Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURGL

CASE NUMBER:

2726/22P

In the matter between:

PHAPHAMA SIKUTSHWA **APPLICANT**

And

FIRST RAND BANK AUTO RECEIVABLES (RF) LIMITED **RESPONDENT**

JUDGMENT

P C BEZUIDENHOUT J:

[1] Applicant is seeking an order that the default judgment granted against him on 6 April 2022 under this case number be rescinded. The order that was granted was for the return of a Mercedes Benz C 180 Avant Garde. The application is opposed by Respondent.

[2] It was submitted on behalf of Applicant that the summons and particulars of claim were not received by Applicant and that he only became aware of the judgment during March 2023 when the Sheriff came to repossess the vehicle. It was submitted that the return of service indicated that Applicant was no longer residing there and that

Respondent must have been aware thereof. It was further submitted that the section 129 notices were not received and did not comply with the provisions of the National Credit Act and also did not refer to the correct motor vehicle. It was further submitted that Applicant had entered into a compromise with Respondent as to the repayment of the loan.

[3] It was submitted on behalf of Respondent that the agreement in clause 22.6 sets out a non-variation clause that any variation must be in writing. It is common cause that there was nothing in writing and also admitted by Applicant that it was done telephonically. It is improbable that Respondent would reach an agreement that Applicant can only pay when he is in a position to do so. From page 74 of the papers it is clear that the last payment by Applicant was during April 2022 in the sum of R 1 000.00 and that no further payments were received until March 2023 when the application for default judgment was brought. The so called compromise is not set out nor what exactly it entailed. At page 85 of the papers Applicant admits that he was in arrears with his payments and also at page 11 of his founding affidavit admits that the debt has to be repaid. It was submitted that Applicant failed to set out any defence and therefore the application could not succeed. It was submitted that in the agreement Applicant provided his domicilium address as […] Drive V[…]. As appears from the papers the notices in terms of section 129 were sent to that specific address as well as to another address. He at no stage changed his domicilium address which had to be done in writing. The summons was served by the Sherriff at the said domicilium address. It was submitted that even though the vehicle mentioned in the section 129 letter was incorrect it did not affect the compliance and service of the summons and that because Applicant has not disclosed any defence the application cannot succeed.

[4] To succeed in this application Applicant has to show a reasonable and satisfactory explanation for is default and also that he has a *bona fide* defence which if the matter has to go to trial has some prospect of success.

[5] Firstly the submissions that the section 129 notice and summons were not received may be correct but there has been compliance with the relevant legislation and requirements. The papers indicate that the section 129 notice was sent to Applicant by registered mail and that the first notification was sent to him at his chosen domicilium. There was accordingly compliance with the requirements as set out in Kubyana v Standard Bank of South Africa Limited 2014 (3) SA 56 (CC) at paragraph 54. Further the summons was served at his chosen domicilium address and it is common cause that he did not change his domicilium address. Accordingly it was in compliance with the requirements. It is not alleged by Applicant that he at any time informed Respondent of a change in his domicilium address. No written notification is attached to the papers. At page 89 of the papers at paragraph 11.3 Applicant admits that it was served at his domicilium.

[6] Applicant in his affidavit admits the credit agreement and his payment history. In paragraph 20 of his founding affidavit he sets out that one Nandi Ngobhozi advised him to at least make some means to pay whatever he could which he did. As already referred to above for a period of eleven months he made no payments. Further it does not set out in paragraph 20 when he made this telephonic conversation and was informed that he could pay when he was able to do so. As appears from page 61 the order for the return of the vehicle was granted on 6 April 2022 and the warrant for delivery was issued on 8 July 2022. The letter which Applicant attaches as indicating that he had changed his address is a letter from Respondent dated 15 October 2022 on page 92 and some months after the warrant for the delivery of the vehicle had been issued. It therefore does not assist Applicant.

[7] The fact that the section 129 notice may refer to the incorrect vehicle, in my view, does not assist Applicant as he has not indicated that he has a defence which has prospects of success. Firstly the conversation that he refers to which allowed him to

pay whenever he can does not indicate when this took place and is also highly improbable. Secondly the agreement specifically provides that there may be no variation unless it was in writing and it is common cause that there is nothing in writing. Accordingly it has not been shown that there is evidence of a compromise which would have any prospect of success if the matter has to go to trial. Further Applicant admits that he was in arrears with his payments. The only defence is that of a compromise which as I have set out above does not have any prospects of success.

[8] I was referred, on behalf of Applicant, to the decision of Kgomo and another v Standard Bank of South Africa and others 2016 (2) SA 184 (GP) where it was held that the judgment had to be rescinded due to the fact that the section 129 notices were sent to an incorrect address, as was apparent from the particulars of claim. In my view the present matter is distinguishable from the said judgment as the section 129 notices went to the correct domicilium address chosen by Applicant which he had not changed and that it was thus done in compliance with the requirements as set out in the judgment of Kubyana referred to above.

[9] The application is dismissed with costs.

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P C BEZUIDENHOUT J.

JUDGMENT RESERVED ON: **1 FEBRUARY 2024**

JUDGMENT HANDED DOWN ON: **6 FEBRUARY 2024**

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