REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

Reportable:	**YES**
Circulate to Judges:	**YES**
	[redacted]
26 SEPTEMBER 2024	
DATE	**SIGNATURE**

CASE NO: 3493/2024

In the application for summary judgment in the matter between:

NEDBANK LIMITED T/A MFC **APPLICANT / PLAINTIFF**

And

MOKGADI DONALD MATSHETHE **RESPONDENT / DEFENDANT**

Neutral Citation: *Nedbank Limited t/a MFC v Mokgadi Donald Matshethe* (3439/2024) [2024] ZALMPPHC (26 September 2024)

Heard: 19 September 2024

Delivered: 26 September 2024

Summary: Summary judgment application- defendant filed notice of intention to oppose and plea - enrolled in unopposed motion court- relief sought: confirmation of cancellation of credit agreement entered into in terms of the National Credit Act, 34 of 2005; return of vehicle; damages claim; and costs of suite – plaintiff's unilateral election to cancel credit agreement notwithstanding primary remedy for breach of contract (specific performance) being available and capable of enforcement- applicant / plaintiff's compliance with the provisions of the Uniform Rules of Court and the Practice Manual of the Division.

This judgment was circulated electronically to the parties' representatives by email. The date and time of hand-down are deemed to be 10:00 am on Thursday, 26 September 2024.

JUDGMENT

MORGAN AJ

1. This is an application for summary judgment, enrolled on the unopposed roll before me.

2. What led me to write this judgment was the plaintiff's counsel's submissions, Advocate Bresler, that the Court was bound to the plaintiff's election of the remedy for breach and further that the court had no discretion to interfere with or alter the

plaintiff's choice of remedy in case of unilateral cancellation of a credit agreement regulated in terms of the National Credit Act, 34 of 2005[1].

3. In addition to the above was Advocate Bresler's repetitive, unrelenting, discourteous and condescending attitude or conduct in open court when the court sought to have an engagement with counsel and point out the various challenges and deficiencies (procedural and substantive) the court took issue with on plaintiff's case as pleaded, which I sought counsel's submissions thereon. The irresistible inference drawn from the counsel's behaviour is that she came with a view that the order she sought was for the taking and that she would not be called or required to make a case out for the order sought. What follows below will explain my views and reasons for my order.

4. The plaintiff sought an order for summary judgment: in the following terms

   i. Confirming the cancellation of a vehicle financing agreement between the plaintiff and the defendant.

   ii. Return of the vehicle.

   iii. Costs for the application on attorney and client scale.

5. In the hearing, I directed Adv Bresler to file written heads of argument addressing two issues, inter alia:

   a. The primary remedies available to the plaintiff in an instance where there is a breach of contract and the obligation to elect specific performance.

[1] Herein after referred to as the National Credit Act.

b. The discretion of the Court is not to allow cancellation if specific performance is possible.

6. The Court is not in the business of writing thriller novels, so I will state the outcome upfront and furnish the reasons below. There is no need for a cinematic build. Some cases may call for that, but this one does not. Ultimately, the plaintiff's application for summary judgment is refused with no order as to costs. This is because the plaintiff failed to adhere to the dictates of the National Credit Act; the matter was not correctly enrolled before me; and the plaintiff did not provide any reasons why specific performance was unavailable in this case and why cancellation, an extraordinary remedy, was applicable. Lastly, given the monetary sum that underpins this dispute, the plaintiff should have approached a magistrate court for a monetary judgment. I move into the background facts and the reasons for the outcome.

7. Before I continue, I want to reiterate the dicta of Bhoola AJ in *FirstRand Bank Ltd t/a Wesbank v Maenetja Attorneys*:

> "The Summary judgment application calls for strict circumspection and Judicial oversight in balancing the rights of both the applicant and the defendant. The summary judgment proceedings have been described as drastic and robust proceedings. In *Joob Joob Investments v Stocks Mavundla Zek JV [2009] All SA 407(SCA)* it was held that summary judgment proceedings are no longer extraordinary, and the Rule must be applied properly. The summary judgment procedure exists for the applicant to obtain a speedy judgment against the defendant in cases where the defendant has no valid defense to the claim. By

short-circuiting an otherwise potentially protracted trial, the applicant avoids incurring unnecessary costs associated therewith.

Naturally, summary judgment cannot be granted where it is clear that some ventilation of evidence is required in order for the Court to come to a decision. Adopting this approach, the successful defendant who demonstrates a triable defence is not excised from further anticipated litigation. Thus, the defendant retains (all) his Constitutional Rights to access justice, as enshrined in section 34 of the Constitution."[2]

BACKGROUND FACTS

8. On 22 March 2023 at Groblersdal, the plaintiff, Nedbank Limited,[3] duly represented by its authorised representative, and the Defendant, Mokgadi Donald Matshethe, representing himself, entered into a written instalment vehicle sale agreement (credit agreement). The total cost of the agreement, including the principal debt, interest, costs, and charges, would be in the amount of R 252 772,50.

9. In terms of the agreement, the plaintiff provided credit to the defendant to purchase a 2016 KIA PICANTO 1.0 LX (hereinafter referred to as "the vehicle"), which was delivered to the defendant. Notwithstanding the delivery of the vehicle to the defendant, ownership of the vehicle remains vested with the plaintiff.

10. The salient terms of the credit agreement provided that the first instalment for the vehicle was R3 532,68, payable on 30/04/2023; after that, seventy equal monthly

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[2] *FirstRand Bank Limited t/a WesBank v Maenet JA Attorneys Inc* [2021] ZAGPPHC 612 at paras 1-2.

[3] The Plaintiff is a credit provider duly registered as such in terms of the National Credit Act, 34 of 2005. The Plaintiff is a registered Credit provider and duly registered as such as defined in section 40 of the National Credit Act 34 of 2005.

instalments of R3 510.42 commencing 30/05/2023 would be payable; with a final balloon payment of R3 510.42 payable on 31/03/2029.

11. The agreement furthermore states that should the defendant fail to pay the instalment on due date or fail to satisfy any of his obligations in terms of the agreement, the plaintiff shall, without prejudicing any of its other rights in law, be justified in: cancelling the agreement and in the instance of such cancellation; claim return and possession of the vehicle; be entitled to retain all installments already made by the Defendant; to claim payment of the difference between; the amount outstanding at date of cancellation of the agreement less a rebate on finance charges calculated from date of termination of the agreement and; the amount at which the vehicle is valued in terms of the agreement or the re-sale value thereof, whichever is the greater; the fixed Credit cost multiple of 1.98 is the ratio of the total cost of credit to the advanced principal debt, cost on the attorney and client scale; claim all expenses incurred in tracing the defendant before or after the instituting of action, attaching the vehicle, removing it, valuing it, storing and the sale of the vehicle.

12. The defendant breached the credit agreement by failing to pay four consecutive monthly instalment from 29 February 2024 and was in arrears in the sum of R15 400.93.

13. The National Credit Act applies to the agreement. This Act governs the agreement, and in compliance with its provisions, the plaintiff delivered a section 129(1)(a) notice via e-mail.[4]

14. The plaintiff delivered section 129 notice to the defendant of the Defendant's breach of the agreement and the amount outstanding and due in terms of the agreement and, on failure by the defendant to pay, of its intention to cancel the agreement. The notice was followed by combined summons, and this application notwithstanding substantial payments being made for the amount that was outstanding in arrears and the defendant's clear intention to defend the primary action for the relief sought, which is limited to the plaintiffs, the sole and exclusive election of the unilateral cancellation of the credit agreement and ancillary relief.

15. The Plaintiff duly issued a combined summons against the defendant, in which it unilaterally cancelled the agreement. The combined summons was served on the defendant at his chosen dominium.

16. As stated above, at the time of the institution of the proceedings, the defendant was in arrears of four monthly payments, totalling R15 400.93 as of 29 February 2024. Upon delivery of the combined summons, he made payments equalling two monthly instalments and sent the plaintiff proof of the same. The proof of payments were annexed to his Plea to defend the claim.

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[4] Section 129(1)(a) of the National Credit Act provides:

> '1) If the consumer is in default under a credit agreement, the credit provider-
> (a) 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 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.'

17. Notwithstanding the payments received after the summons were delivered, the plaintiff proceeded to institute an application for summary judgment.

18. In support of the summary judgment application is an affidavit deposed to by an employee (Team Leader: Litigation and Defended: RBB Secured & Relationship Recoveries) of the plaintiff. No proof of authority to institute the application for summary judgment on behalf of the plaintiff was furnished or annexed to the supporting affidavit. The latter in my view, becomes important in the context of having the application regarded as being properly instituted and before me more so in the context where the defendant / respondent is not present in Court.

UNDERSTANDING THE NATIONAL CREDIT ACT

19. I want to spend some time discussing the National Credit Act. The National Credit Act was introduced to address significant imbalances in the consumer-credit landscape, where previous legislation left defaulting consumers with insufficient protections and subject to the discretion of credit providers. Recognising the urgent need for a more equitable and structured framework, the Legislature enacted the National Credit Act with the aim of shifting the power dynamics in favour of consumer rights and financial fairness.

20. The purpose of the National Credit Act is to establish a unified system for regulating credit. It aims to foster a fair and equitable environment for consumer access to credit while also promoting black economic empowerment and ownership within the credit sector. Additionally, the Act is intended to prevent unfair credit practices and misleading credit marketing, offering protections for consumers. Another key

objective is to encourage responsible lending and borrowing by prohibiting reckless credit granting, regulating credit information, and providing mechanisms for debt restructuring in cases of consumer over-indebtedness.

21. As a general rule, the National Credit Act applies to basically every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic of South Africa

22. At the heart of the Act, as reflected in its preamble and section 3, lies the clear intent to prioritise the protection and empowerment of consumers. One of the key purposes of the National Credit Act is to promote responsible lending practices, ensuring that consumers are not subjected to reckless credit agreements, while also establishing transparent and fair procedures for dealing with default or debt enforcement. By doing so, the Act aims to create a credit market that operates not only on principles of economic efficiency but also on fairness, accountability, and protection against exploitation.

23. Furthermore, Chapter 6, titled "Collection, Repayment, Surrender, and Debt Enforcement," serves as a critical tool in realising the Act's overarching objectives. This chapter provides a clear procedural framework that credit providers must follow before they can enforce or terminate credit agreements, ensuring that consumers are afforded adequate protection throughout the debt collection and enforcement process. By stipulating these procedures, the National Credit Act seeks to balance the rights of credit providers with the fundamental need to safeguard consumers from arbitrary or overly aggressive enforcement actions.

24. Ultimately, the National Credit Act represents a significant legislative effort to modernise the credit industry by fostering a credit system that is not only commercially viable but also aligned with principles of social justice, fairness, and consumer protection. Its purpose extends beyond mere regulation; it embodies a vision of financial inclusivity and equitable treatment, addressing the vulnerabilities of consumers while encouraging responsible and sustainable credit practices across the market.

25. Section 129 of the National Credit Act, which is central to this case, has been interpreted by the Constitutional Court. In *Sebola*,[5] Cameron J, delivering the majority judgment, held that the National Credit Act did not require the credit provider to prove that the default notice had actually come to the attention of the consumer, nor that it had been delivered to a specific address, as such a requirement would often be impossible to meet. Nevertheless, he stressed that while proving actual receipt may be challenging, the credit provider must provide evidence that would satisfy the court, on a balance of probabilities, that the notice had likely reached the consumer.[6] It was not sufficient for the credit provider to merely dispatch the notice. Due to the risk of non-delivery associated with ordinary mail, Cameron J emphasised that the use of registered mail was essential. Although registered letters can sometimes go astray, the probability of their delivery is much higher. Even so, proof of dispatch via registered mail alone was not enough. The credit provider needed to do more than just assert that the notice was sent; they had to prove that

[5] *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC).
[6] Ibid at para 74.

the notice reached the correct post office.[7] To meet this obligation, the credit provider was required to obtain a "track and trace" report from the South African Post Office to confirm delivery to the relevant post office.[8] If this proof was provided and no evidence to the contrary was presented, the court could reasonably accept that the notice had been delivered to the consumer.[9]

26. Cameron J also addressed the situation where a consumer claims they did not receive the notice. In such cases, the court should investigate the validity of the claim and assess whether the credit provider had complied with the requirements of the National Credit Act.[10] If the credit provider had failed to meet these requirements, the court should adjourn the matter under section 130(4)(b) of the Act, allowing the credit provider to take corrective steps to ensure the consumer could exercise their rights.[11]

27. In *Kubyana*,[12] Mhlantla AJ delivered the majority judgment, affirming that the credit provider had complied with the National Credit Act by proving that the notice had been sent via registered mail to the correct post office. This was considered sufficient for the credit provider to credibly assert that the consumer had received the notice. The court ruled that to demand more of the credit provider would place an unreasonable burden on them and would allow consumers to avoid responsibility by ignoring validly sent notices.[13] The Constitutional Court upheld its earlier holdings in *Sebola*, agreeing that the credit provider was not required to prove that the notice

[7] Ibid at paras 74-76.
[8] Ibid at para 76.
[9] Ibid at para 86.
[10] Ibid at para 87.
[11] Ibid.
[12] *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC).
[13] Ibid at paras 12-17.

had come to the consumer's subjective attention, nor that it had been personally served. Section 129 of the Act only required the credit provider to "draw the default to the notice of the consumer in writing."[14] Under section 65(2) of the Act, the credit provider fulfils this obligation by making the document available through one of the prescribed methods of delivery.

28. The Constitutional Court reaffirmed the principle set out in *Sebola* that postal delivery was an acceptable method, but mere dispatch was not sufficient. The credit provider must demonstrate that reasonable steps were taken to bring the notice to the consumer's attention. Where a consumer has opted to receive notices by post, the credit provider's duties include (a) respecting the consumer's election; (b) bearing the cost of sending the notice via registered mail; (c) ensuring the notice is sent to the correct branch of the Post Office; and (d) obtaining proof that the Post Office notified the consumer that a registered item was awaiting collection.[15]

29. The Court reiterated its earlier ruling that a credit provider must take steps to bring the notice to the attention of a "reasonable consumer."[16] In this case, the credit provider had complied with the Act by sending the section 129 notice to the nominated Post Office branch, and the Post Office had issued two notifications to the consumer's address, informing them that an item was awaiting collection. Despite these efforts, the consumer did not respond. The court held that a consumer who unreasonably fails to respond to a valid section 129 notice forfeits the opportunity to engage in the dispute resolution mechanisms provided by the Act and

[14] Ibid at paras 31-39.
[15] Ibid at paras 32, 43 and 54.
[16] Ibid at para 33.

cannot later disrupt enforcement proceedings by claiming that the credit provider did not fulfil its statutory obligations.[17]

30. The Court concluded that when the credit provider had complied with all the necessary steps under the National Credit Act and received no response from the consumer within the designated time frame, there was little more that could be reasonably expected of the credit provider. When a consumer has opted to receive notices via registered mail, they are obliged to respond to notifications from the Post Office. If the consumer fails to do so without a reasonable justification, they cannot later claim ignorance of the notice. It is the consumer's responsibility to demonstrate why they did not deal with the section 129 notice if they wish to avoid the legal consequences of their inaction.[18]

31. The Court summarised the position as:

> "Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the

[17] Ibid at paras 35-48.
[18] Ibid at paras 46-54.

> reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour."[19]

32. Thus, as already stated, the National Credit Act was introduced to address significant imbalances in the consumer-credit landscape, aiming to protect consumers from unfair practices and empower them in their financial dealings. Its purpose is to establish a unified system for regulating credit agreements, ensuring that credit is provided responsibly and equitably. While it applies broadly to credit agreements within South Africa, its primary focus is on consumer protection, particularly in preventing reckless lending and providing mechanisms for debt restructuring. One of the Act's most important features is its procedural safeguards, as seen in Chapter 6, which ensures that consumers are adequately protected during the debt enforcement process. A crucial part of these safeguards is the requirement under section 129 for credit providers to notify consumers of default before taking enforcement action.

33. This notice process has been carefully interpreted by the courts in cases such as *Sebola* and *Kubyana*, which clarified that while actual proof of receipt is not required, credit providers must take reasonable steps to ensure the notice reaches the consumer, typically through registered mail. If the credit provider has followed the required steps, the burden shifts to the consumer to explain why the notice did

[19] Ibid 53.

not reach them. This process balances the rights of both parties, encouraging responsible consumer behavior while preventing credit providers from enforcing debt in an arbitrary or overly aggressive manner. Ultimately, the Act reflects a modernised approach to consumer credit, grounded in principles of fairness, accountability, and social justice, and it is a pivotal tool in fostering financial inclusivity and protection for vulnerable consumers.

34. Having examined the above, there are two issues to dealing with this, *in casu*, to wit: (i) procedural non-compliance and (ii) substantive non-compliance. I consider these issues in turn.

PROCEDURAL NON-COMPLIANCE

35. Practice directives play a vital role in guiding the courts' day-to-day operations. However, they cannot override legislation, common law, or binding court rules. Any procedure permitted by law, especially when designed to ensure the statute's effective implementation, must be followed. The authority of the courts to issue practice directives is crucial for managing their work, but these directives must align with and support the requirements of statutes. They should not create barriers that hinder the fulfilment of a statute's objectives.[20]

36. In *Ramadhani*,[21] the Supreme Court of Appeal held that:

> "<u>The practice directive is subordinate to any relevant statute, the common law and the Uniform Rules and it cannot be applied to restrict or undermine any piece of legislation, the Uniform Rules of Court or the common law. Practice</u>

[20] *National Director of Public Prosecutions (Ex Parte Application)* 2022 (1) SACR 1 (SCA) at para 19.
[21] *National Director of Public Prosecutions* [2018] ZASCA 86; 2018 (2) SACR 176 (SCA) ("*Ramadhani*").

> directives deal essentially with the daily functioning of the courts and, their purpose is to supplement the rules of court. In this case, the court a quo afforded the practice directive statutory force overriding both s 38 of POCA and rule 6(4)(a) of the Uniform Rules which is impermissible. The practice directive should not negate the provisions of s 38 and rule 6(4)(a) of the Uniform Rules. In my view the portion of the practice directive dealing with ex parte applications is not applicable to *ex parte* applications brought in terms of s 38." (emphasis my own)

37. The practice directives of the various Divisions of the High Court of South Africa set out the practice in the Main and its Local seat. They seek amongst others, to inform practitioners and the litigants on how the Judges or courts in each Divisions function and seek to regulate the procedures therein. They also aim to obtain uniformity amongst judges in respect of practice rulings. It is also trite and emphasised that practice directives bind no Judge as the directives are made for the court and not the other way around. Further, for several reasons, each court or Judge has the inherent powers to regulate their court's functioning and procedure proceedings.

38. Accordingly, the practice directive in the Limpopo Division is not intended to bind judicial discretion. The Practice Directives of this Court say as much at para 1.2:

> "As such it seeks to inform how the courts in this high court function. It also seeks to obtain uniformity amongst judges in respect of practice rulings. It must be emphasized that no judge is bound by practice directives. Accordingly, the practice directive is not intended to bind judicial discretion. Nonetheless, it should be noted, that the judges of this high court strive for uniformity in the functioning of the courts and their practice rulings. The

practice directive thus sets out what can be anticipated occurring, in the normal course of events, on any issue dealt within the practice directive."

39. Thus, practice directives seek to inform litigants and legal practitioners how the courts under that directive function, and such practice directives bind no Judge and are not meant to displace or bind judicial discretion.

40. In addition, it is recognised and crystallised that the Judges of this Division strive for uniformity in the functioning of the courts and their practice rulings. The practice directive thus sets out what can be anticipated to occur in the normal course of events on any issue within the practice directive. In addition to that, compliance is compulsory and binding for practitioners and litigants. Only a Judge or court can condone non-compliance thereto and not the parties unilaterally or by agreement.

41. No original or copies of the sheriff's return of service of the summary judgment application or notice of set down and neither were contained in the court file nor listed in the plaintiff's index to the paginated bundle, proving service of the summary judgment application or notice of set down of the hearing of the application on the unopposed motion court roll.

42. The notice of set down required would have been the short form of notice. The notice ought to have stated that the application will be set down for hearing on a stated day, not less than 15 days from the date of delivery of the application.

43. I reiterate that the the plaintiff did not have any proof that it delivered on the defendant the summary judgment application; no condonation application nor

affidavit from the instructing attorney explaining the failure to have the application served by the sheriff or on the defendant at all.

44. The only affidavit filed explained that the instructing attorney had lost the sheriff's original returns of service, evincing the serving of the combined summons and notice of opposition to mediation in terms of Rule 41A, nothing more. In my view, this affidavit is unsatisfactory as the original document could have been easily requested and obtained from the sheriff before the final re-enrolment of the application. Moreover, if the same was obtained after the matter was enrolled and the file was with the judge and could not be accessed, the original document obtained could have, with leave of the court, been handed up from the bar. Lowering the court's procedural requirement or standards to those desired or sought to be imposed by a legal practitioner is, in my view, improper.

45. If condonation were granted for such sluggish conduct (failure to request original returns from the sheriff and submitting or filing same at court) would mean that the Court would have to consistently do the same for other litigants and disregard or render the requirement in practice obsolete by disuse. This Court is unwilling to ignore or use its discretion inconsistently and contrary to the uniform procedures and Rules in the Uniform Rules of Court or the Practice Manual.

46. Further, if the plaintiff had served the summary judgment application or its notice of set down on the defendant by sheriff, it might have prompted a response from the defendant, much like it did when the combined summons and notice of opposition to mediation under Rule 41A were served. In the earlier instance, after the sheriff served the combined summons on the defendant's mother on 23 April 2024, the

defendant promptly opposed the action and filed a plea. Therefore, serving the summary judgment application or notice of set down via the sheriff was necessary to give the defendant a clear opportunity to oppose. Neither was done in this case.

47. There is a distinction between proof of delivery and proof of service of a court process. In this instance, it appears that only delivery occurred concerning the summary judgment application. The likelihood is high that this delivery did not reach the defendant's attention. Given that the defendant was able to defend the cancellation of the credit agreement in the main action and made payments shortly thereafter, it is unclear why he would not oppose the summary judgment application—especially since there is no notice on file indicating that he withdrew his defenses. This suggests his intent to defend was clear.

48. Applications for summary judgment, particularly in cases involving credit agreements regulated by the National Credit Act, require that the respondent or defendant be served by the sheriff, similar to the process for applications for default judgment under Rule 31(5). Following the successful service of the initiating papers, an original return of service must be filed in the court file as part of the necessary documentation before the matter can be enrolled for adjudication before a presiding officer.

49. However, it has become common for judges to be required to perform basic administrative tasks that traditionally fall within the responsibilities of legal practitioners, particularly in building a case for the *dominus litis* (typically the plaintiff in action proceedings or the applicant in motion proceedings). This expectation goes beyond their core judicial function, and when this is not done correctly, it can expose

the presiding officer to undue criticism from the legal profession. The Division's Practice Manual provides in relevant parts:

> "3.9 5 Service
>
> 13.9.1 Service is proved by filing the original return of service in the court file, which establishes the service. In the absence of an acceptable explanation, a return of service will generally not be accepted from the bar.
>
> 13.9.4 Where service is effected at a *domicilium citandi et executandi*, the original document wherein the *domicilium* is chosen must be in the court file.

50. The combined summons and the notice of opposition to mediation were served on the defendant's mother, not on the defendant himself. Furthermore, neither the summary judgment application nor the notice of set down was served on the defendant or sent to him via registered mail to his last known address.

51. According to Section 168 of the National Credit Act: "Serving documents—Unless otherwise provided in this Act, a notice, order, or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either—(a) delivered to that person; or (b) sent by registered mail to that person's last known address." In this case, these requirements were not met. Neither the summary judgment application nor the notice of set down was served on him or sent to him by registered mail to his last known address

52. Courts are often required to entertain condonation applications from the bar, even when no formal application has been made in accordance with the Uniform Rules of

Court. This involves condoning multiple procedural and substantive non-compliances with key provisions of the uniform rules and practice directives, which are designed to ensure the fair and proper adjudication of cases and to uphold justice in the conduct of a fair court hearing or trial. In such cases, litigants, represented by legal practitioners, often incur substantial fees for work and court appearances, despite the lack of proper preparation or adherence to basic procedural requirements. This issue becomes even more problematic when the initiating party has a significant advantage, as their matter may proceed unopposed or undefended. In the present case, although the matter is defended, the plaintiff believes that the defendant has not presented a proper defense in their plea.

53. From my general observations in presiding in motion court, if the continuing decline in the standard and quality of legal practitioners persists, and courts do not insist on the converse and compliance with traditional ethics and court etiquette from legal practitioners, it may eventually lead to those practitioners being considered for judicial appointment in the near future when they apply and sadly if an appointment is made from this batch of practitioners absent of those competent practitioners who shy away from availing themselves for judicial office, simply because of how difficult it has become being a Judge today, more so because Judges have become more vulnerable to unwarranted complaints, attacks or criticism with minimal to no protection by the relevant authorities in the other arms of government, when fulfilling their constitutional functions and obligations entrenched in section 165 of the

Constitution, 1996[22], then the phrase "in the absence of the best, the worst become the best [only option available]" will manifest in the Judiciary and possibly assassinate a critical constitutional institution and arm of government regarded as the moral compass of the Republic.

54. Sadly, most of the procedural non-compliance has to do with most basic rules of civil procedure and practice, and it is the responsibility of litigants, their legal representatives, and counsel to ensure they are adhered to before a matter is finally enrolled. When cases are plagued by procedural deficiencies, they divert the limited time and resources available to judges, preventing them from focusing on cases that have been correctly enrolled and are ready for hearing. This is precisely why litigants engage legal practitioners—to ensure compliance with court rules and to have a highly skilled and diligent professional advocate on their behalf before a presiding officer.

55. In support of this, the deponent of the affidavit accompanying the summary judgment affirms that, when an account is handed over for collection, the plaintiff's employee instructs the plaintiff's attorney of record to proceed with legal action. This instruction is communicated electronically to the plaintiff's attorney, who is granted simultaneous access to the plaintiff's computer system, specifically to the account in question. The attorney thus has access to the same information and documentation that the plaintiff possesses regarding the account. Furthermore, the deponent states

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[22] Section 165 provides: "Judicial authority 165. (1) The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. (3) No person or organ of state may interfere with the functioning of the courts. (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies. (6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts."

that once the account is handed over, the attorney ensures compliance with the requirements of the National Credit Act (where applicable), as well as the specific terms of the agreement(s) relating to the issuance of necessary notices.

A court must be vigilant in safeguarding against any injustice to the defendant, who may be called upon at short notice, and without the advantage of further particulars, discovery, or cross-examination, to prove the existence of a bona fide defense. While the court seeks to assist a plaintiff, whose rightful claim may be hindered by a defendant employing delaying tactics without a valid defense, it is equally cautious about stripping the defendant of their ordinary right to defend, except in cases where the absence of a defense is unequivocally clear. This careful balance is why our courts have consistently stressed the importance of strict compliance with procedural rules.

56. Under Rule 1, service requires that copies be delivered to all relevant parties, with the original document filed with the registrar. In *FirstRand Bank Ltd t/a Wesbank v Maenetja Attorneys*, the plaintiff failed to serve its affidavit supporting summary judgment in accordance with Rules 4(1)(aA) and 4A. Instead, the affidavit was uploaded to CaseLines, where the defendant's attorneys were invited to access it. The defendant opposed the summary judgment application on the grounds of improper service. The key issue was whether an invitation to access documents on CaseLines constituted valid service under the subrule.

57. The court held that CaseLines is not a valid platform for the service of court documents. In the absence of any agreement between the parties to effect service through alternative means other than those prescribed by the Uniform Rules of

Court, and without a substantive application by the plaintiff seeking condonation for non-compliance with the rules on service—particularly as outlined in paragraph 200 of the Judge President's Practice Directive dated 18 September 2020—the affidavit had not been properly served. As a result, the court dismissed the summary judgment application with costs.

SUBSTANTIVE ISSUES

58. In this case, the application for summary judgment seeks to confirm the unilateral cancellation of the credit agreement between the parties. Further, upon the confirmation of the cancellation, the plaintiff seeks to have the defendant return the vehicle, forfeit the monies already paid, and recover the costs of the suit (main action and this application) on an attorney-client scale.

59. It is trite that unique requirements exist for summary judgment sought where the debt or credit agreement falls under the provisions of the National Credit Act. In addition to the unique requirements, the trite legal principles regarding the test in summary judgment proceedings remain.[23]

60. The purpose of Rule 32 is to prevent a plaintiff's claim, based on certain causes of action, from being unduly delayed due to the abuse of court processes by the defendant. In specific circumstances, the law permits the plaintiff to request the court to grant a summary judgment against the defendant, allowing the matter to be resolved swiftly without the need for the plaintiff to bear the expense of a full trial. [24]

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[23] *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC).
[24] *Meek v Kruger* 1958 (3) SA 154 (T) at 159–60; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11C–G; *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F–

However, the rule is not designed to unfairly exclude a defendant who can demonstrate that there is a legitimate and triable issue related to the claim from presenting their defense.

61. For many years, the remedy provided by Rule 32 has been viewed as both extraordinary and stringent, as it effectively bars the defendant from accessing the full trial process and allows a judgment to be rendered without the opportunity for further argument or examination of evidence. [25] This stringent nature reflects the courts' cautious approach, ensuring that summary judgment is only granted in clear-cut cases where no genuine defense exists, while balancing the plaintiff's right to avoid unnecessary delays.

62. In *Maharaj v Barclays National Bank Ltd*,[26] the court stated the correct approach to follow in considering summary judgment applications. This case remains a crucial reference for understanding how courts should exercise caution in granting summary judgments, ensuring that they do so only when it is clear that the defendant has no bona fide defense, and that the application complies with procedural requirements.

G; *Eclipse Systems v He & She Investments (Pty) Ltd and A Related Matter* 2020 (6) SA 497 (WCC) at paragraph [10]; *Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments* (unreported, ECMk case nos 1206/2022; 1511/2022 dated 23 May 2023) at paragraph [16]. How this came about is clearly stated by Van den Heever J in *Edwards v Menezes* 1973 (1) SA 299 (NC) at 303. See also *Sekretaris van Landboukrediet en Grondbesit v Loots* 1973 (3) SA 296 (NC) at 298.

[25] See *Jacobs v Booth's Distillery Co 85 LT 262 (HL)* in which case Lord James of Hereford said that there was a fair issue to be tried; and see the authorities referred to in *n 1 above. In Majola v Nitro Securitisation 1 (Pty) Ltd 2012 (1) SA 226 (SCA) the following was stated (at 232F–G):* 'It is a procedure that is intended "to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavoring to enforce their rights".*' In FirstRand Bank Ltd t/a Wesbank v Maenetja Attorneys (unreported, GP case no 8557/2021 dated 17 September 2021) at paragraph* [2] the court held: 'Naturally, summary judgment cannot be granted where it is clear that some ventilation of evidence is required in order for the Court to come to a decision. Adopting this approach, the successful defendant who demonstrates a triable defence is not excised from further anticipated litigation. Thus, the defendant retains (all) his Constitutional Rights to access justice, as enshrined in section 34 of the Constitution. See also *Velocity Finance (RF) Limited v Desert Fox Investments (Pty) Ltd t/a Desert Fox Investments (unreported, ECMk case nos 1206/2022; 1511/2022 dated 23 May 2023) at paragraph [16].*

[26] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

The judgment also emphasises that summary judgment is a drastic remedy and should be granted sparingly, respecting the balance between the plaintiff’s right to avoid delays and the defendant’s right to present a valid defense.

63. In my view, the relief sought in the interlocutory application for summary judgment, or in the main action proceedings, which includes the confirmation of the plaintiff’s election of a remedy for breach—in this case, the unilateral cancellation of a credit agreement regulated under the National Credit Act—raises significant concerns. The cancellation is based on the debtor's failure to make three monthly instalments, with the plaintiff subsequently claiming the return of the moveable property (a vehicle) and legal costs on an attorney-and-client scale.

64. However, despite the availability of specific performance as the primary remedy for breach under the contract—an option that is competent, enforceable, and just under the circumstances—the plaintiff’s choice to cancel the agreement could lead to unjust and overly prejudicial consequences for the debtor. This approach undermines the objectives of the National Credit Act, which seeks to promote fairness and prevent exploitative outcomes. The election of cancellation in this context appears irrational and would likely result in an unfair outcome, especially when a less drastic remedy like specific performance is available and more appropriate.

65. Courts are required to confirm the cancellation of credit agreements regulated under the National Credit Act due to the essential need for judicial supervision and protection in such matters. This responsibility arises from the courts' role in ensuring that the individuals whom the National Credit Act aims to protect, as outlined in its

preamble, are safeguarded and that the Act's objectives are fully realised. In my view, the plaintiff’s or aggrieved party’s choice of remedy in such cases must be subjected to judicial scrutiny, where its rationality, justification, and appropriateness are examined closely—particularly when the agreement falls under the provisions of the National Credit Act.

66. If courts were to simply confirm the plaintiff's cancellation of the credit agreement without this necessary scrutiny, it would undermine the very protections the Act is meant to provide. In my view, such confirmation is not a mere rubber-stamping exercise. The court must ensure that the remedy chosen by the aggrieved party is rational, just, and equitable under the circumstances. The factors for consideration are not limited to a closed list, but the most basic principle is that the least harmful and most logical remedy should be pursued first, especially when specific performance remains a viable option. Permitting a remedy with harsher consequences for the debtor without such consideration would contradict the constitutional principles and objectives that the National Credit Act is designed to enforce.

67. In the context of our young and developing democracy, where poverty, unemployment, and inequality remain pervasive issues, courts must be particularly cautious not to allow remedies that exacerbate these challenges. The courts are not there to endorse or condone injustice; they are tasked with ensuring fairness and protecting the vulnerable.

Specific Performance

68. Specific performance is considered the fundamental remedy for a breach of contract and is generally available to the aggrieved party. In contract law, an order for specific performance requires a party to fulfil their contractual obligations, which could involve performing specific duties, providing services, delivering goods, or making payments. A plaintiff is typically entitled to seek specific performance, and if they establish their case, the court will grant the remedy, although this is subject to the court's discretion.

69. In *Farmers' Co-operative Society (Reg) v Berry*, Innes J articulated this principle, stating that any party to a binding agreement, who is prepared to fulfil their own obligations, has the right to demand that the other party do the same, as far as it is practically possible. This highlights the right of a contracting party to request the enforcement of the contract’s terms, provided they are ready to meet their own obligations under the agreement.

70. The right to specific performance in cases where the defendant can fulfil their obligations is firmly established. In *Haynes v Kingwilliamstown Municipality*,[27] De Villiers AJA confirmed that under South African law, a plaintiff has the right to choose whether to hold a defendant to the contract and demand exact performance of what was promised or to seek damages for the breach.[28] Importantly, this choice

[27] *Haynes v Kingwilliamstown* 1951 2 SA 371 (A).
[28] Ibid 378D-E; *Cohen v Shines, Mc Haltie and King* 1882 Kotze’s Reports 41

belongs solely to the plaintiff; the defendant cannot insist on paying damages instead of being compelled to perform their contractual duties.[29]

71. Although the plaintiff holds the right to elect specific performance, the court retains the discretion to refuse such an order. This judicial discretion must be applied judiciously and is not limited to specific categories of cases or rigid rules. Instead, each case is assessed based on its particular facts and circumstances.[30]

72. Specific performance remains the primary remedy for breach of contract in South African law. Still, in cases where specific performance is not appropriate or possible, damages can serve as a compensatory alternative for the aggrieved party.

73. The concept of judicial discretion in granting or denying an order for specific performance is governed by common law. In *Haynes v Kingwilliamstown Municipality*,[31] De Villiers AJA emphasised that while courts generally respect a plaintiff's choice to claim specific performance, they retain the discretion to refuse such a decree in appropriate cases, leaving the plaintiff to pursue damages instead. This discretion, though judicially exercised, is not confined to rigid categories or specific types of cases; each matter must be assessed based on its unique circumstances.[32]

74. The Appellate Division identified several grounds where courts may exercise discretion to refuse specific performance, even when performance is not impossible. These include: (a) when damages would sufficiently compensate the plaintiff; (b)

[29] Ibid at 378D-E.
[30] Ibid 378G-H.
[31] Ibid.
[32] Ibid 378F-G.

when enforcing the court's decree would be difficult; (c) when the item in question can easily be obtained elsewhere; (d) when specific performance involves services of a personal nature. Additionally, courts may refuse specific performance if it would impose an unreasonable burden on the defendant, if the underlying agreement is unjust, or if the decree would lead to inequitable outcomes.[33] For instance, an order for specific performance against an employee might be unjust in certain circumstances. However, it should be noted that enforcement of the court's decree is generally not problematic. If a party fails to comply with the order, the aggrieved party may return to court, and the non-compliant party could be held in contempt and dealt with accordingly.

75. In *Benson v SA Mutual Life Assurance Society*,[34] Hefer JA elaborated on how discretion should be exercised, asserting that no strict rules govern this discretion other than the requirement that it must be applied judicially with regard to all relevant factors.[35]

76. Hefer JA outlined three key principles that should guide the court in determining whether to grant specific performance: (i) the remedy must not result in an unjust outcome; (ii) the decision must align with legal and public policy; and (iii) specific performance should not be ordered if it has become impossible. Circumstances that may preclude the granting of specific performance include impossibility of performance, undue hardship, contracts involving personal services, and vague or

[33] Ibid 378 – 379.
[34] *Benson v SA Mutual Life Assurance Society* 1986 1 SA 776 (A) 782.
[35] Ibid 782F – 783C.

imprecise obligations.[36] These factors reflect the broader principle that, while specific performance is a primary remedy, it must be applied with fairness and in consideration of all relevant circumstances.

77. Cancellation of a contract is a general remedy for breach of contract recognised in South African law and is often referred to as a drastic remedy as it brings the contract to an end. In the case of *Standard Bank of South Africa Ltd v Botes t/a JHLS Botes Vervoer (NWM)* (unreported case no: M85/2015, 13-9-2015) (Landman J), the court held that the National Credit Act does not regulate the cancellation of a credit agreement. As a result, the principles of common law regarding cancellation remain applicable and continue to govern such matters. This decision reaffirms that, despite the protections and regulations provided under the National Credit Act, the common law prevails in circumstances where the Act is silent on specific aspects, such as the cancellation of credit agreements.

78. Cancellation of a contract is an extraordinary remedy. I am not convinced that the applicant has made a case for cancellation, despite the existence of a cancellation clause. I believe that the appropriate remedy is specific performance, and a case has not been made as to why specific performance would not be appropriate.

79. The court found that the plaintiff's decision to cancel the credit agreement was unfounded and inappropriate, as specific performance should have been the primary and appropriate remedy in the circumstances. The defendant's actions—filing a notice of intention to defend, submitting a plea, and making payments that covered

[36] Benson *supra* 783D-F.

two of the three missed instalments—clearly demonstrated that specific performance was both feasible and enforceable.

80. Moreover, the plaintiff's choice to unilaterally cancel the credit agreement, despite the brief period during which the defendant was in breach and the defendant's subsequent efforts to resolve the outstanding arrears, weighed in favour of allowing the contract to continue. The defendant's intention to settle the remaining arrears, coupled with the partial payments already made, indicated that providing the defendant with the opportunity to remedy the situation was a fair and just solution. This approach would allow the defendant to catch up on the one or two months of outstanding payments and avoid the disproportionate consequences of cancellation.

81. Moreover, when cancelling the credit agreement will lead to a serious injustice and possibly leave the debtor in a bigger financial hole (debt) after having to have the full outstanding balance on the capital credit amount with interest thereon in terms of the credit agreement immediately called up and payable, added to it sheriffs fees and legal costs on attorney and client scale with interests thereon, which will most probably exceed the amount initially advanced under the credit agreement and loss of the asset (vehicle) which they tried to acquire thus deepening the already existing debt militate against endorsing the irrational election of cancellation of the credit agreement and return of vehicle obtained through a credit agreement regulated under the National Credit Act, as such a remedy will, cause a real and serious injustice where the facts do not justify such and where remedy goes against the provisions and objectives of the National Credit Act.

82. In addition, cancelling the credit agreement in such circumstances would result in a severe injustice, potentially leaving the debtor in a deeper financial crisis. Upon cancellation, the debtor would be required to immediately repay the full outstanding balance of the principal loan, along with interest, as per the terms of the agreement. This burden would be further compounded by the addition of sheriff's fees, legal costs on an attorney-and-client scale, and interest on those costs—likely exceeding the original amount advanced under the credit agreement. Additionally, the debtor would lose the asset they had been working to acquire, exacerbating their financial position and deepening their existing debt.

83. This situation highlights the irrationality of electing to cancel the credit agreement and reclaim the vehicle, particularly under an agreement regulated by the National Credit Act. Such a remedy would create a serious and unjust outcome, contrary to the facts of the case and the underlying objectives of the National Credit Act, which seeks to promote fairness and prevent exploitative practices in credit transactions. The election of cancellation, in this instance, would not only be disproportionate but would also undermine the debtor's ability to recover, reinforcing the very financial instability the Act seeks to mitigate.

84. In the ordinary course where specific performance is still possible, the plaintiff ought to have brought the claim for a monetary judgment for the outstanding arrears at the Magistrates Court and not the High Court, as the amount claimed of R14,283.20 falls within the monetary jurisdiction of the District Magistrates Court, which would have also been more efficient and cost effective. Bringing a matter such as this one to the High Court under the guise of an irrational remedy chosen (cancellation of the credit

agreement for small amount in arrears) where the circumstances do not warrant it not only prejudices the litigant, but the High Court roll too by over congesting it with matters that ought not to be on the roll, creating an increased and unnecessary workload for the presiding officer and taking away the limited resources available to other deserving litigants who have matters that deserve this courts attention. More recently from the matters that have come before me on unopposed motion court seem to lead me to an irresistible view and inference that High Courts are now being reduced to professional playgrounds, that are expected to adjudicate even the most trivial matters which detract from the status and stature of this court in the judicial hierarchy.

85. Bringing a matter like this one illustrates how litigants can circumvent the appropriate court and procedures by invoking this Court’s common law jurisdiction and inherent power to cancel an agreement, even when the circumstances do not warrant such action. This tactic may amount to an abuse of court processes and potentially contravene the very legislation designed to protect vulnerable individuals. The indiscriminate granting of such cancellation orders, without thorough judicial oversight, risks perpetuating a cycle of unlawful conduct, benefitting a system or syndicate that serves the interests of certain industry players—such as debt review companies, practitioners, and legal professionals—who increase their profits at the expense of debtors. This practice particularly impacts the middle class or those described as the "missing middle," who often find themselves vulnerable to predatory actions. Without proper judicial scrutiny, the willy-nilly granting of cancellations could undermine the protective objectives of legislation like the

National Credit Act, designed to ensure fairness in credit agreements, and instead enable profit-driven actors to exploit the legal system to the detriment of those already struggling with debt.

86. Judicial supervision is essential in cases that safeguard and implement provisions of legislation aimed at upholding constitutional rights. Despite this, some parties exploit the congestion of the unopposed motion roll, assuming that judges may be less thorough due to the overwhelming number of cases they must oversee. For example, on a typical day, a judge may face no fewer than one hundred unopposed applications on the court roll, not all of which are truly unopposed—such as the present case. In some Divisions, these matters are set down over two days per week in equal batches, without the luxury of a full reading day, as the growing workload strains the already limited budget for judicial appointments.

87. This situation underscores the need for careful judicial scrutiny and the importance of ensuring that only deserving, well-prepared cases, moved by competent legal practitioners, are brought before the court for adjudication. Without proper oversight, the legal process risks being undermined by poorly prepared applications and opportunistic litigants, further congesting the courts, and compromising the fair administration of justice.

88. In my view, diligent preparation by legal practitioners, coupled with thorough judicial supervision, is essential in cases such as these, especially when they are enrolled in the unopposed motion court or involve an unrepresented litigant. Proper preparation ensures that the legal process is not abused, and judicial oversight is crucial to maintaining fairness and upholding the integrity of the court system. This level of

scrutiny is especially important in unopposed matters or where one party lacks legal representation, as it helps to prevent miscarriages of justice and ensures that all parties receive a fair and just hearing.

Order:

1. The plaintiff's application for summary judgment lacks the necessary procedural compliance with the relevant provisions of the Practice Manual, Uniform Rules of Court, and National Credit Act.

2. The founding affidavit in the interlocutory summary judgment application and particulars of claim in the main action, lack the necessary averments to support the cause of action and relief sought.

3. The application for summary judgment is refused.

4. No order as to costs.

5. The plaintiff must cause a copy of this judgment and order to be served on the defendant prior to the enrolment of the main action proceedings, in the event they resume.

6. The Registrar must provide the Legal Practice Council (both provincial and national) with a copy of this judgment.

[redacted]

M MORGAN
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE, LIMPOPO DIVISION

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