



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

**Not reportable**

**Case no: 2502/2023**

In the matter between:

**SIFISO NDIYA MBOMBI**

First Applicant

**IGNITE SERVICES CC**

Second Applicant

and

**BMW FINANCIAL SERVICES SOUTH AFRICA  
(PTY) LTD**

Respondent

In re:

**BMW FINANCIAL SERVICES SOUTH AFRICA  
(PTY) LTD**

Plaintiff

and

**SIFISO NDIYA MBOMBI**

First Defendant

**IGNITE SERVICES CC**

Second Defendant

**Coram:** De Kock AJ

**Heard:** 20 March 2025

**Delivered:** 28 March 2025. This judgment was handed down in court and released to SAFLII.

**Summary:** The National Credit Act does not apply to a suretyship if the principal debt does not arise from a credit agreement which falls within the scope of the act. The legal nexus of lawful possession had been terminated and default judgment correctly granted for the repossession of the motor vehicle.

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## ORDER

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The first and second applicants' application is dismissed with costs including costs of counsel on a Scale A.

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## JUDGMENT

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**De Kock AJ**

**Introduction:**

[1] On 22 September 2021, the respondent and the second applicant entered into an instalment sale agreement (the instalment agreement), in terms of which the respondent sold a BMW X6 M50i motor vehicle (the motor vehicle) to the second applicant on credit and the second applicant was obliged to repay the total principal debt of R2 155 400.56 in seventy-one monthly instalments of R33 341.88 and one residue payment of R600 901.90.

[2] On 22 September 2021 the first applicant executed a suretyship in favour of the respondent, in terms of which the first applicant bound himself to the respondent as surety for and co-principal debtor together with the second applicant, for the punctual performance and payment by the second applicant of all debts and obligations it owes to the respondent.

[3] On 22 May 2023, the respondent issued summons wherein it stated that it cancelled the instalment agreement and sought judgment against the first and second applicants (the applicants) for *inter alia* the repossession of the motor vehicle and payment of the amount due after deduction of the proceeds of the sale of the motor vehicle, from the full amount owed by the second applicant under the

instalment agreement. On 23 May 2023, the sheriff served the combined summons on the applicants at their chosen *domicilium citandi et executandi* addresses.

[4] The applicants did not enter an appearance to defend the action, whereupon the respondent made an application for default judgment which was granted on 23 November 2023. The default judgment was granted for confirmation of cancellation of the instalment agreement, repossession of the motor vehicle and leave to apply for damages.

[5] The applicants brought the current application which consist of Part A and Part B. Part A was an urgent application, to stay the execution of a warrant to repossess the motor vehicle. In terms of the urgent application, the court granted stay of the execution of the warrant of delivery.

[6] Part B is an application to rescind the default judgment which was granted in favour of the respondent against the applicants on 23 November 2023. Part B of the application serves before me for adjudication. The application for rescission is brought in terms of rule 42(1)(b) and/or the common law.

[7] The applicants contend that default judgment was erroneously granted in that neither of the applicants received a notice in terms of s 129 of the National Credit Act 34 of 2005 (the Act) (s 129 notice), that five payments were made in furtherance of settling the arrears and that on the date the default judgment was granted, the account was not in arrears.

**The law:**

[8] To succeed with a rescission under rule 42(1)(a) an applicant must show that the judgment was erroneously sought or erroneously granted in the absence of any party affected thereby. An order will be erroneously granted if there existed, at the time of its issue, a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court, if aware of it,

not to grant judgment.<sup>1</sup>

[9] Once an applicant establishes that the judgment was erroneously granted it is not necessary to show a *bona fide* defence. In *Kgomo and another v Standard Bank of South Africa and Others*<sup>2</sup> it was held that the applicant for rescission in terms of rule 42(1)(a) is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).<sup>3</sup> Similarly the Constitutional Court in *Ferris and Another v Firststrand Bank*<sup>4</sup> held that good cause, including a *bona fide* defence is not required for rescission under rule 42(1)(a). It is also the position of the Supreme Court of Appeal in *Rossiter and Others v Nedbank* that it is not necessary for a party to show good cause under rule 42(1)(a).

[10] It is trite that for an applicant to succeed with a rescission application under the common law, he or she is required to prove that there is 'sufficient' or 'good cause' to warrant rescission.

[11] In terms of s 4(1)(a) of the National Credit Act, read with Government Notice 713 of 1 June 2006, published in Government Gazette no. 28893, the Act does not apply to a credit agreement in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time the agreement is made, equals or exceeds the threshold value (currently R1 million) determined by the Minister responsible for consumer credit matters, in terms of s 7(1) of the Act. In terms of s 4(1)(b) of the National Credit Act, the Act does not *inter alia*, apply to a credit agreement which is a large agreement as envisaged in s 9(4)(b) read with s 7(1)(b) of the National Credit Act (i.e. the 'principal debt') under the transaction equals or exceeds the amount of R250 000.00 as determined in Government Notice 713 of 1 June 2006.

<sup>1</sup> *Rossiter and Others v Nedbank Ltd* [2015] ZASCA 196 para 16.

<sup>2</sup> *Kgomo and Another v Standard Bank of South Africa and others* [2015] ZAGPPHC 1126; 2016 (2) SA 184 (GP).

<sup>3</sup> *Ibid* para 11.7.

<sup>4</sup> *Ferris and Another v Firststrand Bank Ltd* [2013] ZACC 46, 2014 (3) SA 39 (CC), 2014 (3) (BCLR) 321 (CC).

[12] Section 4(2)(c) of the Act determines that the act applies to a credit guarantee only to the extent that the act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. Furthermore, s 8(5) of the Act determines that an agreement, irrespective of its form but not including an agreement contemplated in subsec 2, constitutes a credit guarantee if in terms of that agreement a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the act applies.

[13] In *Firststrand Bank Ltd v Carl Beck Estates*<sup>5</sup> (*Carl Beck Estates*) it was held that even if the asset value or annual turnover of the principal debtor is below the threshold value of R1 million, the credit agreement giving rise to the principal debt is exempted from the application of the national credit act in terms of s 4(1)(b) if the principal debt arose from a large agreement.<sup>6</sup>

[14] In *Carl Beck Estates* it was further held that:

'There is no doubt that the suretyship obligations of the second respondent theoretically fall within the definition of a credit agreement which encompasses a credit guarantee in terms whereof "a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction", however s 8(5) requires the credit guarantee to apply to the obligations of another consumer in terms of "a credit transaction to which this act applies". I have already found that the NCA does not apply to the mortgage agreement between the applicant and the first respondent. Accordingly, the obligation of the first respondent to the applicant were not incurred in terms of a credit transaction to which the NCA applies. The second respondent therefore cannot claim that the NCA applies to him on the basis that his obligations arise in terms of a credit guarantee as set out in s 8(5) of the NCA.'<sup>7</sup>

[15] Once an agreement is cancelled it cannot be revived.<sup>8</sup> In *ABSA Bank Ltd v*

<sup>5</sup> *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd and Another* [2008] ZAGPHC 423; 2009 (3) SA 384 (T).

<sup>6</sup> *Ibid* para 13.

<sup>7</sup> *Ibid* para 18.

<sup>8</sup> *Edwards v Firststrand Bank Ltd t/a Wesbank* [2016] ZASCA 144; 2017 (1) SA 316 (SCA).

*Cooper N.O. and Others*<sup>9</sup> the court held as follows:

'On the papers it is clear that the applicant did cancel the agreements. It was entitled to do so. It had only to give notice of cancellation. That it did by serving the summons in the magistrate court cases. The subsequent withdrawal of the action could not undo the contents and effect of the notices of cancellation contained in the summons. In any event the process of notification was repeated when the high court action was served. It is important to bear in mind that whereas the cancellation of a contract is a unilateral act, of which notice has admittedly to be given, the withdrawal of a cancellation and the concomitant revival of a contract is not. It has to be consensual.'<sup>10</sup>

### **Averments contained in the papers:**

*The applicants' founding affidavit:*

[16] The following averments are *inter alia* made in the applicants' founding affidavit:

- (a) the second applicant defaulted with payments in terms of the agreement in that it failed to make payments to the respondent either timeously or at all;
- (b) in the event that the applicants breached the agreement, the respondent is entitled to cancellation of the agreement, return of the motor vehicle and to claim outstanding amounts in terms of the agreement;
- (c) the respondent purportedly delivered the s 129 notices to both the applicants at their chosen *domicilium citandi et executandi* addresses;
- (d) the matter falls under the scope of the National Credit Act;
- (e) before a creditor may issue out summons instituting action, it is peremptory that the creditor delivers to the debtor a s 129 notice in terms of the act;
- (f) the applicants did not receive s 129 notices;
- (g) it was incumbent upon the respondent to ensure that the s 129 notices were received and where a creditor does not know the debtor's actual location it is incumbent upon the creditor to employ the services of a tracing agent to locate the debtor for purposes of service;
- (h) the sheriff's return clearly states that the sheriff found the addressees absent. The respondent cannot contend that the notices were received, because at the time

<sup>9</sup> *ABSA Bank Ltd v Cooper N.O. and Others* 2001 (4) SA 876 (T).

<sup>10</sup> *Ibid* at 882C.

of the supposed service the first applicant moved from the address;

(i) the action was issued prematurely and judgment should not have been granted;

(j) judgment was obtained on 23 November 2023. At the time of issuing of the summons, 22 May 2023, the respondent alleged that the account was in arrears of at least R104 771.46, which cannot be true;

(k) when judgment was granted, at least insofar as the certificate of balance annexed to the application for default judgment is concerned, the total amount owing in arrears was R272 242.77, which cannot be true;

(l) a payment in the amount of R100 000.00 was made to the respondent on 18 May 2023, less than a week before the respondent issued out summons. The latter should have prompted the respondent to halt any or further legal processes it had envisaged to embark on as it was communicated with the respondent that the deponent would be making payment;

(m) a further payment of R100 000.00 was made by the applicants' attorneys to the respondent on 5 July 2023. The sum of R150 000.00 was paid on 27 October 2023;

(n) having regard to the proof of payments that were annexed to the bundle that served before court, the court should not have granted the orders sought by the respondent;

(o) a further payment of R50 000.00 was made on 20 December 2023 with the last and most recent payment being made on 19 January 2024 in the amount of R50 000.00;

(p) having regard to the stated payments and that it was readily available and served before court the order was erroneously sought and granted.

*The respondent's opposing affidavit:*

[17] The following averments are *inter alia* made in the respondent's opposing affidavit:

(a) From December 2022, the second applicant failed to make due and punctual monthly payments as obliged in terms of the instalment agreement and fell into arrears and the account was never again brought up to date;



- (b) The s 129 notices were served at the applicants' respective *domicilium* addresses;
- (c) On 22 May 2023 the respondent issued summons wherein, it cancelled the instalment agreement and sought judgment against the applicants for *inter alia* the repossession of the vehicle and payment of amounts due after deduction of the proceeds of the sale of the motor vehicle, from the full amount owed by the second applicant under the instalment agreement;
- (d) The National Credit Act might not be applicable to the matter given that the second applicant is a juristic person and entered into a large credit agreement in terms of the act;
- (e) At the time when the respondent issued summons on 22 May 2023 the account was in arrears in the total amount of R114 657.14;
- (f) Some of the documents provided to the applicants' attorneys were for another similar matter of the respondent, the certificate of balance referred to by the applicants which reflected the amount of R272 242.77 is for the other matter;
- (g) The relevant certificate of balance was attached to the particulars of claim and reflected the amount of R2 603 595.72 as the debt owed by the second applicant under the agreement;
- (h) Upon service of the combined summons on the second applicant on 23 May 2023 the instalment agreement was effectively cancelled by the respondent consequently the full outstanding amount under the instalment agreement became due and payable by the second applicant;
- (i) The respondent instituted action against the applicants for payment of the whole outstanding amount under the instalment agreement and not the accumulated arrears. Thus when the matter was brought before court the fact that the applicants had subsequently made substantial payments was irrelevant in consideration of whether default judgment should be granted. The main issue before court besides the issue of service on the applicants is whether the respondent had cancelled the instalment agreement lawfully. As reflected on the payment history after the payment of the R100 000.00 on 20 May 2023 the account remained in arrears in the amount of R114 657.14. The respondent accordingly cancelled the instalment agreement lawfully upon service of the summons on 23 May 2023. The payment



history is annexed to the opposing affidavit;

(j) It is admitted that the payment of R100 000.00 was made into the account on 5 July 2023. It is denied that a payment of R150 000.00 was made into the account.

(k) As reflected in the payment history when default judgment was granted on 23 November 2023 the account was still in arrears in the amount of R198 678.60;

(l) The payments made subsequent to the cancellation were irrelevant to the application for default judgment as they were too late to save the instalment agreement;

(m) The applicants have not alleged or shown that the respondent was not entitled to cancel or that the instalment agreement was not lawfully cancelled;

(n) In terms of the certificate of balance issued on 14 February 2024 the second applicant is owing the respondent the total amount of R1 953 759.60 under the instalment agreement and had not shown how and when the applicants intend to pay the amount.

*The applicants' replying affidavit:*

[18] The following averments are *inter alia* made in the applicants' replying affidavit:

(a) The first applicant is a natural person and falls within the ambit and scope of the protection of the Act;

(b) The s 129 notices were sent to both the applicants. The notices form part of the bundle of documents. The latter is the case that the respondent made and which the applicants are called to answer. The respondent cannot now at a whim suggest that it may or may not have been correct in dispatching the same;

(c) The respondent sought judgment for the amount of R272 242.77. Judgment in the said amount was granted, despite the fact that the first applicant had not been in arrears in the amount or at all. In effect, the respondent obtained judgment incorrectly because at the time that the judgment was granted, the account was not in arrears.

**Analysis:**

[19] In the replying affidavit the applicants contend that the respondent cannot

now rely on the assertion that the Act does not find application. I do not agree with the applicants' contention. The provisions of the Act either finds application or it does not.

[20] It is not in dispute that the credit agreement entered into between the parties was for an amount of R2 155 400.56, which qualifies as a large agreement as it is in excess of the higher of the thresholds established in terms of s 7(1)(b) of the Act, which is R250 000.00.

[21] It is contended in the replying affidavit that the Act finds application on the first applicant being a natural person. This approach is incorrect, as s 4(2)(c) of the Act provides expressly that the act applies to a credit guarantee only to the extent that this act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. It is accordingly evident that the Act does not apply to a suretyship if the principal debt does not arise from a credit agreement which falls within the scope of the act.

[22] My conclusion as aforesaid is confirmed by the provisions of s 8(5) of the Act, to the effect that the credit guarantee constitutes a credit agreement for purposes of the Act, only if in terms of the credit guarantee a person undertakes or promises to satisfy an obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies. Since the Act does not apply to the credit transaction which gave rise to the principal debt, the suretyship in the present matter does not constitute a credit agreement for purposes of the act.

[23] The respondent was accordingly not obliged to give notice to the applicants as required by s 129 of the Act in respect of credit agreements which are not subject to the Act.

[24] It is clear from the particulars of claim that the respondent exercised its election to cancel the agreement by stating:

'8.1 The plaintiff herewith cancels the instalment sale agreement with immediate effect and consequently is entitled to the return of the motor vehicle to it.'

[25] The summons was served on 23 May 2023 on the applicants' at their respective *domicilium citandi et executandi* addresses. I am satisfied that the summons was properly served.

[26] The applicants deny that on 22 May 2023 when the summons was issued and served that the account was in arrears in the amount of at least R104 771.46. In support of this contention, it is averred that the amount of R100 000.00 was paid on 18 May 2023. It however appears from the payment history annexed to the respondent's papers that after the payment of R100 000.00 on 18 May 2023 that the account remained in arrears in the amount of R114 65.14.

[27] At date of service of the summons the applicants defaulted and were in arrears and the instalment sale agreement was thus lawfully cancelled. The respondent cancelled the agreement prior to the further payments made after 22 May 2023.

[28] The applicants' submission that because they paid the arrears at date of default judgement, the respondent was not entitled to the relief as granted by the default judgment is misplaced. The legal nexus of lawful possession had been terminated and default judgment correctly granted for the repossession of the motor vehicle.

[29] The four payments made subsequent to the cancellation of the instalment agreement, of which the respondent admits three payments, does not warrant the conclusion that default judgement was erroneously sought or granted. The subsequent payments do not revive the agreement. The court in the default judgement granted leave to apply for damages. Thus, the aspect of damages has not been finally adjudicated.

[30] All being said, I am not persuaded that the default judgment was erroneously sought or granted and/or that a proper case for rescission in terms of the common law has been made out.

**Orders:**

[31] In the result the following order is granted:

The first and second applicants' application is dismissed with costs including costs of counsel on a Scale A.



De Kock AJ

**Appearances**Appearances for the applicants:

Adv. Nyezi

Instructed by:

Blair Attorneys.

Appearances for the respondent:

Adv. Verhoef

Instructed by:

MM Hatting Inc.