



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: **2062/2017**

In the Matter between:

ABSA BANK LIMITED

Plaintiff

and

GERRIT OOSTHUIZEN

Defendant

CORAM: POHL, AJ

HEARD ON: 19 SEPTEMBER 2019

JUDGMENT BY: POHL, AJ

DELIVERED ON: 19 SEPTEMBER 2019

INTRODUCTION AND BRIEF BACKGROUND:

- [1] The Plaintiff and the Defendant entered into an instalment sale agreement in respect of a tractor. The Defendant however defaulted with his payments in terms of the said instalment sale agreement. This led to the Plaintiff issuing summons against the Defendant. The Defendant did not file a notice of intention to defend the action after the summons was served on him. In the premises, the Plaintiff obtained judgment by default against the Defendant from the registrar of this Court. The relevant default judgment, *inter alia*, granted the Plaintiff leave to approach the Court, on the same papers, duly amplified, for the specific amount of its damages in terms of the said default judgment. The Plaintiff approached the Court in this regard by way of a “damages affidavit” setting out the exact amount due and owing to it by the Defendant.
- [2] The Defendant then filed a notice of opposition and a notice of intention to defend the action. The Defendant’s case is in essence that this Court cannot in these circumstances grant the Plaintiff a “default judgment” in respect of the specific amount of damages because he is now defending the matter and he was entitled to file his notice of intention to defend the action, as long as he did it before judgment. The judgment he relies on is the judgment the Plaintiff seeks in respect of the amount of damages to be paid to it by the Defendant. His contention is that the Plaintiff has to amend his papers and then go to trial on this issue. He also raised certain

defences emanating from the National Credit Act, which will be dealt with infra.

THE PARTIES:

- [3] The Plaintiff is ABSA Bank Limited, a company duly registered and incorporated in terms of the relevant statutes of the Republic of South Africa, and which conducts business as a retail bank, with its registered head office in Johannesburg.
- [4] The Defendant is Gerrit Oosthuizen, an adult male farmer of the farm Skoongesig, Bultfontein, Free State Province.

THE DEFAULT JUDGMENT GRANTED BY THE REGISTRAR:

- [5] The default judgment which was granted in favour of the Plaintiff and against the Defendant, as far back as 28 August 2017, reads as follows:

- 1. Confirmation of cancellation of the agreement;*
- 2. That the Defendant be ordered to return the following goods and registration documents to the Plaintiff:*

MAKE: MEGA AGRI

DESCRIPTION: 2014 NEW CLAAS AXION 950 TRACTOR

ENGINE NR: 00020034392

CHASSIS NR: ACF950 CABD 4 WD 0119

3. *That leave be granted to the Plaintiff to approach the Honourable damages.*

4. *Further and/or alternative leave.*

THE NOTICE OF SET DOWN AND DAMAGES AFFIDAVIT:

[6] In terms of the notice of set down, the Plaintiff seeks the following orders from the Court against the Defendant:

1. Payment of the amount of R963 074.91;
2. Interest on the aforesaid amount at the rate of 10.75% per annum from 21 August 2018 to date of final payment;
3. Costs of suit on an attorney and client scale;
4. Further and/or alternative relief.

[7] In the damages affidavit, a manager of the Plaintiff, *inter alia*, declares that the Plaintiff sold the tractor after it repossessed same in terms of the judgment. The amount that it was sold for was R2 250 000.00. The outstanding balance then due thereafter was R963 074.91. A certificate of balance issued in terms of the agreement, confirming this amount, was also attached.

THE EFFECT OF A JUDGMENT BY THE REGISTRAR:

[8] Section 23 of the Superior Courts Act, Act 10 of 2013, provides as follows:

“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 the Division”

THE DISPUTES:

- [9] The core issue in dispute and therefore the first question to be decided by this Court, is the Defendant’s assertion that because he has now filed his notice of intention to defend, the matter is now properly defended and the Plaintiff is thus now not entitled to the relief it seeks on an unopposed (default) basis.
- [10] In deciding this issue, it is first of all necessary to have regard to the provisions of Rule 19 of the Uniform Rules of Court. The relevant portion of Rule 19 (5) reads as follows: (5) *Notwithstanding the provisions of subrules (1) and (2) a notice of intention to defend may be delivered even after the expiration of the period specified in subrule 2, before default judgment has been granted:*” (My underlining).
- [11] The judgment referred to in Rule 19 (5) refers to a default judgment in terms of Rule 31 (2) (a), which *inter alia* provides that: *“Whenever in an action the claim... is not for a debt or a liquidated demand and the defendant is in default of delivery of notice of intention to defend...the plaintiff may set the action downfor default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such an order as it deems fit”*

- [12] It is important to have regard to the fact that when the summons was served on the Defendant, the prayers in the summons contained exactly the same relief as contained in the default judgment, referred to in paragraph 5, *supra*. The Defendant thus knew from that day, being the 27th of June 2017, that the Plaintiff will approach the Court on the same papers, duly amplified for damages. Despite this knowledge, the Defendant chose not to defend the action. The judgment by default was then obtained by the Plaintiff on 28 August 2017. The notice of intention to defend was only filed on 8 August 2019.
- [13] It seems to me that for this defence which was raised by the Defendant to succeed, I have to find that when the Court determines and makes an order as to the amount of damages to be awarded to the Plaintiff, it issues a “separate or second judgment”, as opposed to the initial default judgment granted by the registrar. If I however find that the determination of the damages and order of the Court in that regard is part and parcel of the initial default judgment, the defence cannot succeed because the notice of intention to defend was filed after the default judgment was obtained. In other words, not as provided for in Rule 19 (5).
- [14] I find this defence raised by the Defendant rather fanciful. This is not a matter where the cause of debt is for instance a delict where rule 19 (5) may typically find application. The default judgment deals with one contract, which is cancelled. It deals with the very vehicle that form the subject matter of the contract. The repossession of this tractor and the sale of the tractor was done

pursuant to the default judgment which was obtained from the registrar. The amount that is allegedly due after the sale of the tractor is inextricably linked to the orders in the default judgment. It therefore follows that the amount that the Court will order as damages flows directly from paragraph 3 of the default judgment and thus completes that judgment. If the Defendant really wanted to defend the action after the default judgment was granted, he could have and should have applied for the rescission of the judgment, either in terms of the rules of Court and/or the common law. He did not do so. In the premises I reject this defence raised by the Defendant and find that it has no substance.

[15] The second defence raised by the Defendant is that the Plaintiff has not complied with the provisions of section 127 (5) of the National Credit Act, Act 34 of 2005. As a result hereof, so the argument goes, the Plaintiff is not entitled to proceed with its claim against the Defendant regarding the alleged damages or shortfall resulting from the repossession and sale of the tractor.

[16] Section 127 (5) of the National Credit Act reads as follows:

“(5) After selling any goods in terms of this section, a credit provider must-

- (a) credit or debit the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider in connection with the sale of the goods; and*
- (b) give the consumer a written notice stating the following:*
 - (i) The settlement value of the agreement immediately before the sale;*

- (ii) *the gross amount realised on the sale;*
- (iii) *the net proceeds of the sale after deducting the credit provider's permitted default charges, if applicable, and reasonable costs allowed under paragraph (a); and*
- (iv) *the amount credited or debited to the consumer's account."*

[17] In the decision of **Edwards v First Rand Bank Ltd t/a Wesbank** 2017 (1) SA 316 (SCA), the Supreme Court of Appeal dealt with the arguments regarding the applicability or not of Section 127 (2) – (5) of the National Credit Act and then makes the following finding in paragraph 16 at page 323:

"[16] Whilst generally I am inclined to agree with the proposition that ss 127 (2) – 127 (9) of the Act are applicable, I however consider that they are not applicable in the present case because the agreement had already been cancelled." (My underlining).

[18] On 28 August 2017, when the judgment by default was granted, the cancellation of the agreement was confirmed. I therefore align myself with the **Edwards**-judgment, *supra* and thus find that section 127(5) of National Credit Act is also not applicable in the case before me, because the agreement had also been cancelled previously. In the premises I also reject this defence raised by the Defendant.

[19] The findings I made in paragraphs 14 and 18, *supra*, makes it unnecessary to deal with the Defendants last defence that deals with section 128 of the National Credit Act. For the same reasons it must fail.

[20] In the premises I make the following orders:

ORDER:

Having considered the papers filed of record and having listened to Counsel for both parties, I make the following orders:

1. The Defendant must pay the Plaintiff the amount of **R963 074.91**;
2. The Defendant must pay interest to the Plaintiff on the aforesaid amount at the rate of 10.75% per annum from 21 August 2018 to date of final payment;
3. The Defendant must pay the Plaintiff's costs of suit on the scale as between attorney and client.

L. LE R. POHL, AJ

On behalf of Plaintiff :
Instructed by:
INC

Adv P J HEYMANS
E G COOPER MAJIEDT

Bloemfontein

On behalf of the Defendant:
PIENAAR
Instructed by:
ATTORNEYS

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