



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

2021.03.10

DATE


SIGNATURE

CASE NUMBER: 46620/20

DATE: 10 March 2021

DONALD MODIEGI SELEKA

Applicant

V

FAST ISSUER SPV (RF) LIMITED
THE SHERIFF OR HIS DEPUTY

First Respondent
Second Respondent

JUDGMENT

MABUSE J

[1] This is an application in which the Applicant, Mr Donald Modiegi Seleka, seeks a number of reliefs, among them, that a default judgment and writ of execution issued following the said default judgment be set aside.

[2] The application is opposed by the Respondent.

[3] The Applicant is an adult male, who resides at 25 Bandula, 100 Mopani Street, Hennops Park, Centurion, in Pretoria. The Respondent, Fast Issuer SPV Limited, is a financial institution duly registered in terms of the company laws of this country with its registered office located at 14 Merchant Place, Sandton.

[4] It is the Applicant's case that on 6 March 2020 the Respondent obtained default judgment against him in his absence and more importantly, without having complied with the notice requirements of sections 129(1), 130 and 89(10) of the National Credit Act 34 of 2005 ("the NCA").

[5] In terms of s 129(1)(a) of the NCA, credit providers are required, before approaching the Court to claim return of the goods, to send the consumer letters of demand in terms of s 11 of the Credit Agreements Act. Such a letter is required to be sent to the defaulting consumer.

[6] Section 130(3) of the NCA deals with debt procedures before Court. Section 130(3) provides that:

"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."

Quite clearly it is the Court that must be satisfied that the provisions of sections 127, 129 and 131 of the NCA have been complied with.

[7] Section 86(10) of the NCA provides that:

"If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may be give notice to terminate the review in the prescribed manner to:

- (a) *the consumer;*
- (b) *the debt counsellor;*
- (c) *the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for debt review.”*

[8] After Adv C Mosala, counsel for the Applicant, had addressed the Court in accordance with paragraph [4] *supra*, the Court remarked that in a situation where the consumer was under debt review in terms of s 86 and he defaults with his obligations, the service provider is entitled, in terms of s 86(10) of the NCA to terminate the debt review and to proceed with court proceedings, there is no need for the credit provider to send a s 129 notice to the consumer, he informed the Court that if that is the case, he stood by and was adamant that the default judgment was irregularly granted. He informed the Court that the default judgment granted against the Applicant on 6 March 2020, was not granted by the Court but was granted, contrary to the provisions of s 130(3) of the NCA, by the Registrar of Court.

[9] Accordingly, the only question that the Court had to decide was whether the default judgment of 6 March 2020 was granted by the Registrar of this Court, in which case, such a judgment would have been irregularly granted or by the Court in which case it would stand.

[10] Adv Mosala submitted that the Registrar of Court granted the default judgment in a situation in which he or she should have referred the matter to the Court to deal with it. In that manner, the Registrar acted contrary to the provisions of s 130(3)(a) of the NCA. For that reason, the judgment is invalid and needs to be set aside. In support of his argument he referred the Court to **Nkata v Firststrand Bank 2016 (4) SA 257 CC at 298** where the Constitutional Court expressed its displeasure at a Registrar granting judgments in circumstances where the Court should have done so. At paragraph [173] the Court had the following to say:

“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.”

[11] Adv Mosala was in agreement with the remarks made by Jafta J in the Nkata matter. He contended that, in his view, the legislature was deliberate in referring such matters to Court to grant judgments. It had intended to achieve the objects of the NCA. It could only ensure the objects are achieved by entrusting the overseeing obligations to the Court. The oversight function envisaged in the section is crucial in achieving the objects of the NCA. That is an oversight function that requires interpretation exercise.

[12] Now, Mr Sebola pointed out to the following pointers that showed that the default judgment was not granted by the Court. Where draft orders are handed over in Court to prevent fraud and corruption, and orders obtained by underhand means, counsel normally prints the name of the Judge who presides over a matter somewhere in the draft order. Sometimes counsel comes to Court with a draft order which does not have the name of the Judge because counsel does not know which Judge is going to preside over the matter but which has a space for the name of the Judge. Once the Judge's name is known, it is inserted in manually before the matter is heard. It is then required and expected of the presiding Judge to initial the draft order and date it in order to authenticate it. The current judgment only had “D1” marked on it. It had not been initialled by a Judge nor did it have the Judge's name. There was no proof that it was dealt with by a Judge nor was there any proof that it was somehow placed before the Court or judge on an unopposed roll. There was therefore sufficient evidence to show that it was not granted by a Court.

[13] Counsel for the Applicant argued that the Registrar of the Court was not empowered to grant the default judgment. A judgment by default granted by the Registrar of Court in circumstances where it is inconsistent with the law, is invalid and of no force. In support of the law, counsel for the Applicant found support in **Master of the High Court NO North**

Gauteng v Motala 2012 (3) SA 325 SCA. In this case the Court cited with approval the following passage from *Willis v Cauvin* 4 NLR 1883, judgment by Connor CJ:

“The general rule seems to be that a judgment, without jurisdiction in the Judge pronouncing it, is ineffectual and null. The maxim extra territorium jus dicenti impune non paretur is applicable.”

At paragraph [14] the Court had the following to say:

“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 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. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect.”

[14] On the other hand, Mr P Marx, the First Respondent’s counsel, argued that the said default judgment was valid because it had been granted by a Court. He defended the validity of the default judgment even by a reference to s 23 of the Superior Courts Act 10 of 2013. This section provides that:

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

There is no merit in Adv Marx’s reliance on s 23 of the Superior Courts Act. In the first place, an argument such as the one he has raised in defending the judgment, constitutes an indirect admission that indeed the default judgment of 6 March 2020 was granted by the Registrar. This is the reason he invokes the provisions of s 23 in order to justify the Registrar’s conduct in granting the judgment.

[15] The power of the Registrar of the Court to grant default judgment is circumscribed. He does not have power to grant all the applications for default judgment. He can only do so where

the law expressly authorises him to do so. The Registrar may therefore not grant default judgments where it is so prohibited by statute, such as s 130 of the NCA. If he oversteps his powers or where contrary to the statutes, he arrogates to himself the power to grant a default judgment, such a default judgment is null and void.

[16] Adv Marx was not present when the default judgment was granted. This he conceded. He had no knowledge whatsoever about the circumstances under which the default judgment that constitutes the subject matter of this application under consideration was granted. In my view, once the validity of the default judgment was called into question, he was at large to ask his attorney to investigate the issue and furnish him with an affidavit in that regard. This was not done merely because he had relied entirely on the provisions of s 23 of the Superior Courts Act and was convinced that the default judgment was correct and had been granted by the Court. I find that the default judgment of 6 March 2020 was unlawfully granted by the Registrar inconsistently with the provisions of s 130 of the NCA. It is therefore invalid.

In the premises, the application to set it aside is hereby granted with costs.

The amended draft order marked “PSP”, hereto attached, is hereby made an order of this Court.



PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	Adv C Mosala
Instructed by:	S Msomi Attorneys
Counsel for the 1 st Respondent:	Adv P Marx
Instructed by:	Rossouws, Lesie Inc.
Date on the opposed roll before Mabuse J:	8 March 2021
Date of Judgment:	10 March 2021

"PSP"
Pmm -
10/3/2021

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

On this the 8th March 2021

BEFORE THE HONOURABLE JUSTICE: MABUSE J

Court: 4B

46620/2020
Case: 78852/2019

In the matter between:

DONALD MODIEGI SELEKA

APPLICANT

And

FAST ISSUER SPV (RF) LIMITED

1ST RESPONDENT

THE SHERIFF OR HIS DEPUTY

2nd RESPONDENT

DRAFT ORDER

HAVING HEARD the parties it is ordered that:

"PSP"
SM.
10/3/2021

1. The order granted by this Court on 6th March 2020 respectively is rescinded
2. The Respondent is to pay costs of this application on a party and party costs, such costs should be on a High Court scale.

3. ~~Further and alternative relief.~~

SM.

4. ~~Should the defendant fail to pay the Plaintiff's party and party costs as taxed or agreed within 14 days (Fourteen) days from the date of taxation, alternatively date of settlement of such costs, the Defendant shall be liable to pay interest at the applicable rate of 7% as published in the Government Gazette per annum on such costs up to and including the date of final payment thereof.~~

SM.

BY ORDER

Registrar

Counsel for the Plaintiff: Adv C Mosala (082 444 3913)