IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NO: 89371/19

In the matter between:-

THEU, CONSOLATION Applicant

and

FIRST RAND AUTO RECEIVABLES (RF) LIMITED 1st Respondent

THE SHERRIF OR HIS DEPUTY 2nd Respondent

JUDGEMENT

MATEBESE AJ

Introduction:

[1] The applicant approached this court seeking the following:

1.1 In **Part A** of her Notice of Motion, an order on an urgent basis staying the execution of a writ of execution issued under case number 19983/2019 and a notice of attachment dated 8 October 2019, and order interdicting and restraining the respondents from

implementing and in any manner giving effect to the determination issued by the court on 17 October 2019 and the stay of the execution pending finalisation of a rescission application in Part B of the Notice of Motion;

1.2 In **Part B** she seeks an order declaring that the judgement was erroneously sought and granted in her absence and that it be set aside, that the 1st respondent did not comply with the notice requirements of section 129 and section 130 of the National Credit Act 34 of 2005, that such non-compliance resulted in an erroneous judgement and that the judgement and writ be set aside.

[2] The application papers are by no means a model of clarity. However, one can ascertain from the papers that the applicant seeks, in **Part B**, the rescission and setting aside of the default judgement that was granted against her on or about the 8th October 2019 and the writ of execution issued subsequent thereto. The application is opposed by the first respondent only. I will henceforth refer to the first respondent as the respondent.

[3] The relief in **Part A** is, by agreement between the parties, no longer being pursued. What remains for determination is the rescission application in **Part B** of the Notice of Motion. It is to this relief that I will address myself. But first, the background facts which I state hereunder.

Background:

[4] On 22 August 2014 the applicant entered into an agreement with the respondent for the purchase of a motor vehicle., to wit, a **JEEP WRANGLER, UNLTD, 3.5L V6.**

[5] The agreement between the parties is a credit agreement as envisaged in section 8 of the National Credit Act 34 of 2005 ("the NCA").

[6] It is common cause that the applicant chose her address at 49 Ruby Court, Lemonwood Street, Eco Park, Highveld as her domicilium address and her postal address, being P.O. Box 69056 Highveld 0159 for purposes of receiving any correspondence and notices under the agreement.

[7] The applicant fell into arrears with her instalments under the agreement and as at 18 March 2019 was in arrears in the amount of R 35.423.27.

[8] On 25 March 2019 the respondent issued summons against the applicant. The summons were, as appears from the annexures thereto, preceded by a notice in terms of section 129(1) of the NCA dated 22 February 2019. The notice was sent by registered mail to the domicilium address of the applicant.

[9] The track and trace print out attached to the summons shows that the registered letter was last scanned at Highveld Park at 10:15 on 1 March 2019 and that a first notification was sent to the applicant by the post office on the same day.

[10] The applicant never responded to the section 129 notice. As stated herein above, the first respondent then issued summons in which it sought cancellation of the credit agreement, an order directing the applicant to forthwith return the motor vehicle failing which an order authorising the sheriff to attach the vehicle and other ancillary orders, including costs.

[11] It appears that no appearance to defend was entered by the applicant. The first respondent then proceeded and obtained default judgement

against the applicant from the registrar of the High Court on 8 October 2019.

[12] It is this default judgement that is the subject of this application.

The applicant's case:

[13] The applicant contends that the default judgement was erroneously sought and granted in that:

13.1 the first respondent failed to comply with the notice requirements of section 129(1) and 130 of the NCA;

13.2 the court had not been made aware that proper requirements for the service of section 129(1) and 130 of the NCA had not been complied with; and

13.3 the notice was delivered to the incorrect address, being the residential address instead of the postal address, making it impossible for delivery to the place and for the post office to notify the applicant.[1]

[14] The applicant further contends in the heads of argument that she was never served with the papers. I assume that the reference to papers mean the summons in the matter. This is not part of the applicant's pleaded case in the founding papers. It is trite that an applicant in motion proceedings must make out its case in the founding papers. For this reason I am not prepared to deal with this issue. I will only confine myself to the case pleaded in the founding papers.

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[1] See para. 4.1 to 4.7 of the Founding affidavit.

[15] During the hearing of the matter on 5 June 2020 I enquired from the respondent if there was service of the summons on the applicant. This, I did, in order to satisfy myself on the service issue since no return of service formed part of the court papers. The first respondent has furnished a copy of the return of service which records that summons were served on one Mr Theu, the husband of the applicant on 5 April 2019 and at the applicant's residential address.

[16] In the result I find no merit to applicant's contention in this regard. I intend to deal with the effect of the service of the papers to the extent relevant to the respondent's case later in this judgement.

[17] The applicant then asks this court to rescind the default judgement in terms of rule 42 of the Uniform rules of court.

The respondents' case:

[18] The respondent contends that it complied with the provisions of section 129 (1) and 130 of the NCA in that:

18.1 its attorneys, Messrs Smit Jones and Pratt forwarded the section 129 notice to the applicant's chosen domicilium address, being 49 Ruby Court, Lemonwood Street, Eco Park, Highveld, 0157;

18.2 the notice was delivered by registered post to the said address and the applicant had, in clause 18.2 of the agreement, agreed that all notices to her must be sent to her physical address aforesaid; and

18.3 in terms of a track and trace slip from the post office a Fist Notification to recipient was forwarded to the applicant advising her that a registered item is available for collection at the post office.

[19] The respondent argues that it fully complied with its obligations as stated by the Constitutional Court in the *Kubyana* judgement.[2]

[20] During the hearing of the matter the applicant conceded that she chose the physical address as the address at which she will accept service of all notices. She further conceded that the section 129 notice was sent to her physical address as reflected in the agreement and that the track and trace report shows that the notice was received by the Highveld post office which is her closest post office and the track and trace also records that the first notification was sent to her.

[21] Counsel for the applicant however, sought to argue that the physical address was not the correct address to be used and that the bank ought to have used her postal address as it ought to have foreseen that she would not receive the notice regard being had to the fact that she stays in an estate.

[22] I find no merit to this argument. First, there is no evidence that the bank knew at the time of concluding the agreement that the applicant stays in an estate and that she is unable to receive her post through her physical address. Second, the applicant made a choice of where she would like to be served with notices under the agreement. She cannot now seek to avoid the consequences of her choice by belatedly arguing that the address she chose is incorrect. In any event the address is not incorrect simply by reason of the fact that the applicant now suddenly prefers the postal address.

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2 Kubyana v Standard Bank of South Africa 2014 (3) SA 56 (CC)

[23] In *Kubyana*, supra, the Constitutional court, *inter alia*, stated:

> *[83] In the case of registered mail, the delivery of the notice to the consumer's local Post Office, coupled with sending notification to her address, may in appropriate cases be regarded as constituting compliance with the delivery requirement. A consumer who receives notification from the local Post Office but decides not to collect the notice should not be permitted to frustrate the purpose of the provisions while, at the same time, the credit provider is precluded from enforcing its rights under the contract. In such a case, a court may as well hold that there was a fictional fulfilment of the requirement. Our courts are familiar with this concept which applies where, for example, a party to a contract deliberately frustrates the fulfilment of a condition, so that the other party cannot enforce its rights."*

[24] On the strength of the track and trace results and the absence of an address other than that of the applicant to which notification could have been given, the applicant has failed to make out a case that the registered letter containing the s 129 notice was not delivered to the her chosen address. The applicant has thus failed to show that the notice was not delivered in compliance with section 129(5).[3]

[25] In the circumstances of this case I find that there was proper delivery of the section 129 notice to the applicant.

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3 See Benson v Standard Bank 2019 (5) SA 152 (GJ) para.13

[26] Furthermore, a failure to deliver a section 129 notice does not render the proceedings a nullity. It further does not invalidate the proceedings but is simply a dilatory plea.[4]

[27] I have stated herein above that the applicant was, according to the return of service, served with the summons on 5 April 2019. In the summons was attached the section 129 notice.[5]

[28] In her founding papers that applicant did not take issue with the service of the summons but only confined her case to the non-delivery of the section 129 notice.

[29] By the time the default judgement was granted, on 8 October 2019, the applicant had been in default under the credit agreement for at least 20 days and 10 business days had elapsed from the date of receipt of the summons to which was attached the section 129 notice. There was accordingly compliance with section 129 and 130(1) at the time the default judgement was granted.[6]

[30] Having said that, I however, believe that the matter does not end here. Prior to and during the hearing of the matter I raised with the parties the issue of compliance with the provisions of section 130(3) of the NCA. In particular I enquired from the parties whether the registrar had the power under the section to grant the default judgement regard being had to the wording of section 130(3) of the Act. The parties requested time to submit written arguments on the issue to which I agreed. I am grateful to the parties for their valuable submissions. I turn to this issue hereunder.

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4 See Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC); Benson, *supra* para.16

5 See Annexure "I" to the Particulars of claim.

6 See Benson, *supra*, para.19

Was there compliance with section 130(3) of the NCA.

[31] The answer to the above question lies in the proper interpretation of the provisions of section 130(3) of the NCA.

[32] In **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA**) at 603 in para 18 the process of interpretation is set out as follows:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon it coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[33] Section 130(3) provides:

"(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court-

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having-

(aa) surrendered property to the credit provider, and before that property has been sold;

(bb) agreed to a proposal made in terms of section 129 (1) (a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129 (1) (a); or

(dd) brought the payments under the credit agreement up to date, as contemplated in section 129 (1) (a)."

[34] It is important to note that there is no reference in the section to the registrar and that the section is specific in saying *"the court may only determine the matter if the court is satisfied that*" there is, inter alia, compliance with the provisions of section 127, 129 or 131 of the NCA.

[35] The question is whether the reference to *"the court"* in the section includes the registrar or refers to a court as envisaged and or referred to in section 166 of the Constitution.

[36] I am mindful of the legal position created by section 171 of the constitution to the extent that it provides that all courts function in terms of national legislation, which is the Superior Courts Act 10 of 2013 in this regard, and that their rules and procedures must be provided for in terms of national legislation.

[37] I am also alive to the provisions of section 23 of the Superior Courts Act 10 of 2013 which provide that a judgement by default may be granted and entered by the registrar of a Division in the manner and in the circumstances prescribed by the rules, and a judgement so entered is deemed to be a judgement of a court of the Division.

[38] The respondent has argued strongly, in the supplementary heads of argument that the registrar has the authority in terms of rule 31(5) of the Uniform rules of court to grant default judgement. He pegged his argument on the Supreme Court of Appeal judgement in *Saunderson*.[7]

[39] I accept that the registrar has the authority to grant default judgement under rule 31(5) of the uniform rules. I also accept the principle in *Saunderson* to the extent that same survives the reasoning of the Constitutional Court in *Gundwana v Steko Development and others 2011(3) SA 608 (CC)* where the Constitutional court overruled *Saunderson*.

[40] However, I do not believe that is what the question is in this matter. The question is whether the registrar has the authority under the NCA to grant the default judgement regard being had to the following words in the section: *"the court may determine the matter*

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7 Standard Bank of South Africa Ltd v Saunderson 2006(2) SA 264 (SCA) para.23-24

only if the court is satisfied that" and regard also being had to the purpose of the NCA.

[41] The purpose of the NCA is to promote and advance the social and economic welfare of South Africans in order to achieve 'a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers. It is also to create a harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.[8]

[42] It is this purpose that section 2 of the NCA mandates the courts to consider in interpreting the NCA.

[43] It is also important to take into account that the NCA was assented to on 10 March 2006 and commenced operation on 1 June 2006. Uniform rule 31(5) of the uniform rules of court was there long before the enactment of the NCA. Parliament is generally presumed to know the law.[9] In my view, therefore, Parliament was aware of the provisions of rule 31(5) when it left the *"determination"* and *"satisfaction"* in section 130(3) to "*the court"*. The use of the words is in my view deliberate and it accords with the general purpose of the NCA.

[44] I am also of the view that the provisions of section 23 of the Superior Court Act also cannot be interpreted to mean that the registrar is empowered to grant a default judgement in matters involving the NCA. I say this for the reason that, in my view, section 23 properly interpreted does not bestow upon the registrar a status equal to that of a court. What it does is simply to validate a default judgement legally granted by the

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8 Section 3 of the NCA; Nkata v FirstRand Bank Ltd 2016 (4) SA 257 (CC) para.53-63

9 Moodley v Kenmont School and Another 2020 (1) SA 410 (CC) para.40

registrar. Where a statute and the rules do not give the registrar the authority or power to grant default judgement such power cannot be sourced from section 23 of the Superior Courts Act.

[45] In *Nkata v Firstrand Bank*[10] **JAFTA J** writing in support of the majority judgement sated:

"[173] Here the legal fees claimed by the bank arose in circumstances where the bank had acted in breach of the Act in a number of respects....Second, it sought and obtained a default judgment from the registrar of the High Court, something that is incompatible with s 130(3) which requires such matters to be determined by the court...."

[46] I agree with the reasoning of Jafta J in this regard. The legislature was in my view deliberate in its reference to the court in the section. It intended to achieve the objects of the Act and it could only ensure that the objects are achieved by entrusting the obligation on the courts. The oversight function envisaged in the section is very important in achieving the objects of the Act. It is an oversight function that, as authorities like *Kubyana*[11] and *Sebola*[12] have shown, requires much interpretative exercise. In my view, if same is delegated to the office of the registrar it will lose its effectiveness.

[47] In the circumstances I find that the registrar did not have the power or statutory authority to grant the default judgment.

[48] In *Motala*[13] the SCA stated:

"In my view, as I have demonstrated, Kruger AJ was not empowered to issue, and therefore it was incompetent for him to have issued, the order

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10 2016 (4) SA 257 at 298

11 supra

12 supra

13 Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others 2012 (3) SA 325 (SCA) para.14

that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity…."

[49] In my view the registrar in this matter usurped a power that he did not have in terms of the statute. Accordingly the default judgment is a nullity.

[51] It will follow therefore that the warrant issued pursuant to the default judgment must be set aside.

[52] Regarding costs I see no reason why costs should not follow the result.

[53] In the result I make the following order:

53.1 The default judgment granted by the registrar on 8 October 2019 is a nullity.

53.2 The warrant issued pursuant to the said default judgment is hereby set aside.

53.3 The respondent shall pay the costs of the application.

Z.Z. MATEBESE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant: **Adv C. Mosala** (instructed by Nkome Attroneys, Pretoria)
For the defendant: **Adv J. Minnaar** (instructed by Smit Jones and Pratt, Pretoria)

Heard on 5 June 2020 and judgement delivered to the parties by email on 12 June 2020 by reason of social distancing requirements under the COVID regulations