

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

**CASE NO: 15338/2022**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) NOT REVISED.

DATE: 2024-07-22

SIGNATURE

In the matter between:

**TIYANI BARON VUKEYA**

**APPLICANT**

and

**ABSA BANK LIMITED**

**RESPONDENT**

*In re:*

**ABSA BANK LIMITED**

**PLAINTIFF**

and

**TIYANI BARON VUKEYA**

**DEFENDANT**

**Heard 16 April 2024**

**Delivered 23 July 2024**

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**JUDGMENT**

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**VAN DER MERWE, AJ**

**INTRODUCTION**

1. This is an application for rescission of judgment. The Applicant in the application for rescission of judgment is the Defendant in the main action. The Respondent in the application for rescission of judgment is the Plaintiff in the main action. I shall refer to the parties, as in the action.
2. The Plaintiff, as a result of the Defendant's breach of an instalment sale agreement, obtained default judgment on 18 May 2022 against the Defendant for the following:
  - 2.1 Confirmation of cancellation of the agreement;
  - 2.2 Return of the vehicle more fully described as **a 2019 BMW M4 Coupe M-DCT bearing engine number 0[...] and chassis number W[...]**;
  - 2.3 Damages to be postponed *sine die*;
  - 2.4 Costs of R200.00 plus sheriff fees of R382.95.
3. The Defendant applies for rescission of the default judgment premised on the provisions of rule 31(2)(b) of the Uniform Rules of Court.
4. It is to be noted that the Defendant is an advocate and an officer of this court.

The Defendant failed to file heads of argument and to prosecute the application. On 9 March 2023 the Plaintiff obtained an order to compel the Defendant to deliver his heads of argument, practice note, chronology table and list of authorities within 5 days from granting of the order, plus costs. The aforesaid order was served on the Defendant on 17 March 2023.

5. Despite the aforesaid order to compel, the Plaintiff had to set the matter down for hearing.
6. The Defendant only filed its heads of argument on 11 April 2024.

## **THE DEFENDANT'S CASE**

7. The Defendant alleges that he never received the summons at the address, as per the sheriff's return of service, as he was not resident at the said property. He avers that he had furnished the Plaintiff with a change of address when he entered into the substituted agreement on 21 September 2021. The Defendant is however silent on where he currently resides.
8. The Defendant avers that he only became aware of the summons on 16 May 2022 when he contacted the Plaintiff's attorneys of record to follow up on a payment arrangement. The Defendant avers that he has never prior to this, been made aware of any action being instituted against him. The Defendant does not elaborate on the alleged payment arrangement.
9. The Defendant claims that the Plaintiff has a fatal defect in the summons, in that the motor vehicle referred to was not in his possession anymore, moreover, that the agreement the Plaintiff seeks to cancel was no longer in force, as it was substituted in its entirety by a substituted agreement.
10. The Defendant's *bona fide* defence is essentially focused on the description of the motor vehicle in question. The Defendant submits that the Plaintiff's cause of action and summons are fatally defective, and that the Plaintiff will not be able to execute on the order granted, as the order refers to a different vehicle that was no longer in his possession. The vehicle in the substitution agreement was incorrectly identified in the action instituted by the Plaintiff and therefore the cause of action is defective.
11. The Defendant avers that as the summons was defective, it meant that the court order could not be enforced, as it was based on a non-existent cause of action and incorrect description of the motor vehicle.
12. The Defendant admitted to making a payment arrangement with the Plaintiff.
13. The Defendant insists that summons was not served on him and that he had no knowledge thereof.

## **THE PLAINTIFF'S CASE**

14. The Plaintiff and the Defendant entered into a written instalment sale agreement on 6 December 2019. On 10 September 2021 a substitution of goods agreement was concluded between the parties wherein the **2019 BMW M4 Coupe MDCT** with **engine number 0[...]** and **chassis number W[...]** was substituted with a **2019 M4 convertible M-DCT** with **engine number 0[...]** and **chassis number W[...]**.
15. A section 129 notice was sent to the Defendant on 16 February 2022. The Defendant then replied to the section 129 notice and made a payment arrangement, which was not adhered to. The Plaintiff and the Defendant concluded a payment arrangement on 2 March 2022. The Defendant undertook to pay the arrears and legal fees over 6 months from April 2022 but failed to make payment in terms of the agreement.
16. On 16 May 2022, the Plaintiff informed the Defendant that due to defaulting on the numerous payment arrangements concluded, payment of 50% of the arrears at the time would be required to pend legal action. The Defendant paid R30 000.00 and promised to pay R60 000.00 on 26 May 2022. The Defendant did not honour the arrangement with the Plaintiff.
17. Therefore, it is averred that the Defendant knew that there was an action to be instituted against him.
18. The summons was served on the Defendant's chosen *domicilium citandi et executandi* and that the return of service states that the sheriff received confirmation from the security that the Defendant is indeed the occupant of the address where the summons was served.
19. The instalment sale agreement remained in full force and effect, and the substitution of goods agreement only substituted the motor vehicle that was financed. There was no change in *domicilium* in the substitution of goods agreement as alleged by the Defendant.
20. At the time of filing the answering affidavit, the Defendant's account was in arrears of R228 143.50 and the total outstanding balance was R1 334 721.91.

The Plaintiff provided a certificate of balance to that effect.

21. The Plaintiff submits that the court order granted on 17 May 2022 contains the correct engine number and chassis number of the motor vehicle currently in possession of the Defendant and can be enforced once a variation application has been granted in respect of amending the asset subscription contained in the granted order.
22. It is to be noted at this stage, that the Plaintiff did file an application for variation to vary the court order merely to substitute the words “2019 BMW M4 Coupe M-DCT” with the words “2019 BMW M4 convertible MDCT”.
23. The variation application is opposed by the Defendant.
24. The said application was not properly before me and was therefore not adjudicated upon. The Plaintiff furthermore also served a notice of abandonment of the judgment which was withdrawn on 24 June 2022.
25. The Plaintiff avers that the Defendant has no defence to the Plaintiff’s claim that the Defendant also failed to provide a proper explanation for his default in performing in terms of the agreement and defending the action instituted by the Plaintiff.

## **APPLICABLE LEGAL PRINCIPLES**

### **Rescissions of judgment**

26. The essential elements for the rescission of a default judgment, in terms of rule 31(2)(b) and the common law are:
  - (a) That the party seeking relief must present a reasonable and acceptable explanation for his default; and
  - (b) That on the merits such party has a *bona fide* defence which *prima facie* carries some prospect of success.<sup>1</sup>

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<sup>1</sup> Chetty v Law Society Transvaal 1985 (2) SA 756 (A) at 765A-C.

27. If it appears that the default was wilful or that it was due to gross negligence the court could not come to the assistance of an applicant.<sup>2</sup> It has been held that “*wilful default*” is an ingredient of the good cause (or sufficient cause) to which under the element of wilfulness is absent. In ***Maujean v Standard Bank of South Africa Ltd 1994 (3) SA 801 (C) at 803*** the following was held:

*“Wilfulness or the negligent nature of a party’s default is one of the considerations which the court will take into account in the exercise of its discretion.”*<sup>3</sup>

28. In ***Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G-H*** it was held that:

*“Good cause includes but is not limited to the existence of a substantial defence. Furthermore, there should be evidence not only of the existence of a substantial defence, but also a bona fide presently held desire on the part of the applicant to raise the defence concerned in the event of the judgment being rescinded. The defence which has to be established before rescission is granted must be supported by a set of facts which, if true will constitute the defence.”*

29. In ***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 2021 (11) BCLR 1263 (CC) (17 September 2021)***, at 130 it was stated:

*“At the heart of this matter, there is a potent need, to uphold the integrity of the administration of justice and to send a message to all litigants that rescission as an avenue of legal recourse remains open, but only to those who advance meritorious and bona fide applications, and who have not, at every turn of the page, sought to abuse judicial process.”*

## **DISCUSSION:**

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<sup>2</sup> Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-7

<sup>3</sup> Harris v Absa Bank Ltd 2006 (4) SA 527 (T) at 530-531.

## Wilful default

30. The Defendant became aware of the pending legal action after the notice in terms of section 129 was served on him or sent to him via email on 16 February 2022.<sup>4</sup> The Respondent further replied to the said email on 2 March 2022 indicating that he would make a payment arrangement.<sup>5</sup>

31. The summons was served on the Defendant on 17 May 2022 at the Defendant's *domicilium citandi et executandi* by way of affixing. The sheriff's return of service states the following:

*"Confirmed with Mr Peter (security) that the Defendant is the occupant".*

32. The Defendant avers that he did not receive the summons as he does not stay there anymore. It is to be noted that nowhere in the Defendant's papers does he state his residential address. The Defendant further avers that he changed his *domicilium* address when the parties entered into the substitution agreement and that the Plaintiff has been aware that he has moved as the address is on his invoices and his statements. The substitution agreement contains no change of *domicilium* address and there is also no proof of change of address attached to the Respondent's affidavit. It would therefore seem, ostensibly on face value of the sheriff's return, that the Plaintiff might have received the summons, and if not received, it was proper service in terms of the instalment sale agreement.

33. From the above, it is also clear that the Defendant had full knowledge of the pending action against him, hence him making a payment arrangement during March 2022. The Defendant can unfortunately not state that he was not aware of any pending legal action as he is a practising advocate. That averment therefore holds no muster, as the Defendant is not a lay person and should know the legal consequences of not adhering to your agreement and that after receipt of a section 129 notice, a summons would ensue. The Defendant's failure to take effective steps timeously unfortunately creates the impression that the Defendant, with full knowledge of legal consequences in this matter, was in wilful default.

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<sup>4</sup> CL007-28

<sup>5</sup> CL773-30

### Bona fide defence

34. The next consideration is whether the Defendant has a *bona fide* defence to the Plaintiff's claim.
35. It should be considered that a *bona fide* defence is only sufficient if an applicant makes out a *prima facie* defence valid in law, if established at the trial, would entitle the Defendant to the relief asked for.
36. The Defendant's *bona fide* defence can be summarized as follows:
  - 36.1 The motor vehicle referred to in the Plaintiff's particulars of claim, and the subsequent court order has been substituted by a different motor vehicle in terms of the substitution agreement.
  - 36.2 The Plaintiff's particulars of claim are defective in that it does not refer to the correct description of the motor vehicle.
  - 36.3 The default judgment order is unenforceable as the motor vehicle cannot be properly identified, as the motor vehicle is described as a 2019 BMW M4 Coupe, and not 2019 BMW M4 convertible, as contained in the substitution agreement and the NATIS document.
37. From the papers it is to be noted that the original instalment sale agreement, the substitution agreement and the fact that the Defendant is in default is not in dispute. This was confirmed by the Defendant in court during argument in the matter.
38. The Defendant raises the point that as the substitute agreement is not attached to the particulars of claim and not pleaded, the Plaintiff's cause of action is defective. In this respect it is important to mention that neither the agreement nor the substitution agreement is in dispute. It is true that the substitution agreement is not attached to the particulars of claim and that the Plaintiff also did not plead the substitution agreement. This was conceded by the Plaintiff's counsel during argument.



39. It is to be noted at this stage that the particulars of claim describe the motor vehicle as follows: **2019 BMW M4 COUPE M-DCT** bearing **engine number 0[...]** and **chassis number W[...]**. The motor vehicle in the instalment sale agreement attached to the summons is described as follows: **2019 BMW M4 COUPE M-DCT, engine number 0[...]** / **W[...]**.
40. The motor vehicle is described in the Natis document as **2019 BMW M4** bearing **engine number 0[...]** and **chassis number W[...]**. This is also the description in the order that was granted. It is not in dispute that the motor vehicle, as described in the substitution agreement is in possession of the Defendant. The Defendant avers that the motor vehicle, as described in the court order, is not in his possession.
41. The fact that the substitution agreement is not attached to the particulars of claim and also not pleaded, does not entail that the Plaintiff's cause of action is defective and that the order is an unenforceable order.
42. In this respect my view is underpinned by the judgment of ***Absa Bank Ltd v Zalvest 20 (Pty) Ltd 2014 (2) SA 119 (WCC)*** where the court held at paragraph [21]:
- "[21] I also, with respect disagree with the learned Judge's proposition that "in the absence of the written agreement the basis of the [plaintiff's] cause of action does not appear ex facie the pleadings (paragraph 19). If a plaintiff pleads the conclusion of a written contract and the terms relevant to his cause of action, the cause of action will appear ex facie the particulars of claim."*
43. The Plaintiff's failure to annex a written agreement may elicit an objection that there was no compliance with rule 18(6) of the Uniform Rules of Court, but it does not make the pleading automatically offensive or embarrassing or defective. It could not be objectionable where the substitution agreement and the terms thereof have been admitted. The substitution agreement in this matter is only a portion of the agreement entered into between the parties. The remainder of the documents confirm that a written instalment sale agreement was concluded.<sup>6</sup>

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<sup>6</sup> Lorraine Maphage Madihlaba v Wesbank (a division of Firststrand Bank Ltd) case number 21195/2021 Pretoria Division, date of judgment 7 March 2023 at [20]

44. In the order granted on 17 May 2022 the motor vehicle is described as follows: **2019 BMW M4 COUPE M-DCT** bearing engine number **0[...]** and **chassis number W[...]**. In the substitution agreement the motor vehicle is described as: **2019 BMW M4 CONVERTIBLE M-DCT** bearing **engine number 0[...]** and **chassis number W[...]**. It was contended on behalf of the Defendant that since the court order referred to a coupe (which was the previous vehicle) instead of a convertible which is the current vehicle, admittedly in his possession, that the judgment would not be enforceable.
45. It is important to note that the description of the motor vehicle and the particulars of claim and the default judgment and the one admittedly in the Defendant's possession only differs with one word "*coupe*" versus "*convertible*". The remainder of the description of the motor vehicle is the same and also corresponds with the NATIS document. The Plaintiff's counsel, in her supplementary heads of argument, submitted that a "*coupe*" (open top) is the same motor vehicle as a "*convertible*". The only difference is the words used in the certificate of registration and the substituted agreement. She referred to the definition of a convertible as the following: "*Having a folding top, as an automobile or a pleasure boat. Other terms for convertibles include cabriolet, cabrio drop top, drop head coupe, open 2-seater, open top, rag top, soft top, spider and spyder. Consistency is rare about the current use of cabriolet in preference to convertible.*"
46. The Defendant in his supplementary heads of argument stated that the vehicle description means a description of a vehicle including at a minimum the license information, issuing state, make, model, year, colour, body style and vehicle identification number (VIN).
47. It is submitted by the Defendant that if one observes a contract of sale or rental of a motor vehicle, that the abovementioned should be taken into account. The Defendant further submits that the Plaintiff has incorrectly identified the vehicle in a substitution agreement which makes the initial contract ineffective, and the whole cause of action defective.
48. In the matter of ***Eke v Parsons 2016 (3) SA 37 (CC) at 12*** it was held that:

*“A court order must be effective, enforceable and immediately capable of execution by the sheriff, his deputy or members of the South African Police Service.”*

49. In my view, the court order would be enforceable as it contains the correct engine number and the correct chassis number of the vehicle. This is also the engine number and the chassis number contained on the NATIS document. I therefore do not agree with the Defendant's contention that the Plaintiff's cause of action is defective or that the court order would be unenforceable.

50. I find the contention that the current instalment sale agreement is not in force anymore, patently incorrect. If one has regard to simple wording on the substitution of goods agreement, which is admitted by the Defendant, the following is stated:

*“and that the provisions of the agreement in all respects remain in full force and effect as though the agreement was concluded with the goods hereby substituted as the object of the agreement”.*

51. Therefore, the instalment sale agreement, as admitted by the Defendant, is still in force and effect and is thereby enforceable by the Plaintiff.

52. The Defendant also conceded that he is in default of his payment obligations.

53. I was referred to a detailed statement of account that was loaded onto Caselines under section 013. According to this statement, which ends in May 2023, the last payment made by the Defendant was the R30 000.00 that formed part of his arrangement with the Plaintiff. This payment appears on the statement as a payment made in May 2022.

54. The Defendant is admittedly in default of his payment arrangements with the Plaintiff and seeks to rely on a mere technicality in the description of the motor vehicle, which I find is of no consequence.

55. Considering all the facts and circumstances there is therefore no *bona fide* defence with some prospect of success, which would succeed at trial. The Defendant admits the instalment sale agreement, the substitution agreement

and the fact that he is in default of his payment obligations.

56. The Defendant, as a legal practitioner, cannot contend that he is unaware of the legal action that was instituted against him. He received the Section 129 notice and made a subsequent payment arrangement. There is also no evidence that the Defendant changed his *domicilium* address. I am not convinced that the Defendant was not in wilful default.

57. The Defendant simply makes out no case for this court to rescind the default judgment. As a result, the application cannot succeed.

**I THEREFORE MAKE THE FOLLOWING ORDER:**

1. The application for rescission of judgment is dismissed with costs.

**VAN DER MERWE AJ  
ACTING JUDGE IN THE HIGH COURT OF  
SOUTH AFRICA, GAUTENG DIVISION, PRETORIA**

For the Plaintiff: Adv D Senyatsi

Instructed by: LGR Incorporated

For Defendant: Adv TB Vukeya (Defendant)

Assisted by: NKA Mathebula Attorneys