

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2021/50751

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE 4 April 2021

In the matter between:

CHOVELA, HONGA BETHUEL

Applicant

and

POTPALE INVESTMENTS (RF) (PROPRIETARY)
LIMITED

First Respondent

SHERIFF, HIGH COURT, VENTERSDORP N.O.

Second Respondent

IN RE:

POTPALE INVESTMENTS (RF) (PROPRIETARY)
LIMITED

Plaintiff

and

CHOVELA, HONGA BETHUEL

Defendant

JUDGMENT

KORF, AJ

Introduction

- [1] This is an application in which the applicant (the Defendant) seeks an order, in terms of prayer 1 of the Notice of Motion, that the “... *[d]efault Judgement granted against the Applicant on an unopposed basis on 9 December 2021 by the Registrar of the above Honourable Court be rescinded as envisaged under Uniform Rule 42(1)(a)...*”.

Litigation history

- [2] The respondent’s claim against the applicant is founded on a credit agreement, concluded on 23 December 2020 at Midrand, under which the applicant financed the purchase of a Toyota Quantum vehicle. On 4 November 2021, the respondent’s summons was served on the applicant personally.
- [3] In the Particulars of Claim, the respondent alleged that the applicant failed to make payment under the credit agreement and, consequently, exercised its contractual remedies, including terminating the agreement through the summons and claiming the return of the vehicle.
- [4] After the applicant failed to enter an appearance to defend, the respondent applied with the Registrar for default judgment, *inter alia*, for confirmation of termination of the agreement, return of the vehicle, costs in terms of Rule 31(5)(e) and the sheriff’s fees, which default judgement was granted on 9 December 2021, as appears above.

Basis of the application

- [5] The Notice of Motion indicates that the application was intended to be brought under Rule 42(1)(a).
- [6] However, as the discussion below shows, the Founding Affidavit does not contain any allegations of fact or contentions suggesting that the application is

brought under Rule 42(1)(a), or if such allegations or contentions exist, they are not clearly stated regarding the said rule.

- [7] In paragraph 6 of the Founding Affidavit, the applicant states that, for the default judgement to be set aside, he “...*must prove...the reasons why the notice to defend was not filed timeously...[and that] I possess over defences fit for a trial (sic)...*”.
- [8] It is trite that if a case is made out that satisfies the jurisdictional requirements for rescission under Rule 42(1)(a), an applicant need not show good cause for the judgment to be rescinded.
- [9] Therefore, despite the reference in the Notice of Motion to Uniform Rule 42(1)(a), the contents of the Founding Affidavit suggest that the application was intended to be brought either under Rule 31(2)(b) or the common law.

The applicant's case

- [10] On 4 November 2021, the summons was served on the applicant. The applicant, who did not understand the consequences of receiving a summons, initially instructed attorneys in Tshing, Ventersdorp. The applicant enquired fortnightly with his attorney regarding the matter. Occasionally, he was informed that his attorney negotiated with the respondent's attorney. When the applicant visited the attorney in December 2021, he found the offices closed. In January 2022, the applicant obtained advice from a different attorney and ultimately instructed the firm of attorneys to represent him in the rescission application.
- [11] The applicant did not deny breaching his contractual obligations or being in arrears with monthly instalments as per the credit agreement.
- [12] The applicant's first ground of rescission is that this court does not have jurisdiction. The crux of this ground of precision reads as follows:

“46. *I therefore only could have taken notice of the acceptance of the quotation / offer by the First Respondent at my chosen address which is in Ventersdorp within the jurisdiction of the High Court of Mahikeng.*

47. *The contract could only become a contract from a quotation where I obtained knowledge of it and therefore Ventersdorp.”*

- [13] The applicant’s second ground for rescission is that the terms of the contract were explained to him in English, not his mother tongue or Afrikaans. He did not understand the entire contents of the documents presented to him for signing. Consequently, there was no mutual understanding.
- [14] Thirdly, the applicant contends that the credit provider failed to conduct a credit assessment and, in any event, the credit provider ought to have known that the applicant did not appreciate the risks, costs or obligations or that the agreement would make him over-indebted.
- [15] Lastly, in the Founding Affidavit, the applicant prays that he be allowed to keep the vehicle and pay a reasonable and affordable instalment.
- [16] The second, third and fourth grounds for rescission are interrelated in that, in essence, the alleged lack of mutual understanding constitutes the basis for contending that the respondent failed to satisfy the requirements concerning a credit assessment. Due to this alleged non-compliance, read in conjunction with the applicant’s personal circumstances, provides the basis for the “relief” sought under the fourth ground of defence.
- [17] The applicant did not deliver a reply to the respondent’s answering affidavit.

The respondent’s case

- [18] In short, the respondent contends that the applicant failed to present facts upon which the default judgment ought to be rescinded, that the applicant’s explanation for his failure to deliver a notice of intention to defend timely was inadequate, and that the applicant was in wilful default.
- [19] The respondent states that the applicant chose to buy the motor vehicle at a dealership in Fourways, that he completed the respondent’s credit application forms, and he signed the agreement at the respondent’s offices in Midrand on 23 December 2020, which the respondent accepted on the same day, also at Midrand. Accordingly, the credit agreement was concluded in Midrand, within

the jurisdictional area of this court. As such, the court has jurisdiction in that the cause of action arose within the court's jurisdictional area.

- [20] The respondent contends that the applicant failed to provide evidence concerning his alleged lack of understanding of the agreement's provisions or which parts of the agreement he allegedly did not understand. The applicant furthermore signed a "Warranty on Veracity of Credit Application Details" in which, *inter alia*, the applicant warranted that "...I have signed and understood all the following documents, and I confirm that I have been offered copies of the documents in either Sotho or Zulu...", which statement is followed by a list of documents, including the Summary of the Credit Agreement, the Application Form, the Credit Agreement. The respondent emphasises that the applicant seeks to retain the vehicle despite this alleged lack of understanding. Whilst relying on the alleged lack of mutual assent, the applicant chooses not to resile from the contract but, to the contrary, seeks to retain the vehicle.
- [21] The respondent provides a detailed version of the credit assessment process that was followed for the applicant before the credit agreement was concluded. The respondent obtained a consumer profile from a credit bureau, for which the applicant's credit risk score was rated as average. Based on various documents provided by the applicant (the correctness of which has been warranted under the "Warranty on Veracity of Credit Application Details"), including a letter of recommendation from the Taxi Association of which the applicant was a member, his operating license, the route on which the vehicle was intended to be used (between Ventersdorp and Rustenburg), the respondent prepared a detailed calculation of the net income, just short of R55,000.00 per month, that the applicant was expected to earn through the vehicle. This net calculation comprised the expected gross income of some R107,000.00, less petrol costs, driver wages, the vehicle instalment, short-term insurance, credit life insurance, a tracking system and a monthly service fee. Based on this assessment, the respondent concluded that there was no risk, let alone an appreciable risk, that the applicant would become over-indebted by entering into the credit agreement.

Time for the institution of a rescission application

- [22] Applications for rescission under Uniform Rule 42¹ and those on common-law grounds must be made within a reasonable period of time². Applications for rescission of default judgment under Rule 31(2)(b)³ must be made within 20 days of acquiring knowledge of such judgment.
- [23] It is trite that the court may consider the following factors in exercising its discretion to grant condonation: the degree of lateness, explanation for the delay, prospects of success, degree of non-compliance with the rules, the importance of the case, the plaintiff's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice.⁴
- [24] On 22 January 2022, the applicant learnt that default judgment had been granted. This fact is uncontested. The rescission application was delivered on 31 January 2022.
- [25] The application was accordingly instituted within 20 days of the applicant gaining knowledge of the judgment (inasmuch as it is brought under Rule 31(2)(b)) or within a reasonable period of time (inasmuch as it is brought under Rule 42(1)(a) or the common law.

¹ “**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) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;”

² *Money Box Investments 268 (Pty) Ltd v Easy Greens Farming and Farm Produce CC* (A221/2019) [2021] ZAGPPHC 599 (16 September 2021) at paragraph 7.

³ Rule 31(2)(b) provides that: “...A defendant may within 20 days after acquiring 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 it deems fit.”

⁴ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] 2 All 251 (SCA) at paragraph 11.

Uniform Rule 42(1)(a)

[26] Under Rule 42(1)(a), an applicant must show that the judgment sought to be set aside was erroneously sought or erroneously granted. The principles governing rescissions under this subrule include:⁵

1. the rule caters for a mistake in the proceedings;
2. the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;
3. a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;
4. the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and,
5. the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).

[27] Once an applicant has met the requirements of Rule 42(1)(a) for rescission, a court is merely endowed with the discretion to rescind its order. After all, the precise wording of Rule 42 postulates that a court “may”, not “must”, rescind or vary its order—the rule is merely an “*empowering section and does not compel the court*” to set aside or rescind anything. This discretion must be exercised judicially.⁶ However, the court does not have the discretion to set aside a

⁵ *Kgomo and Another v Standard Bank of South Africa and Others* (47272/12) [2015] ZAGPPHC 1126; 2016 (2) SA 184 (GP) at paragraph [11]. See also: *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) (31 March 2003) at paragraph [4], and *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* (128/06) [2007] ZASCA 85; [2007] SCA 85 (RSA) ; 2007 (6) SA 87 (SCA) at paragraphs [17] to [19].

⁶ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021, paragraph 53.

judgment where none of the jurisdictional requirements contained in paragraphs (a) to (c) of the subrule exist.⁷

- [28] To succeed with his application for rescission of judgment under this subrule, the *onus* is on the applicant to show that there was a mistake that appears from the record of proceedings or to advance grounds from which the mistake becomes apparent.
- [29] As stated, the applicant failed to argue that the default judgment had been granted because of a mistake in the proceedings' record.
- [30] None of the four grounds the applicant relies on in his founding affidavit (lack of jurisdiction, lack of understanding and no mutual assent, failure to conduct a credit assessment or determine a reasonable instalment) demonstrates that the default judgment was granted mistakenly.
- [31] For these reasons, the court finds that the application for rescission of judgment should not succeed, inasmuch as it is based on the provisions of Uniform Rule 42(1)(a).

Rescission Under Rule 31(2)(b) or the Common Law

- [32] It is trite law that applications for rescission of judgment under Rule 31(2)(b) and the Common Law require an applicant to show 'good cause'.
- [33] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*⁸, the court explained the approach as follows:

"In order to succeed, an applicant for rescission of a judgment taken against him by default must show good cause. The authorities emphasise that it is unwise to give a precise meaning to term "good cause". As Smalberger J put it in HDS Construction (Pty) Ltd v Wait: when dealing with words such as 'good cause' and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these

⁷ *Van der Merwe v Bonaero Park (Edms) Bpk* 1998(1) SA 697 at 702H.

⁸ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*, 2003 (6) SA 1 SCA at paragraph [11]. See also: *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) 476, *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E) at 300 in fine – 301C. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764 I – 765 F.

words. The court's discretion must be exercised after a proper consideration of all the relevant circumstances."

With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospects, of success."

- [34] Applied to the instant application, the inquiry engages the issues of wilful default and the alleged grounds for rescission raised by the applicant.

Wilful default

- [35] Considering the explanation the applicant advanced for his failure to enter an appearance to defend, more fully referred to above, the court cannot find that the applicant was in wilful default and, consequently, that the application should fail on this ground.

Jurisdiction

- [36] The Applicant avers that he resided in Ventersdorp, which is outside the jurisdictional area of this court. He refers to clause 3.1 of the credit agreement, which provides that: "...[i]f you decide that you would like to enter into this Agreement on the terms and conditions set out in the quotation...your signature on the Quotation will constitute an **offer** which may be accepted or declined by the credit provider."
- [37] The applicant further refers to clause 3.2, which, according to the applicant, provides that "... If you are accepted, the credit provider will give you a copy of the signed quotation." The applicant then highlights that his *domicilium citandi et executandi* was his residential address in Ventersdorp, and he made payment at Ventersdorp. The applicant contends that he could only have taken notice of the acceptance of the offer, and the credit agreement could only have become "a contract" upon him acquiring knowledge of acceptance at Ventersdorp.

- [38] The pertinent question is when the credit agreement became legally effective. More particularly, whether, on the terms of the document, the credit agreement was concluded only when and where the applicant was given a copy of the signed quotation or when and where he was informed of the credit provider's acceptance of the offer.
- [39] The applicant's quotation mentioned above from clause 3.2 is incorrect. This clause reads as follows:
- "3.2 If the credit provider accepts your offer, the credit provider will give you a copy of the signed Quotation to keep. [Emphasis added]"*
- [40] Significantly, the purpose of the respondent providing a copy of the signed Quotation to the applicant is for his record-keeping. Clause 3.2 does not mean that the purpose of furnishing a copy of the signed Quotation to the applicant is to constitute the time and place of the conclusion of the credit agreement.
- [41] Contrary to the applicant's contention [that the credit agreement could only have become of force and effect when he gained knowledge of the acceptance of his offer], the express wording of the credit agreement shows that the parties intended for the contract to have legal effect upon them signing the documents comprising the contract. By way of example, clause 19.4 provides that:
- "The signature of this Agreement by the credit provider and you will mean that any prior Agreement(s) between the credit provider and you ...is cancelled and the terms of this Agreement shall determine the contractual relationship between the credit provider and you..."*.
[Emphases added]
- [42] It follows that the express provisions of the credit agreement provided that it would become legally effective upon signing the relevant documents by or on behalf of the applicant and the respondent.
- [43] As such, the first ground for the rescission of judgment, i.e. that the court does not have jurisdiction, must fail.

Mutual Understanding

- [44] The applicant states that the contract was explained to him in English, not his mother tongue or the Afrikaans language, which he understands well. *“All was done in English which I am not fluent in. The person present explain[ed] to me as good as possible...I, therefore, nevertheless, did not completely understand all of the quotation that day and especially not all about the credit assessment... There, therefore, was no mutual understanding.”*
- [45] The question is whether these allegations adequately establish a *bona fide* defence.
- [46] In *Gap Merchant Recycling CC v Goal Reach Trading CC*⁹, Rogers J, relying on the judgment of Marais J¹⁰, stated the following:

“[25] Marais J said that this explanation regarding the requirement of bona fides applied with equal force to the requirement in rescission proceedings that the defendant demonstrate a bona fide defence, emphasising in particular that bona fides cannot be demonstrated by making bald averments lacking in any detail (at 785H – I).”

- [47] In *Standard Bank of SA Limited v El-Naddaf and Another*, Marais J referred to the judgment of Colman J in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) and stated as follows (at 785D-786B):

“...Colman J separates the requirement to show bona fides and the requirement to 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'.

I stress the distinction drawn by Colman J because, since he does not rely upon the other arguments of the Rule when he lays down what is required to demonstrate bona fides, I am satisfied that his remarks regarding what is required to demonstrate that a defence is bona fide are of equal application to applications for rescission where the applicant is also required to demonstrate that he has a defence which is bona fide.

⁹ *Gap Merchant Recycling CC v Goal Reach Trading CC* 2016 (1) SA 261 (WCC).

¹⁰ *Standard Bank of SA Limited v El-Naddaf and Another* 1999 (4) SA 779 (W).

In my view the concluding sentence in the passage that I have quoted is of full application to applications for rescission. In my view, where it is required that bona fides be demonstrated, this cannot be done by making a bald averment lacking in any detail...."

- [48] The applicant states that the terms and conditions of the credit agreement were explained to him in English, which he is not fluent in, and not in his home language or Afrikaans, which he understands well. Neither of these allegations is adequate to conclude that the applicant did not understand the terms and conditions of the credit agreement.
- [49] The applicant fails to disclose which parts of the documents he signed and does not explain why he did not fully understand them. Crucially, he does not state that he did not understand the portion of the "Warranty on Veracity of Credit Application Details", stating, *inter alia*, that "...I have signed and understood all the following documents, and I confirm that I have been offered copies of the documents in either Sotho or Zulu...", and why he did not make use of this invitation.
- [50] Notably, the applicant must be assumed not to have had any difficulty deposing to a reasonably lengthy affidavit prepared in English, the contents of which, according to the certificate of the Commissioner of Oaths, the applicant understood.
- [51] Accordingly, I believe the applicant did not acquit himself of the *onus* of showing a *bona fide* defence regarding his alleged lack of understanding of the credit agreement.

Credit Assessment

- [52] Thirdly, the applicant contends that the credit provider failed to conduct an assessment or, if it did, that the preponderance of information available to the credit provider indicated that he didn't generally understand or appreciate the transaction's risks, costs or obligations or that he would be over-indebted.

“...Even if a credit assessment was done, I wouldn’t have understood the concept of a credit assessment.”

- [53] The respondent provided a detailed version, supported by documents, that contradicted the applicant's version. As stated, the applicant failed to reply to the respondent’s answering affidavit.
- [54] The applicant failed to provide any grounds to show that the income projection and calculated anticipated profits were ill-founded, unrealistic or irrational.
- [55] This ground concerns the applicant’s alleged lack of understanding of the documents in question, but the applicant’s contention cannot be sustained for the reasons set out above regarding the second ground for rescission.
- [56] Given these findings on the third ground for rescission, I cannot find that the applicant demonstrated a *bona fide* defence.

Reasonable Monthly Instalment

- [57] The applicant cuts across the first to third grounds for rescission and requests this court, in exercising its discretion, to determine a reasonable monthly instalment that the applicant is to pay to the respondent. By necessary implication, despite the applicant’s default, he seeks to retain the vehicle under this court's sanction. The applicant seeks this “relief” on the purported basis of certain allegations in the founding affidavit without any counter-application for a variation of the default judgment. The applicant’s endeavour to grant such “relief” is incompetent and cannot be entertained.
- [58] In any event, the applicant has failed to demonstrate a *bona fide* defence regarding the second and third grounds for rescission and to contradict the respondent’s entitlement to the relief granted in terms of the default judgment. Because the fourth ground for rescission piggy-backs on the third ground and, in turn, the second ground, the fourth ground cannot succeed given the findings on the second and third grounds.
- [59] This purported ground for rescission is wholly unfounded and cannot be entertained.

Conclusion


[60] For the reasons above, the applicant's application for rescission of default judgment must fail.

Costs

[61] There is no reason why costs should not follow the outcome of the application.

Order

[1] The applicant's application for rescission of judgment is dismissed with costs.



C. A. C. KORF
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

In person

For the Respondent:

R Stevenson, instructed by Marie-Lou
Bester Inc.

Heard on:

12 April 2023

Judgment handed down:

4 April 2024