



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

CASE NO. 64837/2019

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIGNATURE

MUTHEIWANA SYDWELL SIKHWARI

APPLICANT

AND

MERCEDES-BENZ FINANCIAL SERVICES SA (PTY) LTD

RESPONDENT

JUDGMENT

MAKHOB A J

INTRODUCTION

1. The applicant seeks rescission of a judgment granted by way of default on the 21st October 2019. The respondent is Mercedes Benz Financial Services (Pty) Ltd.
2. The judgment and order were granted by the registrar in terms of Rule 31(5)(b)(i).
3. The application is brought in terms of Rule 31(5)(d) alternatively Rule 42(1) or in terms of the common law.
4. In the rescission application founding papers the applicant admits falling into arrears. In his replying affidavit, the applicant proposes that the respondent agrees that the judgment be rescinded and he (the applicant) will in turn surrender the motor vehicle voluntarily without default judgment. Each party to pay its own costs. However, this settlement proposal was not accepted by the respondent.
5. The matter was thus argued by the parties before me. The applicant put forward the following reasons why judgment against him should be rescinded:
 - (a) The summons never reached him.
 - (b) Section 129 notice was not properly served to him.
 - (c) Jurisdiction of this Court is contested, the applicant submits that the Limpopo Province have jurisdiction.

(d) The level of the applicant's indebtedness was not properly assessed when the agreement to finance him was concluded.

6. On the issue of jurisdiction raised by the applicant, the respondent submitted that in terms of the agreement, the parties agreed that the applicant would pay the respondent the required payment and any other charges specified in the agreement. Therefore, when the applicant failed to make payment to the respondent such occurred in the area where the payment had to occur, which is, Zwartkop Centurion. On this basis the breach occurred within the jurisdictional territory of this Court.
7. On the section 129 notice, they were sent to the applicant's chosen *domicilium citandi et executandi* and were sent by way of registered post and received at the correct post office being Makhado post office. According to the respondent the summons were served also at the chosen *domicilium citandi et executandi* of the applicant.
8. The respondent contends that on the allegation of reckless credit the applicant conveyed to the respondent that he is in a position to make payment of the monthly instalment due and he had a discretionary monthly income in the amount of R 45 280.62.
9. When the motor vehicle was found it had a number plates that did not correspond with the details of the motor vehicle. The explanation given by the applicant in this regard is described as untenable by counsel for the respondent.

10. In terms of the provision of Rule 31(2)(b) a defendant may within 20 days after he has knowledge of such judgment 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 to it seems meet.

11. It has been stated that this subrule does not require the conduct of the applicant for rescission of a default judgment be not wilful, but it has been held that it is clearly an ingredient of the good cause to be shown that the element of wilfulness is absent.¹

12. Hence the element of wilfulness is one of the factors to be considered in deciding whether or not an applicant has shown good cause. The requirement for an application for rescission under the subrule have been stated to be as follows:²

12.1. The applicant must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance;

12.2. The application must be bona fide and not made with the intention of merely delaying the plaintiff's claim;

12.3. The applicant must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully

¹ Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994(3) SA 801 (C) at 803.

² Erasmus Superior Court Practice on B1-201.

with the merits of the case and produce evidence that the probabilities are actually in his favour.

12.4. While wilful default on the part of the applicant is not a substantive or compulsory ground for refusal of an application for rescission, the rescission for the applicant's default remain an essential ingredient of the good cause to be shown.³

13. In my view, the respondent has shown that the section 129 notice and the summons were properly served on the applicant and the applicant has failed to give a reasonable explanation of his default. Moreover, the applicant has offered to surrender the vehicle to the respondent with condition. As such the applicant stand to be dismissed in terms in terms of the provisions of Rule 31(2)(b).

14. In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the Court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment.⁴

15. In my view, the registrar was aware of all the relevant facts at the time of granting the judgment. There is nothing on the papers which suggests that the registrar overlooked anything in granting the judgment.

³ Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at 529 E-F.

⁴ Nyingwa v Noolman NO 1993(3) 508 (TK) at 510 D-G; Naidoo v Matlala NO 2012 (1) SA 143 (GHP) at 153C; Rossiter v Nedbank Ltd (unreported, SCA Case no 96/2014 dated 1 December 2015), paragraph [16].

16. The changing of number plates by the applicant is rather bizarre and the explanation given by him in this regard is irrational.

17. I am satisfied that the applicant has failed to make out a case in terms of either the provisions of Rule 42(1).

18. In the premise, I make the following order:

(a) The application is dismissed

(b) Costs on the scale between attorney and client.

D MAKHOBA

JUDGE OF THE GAUTENG DIVISION,

PREORIA

APPEARANCES:

For the applicant : Advocate MS Sikhwari (in person)

For the respondent : Advocate C Richard

Date heard : 01 August 2022

Date of Judgment : ___August 2022