



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: 21308/2022

DELETE WHICHEVER IS NOT APPLICABLE

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

30 May 2025

In the matter between:

FFS FINANCE t/a FORD CREDIT

APPLICANT/ PLAINTIFF

And

CP VAN DER MERWE

RESPONDENT/DEFENDANT

Date of Hearing : 30 April 2025

Date of Judgment: 30 May 2025

JUDGMENT

THULARE, J

[1] This matter was heard on the unopposed roll as an application for judgment by default. It concerns an application for the repossession of a motor vehicle in terms of a credit agreement governed by the National Credit Act, 2005 (Act No. 34 of 2005) ("the NCA"). The applicant, a credit provider, sought enforcement of its rights arising from the respondent's alleged default on monthly instalments. This matter required that the court carefully weigh the applicant's contractual and statutory entitlements against the broader objectives of the NCA, particularly the promotion of fairness and the protection of consumers from unfair practices. This court, in the circumstances of this case, on the papers, was not persuaded that it would be just and equitable to grant the relief sought by the applicant. It seemed to me that the respondent may not have been afforded a fair opportunity to regularise the account.

[2] A section 129 notice in terms of the National Credit Act was delivered, followed in due course by personal service of the summons, on the defendant on 16 January 2023. A Notice of Intention to Defend was thereafter filed on 06 February 2024. The defendant was barred from filing a plea. According to the Declaration filed on 12 February 2024, the plaintiff, a registered commercial bank, entered into a written instalment sale agreement with the defendant for the sale and purchase of a 2015 Ford Ranger 4 x 4 motor vehicle. The plaintiff alleged that the defendant failed to make payments as agreed, hence the plaintiff cancelled, alternatively, cancels the agreement and alleged it is entitled to the immediate return of the goods. It was alleged that the arrears as of 09 December 2022, amounted to R112 888,19 which also is the outstanding balance. The plaintiff alleged that it had complied with the provisions of the National Credit Act and hence sought judgment confirming the cancellation of the agreement and return of the 2015 Ford Ranger 4 x 4 motor vehicle, as well as costs on the attorney and client scale.

[3] The defendant was represented, and the plaintiff's Declaration was served on his attorneys electronically on 13 February 2024. On 15 March 2024, the plaintiff's attorneys, not having received a plea, despatched a Notice of Bar, electronically to the Defendant's attorneys. The defendant's attorneys per return email, acknowledged receipt of the Notice of Bar. The plaintiff filed its Notice in terms of **Rule 41A, dated 09 December 2022**. In this Notice it is recorded that the defendant was invited to a whole range of alternative dispute resolution options when it delivered its section 129

notice in terms of the NCA to the defendant, prior to the institution of legal proceedings against the defendant. The notice records further that there was no response forthcoming from the defendant. This notice was directed to the defendant himself, and the defendant was notified as follows: *“The plaintiff has cancelled the agreement with the defendant as a result of the defendant’s failure to make payments as alleged in the summons and delivery of the asset described in the instalment sale agreement cannot be an aspect for referral to mediation and constitutes urgent relief...”*

[4] In bringing this application, the plaintiff relied on the affidavits deposed to by Kyle Vilakazi (Vilakazi) on 22 July 2024. He averred that he is a manager employed by the plaintiff in Auckland Park who has personal knowledge of this matter. He stated the following about the arrears: *“The defendant contacted the plaintiff to make the necessary payment arrangement to bring the arrears up to date. The defendant was accordingly informed that his last payment was in August 2022 and that he is required to pay 50% of the arrear amount immediately and the remaining arrear amount over a period of three months. The defendant advised that he is unable to meet the plaintiff’s requirements and therefore an arrangement was not concluded.”*

[5] The NCA regulates credit agreements. The various purposes of the NCA are set out, in section 3, in some detail. Section 3(e) aimed to address and correct the imbalances that existed in the negotiating power between consumers and credit providers. The NCA aimed to promote social and economic welfare of South Africans by fostering a fair, transparent, responsible, and accessible credit market. It encouraged responsible borrowing and lending, protected consumers from unfair practices, provided for improved credit information and regulation, and addressed over-indebtedness. The Act also promoted informed consumer choices through education and disclosure and established mechanisms for dispute resolution in credit matters. In section 3(e), the NCA expressed its intention to protect consumers from unfair conduct.

[6] Section 129 (1) to (3) of the NCA read:

“ Required procedures before debt enforcement

129 (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; and

[NB: Para. (a) has been substituted by s. 20 (a) of the National Credit Amendment Act 7 of 2019, a provision which will be put into operation by proclamation. See PENDLEX.]

(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.

(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied."

[7] In the absence of an indication of abuse to alert the court to a more vigilant enquiry, an applicant would ordinarily be entitled to judgment in the ordinary course where a creditor sought to enforce an agreement [*Nedbank v Fraser* 2011 (4) SA 363 GSJ at para 27]. One of the philosophical shifts in the jurisprudence of credit agreements, ushered in by the NCA, is to research the existence of reasonable alternatives to the satisfaction of the debt without resort to litigation. In *Nedbank* at para 43 the court said:

“The existence of these reasonable alternatives will be determined with regard being had to attempts by the debtor to pay off the debt and the debtor’s resources”

At para 44, the court opined that a determination of these considerations was made much easier by the ability of the debtor to disclose resources, employment status and any other factor which might militate against an order being granted in favour of a creditor. In *Ranamane v SB Guarantee Company (Rf) (Pty) Ltd* (5285321) 2023 ZAGPJHC 592 (29 May 2023) the creditor had required information from the debtor which included proof of income; reasons for not maintaining monthly payments and proposal; breakdown of monthly expenses; list of all debt, monthly repayment amount and outstanding balance; 3 month bank statements, municipality utility bill and if in arrears proof of payment arrangements; and in the alternative the debtor’s attention was brought to the creditor’s programmes to assist debtors in distress. This was a movement of a creditor in the right direction in the spirit of the NCA, for it to make a fair assessment of the proposal.

[8] In the matter before me, the applicant’s attitude was preference to only one payment arrangement option, which was its own proposal. On the applicant’s own version, the respondent “*contacted the plaintiff to make the necessary payment arrangements to bring the arrears to date*”. This is not the conduct of a respondent who has a hostile mindset towards his obligations in terms of the contract. The conduct suggests an appreciation of the problem and a desire to resolve it. The “*necessary payment arrangements to bring the arrears to date*” proposed to the applicant were not disclosed to the court in this matter. The applicant elected to make the proposal a mystery in its approach to the court for relief. Whilst the applicant followed the attitude in *Ranamane* and sought a lump-sum payment of 50% of the arrears, it does not follow that such option is always reasonable and fair to a debtor who is known to have suffered financial distress in the recent past. Such demand appear to have the tendency to negate a genuine attempt made to reach a resolution of the indebtedness without resorting to litigation, as envisaged by the NCA. The submission of a debtor’s comprehensive financial documentation acknowledged that some debtors may not be able to meet strict lump-sum requirements but may require payment arrangements plans tailored to provide a solution to meet their individualised capacity. In my view,

this promoted equity, and not the punitive approach of ‘my way as a creditor or we are having a meeting with a Judge’.

[9] I am circumspect in confirming a cancellation of an agreement where the credit provider did not attempt to negotiate with the debtor in the spirit of our jurisprudence. The statement by Vilakazi that “*the defendant advised that he is unable to meet the plaintiff’s requirements and therefore an arrangement was not concluded*”, in my view, reflected the power imbalance of the parties. There was no equality of arms. The approach of Vilakazi, to wit, that the only way towards a payment arrangement was for the debtor to meet the plaintiff’s requirements of 50% immediate payment and the remainder of the arrears within three months, suggests coercion and not collaboration, in the discussions on the payment arrangements to bring the arrears up to date. The failure to indicate the proposal by the debtor, his financial health, and why the proposal did not make business and/or economic sense amounts to simply a pursuit of a dangerous policy to the limits of threatening debtor fairness and protection and is an unfair practice in debt collection. It excludes meaningful participation by the debtor in the payment arrangement. Vilakazi’s approach, when assessed for fairness, transparency, accessibility and debtor protection, fell short of what was required.

[10] A creditor should engage meaningfully with a debtor. A section 129(1)(a) notice of the NCA is not a creditor’s ritual. It should never be equated to an empty box for a creditor to tick. It confers on a creditor certain responsibilities which are prerequisites central to the decision of the creditor to institute litigation proceedings. The response of a debtor to a section 129 is not simply a noisy irritation to be endured by a creditor, which a creditor can simply ‘blue tick’. Vilakazi was wrong to simply read and ignore the debtor’s proposal. The applicant was wrong to expect the courts to accept their ignorance of the proposal, without the courts even knowing what that proposal was. The debtor, in response to the section 129 through a proposal, expected or requested a consideration thereof. A debtor’s proposal is an essential part of the prerequisite to institute legal proceedings.

[11] A consideration of the proposal would mean that the creditor acknowledged and saw the debtor as a party that could contribute to the resolution of the challenge faced. A genuine consideration of the proposal means the creditor appraised the relationship

and the esteem of the debtor, and did not see the debtor as a commodity with fungi, to be dispensed with at will. The debtor and their response may no longer be important for the creditor who may have developed an impatient and restless behaviour, but that did not mean they were not important for the courts. Debtors must still be seen and heard by the courts, despite the views of creditors on them. This case demonstrated the need for a creditor not only to provide a certificate of indebtedness, but also a compliance affidavit, especially dealing with the path of travel after the section 129(1)(a) notice was served, where it was reacted to by a debtor who accepts responsibility and needs to correct the failures, even in an application for a default judgment. In this matter, except for an unexplained condescending attitude towards the debtor's proposal, there is no explanation as to why the creditor did not deem the debtor's proposal worthy enough for a payment plan arrangement. For these reasons I make the order.

(a) The application is dismissed on the papers.

(b) No cost order is made.

DM THULARE
JUDGE OF THE HIGH COURT

Counsel for the Applicants: Adv Lauren Bosman

Attorneys for the Applicants: Sandenberg Nel Haggard
Bellville

Attorneys for the Respondent: In Person