANA AJ

31 DECEMBER 2022

CASE NUMBER: 57416 / 2020

IN THE MATTER BETWEEN:

VELOCITY FINANCE (RF) LIMITED

PLAINTIFF

AND

TERSIA NTIBANENG SEKOATI

DEFENDANT

COURT ORDER

HAVING read the documents filed of record and having considered the matter: IT IS ORDERED THAT:

1. Rescission of Judgment is dismissed in so far as the cancellation of the agreement and an order of variation is granted in terms of the Magistrate's Court Scale.
2. Each Party is to pay his or her own costs.

BY REGISTRAR