

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 21562/21

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

DATE:

SIGNATURE OF THE JUDGE:

In the matter between:

LEHANA, LEHLOHONHOLO REUBEN

APPLICANT

and

NEDBANK LIMITED

RESPONDENT

JUDGMENT

FLATELA AJ

INTRODUCTION

[1] This is an application for rescission of a default judgement granted by this court against the applicant on 14 June 2021. The rescission is sought in terms Rule 32(1)(b) and rule 31(5)(d) read together with rule 42(1) (a) of the Uniform Rules of the Court and the common law. The applicant avers that prior to the institution of the action, the respondent failed comply with the provisions of Section 129 of the National Credit Act 32 of 2005 (**hereinafter the “NCA”**) in that the Section 129 notice (**hereinafter the “Notice”**) was delivered to the wrong post office for notification and delivery to the defendant.

[2] The respondent admits that this may be the case that the applicant never received notification of the section 129 notice, however it is the respondent’s contention that non-compliance with Section 129 is merely dilatory, and it does not render the summons premature and/or the judgment erroneous. Furthermore, the respondent argues that the summons was served to the applicant’s *’s domicilium citandi et executandi* and no appearance to defend was entered on behalf of the applicant.

[3] The issue for determination by this court is whether the applicant has established an entitlement to rescission of the default judgement granted against him.

Factual Background

[4] The common cause facts are that:

- 4.1. On 21 November 2017 the applicant and the respondent entered into a written instalment sale agreement in terms which the respondent sold to the applicant a 2009 Mercedes Benz C180K BE CLASSIC, Engine Number 271910331258 and chassis number WDD2040452R096260 for R254 229.60 (two hundred and fifty-four thousand, two hundred and twenty nine rands, sixty cents) inclusive of the finance charges at an interest rate of 14.84 % per annum above the prime rate.
- 4.2. The applicant agreed to pay the respondents 1st instalment in the amount of R43 620.90 on 1 January 2018 and thereafter an amount of R3620.90 in 70 monthly instalments commencing on 2 February 2018 and payable on the 1st day of every consecutive month with final instalment of R3 529.70 payable on 1 December 2023.

[5] As his domicilium *citandi et executandi*, the applicant chose UNIT 32 NEW HAVEN COMPLEX, CHAUCER AVENUE, GROBLESPARK.

[6] The applicant fell into arrears, and he could not keep up with punctual payment of his instalments. On 18 March 2021, the plaintiff was in arrears in the amount of

R20 082.68.

Compliance with the Provisions of the NCA

[7] In its particulars of claim the respondent pleaded full compliance with the provisions of the NCA. The respondent states:

- 7.1. On 19 March 2021, by way of prepaid registered post, the respondent dispatched a Notice in terms of Sec 129(a), read with section 123 of the NCA to the respondent.
- 7.2. The Notice was delivered to the receiving post office of the chosen address of the applicant at Lentegour on or about 8 April 2021, which it by delivering a registered item notification slip, duly informed the applicant that the Notice was available for collection. A copy of the registered tracking point was annexed.
- 7.3. As such, it can be reasonably assumed that that the respondent has delivered the notice to the applicant, and that in the normal course the applicant, acting reasonably, would have ensured retrieval of the Notice from the receiving post office. In the absence of any contrary indication, the respondent knows of no reason as to why the Notice would have not come to the attention of the applicant.
- 7.4. In terms of the Notice, the respondent has drawn the default to the notice of the applicant and proposed that the applicant refer the agreement to a debt counsellor, alternatively a dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the

agreement or develop and agree to a plan to bring the payments under the agreement up to date.

- 7.5. A period in excess of then business days lapsed since the delivery of the Notice and notwithstanding the Notice, the applicant did not respond to the Notice. The respondent accordingly cancelled the agreement on 23 April 2021 in writing. A copy of the cancellation letter was attached hereto marked as annexure “E”. In the alternative, the respondent herewith cancels the agreement.
- 7.6. In terms of Section 130(3) of the NCA, at s154, the applicant has not agreed to agreed to a proposal made in terms of section 129(1)(a) of the NCA.
- 7.7. Therefore, the respondent has complied with the provisions of the NCA and all its obligations to the defendant and the goods have been delivered to the defendant.

[8] The notice also warned the applicant that failure to respond or to act would lead to the following:

- 8.1. Confirmation of cancellation of the agreement;
- 8.2. Return of the goods which is subject to the agreement (if applicable);
- 8.3. Payment of the full outstanding balance and/or damages; and
- 8.4. Legal costs.

[9] According to parcel tracking results the final notification of the Notice was delivered to Lentegour Post Office.

[10] There was no response and therefore the respondent cancelled the contract as stipulated in the Notice.

[11] The respondent issued summons for the confirmation of the cancellation of the contract and for the delivery of goods being the motor vehicle and the costs of suit on attorney and client scale. The summons was served on the respondent at his place of residence. No appearance to defend was entered on behalf of the applicant.

[12] The judgement was granted against the respondent on 18 June 2021.

[13] The sheriff of this court attached the vehicle per court order.

[14] Relying on the Constitutional Court judgements on *Sebola & Another v Standard Bank of South Africa Limited & Another*¹ and *Kubyana v Standard Bank of South Africa Ltd*² and on the judgements of this division *Kgomo & Another v Standard Bank*³ and *More v BMW Financial Services*⁴, the applicant submits that the judgement against him must be rescinded.

[15] The applicant states that had he received the notification, he would have exercised his rights fully.

¹ 2012 (8) BCLR 785 (CC)

² 2014 (3) SA 56 CC

³ 2016 (2) SA 184 GP

⁴ ZAMPHC (1658/2017) (Unreported)

[16] The respondent avers that the applicant has failed to make out a case in terms of rule 42(1)(a) or rule 31(2)(b) or the common law.

[17] Whilst the respondent admits that the applicant may not have received the Notice, that does not constitute a triable issue and thus a defence as envisaged in the Rules entitling the applicant to a rescission. The respondent argues that if it is found that there has been non-compliance, the Court must, in terms of section 130(4)(b) of the NCA, issue directions as to compliance and adjourn any proceedings accordingly until there has been compliance.

[18] Moreover, the respondent states that the applicant has not set out what rights and in which manner he would have exercised such rights and he has not set out his financial position at the time given his default on the account.

[19] The respondent furthermore avers that other than not having the Section 129 Notice, the applicant has not, in terms of Section 129 itself, set out any triable issues relating to the agreement that would have entitled him for instance refer the matter to an ombud and/or consumer court.

[20] The respondent furthermore avers that the applicant has failed to provide a reasonable *bona fide* defence which comes with triable issues that renders the default judgement executable. Relying on the constitutional court judgements of *Sebola* (supra) and *Ferris and Another v Firstrand Bank Ltd*⁵ the respondent submitted that non-

⁵ 2014 (3) SA 39 (CC),

compliance with the provisions of section 129 does not render the summons premature nor the judgement erroneous.

[21] In *Ferris the Court held*

'[17] It follows that Mr and Mrs Ferris' breach of the debt-restructuring order entitled FirstRand to enforce the loan without further notice. However, even if further notice were required, its absence is a purely dilatory defence — a defence that suspends proceedings rather than precludes a cause of action — and is not an irregularity that establishes that a judgment has been 'erroneously granted', justifying rescission under rule 42(1)(a)'

[22] The respondent submits that if should I find that there was non-compliance, I must issue directives in terms of section 130(4)(b) of the NCA and adjourn any proceedings until there has been compliance.

Discussion

[23] Counsel for the respondent submitted that the issue boils down to the interpretation of the Act and whether the applicant has made out a case for rescission of judgement.

[24] The issues relating to the delivery of sec 129 (1)(a) were clarified and settled in *Kubyana* matter where Mhlantla J in concluding remarks said:

[54] The Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that—

- (a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;
- (b) the Post Office issued a notification to the consumer that a registered item was available for her collection;
- (c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and
- (d) a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a)-(c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.'

[25] In *Amardien v The Registrar of Deeds*⁶, Mhlantla J again writing for the court explained once more the purpose of section 129. She said:

⁶ *Amardien and Others v Registrar of Deeds and Others* [2018] ZACC 47

[56] The purposes of section 129 of the NCA are as follows:

(a) It brings to the attention of the consumer the default status of her credit agreement.

(b) It provides the consumer with an opportunity to rectify the default status of the credit agreement in order to avoid legal action being instituted on the credit agreement or to regain possession of the asset subject to the credit agreement.

(c) It is the only gateway for a credit provider to be able to institute legal action against a consumer who is in default under a credit agreement.”

[57] This section reveals that in the event of the consumer being in default of her repayments of the loan, the credit provider is obliged to draw the default to the attention of the consumer. It prescribes that the notice given to the consumer must be in writing and specifies what the notice must contain. The notice must propose the options available to the consumer who is in financial distress and unable to purge the default. It must point out that the consumer has the option to refer the credit agreement to a debt counsellor, dispute resolution agent, consumer court or ombudsman. The purpose of the referral must also be stated in the notice.

[58] There are two statutory conditions which must be met before the credit provider may institute litigation under section 129. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before (a) providing notice to the consumer; and (b) meeting further requirements set out in section 130.

[59] The reference to section 130 reveals a strong link between the two provisions hence they are required to be read together. When a credit provider seeks to enforce the agreement by means of litigation, it must first show compliance with section 130, which, by extension, refers back to section 129. The application of these sections is triggered by the consumer's failure to repay the loan. These sections suspend the credit provider's rights under the credit agreement until certain steps have been taken. The credit provider is not entitled to exercise its rights immediately under the agreement. It is first required to notify the consumer of the specific default and demand that the arrears be paid. If the consumer pays up the arrears, then the dispute is settled."

[26] That *'there are two statutory conditions which must be met before the credit provider may institute litigation under section 129'* could not be clearer. *'In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before (a) providing notice to the consumer; and (b) meeting further requirements set out in section 130.'*⁷ Now that it has come to light that contrary to the

⁷ Amardien, para 58

allegations of compliance, the applicant never received the notice due to error on the part of the respondent it logically follows that these peremptory terms have not been fulfilled.

[27] It also follows that the respondent's reliance on *Sebola* and *Ferris* which were decided earlier is misplaced as those cases and the issues therein pertinent to this case were clarified by *Kubyana* and in *Amardien* recently.

[28] The respondent also made submission that if I should find that it was not in compliance with s129 as contemplated by the act, then I should act within s130(4)(b) and adjourn the proceedings to allow for compliance that is for them to serve the applicant with the peremptory Notice. This invitation begs the question, what proceedings are there to adjourn? The default judgment has already been granted in favour of the respondents, therefore, Court in respect of that judgment is *functus officio*, save to the exception of rescission of judgment as provided for in the rules.

[29] In the result the following order is made:

1. The application for condonation is granted;
2. The default judgement granted on 14 June 2021 is rescinded.
3. The respondent is ordered to pay costs of this application.

L FLATELA

JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 1 December 2022.

Date of Hearing: 28 November 2022

Date of Judgment: 1 December 2022

Attorneys for Applicant: Mr Mzukisi Ndabeni

M Ndabeni Attorneys

Tel: 010 023 2977

mzukisi@ndabeni-attorneys.co.za

mzukisindabeni@gmail.com

Mobile: 076 491 8201

Counsel for Respondent: Adv M Reineke

Cell: 082 411 9452

Instructed by: DRSM ATTORNEYS

TEL: (011) 447 8478

FAX: (011) 447 4159

Ref: L WISKIN/ 143776

EMAIL: lori@drsm.co.za