



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

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

CASE NO: 2022/00750

In the matter between:-

ABSA BANK LIMITED (PTY) LTD

APPLICANT

and

MUDZIVITI MICHELLE IRENE

RESPONDENT

JUDGMENT

Mazibuko AJ

Introduction

1. The applicant seeks relief for confirmation of cancellation of the instalment sale agreement (the agreement) and the return of the motor vehicle (described below) and leave to approach the court for judgment regarding the damages suffered by the applicant.

2. The summary judgment is resisted on the following grounds: this court has no jurisdiction to adjudicate the matter but the magistrates' court. The applicant was not reasonable in not consenting to the respondent's proposed repayment plan. Such refusal led to the respondent not being afforded an opportunity to approach a debt counsellor. The instalment sale agreement must be declared a reckless credit agreement due to the applicant's failure to conduct due diligence and background checks when the parties entered into the instalment sale agreement.

Common cause facts

3. It is common cause that on 26 July 2017, the parties concluded the agreement. In terms of the agreement, the defendant purchased a motor vehicle, 2017 MAZDA 2 1.5 DYNAMIC 5DR, engine number: [...], chassis number: [...], for an amount of R230 297.01, with the finance or interest charges of R68 265.46. The motor vehicle was delivered to the respondent.
4. In terms of the agreement, the applicant reserved ownership of the motor vehicle until all amounts payable in terms of the agreement had been made. The respondent would be in default if, inter alia, she failed to pay any amount payable on the due date.
5. In April 2020, the respondent fell into arrears with her monthly instalment payments. Due to Covid-19, the respondent's monthly instalments payments were deferred from May 2020 to August 2020, resuming in September 2020.
6. In November 2021, the Section 129 notice was received by the respondent. The content of the certificate of balance is not in dispute in that as of December 2021; the respondent was in arrears in an amount of R50 345.51 with a total outstanding balance of R153 943.99.

Condonation

7. The applicant seeks condonation for the late filing of its application for summary judgment. The summary judgment application was due in March 2022. It was only filed in April 2022. The explanation given by the applicant is

that its attorneys' emails were hacked, and there was a delay in receiving correspondence and court processes. The respondent does not oppose the application.

8. In exercising the court's discretion in respect of good cause for condonation, the following was stated in the matter of *United Plant Hire Pty Ltd v Hills*¹ *"It is well settled that, in considering applications for condonation, the court has the discretion to be exercised judicially upon consideration of all facts and that, in essence, it is a question of fairness to both sides. In this inquiry, relevant considerations may include the degree of non-compliance with the rules, the explanation, therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgement, the convenience to the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive."*
9. In *Van Wyk v Unitas Hospital*,² it was stated that: *"This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this inquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."*
10. I am satisfied that the applicant has shown good cause for the delay in filing its application. Granting the condonation application will not be prejudicial to the respondent and is in the best interest of justice. The non-timeous filing of the application for summary judgment is hereby condoned.

Issues

11. The court is required to decide whether this court has jurisdiction to adjudicate

¹ United Plant Hire Pty Ltd v Hills 1976 (1) SA 717(A) at 720E-G

² Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) at 447A-B

the matter. Whether the respondent's opposing affidavit disclosed a bona fide defence to be granted leave to defend the main action.

The Law

12. Rule 32 of the Uniform Rules provides:

- "(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only-*
- (c) for delivery of specified movable property, together with any claim for interest and costs.*
- (2) (b) The plaintiff shall, in the affidavit referred to in subrule (2)(a) verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.*
- (3) The defendant may—*
- (a) ...*
 - (b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard) or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence, and the material facts relied upon therefor."*

The respondent's defences

Lack of Jurisdiction

13. The respondent contends that the monetary amount claimed (namely, the balance is R153 943.99 and the arrear amount R50 345.51) falls within the monetary jurisdiction of the Magistrates' Court 32 of 1944 ("The Magistrates' Court Act").

14. She averred that the precedent set by the Supreme Court of Appeal in its findings in *Standard Bank of South Africa Ltd and Others v Mpongo and Others 2021 (6) SA 403 (SCA)* is a rather unfortunate one.
15. The applicant asserts that the respondent's defence in this regard is not a bona fide defence according to the Supreme Court of Appeal in *Standard Bank of South Africa Ltd and Others v Mpongo and Others*³
16. Section 21 of the Superior Courts Act 13 of 2013 provides that a High Court has jurisdiction over all persons residing or being in a relation to all causes arising within its area of jurisdiction. In *casu*, the parties concluded the instalment sale agreement in Johannesburg, which is within the area of jurisdiction of this court.
17. In *Standard Bank of SA Ltd and Others v Thobejane and Others*; *Standard Bank of SA Ltd and Others v Gqirana N.O. and Another*⁴, in deciding whether the High Court could refuse to entertain a matter that fell within the jurisdiction of the magistrates' court, the court held: "*a High Court is obliged by law to hear any matter that falls within its jurisdiction and has no power to decline to hear such a matter on the ground that another court has concurrent jurisdiction to hear it.*"

³ 2021 (6) SA 403 (SCA)

[74] Section 29 of the Magistrate's Court Act, insofar as NCA matters are concerned, provides:
'(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court in respect of causes of action, shall have jurisdiction in –
(e) Actions on or arising out of any credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005).

[75] The complete answer in the Eastern Cape court's finding is contained in Standard Bank's argument. It is that, far from impliedly ousting the concurrent jurisdiction of the High Court, the sections of the NCA that it relied on and s 29 of the Magistrate's Courts Act are premised on the High Court having concurrent jurisdiction with Magistrate's Court."

⁴ *Standard Bank of SA Ltd and Others v Thobejane and Others*; *Standard Bank of SA Ltd and Others*

v Gqirana N.O. and Another [2021] ZASCA 92 (25 June 2021)

18. A court can only be said to have jurisdiction in a matter if it has the power not only to take cognisance of the suit but also to give effect to its judgment. See *Steytler NO v Fitzgerald*.⁵
19. The Supreme court of Appeal in the matter of Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others,⁶ confirmed the principle in the case of Bester, stating that “*save in admiralty matters, our law does not recognise the doctrine of forum non conveniens, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction*”.
20. I find that though the debt owed by the respondent ordinarily falls within the magistrates’ court, the High court has jurisdiction to adjudicate the matter as the High court has concurrent jurisdiction with the Magistrates’ court.

Restructuring the debt and reckless credit

21. In her answering affidavit, the respondent averred that the applicant’s failure to cooperate with her proposed debt restructuring plan had deprived her of her right to approach the debt counsellor, who would have assessed her financial circumstances and assisted her in bringing her financial obligations up to date. She further stated that a fee of R7 500 was required in the application for a debt review, and the applicant needed to bear that in mind when considering her proposed debt restructuring.
22. The applicant contended that the respondent was granted ample time to approach a debt counsellor to apply for debt review when the previous action was withdrawn. Further, the applicant was not bound to the restructuring offer, which was unacceptable.
23. The National Credit Act⁷ (the NCA) has three main purposes as set out in Section 3 of the NCA, namely, to promote and advance the social and economic

⁵ 1911 AD 295 at para 346.

⁶ 2013 (5) SA 484 (SCA), para 19

⁷ National Credit Act, [No. 34 of 2005]

welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry; and to protect consumers.

24. Section 85 of the NCA provides: *“Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may-*

(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluates the consumer’s circumstances and make a recommendation to the court in terms of section 86(7), or

(b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer’s over-indebtedness.

25. Section 86. *(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted. (2) An application in terms of this section may not be made in respect of and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.*

(3) A debt counsellor-

(a) may require the consumer to pay an application fee, not exceeding the prescribed amount, before accepting an application in terms of subsection (1); and

(b) may not require or accept a fee from a credit provider in respect of an application in terms of this section.

(4) On receipt of an application in terms of subsection (1), a debt counsellor must-

(a) provide the consumer with proof of receipt of the application.

(i) all credit providers that are listed in the application; and

(ii) every registered credit bureau.

(b) notify, in the prescribed manner and form-

(5)

(6) A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time-

(a) whether the consumer appears to be over-indebted; and

(b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.

(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that-

(a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into.

(b) the consumer is not over-indebted but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-

(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and

(ii) that one or more of the consumer's obligations be re-arranged by -

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly.

(bb) postponing during a specified period the dates on which payments are due under the agreement.

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5 or Part A of Chapter 6.

26. The respondent contended that the debt review application costs money. She was putting it together when the applicant refused to grant her more time and decided to proceed with legal action. In that way, she could not exercise her rights in sections 85 and 86 of the NCA.
27. It is common cause that the respondent made no debt review application. The respondent stated that she was raising the money to pay the debt counsellor when the applicant commenced the legal action. These averments fail to assist the respondent in any manner or form.
28. In November 2021, a section 129 notice was served on the respondent, and she has acknowledged receipt thereof. The notice had options provided for the respondent to exercise. During December 2021, the respondent proposed restructuring her debt and stated to the applicant that she would resume her proposed repayments in January 2022, failing which she would approach a debt counsellor. The applicant did not accept such debt restructuring.
29. I find that the respondent's contention that she could not apply for debt review since she had to pay the R7 500 for same and that the applicant did not grant

her sufficient time to raise same cannot be accepted as a bona fide defence to the summary judgment as that raises no triable issue.

30. Regarding the defence of reckless credit. In paragraphs 35 and 36 of her answering affidavit, the respondent stated that

“35. After a recent consultation with a debt counsellor the Defendant has since discovered that credit may have in fact been provided in a reckless manner by the Plaintiff contrary to the terms of section 80 and 81 of the NCA.

36. These are clearly arguable questions of law which ought to be dealt with properly on trial.”

31. It is not disputed that the respondent is the one who supplied the applicant with details to enable the applicant to decide whether the respondent qualified for credit or not. The respondent signed an application form containing her income details for assessment. Relying on the information provided by the respondent, the instalment agreement was concluded between the parties. From the conclusion of the instalment sale agreement in 2017 till the period the respondent was granted three-month debt relief between May and August 2020, she made monthly instalment payments in terms of the agreement.
32. It is so that the respondent is required to disclose sufficient facts in support of reckless lending allegations. A court will consider substantiated and detailed allegations before declaring a credit agreement reckless.
33. In *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases*⁸, a comment was made: *“There is a tendency for defendants to make a bland allegation that they are overindebted or that there has been reckless credit. A bald allegation that there was reckless credit will not suffice.”*

34. In my respectful view, the respondent did not set out her defence of reckless credit sufficiently and in a detailed manner. The applicant has complied with its obligations and that it conducted the required assessment.
35. It is settled law that whilst the respondent is not required to prove her defence, she must at least provide sufficient detail to enable the court to ascertain that

⁸ 2011(1) SA 310 (GSJ), paragraph 26

her opposing affidavit discloses a bona fide defence. She is further required to go beyond the mere formulation of disputes and take the court into her confidence. (see Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoors (Edms) Bpk).⁹

36. The respondent contended that her recent consultation with a debt counsellor revealed that the credit might have been granted recklessly. The respondent did not give details of her consultation with the debt counsellor, whether her application was accepted, or the findings emanating from the said consultation. Her bald statement cannot afford her any assistance in this summary judgment application due to a lack of details that will assist the court in determining whether the respondent has a triable defence.
37. The respondent has not provided sufficient details to enable this court to determine whether she has a bona fide defence. Therefore, this defence cannot be successful as the respondent needed to disclose the nature and grounds of the defence and the material facts relied upon.
38. The respondent has failed to deal with the merits of this application and has not disputed her indebtedness or the amount claimed by the applicant. As a result, the summary judgment application should be granted.

Costs

39. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*¹⁰, it was stated: “*The Supreme Court has, over the years, developed a*

flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful

⁹ 1997 (1) SA 244 (T) at 249 F-G

¹⁰ 1996 (2) SA 621 (CC) Para 3

party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation.”

40. The applicant brought these proceedings in terms of Uniform Rule 32 (1). I find no ground on why costs should not be awarded against the respondent on the attorney and client scale. Such costs are also provided for in the agreement between the parties. Considering that the applicant’s claim falls within the monetary jurisdiction of the magistrates’ court though this court has concurrent jurisdiction, it is justifiable to award costs on the Magistrate’s Court’s scale on an attorney and client basis.

41. In the premises, the following order is made.

Order:

1. The late filing of the summary judgment application is condoned.

2. The agreement between the parties is cancelled.
3. The respondent is ordered to return to the plaintiff; alternatively, the Sheriff is authorised to attach and return to the applicant the following motor vehicle: 2017 MAZDA2 1.5 Dynamic 5DR, Engine Number: [...]Chassis Number: [...].
4. Leave is granted to the applicant to approach the court on the same papers, duly supplemented if necessary, for judgment regarding the damages the applicant suffered together with interest thereon.
5. Costs of suit on the attorney and client basis on a Magistrates' court scale.

N. MAZIBUKO

Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email being uploaded to Case Lines.

Representation

For the applicant:	Ms K Mitchell
Instructed by:	Smit Sewgoolam Incorporated
For the respondent:	In person
Hearing date:	2 February 2023
Delivery date:	2 March 2023