



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

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE: 20 MARCH 2019.....

SIGNATURE: *eies*.....

Case No. 51196/2017

In the matter between:

MOLATELO DOREEN RAMOSEBUDI

APPLICANT

And

**MERCEDES BENZ FINANCIAL SERVICES
 SOUTH AFRICA (PTY) LTD**

RESPONDENT

JUDGMENT

MILLAR, A J

1. On 25 January 2018, the respondent was granted judgment by default against the applicant. The terms of the order were for the cancellation of an agreement that had been entered into between the parties for the financing of a Mercedes Benz motor vehicle, the return of the motor vehicle, leave to apply for judgment for damages if any and costs.
2. A warrant was thereafter issued on 10 May 2018 for the recovery of the vehicle and this was executed on 4 June 2018 when the respondent retook possession of the vehicle.
3. On 7 September 2018, the applicant brought the present application seeking the rescission of the judgement granted on 25 January 2018 and the return of the vehicle.
4. The applicant set out in some detail in her founding affidavit the reasons why the application was brought when it was some 3 months later.
5. The grounds upon which the application was brought are that the judgment ought not to have been granted because this court does not have jurisdiction¹, that the spirit of the National Credit Act was not followed and that the respondent's particulars of claim did

¹ Gallo Africa v Sting Music (Pty) Ltd 2010 (6) SA 329 (SCA) at 333C-D

not comply with rule 18(6) of the Uniform Rules of Court. It was advanced on behalf of the applicant that the judgment had been erroneously sought or granted as contemplated in Rule 42(1)(a) of the Uniform Rules.

6. The crux of the applicant's contention is that the entire agreement between her and the respondent and performance in terms thereof occurred within the jurisdiction of the Limpopo Division of the High Court and furthermore she resides, and the vehicle was kept within that courts area of jurisdiction. For these reasons this court had no jurisdiction and the judgment should not have been granted.
7. That the written agreement between the parties was signed in Limpopo, the applicant resides there, delivery of the vehicle was effected there and it was kept there is not in dispute. The dispute in this matter turns on where performance on the part of the applicant in respect of payment of what was due in terms of the agreement to the respondent occurred.
8. The written agreement between the parties provided that the applicant would make payment of the installments due by her to the respondent by debit order. It was argued that a debit order, in the circumstances of the present matter, entailed the respondent "fetching payment" from the bank account of the applicant which it was argued was in Polokwane. On this basis, it was argued that the entire cause of action arose in Limpopo.
9. The written agreement between the parties provides:

"22.1 You will pay to us the installments or rentals and any other charges specified in the Schedule (page 1) at the time or times as set out therein without any

deduction, free of exchange and at our address by way of debit order only.” (my emphasis)

10. It was not disputed that the respondent’s address is within the jurisdiction of this court.

The applicant argued however that a debit order cannot be paid at an address and that for that reason the words “*and at our address*” were of no consequence.

11. The entire argument advanced by the applicant was predicated on this court finding that the applicants bank account is indeed located in Polokwane in Limpopo. Neither the written agreement entered into between the parties nor the founding affidavit makes any reference to the applicant’s bank account being in Polokwane. The high-water mark is a passing reference to this made in the replying affidavit. Nothing has been placed before this court establishing this fact, fundamental to the applicant’s case for rescission².

12. The applicants counsel also urged me from the bar to consider transferring the matter to the Polokwane High Court, arguing that the applicant had been prejudiced by the institution of the proceedings in this court. I was referred to *First National Bank v Lukhele and Seven Other Cases*³ as authority. This would of course only require consideration

² See *Mokoena and Others v Lengoabala; In re: Lengoabala v Nhlapo and Others* (1166/2012) [2016] ZAFSHC 4 (22 January 2016)” [7] *In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties’ cases should appear clearly therefrom. See Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D. It is trite that the applicant in application proceedings must make out his/her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. The founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant’s favour. An applicant must stand or fall by his/her founding affidavit. See Director of Hospital Services v Mistry 1979 (1) SA 626 (AD) at 635H – 636D.”*

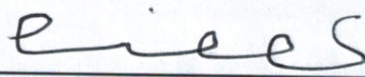
³ [2016] ZAGPPHC 616 (16 May 2016)

were the order for rescission granted. If the rescission is refused then there is nothing to transfer, the matter being *res judicata* and there no longer being any triable issue between the parties capable of transfer.

13. I find that the applicant has failed to make out a case for rescission of the judgment granted on 25 January 2018.

14. In the circumstances I make the following order:

14.1 The application is dismissed with costs.



A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 18 MARCH 2019

JUDGMENT DELIVERED ON: 20 MARCH 2019

COUNSEL FOR THE APPLICANT: ADV. J GROENEWALD

INSTRUCTED BY: ESPAG MAGWAI ATTORNEYS

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