

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Vellem (M404/2022) [2025] ZANWHC 100 (12 June 2025) [2025] ZANWHC 100

COURT

North West High Court, Mafikeng

BEFORE

Oosthuizen-Senekal

CASE / FILE NUMBER

M404/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION -

MAHIKENG

CASE

NUMBER: M404/2022

Reportable:

NO

Circulate

to Judges: NO

Circulate

to Magistrates: NO

Circulate

to Regional Magistrates: NO

In

the matter between:

FIRSTRAND
BANK LIMITED
APPLICANT
and
KHULA
MXOLISI VELLEM
RESPONDENT

In
re the main application between
KHULA
MXOLISI
VELLEM
APPLICANT
FIRSTRAND
BANK LIMITED
RESPONDENT

CORAM:

OOSTHUIZEN-SENEKAL AJ

Date

judgment reserved: 22

May 2025

The judgment was handed
down electronically by circulation to the parties'
representatives via email. The date and time
for hand-down is
deemed to be 12 June 2025 at 10H00am.

ORDER

1.

The application for rescission of the
judgment granted by Gura J on 22 September 2022 is granted.

2.

The judgment granted in favour of
“Bonele Mxolisi Vellem” on 22 September 2022 is hereby
set aside.

3.

The Applicant, FirstRand Limited, is
granted leave to defend the action instituted against it.

4.

The costs of this application shall be
costs in the cause.

JUDGMENT

OOSTHUIZEN-SENEKAL AJ:

Introduction

- [1] This is an application for the rescission of a default judgment granted by Gura J on 22 September 2022 in favour of Mr Bonele Mxolisi Vellem.
- [2] The Applicant, FirstRand Bank Limited, seeks rescission in terms of Rule 42(1)(a) of the Uniform Rules of Court (“the Rules”) on the basis that the judgment was erroneously granted in its absence. The grounds advanced in support of the application are:
- (i) That the summons was served upon the incorrect legal entity—namely FirstRand Bank Limited—rather than FirstRand Life Assurance Limited, the insurer alleged to be liable under the life insurance policy;
 - (ii) That the summons was served on a branch of FirstRand Limited and therefore was defective; and
 - (iii) That the court order itself reflects a manifest error in that judgment was purportedly granted in favour of the deceased, Mr Bonele Mxolisi Vellem, rather than the later appointed executor of the estate or the respondent, Mr Khula Mxolisi Vellem.
- [3] The Applicant accordingly seeks an order rescinding the judgment, setting aside the order of Gura J, and granting it leave to defend the action.

Background

- [4] The Respondent, Mr Khula Mxolisi Vellem, was appointed executor of the estate of the late Bonele Mxolisi Vellem, who passed away on 2 February 2019. During the administration of the estate, he discovered that the deceased held a life insurance policy at FirstRand Life Assurance Limited (“FirstRand Life”).
- [5] The Respondent made enquiries and demanded payment of the policy proceeds. When payment was not forthcoming, he instituted legal proceedings in the North West Division of the High Court. Summons was issued citing FirstRand Bank Limited as the Defendant. Service was effected at a branch of FirstRand Bank, and default judgment was granted in favour of Bonele Mxolisi Vellem on 22 September 2022.
- [6] The Applicant, however, contends that it is neither the issuer of the policy nor the proper party to be cited or served. It contents that the insurer is a distinct legal entity, namely FirstRand Life Assurance Limited, and not FirstRand Bank Limited. As such the Applicant argues that the service and citation were fundamentally flawed.
- [7] The Applicant seeks rescission of the judgment primarily on two grounds, namely:

- (a) The citation of the incorrect party—FirstRand Limited rather than FirstRand Life Assurance Limited; and
- (b) That the order was erroneously granted in favour of the deceased, Mr Bonele Mxolisi Vellem.

Legal Frame Work

- [8] Rule 42(1)(a) of the Uniform Rules of Court empowers a court to rescind an order or judgment erroneously sought or granted in the absence of an affected party. The rationale behind this rule is to protect the integrity of judicial proceedings by enabling the court to correct orders that were clearly wrong at the time they were issued.
- [9] The courts have consistently held that an error for the purposes of Rule 42(1)(a) may arise from a mistake of fact or law. In *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz*[1], Van Zyl J stated that relief under Rule 42(1)(a) may be granted where “an order or judgment was erroneously granted because the court was unaware of facts which, if then known, would have precluded the granting of the order or judgment.”
- [10] This principle applies where a judgment was granted against a party who was not properly before the court or had no legal liability under the claim. In *De Wet and Others v Western Bank Ltd*[2], the Appellate Division confirmed that a judgment granted against a person who was not legally liable or not the correct party amounts to a nullity.
- [11] At common law, a party may also seek rescission of a judgment where “sufficient cause” is shown, which may include procedural

irregularities, fraud, misrepresentation, or any other circumstance that renders the judgment fundamentally unjust. In *Sperling v Sperling*[3], the court noted that “the overriding consideration remains whether justice requires the rescission of the judgment” and that the court retains a discretion to do so where warranted by the

facts.

- [12] Proper service is fundamental to the validity of proceedings. A bank, like any juristic entity, must be served at its registered head office unless it has explicitly authorised another address to receive service. In *ABSA Bank Ltd v Naude and Another*[4], the Supreme Court of Appeal held that improper service on a branch office, without proof of authority to accept service, constitutes

defective service and renders any default judgment susceptible to rescission. Similarly, in *Standard Bank of SA Ltd v G L Sears (Pty) Ltd*[5], the Court held that in the absence of proper service, the court could not be satisfied that the defendant had notice of the proceedings.

Evaluation

[13] The applicant contends that the judgment granted by Gura J was erroneously issued against FirstRand Limited, a banking institution, instead of the correct legal entity—FirstRand Life—responsible for issuing life insurance policies. The misidentification of the party materially affected the outcome and constituted an error of law and fact.

[14] This error was compounded by the service of court documents on a branch of the bank rather than at the registered address of the correct legal

entity. Proper service is not a mere procedural formality—it is a constitutional imperative rooted in the audi alteram partem principle, which requires that parties be given a meaningful opportunity to be heard.

[15] In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*[6], the Supreme Court of Appeal made it clear that a judgment granted in the absence of proper notice—either as a result of defective service or misidentification of the party—may be set aside as being erroneously granted.

[16] In *Standard Bank of SA Ltd v Saunderson and Others*[7], the Supreme Court of Appeal reiterated that due process lies at the heart of the rule of law. Judgments obtained in the absence of due process, including those based on inadequate or defective service, risk being fundamentally unjust.

[17] No evidence was presented that the branch served was authorised to accept service on behalf of either FirstRand Limited or FirstRand

Life. Consequently, the court was misled into believing that the proper party had been served and was before it when the

judgment

was granted.

[18] As held in *De Wet v Western Bank Ltd*, supra[8], a judgment granted against a party who is not the correct debtor is not just voidable, but void ab initio and susceptible to rescission under Rule 42(1)(a).

[19] Furthermore, *Promedia Drukkers* supra[9], confirmed that a procedural irregularity or factual misrepresentation, such as a misidentified litigant or improper service, entitles a party to relief under Rule 42.

[20] The audi alteram partem principle, as entrenched in section 34 of the Constitution, forms the foundation of procedural fairness in South African law. In

Kgomo v Standard Bank of South Africa Ltd[10], the Supreme Court of Appeal reiterated that while finality in litigation is important, it must be weighed against the imperative of achieving justice where procedural flaws have tainted the outcome.

- [21] The present matter reveals multiple irregularities. An incorrect party was cited; service was defective; and the judgment granted was in favour of a deceased person not legally before the court. These collectively justify rescission.
- [22] The Applicant has also provided a credible and satisfactory explanation for the delay in bringing this application. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* [11], the Supreme Court of Appeal held that while absence of fault is not a prerequisite, the explanation must be reasonable and bona fide. The explanation offered in this matter meets that standard.
- [23] In conclusion, having regard to the misidentification of parties, defective service, and the patent error on the face of the order, I find that the judgment was erroneously granted and stands to be rescinded in terms of Rule 42(1)(a) of the Uniform Rules of Court.

Costs

- [24] The award of costs in rescission applications is discretionary and must be exercised judicially, taking into account the particular circumstances of the case. While the general principle is that costs follow the result, this is not an inflexible rule.
- [25] In *Chetty v Law Society, Transvaal*[12], the Appeal Court emphasised that the successful party is usually entitled to costs, but the court may deviate from this where fairness and equity so demand. The conduct of the parties, the reasons for the default, and the bona fides of the application are all relevant considerations.
- [26] Importantly, in the context of rescission under Rule 42(1), it is recognised that the costs of the rescission application may appropriately be made costs in the cause.
- [27] In this case, given that the default judgment was erroneously granted against the Applicant due to misidentification and service on the wrong party, and in the absence of improper conduct on either side, it is appropriate that the costs of this application be costs in the cause.

Order

- [28] In the result, the following order is made:

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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[1] 1996

(4) SA 411 (C) at 417H-418B.

[2] 1979

(2) SA 1031 (A) at 1042H-1043B.

[3] 1999

(2) SA 805 (W) at 808C-D.

[4] 2015

(4) SA 432 (SCA) at para [16].

[5] 2002

(1) SA 180 (W) at 186G-I.

[6] 2007

(6) SA 87 (SCA) at para [27].

[7] 2006

(2) SA 264 (SCA) at para [17].

[8] See 1042.

[9] See 418B.

[10] [2016] ZASCA 73 at paras [14]–[16].

[11] 2003

(6) SA 1 (SCA) at para [11].

[12] 1985

(2) SA 756 (A) at 768D–E.

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