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REPUBLIC OF SOUTH AFRICA



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

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

**CASE NO: 2483/2014
DATE: 18 December 2015**

In the matter between:-

ERKLING, ALI EREN

APPLICANT

And

NEDBANK LIMITED

RESPONDENT

JUDGMENT

MADIBA (AJ)

INTRODUCTION.

1. The Applicant seeks a rescission of the default judgment granted with costs on the 12 February 2014 in favour of the Respondent. The application of rescission for the default judgment is in terms of Rule 42 of the Uniform Rules of Court.
2. The basis for the relief sought by the Applicant is that the default judgment was granted by mistake as the Applicant has served and filed the notice to defend before the judgment was granted.
3. The Applicant's founding affidavit was attested to by Applicant's attorney as it was alleged that Applicant is not available as he is out of the country. There are no practice notes and heads of argument filed by the Applicant.

FACTUAL MATRIX

4. Applicant entered into an agreement of purchase with East Rand Mall Nissan in terms whereof he purchased a motor vehicle Nissan Navara with registration numbers [...]. The sale was financed by Motor Finance Corporation a division of the Respondent (Nedbank). Applicant agreed

with East Rand Mall Nissan (dealership) that certain repairs would be effected by the dealership within a period of two weeks. The dealership failed to repair the vehicle as agreed. Applicant cancelled the agreement of purchase due to the breach of agreement by the dealership.

5. Applicant persisted on the cancellation of the agreement despite numerous requests from the dealership not to do so. The Respondent then issued summons against the Applicant for non-payment of the monthly installment as agreed. Applicant serves his notice to defend on the 6th February 2014 and it was filed at court on the 7th February 2014. The notice to defend could not be filed in the court file as the court file was taken to the Registrar on the 6th February 2014 for the granting of the default judgment.
6. The default judgment was granted on the 12th February 2014. The *dies induciae* expired on the 31st January 2014. The Applicant's contention is that the default judgment was granted erroneously as he had already served and filed the notice to defend when the judgment by default was granted.
7. The test in a Rule 42 application for rescission of the default judgment is:-

Whether or not the Applicant disclosed grounds that the order was erroneously sought or granted. Judgment is erroneously or mistakenly granted if there existed at the time of its issuing, facts which the judge was unaware of which would preclude the granting of the judgment if the Judge was aware of. **See Naidoo v. Matlala NO 2012 1 SA 143 at 153.**

8. Applicant must show that the default judgment was granted in error or by mistake in order to succeed with a rescission application in terms of Rule 42(1)(a).
9. The Respondent's contention is that the notice to defend was served and filed after the dies indicuae have expired. Rule 19 (5), of the Uniform Rules of Court provides that the defendant may deliver a notice to defend even after the expiry of the period provided that default judgment has not been granted.
10. It is apparent that the notice to defend was served on the Respondent and filed at court before default judgment was granted.
11. If the court was aware that notice of intention to defend was filed at court prior to its granting of the judgment, it would not have granted it. The

Application stands to be granted as the Applicant succeeded in showing that the judgment was granted in error.

12. Regarding the costs, a successful party is usually granted costs. However in this matter, the applicant filed the notice to defend after respondent has lodged the application for default judgment.

13. Accordingly the Applicant has to bear the costs of this matter.

ORDER

14. I make the following order:

- a) The default judgment granted on the 12th February 2014 is hereby rescinded
- b) Applicant is ordered to pay costs.

**ACTING JUDGE OF THE HIGH COURT
S MADIBA**