

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON LOCAL CIRCUIT DIVISION)**

CASE NO: EL 1637/2021

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

.....
DATE

.....
SIGNATURE

In the matter between:

NDODOMZI DAVID NGANDELA

Applicant

and

ABSA BANK LIMITED

1st Respondent

SHERIFF OF THE HIGH COURT

2nd Respondent

J U D G M E N T

DREYER AJ

Introduction

- [1] In 2019, the applicant secured finance from the respondent, ABSA Bank Limited (“Absa Bank”) for the finance of a 2018 Volkswagen Golf V11[...], with engine number CHH 2[...] and chassis number WVWW[...] (“the motor vehicle”). The finance for the purchase of the motor vehicle was regulated by an instalment sale agreement. The applicant failed to make certain monthly instalment payments. After issuing summons against the applicant, on 25 March 2022, the registrar of this court (“the Registrar”), granted Absa Bank default judgement which included *inter alia* the confirmation of the cancellation of the instalment sale agreement and that the applicant deliver the motor vehicle to Absa Bank.
- [2] This judgement concerns the validity the default judgement granted by the Registrar.
- [3] A number of recent decisions have considered the power of the registrar to grant default judgement relating to credit agreements. In the decisions of *Theu v FirstRand Auto Receivables (RF) Limited and another*¹; *Xulu v Standard Bank of South Africa Limited and Others*²; and *Seleka v Fast Issuer SPV (RF) Limited and Another*³, the courts have held that the registrar of the court is not empowered to grant such default judgement.

¹ [2020] ZAGPPHC 319 (12 June 2020);

² [2021] ZAKZPPHC 51 (23 August 2021)

³ [2021]ZAGPPHC 128 (10 March 2021)

[4] All these decisions refer with approval to the concurring majority decision Jafta J in *Nkata v FirstRand Bank Limited and Others (Socioeconomic Rights Institution of South Africa as amicus curiae)*⁴ (“the Nkata decision”) that the pre-emptory language of s130 of the National Credit Act⁵ (“NCA”) requires the court, not a registrar of the court, to consider the enforcement of a credit agreement. The credit provider, Jafta J held

“*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.***” (my emphasis)

[5] The outlier in the line of recent authorities regarding the powers of the registrar to grant default judgement relating to credit agreement is a full bench decision of the Mpumalanga Division, Middelburg, *Nedbank Limited v Mollentze; FirstRand Auto Receivables (RF) Limited v Radebe and Another*⁶ (“the Mollentze decision”), which held that s23 of the Superior Courts Act⁷ clothed the registrar with the authority of a court, enabling the registrar to deal with quasi-judicial functions, including a consideration and granting of default judgments under the NCA.⁸

⁴ 2016 (6) BCLR 794 (CC)

⁵ Act 34 of 2005

⁶ 2022 (4) SA 597 (ML)

⁷ Act 10 of 2013

⁸ At para [65] Mabusa J in *Seleka supra* @ para [13] to [15] after referring to the decision of *Master of the High Court NO North Gauteng v Motala* [2012 \(3\) SA 325](#) SCA,

- [6] The court in the Mollentze decision, considered the concurring judgement of Jafta J in Nkata decision as a minority and *obiter* decision (as, the Mollentze decision found, the Constitutional Court was not called on to interpret s130 of the NCA). This finding of the court is, respectfully, incorrect.
- [7] Firstly, Moseneke DCJ for the majority in Nkata specifically states in the introductory paragraph of his judgement “*I am also grateful for the concurring judgement of Jafta J and have noted the additional reasons he relies on*”.⁹
- [8] Jafta J in his concurring majority decision, echoes this:” *Like Moseneke DCJ, I would uphold the appeal and set aside the order of the Supreme Court of Appeal, for mainly the reasons advanced by him in his judgement and to which I add mine*”.
- [9] It is clear that these two concurring judgements are the decision for the majority in the Nkata judgement.
- [10] Secondly, the question before the Constitutional Court was, whether the credit provider had met the provisions of s129 of the NCA (that is whether proper notice had been given to the credit receiver, prior to the credit provider instituting legal proceedings) to justify the grant of default judgement by the registrar of the court. The default judgement

held that the registrar’s power to grant default judgement was prohibited by statute and where the registrar arrogates such powers, the judgement so granted was null and void.

⁹ Ibid @ para [75]

included the cancellation of the credit agreement. The question whether default judgement was properly granted, consequently the interpretation of s130 of the NCA, was an issue front and central for the Constitutional Court's determination.

[11] I am bound by the Nkata decision, not the Mollentze decision.

The provisions of the NCA

[12] The NCA regulates instalment sale agreements. The long title of the NCA states that it was promulgated, *inter alia*, "*to promote a fair non-discriminatory marketplace ... [and] to provide for the general regulation of consumer credit and improve standards of credit information*".

[13] The purpose of the NCA is set out in section 3, recording that:

"The purposes of this Act are to promote and advance the social and economic welfare of South Africans, to promote a fair, transparent and competitive, sustainable, responsible, efficient, effective, and accessible credit market and industry and to protect consumers, by –

...

- (i) *by providing for a consistent and harmonised system of debt restructuring, enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.”*

[14] The purpose of the Act to provide a harmonised system of enforcement and judgment is realised in s 130, which details the procedures a **credit provider must follow to enforce a credit agreement**. A credit provider may only approach the Court once it has complied with specific procedural steps and after giving notice as specified to the credit receiver in writing. S130(3) further specifies that “***despite any provision of the law or contract to the contrary, any proceedings commenced in a court in respect of a credit agreement to which the Act applies, the court may only determine the matter if the court is satisfied that...***” certain specific procedural requirements of the Act have been met.

[15] As the Supreme Court noted, in *FirstRand Bank Limited t/a Wesbank v Davel (University of the Free State Law Clinic as amicus curiae)*,¹⁰ it is clear from these provisions that the legislature was intent on ensuring that sufficient protections are provided to ensure that, on termination of the credit agreement, a consumer is protected. These consumer protections include the court’s oversight of the enforcement of credit agreements.

¹⁰ [2020] 1 All SA 303 (SCA), at paragraph [19]

[16] The Absa Bank, argues that, despite the specific wording of the Act requiring **the court to determine the enforcement** of a credit agreement, the default judgment granted by the registrar of this court on 25 March 2022 was competent. Absa Bank relies on the Mollentze decision.

[17] The applicant, in contrast, relies on the Nkata decision.

[18] The applicant's argument is supported by an unreported decision of the Free State Division, Bloemfontein, *Gcasamba v Mercedes-Benz Financial Services SA (Pty) Limited and Another*¹¹ ("the Gcasamba decision"), handed down after I had heard argument in this matter. Snellenberg JA in the Gcasamba decision held that the Registrar of the High Court is not competent or empowered to grant any order or judgment in a matter where the NCA applies.¹² Snellenburg JA held that this question has been settled by the Constitutional Court in the Nkata decision and that a proper interpretation of the provisions of the NCA leaves no doubt that the legislature (NCA) entitled the court and only the court to grant judgments and orders in matters in which the NCA applies.¹³

[19] I agree. I referred the parties to the Gcasamba decision and requested the parties to provide me with their written submissions. Unfortunately, the parties did not take up the opportunity.

¹¹ (4526/2021) [2022] ZAFSHC 197 (15 August 2022)

¹² Gcasamba decision at para [31]

¹³ The Gcasamba decision at para [36]

[20] I will return to the consideration of the competing decisions on the interpretation of s130 of the NCA.

The Facts

[21] On 25 March 2022, the Registrar granted Absa Bank default judgment against the applicant.

[22] On 12 April 2022, Absa executed the warrant for the delivery of the motor vehicle. The applicant complied with the warrant and delivered the motor into the possession of the Sheriff on 12 April 2022. The applicant settled the outstanding arrears, in the sum of R20 345.41.

[23] This amount was in addition to amounts the applicant had made since the service of the summons in December 2021, in reduction of his indebtedness to Absa Bank, including payments of R20 000.00 in January 2022, R12 000.00 in February 2022, R12 000.00 in March 2022, and a payment of R15 000.00 on 5 April 2022. On 4 April 2022, Absa Bank secured payment from a debit order due in terms of the instalment sale agreement in the sum of R11 497.58.

[24] On 22 April 2022, the applicant instituted these proceedings. This court, (per Hartle J), granted the applicant interim relief staying the execution of the motor vehicle and directed Absa Bank return the motor vehicle to the applicant, pending finalisation of the rescission application. This is the application before me.

The rescission application

[25] The applicant relies on three grounds for the rescission of the judgment:

25.1 firstly, he did not receive the statutory notice in terms of s129 of the National Credit Act, prior to the institution of the legal proceedings;

25.2 secondly, Absa Bank is estopped from relying on the cancellation of the instalment sale agreement, as its conduct in debiting the applicant's bank account, contradicts cancellation; and

25.3 thirdly, the default judgment is a nullity as it was granted by the Registrar, who is precluded from doing so in terms of the provisions of s130 of the National Credit Act 2005.

[26] During argument, the applicant's representative did not persist with the argument that due notice of the breach was not given in terms of s129 of the NCA. This concession was correctly made. While the applicant may not have physically received the s129 notice, this is not the test.

[27] The s129 notice was sent to the applicant at 26 16th Avenue, Gonubie by registered mail. The applicant concedes this is his home address.

SA Post Office's parcel tracking records receipt of the s129 letter at the Gonubie Post Office and that final notification given to the applicant to collect the notice on 13 October 2021. This constitutes sufficient notice.¹⁴

[28] Counsel for Absa Bank contended in argument that the applicant could not rely on the estoppel defence as it was only raised in the reply. I disagree. It is trite that estoppel is not a cause of action. A plaintiff must not rely on estoppel in the claim, nor may a defendant rely on it in the counterclaim.¹⁵ A plaintiff wishing to rely on estoppel must plead it in the replication in the reply to a defendant's plea.¹⁶ Where a plaintiff is aware, at the inception, of the true facts, these must be pleaded. In these circumstances, a plaintiff may rely on estoppel in the replication.¹⁷

[29] The applicant has properly raised the estoppel defence. The facts on which the applicant relies for this defence are set out in the founding affidavit in accordance with the settled legal principles. The estoppel defence, itself is raised in the replying affidavit. Absa Bank's opposition to the applicant's estoppel defence is misguided.

[30] Absa Bank, in any event, did not oppose the application for condonation for the late filing of the replying affidavit. I was

¹⁴ *Kubyana v Standard Bank of South Africa* 2014 (3) SA 56 (CC)

¹⁵ *Sodo v Chairman, African National Congress, Umtata Region* [1998] 1 All SA 45 (Tk)

¹⁶ *Mann v Sidney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (G)

¹⁷ *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 2011 (2) SA 508 (SCA), at para [31]

pertinently informed by the counsel for Absa Bank that he had no instructions to oppose the application for condonation.

[31] I am satisfied that the applicant has provided adequate explanation why the replying affidavit was filed late. Condonation for the late filing of the replying affidavit is granted.

[32] For the reasons set out below, I do not consider it necessary to decide whether Absa Bank was estopped by its conduct, after default judgement was granted in its favour, to contend that the credit agreement had been cancelled.

[33] The question, which is dispositive of this rescission, is whether it is permissible for the registrar of the High Court, to grant default judgement when the subject matter of the action is a consideration of the credit agreement .

The Powers of the registrar

[34] A registrar's authority to grant default judgement is regulated by s23 of the Superior Courts Act:¹⁸

¹⁸ Act 10 of 2013

“a judgment by default may be granted and entered by the registrar of a division in the manner and in circumstances prescribed by the rules and a judgment so entered is deemed to be a judgment of the court”.

[35] The deeming provision in s23 of the Superior Courts Act does not deem the Registrar as a court, empowered with the functions of a court. The deeming provision merely deems that the default judgments granted by the Registrar are, as prescribed, are in all instances, decisions of the Court.

[36] Uniform Rule of Court 31(5) prescribes the manner and the circumstances when a registrar can grant default judgement:

*“(5) (a) Whenever the defendant is in default of delivery of a notice of intention to defend or of a plea, the plaintiff, if he wishes to obtain judgment by default, shall where each of the claims is for a **debt** or a **liquidated demand** file with the registrar a written application for judgment against the defendant:*

(b) The registrar may –

(i) grant the judgment as requested;

(ii) grant judgment for part of the claim only or on amended terms;

(iii) refuse the judgment wholly or in part;

(iv) *postpone the application for judgment on such terms as he or she may consider just;*

(v) *request or receive oral submissions;*

(vi) *require that the matter be set down for hearing in open court:*

Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.”

[37] Rule 31(5) limits the authority of the Registrar to grant default judgment to matters which relate to a debt or a liquidated demand. The courts have held that a liquidated demand includes the return for a fixed or a definite thing.¹⁹ This interpretation would include the return of a motor vehicle. While the registrar may consider an application for default judgement which includes the physical return of a motor vehicle, this power is limited by the specific provisions of s130 of the NCA.

[38] S130 of the NCA requires judicial oversight of credit agreements by the court where a credit provider seeks the enforcement of the agreement against the credit receiver.²⁰ This section emphasises the oversight role of the court to the exclusion of any law to the contrary.

¹⁹ *Supreme Diamonds (Pty) Ltd v Du Bois* 1979 (3) SA 444 (W).

²⁰ The Constitutional Court has in the decisions of *Sebola & another v Standard Bank of South Africa & another* 2012(5) SA 142 (CC) and *Kubyana v Standard Bank of South Africa Ltd* 2014 (4) BCLR 400 (CC) considered the judicial oversight role given to the court under the National Credit Act

Such exclusion, covers the provisions of s23 of the Supreme Court Act.

“130 (1) Subject to section 2, a credit provider may approach the court for an order to enforce a credit agreement only if at the time the consumer is in default and has been default under the credit agreement for at least 20 days...

(2) ...

(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 which sections 127, 129 or 131 apply, the proceedings required by those sections have been complied with...”

[39] A clear reading of s130 of the NCA read together with s23 of the Superior Courts Act, is that the grant of default judgment in matters under the NCA, must be dealt with by the court. This does not include the registrar of the court. The registrar of the court is not a court.

[40] I align myself with the prevailing recent decisions of Tseu, Xulu and Seleka.

- [41] The Constitutional Court has dealt decisively with the power of the registrar to grant default judgement on credit agreement under the NCA in *Nkata v First Rand Bank*²¹ Registrars have no such power.
- [42] The Mollentz decision held that “ *burdening the court with procedural issues that can easily quickly and in a less expensive manner be dealt with by the registrar is not in the interest of the administration of justice..*”²² and “ *it could never have been the intention of the legislature that the enforcement of credit agreements due to default should be determined by the court and not the registrar*”²³
- [43] The practicalities of the operation of a court cannot be equated to the interests of justice. Particularly, when such practicalities are contrary to the law and the interpretation of that law in the pronouncement by the Constitutional Court.
- [44] In the *Nkata* decision the Constitutional Court held that the default judgement granted by the registrar was in violation of the pre-emptory provisions of the s 130 (3) of the NCA, was a nullity and had no force in law.²⁴ As such, the constitutional court held, the registrar had usurped a power expressly left to the court by s130 of the NCA.²⁵

²¹ 2016 (4) SA 257 (CC)

²² Mollentze decision @ para [38]

²³ Ibid @ para [60]

²⁴ Ibid @para [186]

²⁵ Ibid@ para [187]

[45] The Mollentze decision did not have regard for these pronouncements of the Constitutional Court, in arriving at its decision.

[46] I find that the registrar, was not authorised to grant Absa Bank default judgement against the applicant.

[47] In these circumstances, it is not necessary for me to consider the other grounds on which the applicant relies to rescind the judgement order or to consider whether the applicant has shown good cause to meet the requirements of rescission.

[48] In the result I make the following order

48.1 the rule *nisi* is confirmed;

48.2 the judgment granted by the registrar on 25 March 2022 is rescinded;

48.3 the first respondent is to pay the applicant's costs.

DREYER AJ
ACTING JUDGE OF THE HIGH COURT

Representation for the applicant

Counsel	Adv Mafu
Instructed by:	MT Klaas Incorporated 45 Stewart Drive Baysville East London

Representation for respondents

Counsel	Adv Kotze
Instructed by	Strauss Daly Incorporated c/o Bax Kaplan Russell Incorporated 2 Clevedon Road Selbourne East London
Date matter heard:	11 August 2022
Date judgment handed down:	31 January 2023