IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)
PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
4/02/2010.
DATE SIGNATURE

04/02/2010.

Case no. 28713/08

In the matter between;

IMPERIAL BANK Plaintiff

and

AUDREY BUSISIWE KUBHEKA Defendant

JUDGMENT

Judgment Reserved:: 07/12/2009
Judgment handed down: 04/02/2010

LEGODI J

1. This is an application for rescission of default judgment which was granted against the defendant on the 10 October 2008. The applicant will be referred to as being the defendant in the main action and the respondent as the plaintiff.

2. On the 21 December 2004, the plaintiff and the defendant concluded Installment Sale Agreement governed by the provisions of National

1.

2.

Credit Act, in terms whereof the plaintiff assisted the defendant financially in the purchase of a certain motor vehicle.

3. The repayment on the funds advanced on behalf of the defendant was for a period 53 installments at R1 210.08 per month starting from the 1 February 2005, the final payment being the 1 July 2009.

4. As on or about the 7 April 2008 defendant fell in arrears in an amount of R1 276.15. This prompted the plaintiff to issue a notice as envisaged in section 129 of Act 34 of 2005. The notice in a form of a letter is dated the 7 April 2008. It is said to have been sent to the defendant by registered post.

5. When the plaintiff received no response to the notice, on the 11 June 2008 a further letter was addressed to the defendant in which a notice of cancellation of the agreement was given.

6. On the 17 June 2008, summons were issued against the defendant. Of importance, in terms of which the plaintiff claimed for the return of the motor-vehicle forming the subject of the agreement. It was also prayed that the Sheriff be authorised and requested to attach, seize and hand over to the plaintiff the said motor-vehicle. The plaintiff further prayed for the forfeiture of the instalment payments already made by the defendant.

7. The summons were served on the 4 July 2008 upon one Nhlanhla, described on the return of service as a member of a household at the place of residence of the defendant.

8. When there was no reaction to the summons, the plaintiff obtained default judgment on the 10 October 2008. Subsequently, the order as per default judgment was executed on the 25 November 2008 when the Sheriff attached and handed over the vehicle to the plaintiff.

9. On the 2 December 2008, the plaintiff's attorneys informed the defendant's attorneys of the amount still owing which were set out as follows:

"Capital outstanding	:	*R10 736-78*
Tracing/attachment costs	:	*R3000 -00*
Attorneys' costs	:	*R4145 -39*
Sheriff's fees	:	*R1944-95*
Subtotal	:	***R19 827-12***
Less paid	:	*R8 000-00*
AMOUNT PAYABLE	:	*R11 827-12"*

10. The defendant's attorneys in the letter of the 2 December 2008 were further informed that the plaintiff will not reinstate the cancelled agreement and the vehicle will only be returned on settlement of the aforesaid amount.

11. The response to the letter of the 2 December 2008 is contained in the letter of the 3 December 2008, and can be summarised as follows:

11.1 that as on the date on which the summons were instituted, that is, the 17 June 2008, the defendant was in arrears in the amount of R3 741.67,

11.2 that on the 25 June 2008, and before the service of the summons on the 4 July 2008, the defendant paid the sum of R4000,

11.3 that further payments were made as follows:

11.3.1	24 July 2008	=	R1200
11.3.2	23 September 2008	=	R1600
11.3.3	31 October 2008	=	R2000
11.3.4	27 November 2008	=	R8000

12. The defendant's attorneys then concluded in the letter by requesting immediate return of the motor-vehicle. In response thereto, the plaintiff's attorneys referred to notice in terms of section 129 to which the defendant did not respond. It was further indicated that the agreement has been cancelled and that the amount claimed in the summons was for the whole amount outstanding. Lastly, that the vehicle would be released upon payment thereof, including legal costs and costs for recovery of the motor-vehicle.

13. On the 10 February 2009, the present application for rescission of judgment was launched. In the application, the applicant also prayed for condonation of the late filing of the application. The failure to timeously launch the application for rescission of default judgment is described in the founding affidavit as follows:

"12.1 I hereby confirm that the reason for the delay in this matter is due to the fact that my attorneys and I

have been attempting to determine what the correct position of this matter as well as to attempt to settle the matter without going to court for an application for rescission in order for me to set out the full facts to this Honourable Court."

12.2 But to date, no clarity on the situation has been achieved, nor has the matter become settled and as a result, I am now forced to bring a High Court application in order for me to rescind the orders granted and to determine what the position is.

13.

I therefore request this Honourable Court to condone the late filing of this application as I am not delaying the matter deliberately but that I was attempting to obtain all the facts, and to settle the matter without approaching the Honourable Court unnecessarily to make a full disclosure to this Honourable Court.

14. For the following reasons, I am prepared to condone the late filing of the application for rescission:

14.1 firstly, the delay considered from the date on which the motor-vehicle was attached and removed from the applicant, all up to February 2009 coupled with payments of the 31 October and 27 November 2008, is not unreasonably inordinate.

14.2 secondly, efforts to resolve the matter coupled with payments dispel the attitude of delaying tactics on the part of the defendant, more so that the subject of the dispute being the motor vehicle has been attached, removed from the defendant and handed over to the plaintiff.

14.3 lastly, I considered the merits of the case in favour of the defendant an aspect which is relevant in an application for condonation,

15. I now turn to deal with the essence of the application for rescission of judgment. The explanation for delay in defending the matter seems to be attributable, firstly, to the fact that the summons were not served personally on the defendant. Whilst it is so stated, it looks like the real delay was occasioned by the defendant's decision to make arrangements to pay the arrears and some payments having been made before judgment was granted on the 1st October 2008. Secondly, according to the defendant, he genuinely believed that no further actions would be taken as the arrears were paid up to date before judgment was obtained. That is, summons having been served on the 4 July 2008, showing an amount of R3 741.67 outstanding and payment of R4000 having been made on the 24 June 2008, that is, before service of the summons, the defendant seemingly believed that no further actions would be taken by the plaintiff, whereas it is not specifically so stated in the three paragraphs quoted above, it can be so inferred from them.

16. I am therefore satisfied that the reason for the delay is justified. In addition to this, I am also persuaded by the

merits of the application. This brings me to deal with a bona fide defence as a requirement in an application for rescission of judgment.

17. The only defence raised, that deserves consideration, is what is referred to in paragraph 4 of the founding affidavit as a point *in limine*. In a nutshell, the defence is that, the defendant did not receive the notice in terms of section 129 of the National Credit Act and that if she had received it, she would have availed herself of the remedies set out in the letter.

18. Before I deal with the defence, I find it necessary to preview the relevant provisions of Act and the real essence of the Act or to put it differently, the real intention of the Legislature in the Act.

19. The object of the Act amongst others is described as, to promote ownership within the consumer credit industry, to prohibit certain unfair credit and credit marketing practices. But of great importance, for the purpose of this case, to provide for debt re-organisation in cases of over indebtedness and to provide for registration of debt counselling services.

20. The main objective of the establishment of counselling is founded in section 129 of the Act. Subsection (1)(a) thereof provides that if the consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor,

alternative dispute resolution agent consumer court or ombud with jurisdiction, with intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payment under the agreement up to date.

21. In terms of section 129 (1)(b)(i) and (ii), a credit provider may not commence any legal proceedings to enforce the agreement before it has first provided a notice to the consumer as contemplated in paragraph (a) or in section 86 (10), as the case may be, and meeting any further requirements set out in section 130.

22. Coming back to the intention of the legislature, and in particular subsection (1)(a) of section 129, the Legislature must have contemplated firstly, that legal proceedings should not be resorted to without a consumer and credit provider, having attempted to resolve the dispute and meet each other half way in times of need. Secondly, the legislature must have seen un-relented resort to legal proceedings as being oppressive especially to the consumer and as being too costly. For example, in the instant case, a total amount of R9090.34 went towards costs occasioned by the institution of legal proceedings. Had the dispute been dealt with as envisaged in section 129 during April 2008, by the 27 November 2008, when the defendant made a further payment of R8000, she would not only have bought the account up to date, but would also have paid off the whole balance outstanding regard been had to the payments made as set out earlier in paragraphs 11.2 and 11.3 of this judgment.

23. The legislature puts a bar to the institution of legal proceedings unless the provisions of section 129 and other requirements in section 130 have been complied with.

24. I think it has to be accepted that it is not every consumer who is aware of the provisions of section 129. For this reason, a credit provider should not only comply with the provisions of section 129, but should also ensure that the notice in terms of section 129 comes to the attention of the consumer. In facilitating the giving of the notice, the credit provider can by a registered mail give such a notice in which the consumer's attention is drawn to the fact that the dispute under the credit agreement, could be referred to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction in order to bring payments up to date.

25. The plaintiff in the instant case, as a credit provider, elected to give such a notice as provided for in terms of section 168(b), that is, by registered letter dated the 7 April 2008. To this, a certificate of posting forms part of the papers. This is a post office form titled "LIST OF REGISTERED LETTERS". This is a form which is normally, completed by a sender of registered letter. Upon, completion it would then be taken to the post office. The right bottom of the form provides for a date stamp. This is where the post office is expected to put its date stamp to indicate the date on which the letter was sent or handed over to the post office.

26. Quite very often the date stamp is accepted as the date on which the letter would have been despatched to the

addressee. Service by registered post creates a presumption of receipt thereof within three days from date of posting. However, in terms of the agreement, the parties elected such a presumption to take effect seven days from date of posting of the notice per registered post. When the matter was agued, I expressed my concern about certificate of posting which did not have a date stamp. The plaintiff has since furnished certificate of posting with a date stamp being the 8 April 2008.

27. Counsel for the defendant vigorously argued the point that the registered letter in terms of section 129 was never received. In paragraph 4 of the founding affidavit, dealing with the point in limine, it is stated as follows:

"4.1 I confirm that I am advised, which advice I accept as being correct, that I should bring the following to the Honourable Courts attention, before I deal with the claim of the Plaintiff/Respondent,

4.2 I confirm that the respondent, in terms of pray 10 of the Particulars of Claim is alleging that the plaintiff is found to have complied with the requirements, as set out in section 129(1) of the National Credit Act, Act 34 of 2005 (hereinafter referred to as the "Credit Act"). The respondent seems to rely upon the unlabelled Annexure to the summons, in this regard.

4.3 I deny having ever received any notification from the plaintiff, as required by section 129(1) of the Credit Act, and more specifically I deny having received

the document attached to the Summons of the Plaintiff. I confirm that I receive no notice of my alleged default in payment, nor have I received any period in which I was required to rectify the alleged default in payment of my monthly bond.

4.4 Had I been made aware of my rights of this Act, I would certainly have made use thereof, as I have now been informed by my attorney of record what these rights entail and that the available procedures would have assisted me greatly in the financial strains that I underwent during last year. I would certainly have made use of these rights, had I been so informed

.

4.5 The plaintiff has failed to comply with the requirements of the Credit Act, and as such, the summons of the Plaintiff is defective. Full legal argument on this aspect, as well as the annexure to the Plaintiff's summons will be made before court at the hearing of this application.

4.6 *I therefore confirm that the Plaintiff's Default Judgment should be set aside on this aspect alone."*

28. The averment as quoted above and the submission that was made on behalf of the defendant was refuted by counsel on behalf of the plaintiff as not constituting a bona fide defence to the plaintiff's cause of action. As I understood him, regard been had to the followings:

28.1 that the defendant fell in arrears with her payments in terms of the instalment sale agreement,

28.2 that the plaintiff duly gave a notice as envisaged in section 129 read with section 168(b) of the Act,

28.3 that the defendant failed or neglected to react to the notice in terms of section 129 within the time period as set out in the letter of the 7 April 2008,

28.4 that the plaintiff accordingly, cancelled the agreement and instituted the action against the defendant for relief as set out earlier in this judgment,

28.5 that therefore, the fact that the defendant did not receive the notice is of no consequence to the plaintiff, alternatively that on probability, the defendant had received the notice in terms of section 129, but elected to ignore it,

28.6 that the agreement validly cancelled cannot be revived as the defendant seeks to do.

29. The submission seems to raise the following issues:

29.1 whether it is a defence to the plaintiff's cause of action that the defendant did not receive a section 129 notice? And if so,

29.2 whether the defendant rebutted the presumption that she must have received the notice within three or seven days

from the date on which it was sent, being the 8 April 2008? And if so,

29.3 whether the defendant did not know of her rights as set out in section 129? And,

29.4 whether the defendant would have elected to refer the credit agreement to a debt counsellor with the intention that the parties develop and agree on a plan to bring the payments under the agreement up to date, had she have known of her rights to do so?

30. The other issue raised during argument was, whether a duly cancelled credit agreement could be revived or reinstated"? Or to put it differently, whether the credit agreement was duly cancelled?

31. Starting with the latter issue, section 129(4)(a)(b) and (c) of the Act provides that a consumer, that is, the defendant in the present case, may not re-instate a credit agreement after the sale of any property pursuant to an attachment order, or surrender of property in terms of section 127, or after the execution of any other court order enforcing that agreement or termination thereof in accordance with section 123. Of relevance, section 123(1) provides that a credit provider may terminate a credit agreement before time provided in that agreement only in accordance with this section. Subsection (2) thereof, provides that, if a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce

and terminate the agreement. Termination and enforcement are as in sections 129 and 130 of the Act.

32. Coming back to subsection 4 of section 129, there was no sale of the property pursuant to the attachment of the motor vehicle, nor did the defendant surrender the property in terms of section 127. The termination in accordance with section 123 is challenged on the basis that there has not been full compliance with the provisions of section 129, the contention being that the defendant did not receive the letter of the 7 April 2008. What appears to be contentious however, is paragraph (b) of subsection 4. Although not specifically argued, the contention appear to be, the attachment and seizure of the motor vehicle and the handing over thereof to the plaintiff was an execution of an order envisaged in subsection 4(b).

33. Remember, I am dealing here with an application for rescission of judgment. Not necessarily with a final determination on the merits of the defence that might be available to the defendant during trial. For example, does the "execution of any other court order enforcing the agreement" in terms of section (4)(b) divest of the court's discretionary powers in terms of section 129? I do not think so. But, I am constrained not to make a final determination in this regard the reason being that I am not dealing with a trial. Therefore, without making a factual finding as to whether or not there has been a full compliance with section 129, no final determination can be made as envisaged in section 129 (4)(b). Such an execution as envisaged in subsection (4)(b) is challenged on the basis that the

defendant did not receive the notice in terms of section 129 and that if she did, she would have availed herself of the remedies therein.

34. I now turn to deal with the issue as raised in paragraph 29.1 of this judgment. Again, I am hesitant to make a final determination. The issue is whether it is arguable that the defendant ought to have received a notice in terms of section 129 before it could be said that there has been compliance thereof?

35. Clearly, the giving a of notice in terms of section 129(1), is intended that it should come to the attention of the consumer who may not be aware of his or her rights to refer the credit agreement to a debt counsellor with the intention as stipulated therein. When it is so despatched by registered post, firstly it is to ensure that it is received and secondly, to relieve the sender of the duty to establish receipt thereof. If it is alleged that it has not been received and the consumer discharges the onus or succeeds in rebutting the presumption, it should be regarded as if it has not been given. Therefore, should it be shown during trial that the defendant did not receive the letter of the 7 April 2008, this should constitute a good defence to the plaintiff's claim.

36. This then bring me to deal with the other issue raised earlier. That is, whether the defendant did not know of her rights as set out in section 129. The issue should be considered together with the one raised in paragraph 29.4 of this judgment. At the risk of repeating myself, the issue is:

"Whether the defendant could have elected to refer the credit agreement to a debt counsellor for example, had she have known of her rights in terms of section 129".

36.1 She says specifically so. She did not know of the provisions of section 129. She concedes readily that she had problems in fulfilling her obligations in terms of the credit agreement. She specifically says she would have opted for the remedies set out in the notice, had she have received it.

36.2 The plaintiff also as argued by its counsel, wishes to suggest that in all probabilities, the defendant must have received the notice as per the letter of the 7 April 2008. In making this submission, it was suggested that the defendant started making payments in earnest only after the notice in terms of section 129 was sent to her on the 7 April 2008. It is further suggested that further payments were only made after summons were served and after the order that was obtained by default was executed on 25 November 2008.

37. The submission in my view, would have been valid had the defendant did nothing before and after the letter of the 7 April 2008. The facts of the case does not display the defendant as the person who had or has no intention of complying with her obligations or as the person who would have ignored an advice to her advantage, an advice that might have assisted her in not loosing possession of the motor vehicle in question. For example, she was nearing the end of the credit agreement. Secondly, when the letter of the 7 April 2008 was sent, she was apparently about one to two months in arrears. Thirdly, the capital amount that was

still owing at the time the agreement was cancelled was really minimal as compared to the amount already paid by her. On the 26 March 2008, few days before the notice in terms of section 129, the defendant made payment in the amount of R1300. The vehicle having been taken from her on the 25 November 2008, she made two payments totalling to R10 000 just before and after it was taken. That is, R2000 on the 30 October 2008 and R8000 on the 27 November 2008. This in my view, is not consistent with the suggestion that the defendant ignored to make a choice to pursue remedies in terms of section 129. It would have been easier and more convenient for the defendant to resort to section 129 than to risk loosing the motor vehicle and every cent that she had already paid towards the redemption of the capital amount.

38. I am not making a final finding in this regard. The sentiments I have expressed herein, if established during trial could serve to negate proper compliance with the provisions of section 129. Or to put it differently, it could have a bearing on the plaintiff's is entitlement to enforce and cancel the credit agreement. A bona fide defence should therefore be found to have been established.

39. I posed a question to the parties as to what kind of an order should be made, should I find that the issue raised as a point in limine could constitute a bona fide defence. The suggestion by counsel on behalf of the plaintiff as I said was that, I cannot rescind the judgment and then revive or reinstate the credit agreement. I dealt earlier in this judgement with the circumstances under which a cancelled credit agreement cannot be revived or reinstated.

40. The provisions dealing with the authority to reinstate or not to reinstate the agreement in my view, should be seen in the light of the further provisions of the Act. Section 129(4)(b) provides that, in any proceedings contemplated in this section, if the court determining that the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a) or has approached the court in circumstances contemplated in subsection (3)(c), the court must adjourn the matter before it, and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

41. The final determination on whether or not the plaintiff as a credit provider has complied with, the provisions of section 129, is an issue that could properly be ventilated during trial. In particular, the issue whether the defendant had received the notice in terms of section 129 could be found to be material in vitiating the steps taken by the plaintiff as a credit provider before the institution of the main action. For now, it suffices to mention that the defence as raised by defendant cannot be said not to be bona fide. This should justify the setting aside of the order that was obtained by default on the 10 October 2008 and executed upon on 25 November 2008.

42. As a general rule, when an order is given rescinding a judgment as in the instant case, the defendant should be entitled to leave to defend the matter. However, having regard to the provisions of section 129(4)(b) and the nature of the defence raised, I do not find it necessary to grant

leave to defend the matter at this stage. Such leave should specifically be requested should it become necessary to do so, after having exhausted the steps that I intend making in terms of section 129 (4)(b)(ii). Put it this way, leave to defend is to be adjourned as envisaged in section 129(4)(b). However, the setting aside of the default judgment should entitle the defendant to have the motor vehicle returned to her, whilst parties attempt to resolve the dispute as to be directed hereunder. It would only be fair and reasonable to do so, particularly having regard to the payments made by the defendant since March 2008 to the 27 November 2008 and the period that was left before the expiry of the credit agreement.

43. Before I conclude, I find it necessary to deal in detail with some of authorities to which I was referred by counsel on behalf of the plaintiff. These authorities are contained in the supplementary heads of argument which were submitted on the 11 December 2009 after this matter was argued on the 7 December 2009.

44. Firstly, is the unreported judgment of WALLIS J, in the matter of **Marimuthu Munien V BMW Financial Services (SA) (PTY) Ltd & Another Kwazulu-Natal Local Division** under case number 16103/08. In paragraph 22 of the judgment Wallis J, having found that the notice in terms of section 129(1) was sent per registered post at the address chosen by the consumer, expressed himself as follows:

"It follows that in my judgment, provided the credit provider delivered the notice in the manner chosen by the

consumer in the agreement and such manner was one specified in section 65(2)(a) it is irrelevant whether the notice in fact came to the attention of the consumer. As the consumer has the right to chose the manner in which notice is to be given, it is for the consumer to ensure that the method chosen will be one that is reasonably certain to bring any notice to his or her attention. In the present case, the applicant was presumably aware of the deficiency in the postal services at the address chosen in the agreement. He was certainly aware that he had moved. In terms of clause 15.1 of the contract, he was perfectly entitled to give notice of that fact to the first respondent and to alter his domicilium. He did not do so. His right to alter his address was reinforced by section 96 of the NCA. In addition he was obliged under section 97 of the NCA to inform the first respondent that the location of the motor vehicle had changed, but it does not appear that he did so. <u>The fact that he did not receive either the notices or summons, appears to follow very largely from his own actions rather than those of the first respondent</u>". (my own emphasis).

45. Wallis J, also referred to the case of **Wessels and Another v Brich NO and others 1950 (4) SA 352 (T)** where the court had to deal with a rule governing execution that provided that a "*... notice shall be served by means of a registered letter, duly prepaid and posted, addressed to the person intended it to be served*". In that case, it was held that provided the notice was given in that manner, the fact that it was returned by the postal service as undelivered was immaterial. The judgment is said to have been followed in several other cases, for example, in **Exparte First Rand Bank**

Ltd t/a FNB Home Loans V Sheriff, Brakpan and others 2007 (3) SA 194 (W).

46. Firstly, I do not think that it is irrelevant and immaterial whether the notice in fact came to the attention of the consumer as expressed by Wallis J. Remember, section 129(1) does not only serve to draw the attention of the consumer to his or her default and being put to terms to make payment or being put *in mora*. It goes far more than that. It puts an obligation on a creditor provider to notify the consumer of latter's rights to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud. The intention of such a referral being to resolve any dispute or develop and agree on a plan to bring the payment under the credit agreement up to date. This is new innovative measure regulating the conduct of the parties to a credit agreement.

47. It is no longer the giving of the notice of the default and then immediately resort to legal proceedings upon failure to honour one's obligations in terms of the agreement. For example, unlike before, should a debtor or consumer who is unable to pay in terms of the credit agreement, refer the agreement for review or should he or she act upon the notice in terms of section 129, by referring the credit agreement as envisaged, the credit provider does not have a free hand to resort to legal proceedings.

48. Unless such rights to have one's obligations in terms of the credit agreement be reviewed in terms of section 64 or to refer such obligation for restructuring in terms of section

129, are clearly spelled out or embodied in the credit agreement, itself, it cannot be said that it is not a defence when one alleges that he or she was not aware of such rights and did not receive notification in terms of section 129. You can only assert your right when you know of it.

49. In certain circumstances credit provider cannot just contend itself with the chosen address by a consumer. Where it is clear for example, that there may not be a postal services, it would not be reasonable to sent notice in terms of section 129(1) to that address. Other reasonable means of notification should be utilised. Requesting the sheriff to serve the notice on the consumer could be sufficient and efficient. I therefore do not think that it would still be immaterial when the notice by postal service is returned as undelivered or where it is clear or established that there are no postal services and the person to whom the letter was intended did not receive it. What I say is this, when credit provider accepts postal services as a means of serving notice in terms of section 129(1), it must be clear from the address that postal services can reasonably be expected to exist at the chosen address. If uncertain, other means of service than by registered mail should be resorted thereto.

50. In any event, the facts of the present case is in my view differ from the facts of the case dealt by Wallis J. The fact that the consumer did not receive either the notices or the summons appears to follow largely from the consumer's own actions rather than those of the credit provider. Surely, if there is an indication of being unwilling to fulfil obligations and evading the credit provider, a consumer cannot expect

any sympathy from the credit provider or the court. The defendant in the instant case cannot be said to have done any of these. Such step could only have been taken with the leave of the court as I intend to do hereunder.

51. There are other four unreported cases to which I was referred by counsel on behalf of the plaintiff. The facts of the present case are clearly distinguishable from the facts of those cases. I do not find it necessary to specifically refer to them.

52. Counsel for plaintiff passionately argued the point that the defendant having received the summons did nothing to challenge reliance on compliance with the provisions of section 129(1). Explanation for not launching the present application which has a bearing on not having followed the remedies in section 129(1) is quoted in paragraph 27 of this judgment. Of course the other issue is, whether the defendant could have referred the credit agreement for debt review as envisaged in section 85 or for restructuring of the debt as envisaged in section 129, after all steps taken by the plaintiff? I do not think so. Such a step could only have been taken with the leave of the court as I intend to do hereunder.

53. Coming back to the notice, strict compliance in terms of section 129(1) should mean the notice also coming to the attention of the consumer. Properly posted letter of notice in terms of section 129 should put a heavy burden on the consumer to satisfy the court that he or she did not receive the notice and secondly, that he or she is not blamed for not

having received the notice. Lastly, that he or she is or has not been adopting delaying tactics to the prejudice of a credit provider. The facts of the present case does not suggest any of these on the part of the defendant. Fairness dictates towards leaning in favour of the defendant, by rescinding the default judgment and allow the parties to attempt to resolve their dispute.

54. The plaintiff having cancelled the agreement and having brought forward the whole of the outstanding amount when it executed the order on October 2008, should have been mindful of the amount already paid just before it proceeded against the defendant on 7 April 2008 and just before the order was executed on the 25 November 2008.

55. The purpose of section 129 and other relevant provisions in terms of the Act is not to bring down a consumer once in arrear by one instalment or few instalments after long period of compliance with his or her obligations, like it happened in the preset case. Similarly, the protection given to a consumer in terms of section 129 and other provisions of the Act is not to bring down a credit provider who is halted by tactical manoeuvres adopted by a consumer in evading payment to a great prejudice of a credit provider.

56. When the order was executed on the 25 November 2008, the defendant had already made a total amount of R10 000 since 28 March 2008. To this, adding R8000 which was made on the 27 November 2008.

57. A credit provider must act reasonably in each given case. In the instant case, I do not think it was reasonable and fair to have executed the order. Firstly, when summons were drafted and issued on the 17 June 2008, and as it would appear from paragraph 11.1 of the particulars of claim, the defendant was in arrears in the sum of R3741.67. Before service of the summons on the 4 July 2008, the defendant must have been up to date with her payments, the defendant having paid R4000 on the 25 June 2008. As on the 10 October 2008 when judgment was granted, the plaintiff had paid R6800 in total since summons were issued on the 17 June 2008. Again I make no final finding.

58. I am not suggesting for a moment that a credit provider who complies with the relevant provisions of the Act is not entitled to resort to legal proceedings as envisaged in the Act for enforcement of rights, where obligations are not been fulfilled by a consumer. The objective of the Act in making it possible for the parties to a credit agreement to resolve their dispute or bring payment up to date, should always be primary without compromising each other's right. In doing so, the spirit of the Act would be promoted and could be found to be user friendly by the parties to the credit agreement.

59. Consequently, an order is hereby made as follows:

59.1 the order granted on the 10 October 2008 against the defendant/applicant is hereby rescinded,

59.2 the plaintiff/respondent is hereby ordered to return to the defendant/applicant the motor vehicle attached and seized by the sheriff on the 25 November 2008,

59.3 the plaintiff and the defendant are directed to attempt to resolve the dispute, failing which the defendant is directed to refer the dispute in terms of the credit agreement to a debt counsellor, alternative 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 on a plan to bring the payments under the agreement up to date,

59.4 should the matter not be resolved as envisaged in paragraph 59.3 above, each party is entitled to approach this court on supplemented papers either for leave to defend the matter or for an order as the plaintiff might be entitled to under the credit agreement,

59.5 each party to pay his or her own costs arising from the application for rescission of judgment.

M F LEGODI
JUDGE OF THE HIGH COURT

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