Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

CASE NO:741/21

In the matter between:-

MOGOMOTSI BOGOPANE Applicant

and

TOYOTA FINANCIAL SERVICES (PTY) LTD 1st Respondent

SHERIFF RUSTENBURG 2nd Respondent

CORAM: MFENYANA J

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **16 January 2024**.

ORDER

(1) Condonation for the late filing of the rescission application is granted.

(2) Condonation for the late filing of the answering affidavit is granted.

(3) There shall be no order for costs in respect of both condonation applications.

(4) The application for rescission is dismissed with costs.

JUDGMENT

Mfenyana J

[1] In this application, the applicant seeks an order for the rescission of an order granted against the applicant on 31 May 2022. The notice of motion stipulates that the application is made pursuant to the provisions of Rule 42(1)(b)(c) of the Uniform Rules.

[2] For the sake of clarity, it is apposite, to, at this early stage set out the provisions of both Rule 42(1)(b) and (c) as in both the application, and the applicant's heads of argument, reference is only made to Rule 42(1)(b)(c) which is a misnomer. The Rule states:

> ***42. 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)… ;*
>
> *(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*.

[3] The remainder of the relief, as set out in the notice of motion, pertains, to the stay of the warrant of delivery issued on 7 July 2022, pending finalisation of this application.

[4] The applicant further seeks a costs order against both respondents.

[5] The application for rescission was filed six days out of time. The applicant thus seeks condonation for the late filing of the application. The reasons advanced by the applicant for the delay, are that he only became aware of the judgment on 17 August 2022 as it was not served on him. Likewise, the first respondent sought condonation for the late filing of the answering affidavit. Given the length of the delay, both in filing the rescission application in the case of the applicant, and the answering affidavit, in the respect of the first respondent, each of the parties contend that none of them is prejudiced by the delay. As such, neither of the parties opposed the application for condonation in respect of the other. I am of the view that the interests of justice would be better served if condonation is granted to enable proper ventilation of the issues between the parties.

[6] The salient facts leading up to the present application are that the parties concluded an instalment sale agreement (the agreement) in terms of which the applicant purchased a motor vehicle from the first respondent. Following the applicant's non- payment and what

the first respondent considers a breach of the terms of the agreement, the first respondent issued a summons against the applicant for the return of the motor vehicle.

[7] On 31 May 2022 this court, per Mahlangu AJ, granted an order by default, in favour of the first respondent for, *inter alia*, the delivery of the motor vehicle.

[8] Subsequent to the granting of the default judgment, the first respondent sought to execute the order, and instructed the second respondent (sheriff) to collect the motor vehicle. On 17 August 2022 the sheriff attended at the premises of the applicant to collect the motor vehicle as instructed.

[9] The applicant avers that it was only when the sheriff attended at his premises that he became aware that a judgment may have been granted against him. He contends that he was never served with the summons in the main action, or a notice in terms of Section 129 of the National Credit Act (the NCA). On those bases, he contends that the order stands to be rescinded.

[10] The application is opposed only by the first respondent.

[11] It appears from the sheriff's return of service filed of record, that the summons was served on 12 August 2021 by affixing at the applicant's chosen *domicilium* address, as recorded in the agreement. Having received no notice of intention to defend from the applicant, the first respondent proceeded to obtain judgment by default against the applicant.

[12] The founding affidavit sheds no light as to the reason why the summons, having been duly served, did not reach the applicant. Neither does the applicant dispute the correctness of the address at which service of the summons was effected. The agreement itself is not in dispute. Given this, and the fact that the summons was served at the *domicilium* address chosen by the applicant in terms of the sale agreement, I am of the view that this aspect of the application need not detain this Court.

[13] In the founding affidavit, the applicant contends that the first respondent has shown disregard for the law by obtaining an "unlawful court order and warrant of delivery in (his) absence." The applicant contends that he has a clear right to approach this Court on the basis that the respondent has breached the

provisions of the NCA. As already alluded to, the applicant's contention is that he was not served with a notice in terms of Section 129.

[14] During the course of argument, counsel on behalf of the applicant submitted that the applicant, in the main, places reliance on these two issues. Having made naught of the applicant's contentions relating to service of the summons, and the applicant's concession that the service effected by the respondent in this case amounts to proper service, the only issue remaining for this Court's consideration, is the issue of the notice in terms of Section 129 of the NCA.

[15] The applicant assails the respondent's non- compliance with the provisions of Section 129. As with the rest of his averments, the applicant does not state why in the circumstances of this case, it was incumbent on the first respondent to serve him with such notice. the provisions of Section 129 find no application in the present case. This is particularly relevant in the face of the first respondent's retort that the applicant had entered into a repayment arrangement with the first respondent, which entitles the first respondent to enforce its rights in terms of Section 88(3) of the

NCA. In *Standard Bank of South Africa Ltd v Kruger and Standard Bank of South Africa Ltd v Pretorius*[1], the court observed:

> *"…the application of section 129(1) is, in terms of section 129(2), expressly excluded with regard to "a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order".*[2]

[16] This much is clear from the wording employed in Section 86(10) itself. Thus, in these circumstances, the applicant's contention to a notice in terms of Section 129 is clearly misplaced.

[17] Presuming that the applicant's reliance is on both subsection (b) and (c), it is settled law that where an error or ambiguity is relied upon, such error or omission must be attributable to the court and that error must be patent. The applicant must show that the order granted by the court does not reflect the intention of the judicial officer, and that the error was partly or wholly attributable to the court.[3] No such averment has been made by the applicant. To the contrary, the applicant lays the blame at the doorstep of the first respondent. He assails the latter's non- compliance with Section

[1] *(unreported case number 45438/09 (GSJ)* and; *unreported case number 39057/09 (GSJ)).*
[2] Paragraph 26.
[3] In this regard, see: *First National Bank of South Africa v Van Rensburg NO and Others* 1994 (1) SA 677 (T).

129 of the NCA. Singularly on this basis, the applicant's reliance on Section 42(1)(b) cannot stand.

[18] As regards subsection (c), the applicant must satisfy two broad requirements. The first is that there was a mistake common to the parties. The second is that a causal link must exist between 'that' mistake 9common to the parties) and the consequent order. In *Minister of Justice and Correctional Services and Others v Estate Late Stransham-Ford (Doctors for Life International NPC and Others as amici Curiae)*[4] the Supreme Court of Appeal set aside an order by the court *a quo*, which allowed the applicant to have his life terminated despite the fact that the applicant had died hours before the order was granted. In that matter neither the parties nor the court were aware of the developments. That is not the case in this application.

[19] Not much turns, in my view, on the fact that the order was granted in the absence of the applicant. A party's absence is not a jurisdictional requirement in respect of subrules (b) and (c). The applicant's contention that he was not served with the summons is of no moment as the sheriff's return of service coupled with the

[4] [2017] 1 All SA 354(SCA).

applicant's concession, in this regard are sufficient to dispense with this issue.

[20] I agree with the first respondent that the applicant has failed to discharge the onus on him, in respect of Rule 42(1) (b) and (c). There is simply no plausible basis for the application. It stands to be dismissed.

[21] With regard to costs, the applicant and the first respondent sought condonation for the late filing of the rescission application, and the answering affidavit, respectively. Neither of the parties sought an order for costs in respect of both condonation applications. In the circumstances it is only fair that no order for costs should be granted.

[22] In relation to the application for rescission, there exists no reason to depart from the general rule that costs should follow the result.

Order

[23] In the result, I make the following order:

(1) Condonation for the late filing of the rescission application is granted.

(2) Condonation for the late filing of the answering affidavit is granted.

(3) There shall be no order for costs in respect of both condonation applications.

(4) The application for rescission is dismissed with costs.

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S MFENYANA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

Appearances:

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Reserved	:	05 May 2023
Handed down	:	16 January 2024