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

Case Number: 19983/2019

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:
DATE: 22/01/2026
SIGNATURE

In the matter between:

FIRSTRAND AUTO RECEIVABLES (RF) LIMITED

Plaintiff

And

THEU CONSOLATION

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be the 22nd January 2026.

JUDGMENT

BOTSI-THULARE AJ

Introduction

- [1] The plaintiff instituted action against the defendant in terms of which it sought, *inter alia*, confirmation of the cancellation of the credit agreement between itself and defendant, return of a motor vehicle, the postponement of the damages claim *sine die* and further related relief.
- [2] The action is opposed by the defendant. To this end, the defendant raised a single defence in terms of which the defendant alleges that the plaintiff failed to comply with the provisions of section 129 of the National Credit Act 34 of 2005 (the National Credit Act). Conversely, the plaintiff argues that the defendant's single defence was adjudicated and determined by my brother, Matebese AJ on 12 June 2020 in a rescission application instituted by the defendant under the above case number (*Rescission Judgment*).¹
- [3] Before dealing with the issues that arise from the above, it is apposite to first provide a summary of the facts that give rise to this matter.

Factual background

- [4] The common facts are that FirstRand Bank Limited t/a WesBank (WesBank) and defendant entered into an instalment sale agreement in 2018, in terms of which goods were exchanged, *in casu* a 2014 JEEP WRANGLER UNLTD SAHARA 3.6L V6 A/T (the Vehicle). The terms of the agreement were and still are governed by the provisions of the National Credit Act.
- [5] The salient terms of the credit agreement are the following:
- a. WesBank sold and delivered to the defendant the Vehicle.
 - b. Notwithstanding delivery of the vehicle to the defendant, ownership of the Vehicle remained vested with WesBank.
 - c. The total cost of the credit agreement, including, *inter alia*, the principal debt, total accessories and additional charges and finance charges, is the amount of R657 094.95.
 - d. The total cost of the credit agreement was payable in 59 equal monthly amounts of R8 224.55 each, the first of which was payable on 30 September 2014 and thereafter on the same day of each succeeding

¹ *Theu v First Rand Auto Receivables (RF) Limited and Another* [2020] ZAGPPHC 319 (*Rescission Judgment*).

month, with the final instalment in the amount of R171,846.50, payable on 31 August 2019.

e. The defendant chose 4[...] R[...] Court, L[...] Street, Eco Park, Highveld 0[...], as her *domicilium citandi et executandi*.

[6] On 4 August 2015, WesBank ceded all its rights, title and interest in and to the credit agreement, including ownership of the vehicle, to the plaintiff. Notably, the plaintiff at all material times remained and still is the owner of the vehicle. To this end, WesBank and the plaintiff complied with their obligations towards each other in terms of the cession agreement and with their obligations towards the defendant under the credit agreement.

[7] It is common cause that the defendant breached the terms of the credit agreement by failing to make full and punctual payments of the monthly instalments. Consequent upon the defendant's breach, the plaintiff caused a notice in terms of section 129 of the National Credit Act to be sent to the defendant's chosen *domicilium* address, by registered mail.

[8] The defendant failed to respond to the notice and further failed to remedy her breach under the credit agreement. Because of the defendant's failure to enter an appearance to defend, the plaintiff proceeded and obtained default judgment (granted by the registrar) against the defendant on 8 October 2019.

[9] After the granting of default judgment against the defendant, the defendant then instituted a rescission application in terms of which she sought that the default judgment be set aside on the basis that it was erroneously sought and granted. Further, that the respondent did not comply with the notice requirements of sections 129 and 130 of the National Credit Act and that such non-compliance resulted in an erroneous judgment.²

[10] On 12 June 2020, Matebese AJ handed down the Rescission Judgment in the following terms:³

a. The default judgment granted by the registrar on 8 October 2019 is a nullity.

b. The warrant issued pursuant to the said default judgment is hereby set aside.

² See *Rescission Judgment* at para 1.2.

³ *Id* at para 53.

c. The respondent [plaintiff] shall pay the costs of the application.

[11] In a nutshell, the Rescission Judgment went in favour of the defendant. As a result, the defendant delivered a plea to the plaintiff's particulars of claim. In the plea, the defendant pleaded that the plaintiff did not comply with section 129 of the National Credit Act, in the following manner:

“AD PARAGRAPH 9.3 THEREOF

The contents of this paragraph are denied. The defendant was not notified by the Post Office. The Tracking Results referred to as annexures "I" "J" and "K" respectively were not brought to the attention of the Defendant by the South African Post Office.

The Post Office has provided the Defendant with a confirmation that it does not deliver mail to the Estate where the Defendant's physical address is located at and that the said Notice were returned to the sender. Attached herein Annexure “N1”.”

[12] The plaintiff submits that, save for the defendant's allegation pertaining to the plaintiff's non-compliance with section 129 of the National Credit Act, the defendant's plea does not disclose a *bona fide* defence considering the fact that the section 129 non-compliance was already adjudicated and determined by Matebese AJ in the Rescission Judgment. Accordingly, no material facts are put forward in the plea to support the denial of the plaintiff's claim and accordingly, in essence, it constitutes a bare denial to the plaintiff's claim.

[13] In contrast, the defendant submits that this court can't simply rely on the fact that Matebese AJ in the Rescission Judgment ruled that provisions of section 129 were complied with by the plaintiff and this vindicates this court to overlook or bypass the legal obligation placed upon it, in terms of Section 130 (3)(a), to first satisfy itself on whether or not there is compliance or not.

Issues

[14] Against this background, this court is required to resolve the following issues:

- a. Whether the defendant's single defence regarding non-compliance by the plaintiff with section 129 of the National Credit Act has already been finally determined by Matebese AJ in the Rescission Judgment.
- b. If not, whether the plaintiff did not comply with section 129 of the National Credit Act.
- c. Lastly, whether the plaintiff's claim should succeed.

[15] I deal with each of the issues below.

Whether the defendant's single defence has already been finally determined by Matebese AJ

[16] As a point of departure, it is pertinent to set out the findings made by Matebese AJ in the Rescission Judgment. In respect of the defendant's (referred to as the applicant in the rescission application) allegation that the plaintiff (referred to as the respondent in the rescission application) did not comply with the notice requirements of section 129 and 130 of the National Credit Act and that such non-compliance resulted in an erroneous judgment, Matebese AJ observed:

“During the hearing of the matter the applicant conceded that she chose the physical address as the address at which she will accept service of all notices. She further conceded that the section 129 notice was sent to her physical address as reflected in the agreement and that the track and trace report shows that the notice was received by the Highveld post office which is her closest post office and the track and trace also records that the first notification was sent to her.

Counsel for the applicant however, sought to argue that the physical address was not the correct address to be used and that the bank ought to have used her postal address as it ought to have foreseen that she would not receive the notice regard being had to the fact that she stays in an estate.

I find no merit to this argument. First, there is no evidence that the bank knew at the time of concluding the agreement that the applicant stays in an estate and that she is unable to receive her post through her physical address. Second, the applicant made a choice of where she would like to be served with notices under the agreement. She cannot now seek to avoid the consequences of her choice by belatedly arguing that the address she chose is incorrect. In any event the address is not incorrect simply by reason of the fact that the applicant now suddenly prefers the postal address.

... .

On the strength of the track and trace results and the absence of an address other than that of the applicant to which notification could have been given, the applicant has failed to make out a case that the registered letter containing the s 129 notice was not delivered to the her chosen address. The applicant has thus failed to show that the notice was not delivered in compliance with section 129(5).

In the circumstances of this case I find that there was proper delivery of the section 129 notice to the applicant.”⁴

[17] The plaintiff argues that it is abundantly clear from the above paragraphs from the Rescission Judgment that the plaintiff complied with section 129 of the National Credit Act. In this regard, the plaintiff submits that the following is clear from the Rescission Judgment:

- a. The defendant had made a choice of where she would like to be served with notices under the credit agreement.
- b. The defendant conceded her chosen domicile address.
- c. The defendant conceded that the section 129 notice was sent to her chosen *domicilium* address as reflected in the credit agreement and that the track and trace report showed that the notice was received by the Highveld post office which is her closest post office and that the track and trace also records that the first notification was sent to her.
- d. There was no evidence to show that the plaintiff knew at the time of concluding the credit agreement that the defendant stayed in an estate and that she was unable to receive her post through her physical address.
- e. The defendant had failed to make out a case that the registered letter containing the section 129 notice was not delivered to her chosen address.

[18] The plaintiff submits that the Rescission Judgment is binding on this court because it has not been set aside. Accordingly, the defendant is bound by the findings held therein and cannot seek to appeal the Rescission Judgment through this court without following the procedure set out in Uniform Rule 49.

[19] Conversely, the defendant submits that this argument by the plaintiff is legally flawed because if it were to be believed, it would mean that this court would automatically defer its obligation in terms of section 130(3)(a) “to satisfy itself” and act contrary to the spirit and purport of the National Credit Act.

[20] The defendant argues that it should be noted that the matter is not in the rescission court anymore but at a different hearing, where the termination of the sale agreement is sought, this request alone, warrants this court to strictly

⁴ *Id* at paras 20-22 and 24-25.

adhere and consider the legal obligation upon it in terms of section 130(3)(a) provisions.

[21] To this end, the defendant submits that this court cannot just rubber stamp previous decisions on the matter (in this case the Rescission Judgment) instead this court has a legal obligation to look at the evidence before it, satisfy itself on whether or not the provisions of section 130(3)(a) of the National Credit Act have been complied with.

[22] In my view, the argument regarding the relevance of the Rescission Judgment to this action proceeding turns to the principle of *res judicata*. In this regard, it is worth mentioning that the court in *Smith v Porritt* stated the following regarding the principle of *res judicata* as applied in the South African law context:

“Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the exceptio *rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res and eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become common place to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v Absa Bank* (supra) at 670E-F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, ‘unless carefully circumscribed, [the defence of

res judicata] is capable of producing great hardship and even positive injustice to individuals’.”⁵

- [23] In this matter, the first question is to determine whether, as a matter of fact, the same issue of fact or law which was determined by the Rescission Judgment is before this court for determination. The first component of this enquiry requires a careful examination of what issues of fact or law were decided by the Rescission Court. This is so because if the same issue (*eadem quaestio*) was not determined by the Rescission Judgment, an essential requirement for a defence of *res judicata* is not met.
- [24] In other words, it does not, however, necessarily follow that once the inquiry establishes that the same issue was determined, the plaintiff’s defence must be upheld. That is so because this court, when considering the argument raised by the plaintiff is in principle concerned with a relaxation of the requirements of *res judicata*. This court must therefore, with reference to the facts of this case and considerations of fairness and equity, decide whether in this case, the plaintiff’s argument of *res judicata* should be upheld.
- [25] It is common cause that the Rescission Judgment decided on the issue regarding the section 129 non-compliance. Having said that, it cannot be concluded that this current dispute is *res judicata* because of the existence of a Rescission Judgment which made a determination on one issue which, in my view, was not conclusive of the dispute between the plaintiff and defendant.
- [26] The dispute before this court is whether the cancellation of the agreement between plaintiff and defendant should be confirmed. The Rescission Judgment did not decide on this. The Rescission judgment was concerned with whether the registrar had the powers in terms of law to grant a default judgment against the defendant. Indeed, it happened that in the process of deciding on the issue that was before it, the rescission court touched on the section 129 non-compliance issue. Even if that is the case, it is clear from the Rescission Judgment that the rescission court’s conclusion on the section 129 non-compliance had no bearing on the outcome of the rescission application.
- [27] It is therefore my considered view that the interest of justice dictates that the common law rule regarding *res judicata* be relaxed in this case. To this end, it is

⁵ [2007] SCA 19 (RSA) at para10.

worth noting that it was recently held by the Constitutional Court in *Mothulwe v Labour Court, Johannesburg and Others* that the common law rule of *res judicata* can be relaxed in the interest of justice.⁶

[28] In my view, the facts in this case are wholly exceptional to justify relaxation of the common law *res judicata* doctrine. Failure by this court to consider this matter would result in a failure to give effect to the defendant's constitutional rights to access to court; and will result in a grave injustice.

[29] Against this background, I therefore proceed to deal with the issue whether the plaintiff did not comply with notice requirements in section 129 of the National Credit Act

Whether the plaintiff did not comply with section 129 of the National Credit Act

[30] At the commencement of trial, it was agreed between the parties that a point *in limine*, pertaining to the allegation that the plaintiff had not complied with section 129 of the National Credit Act would be argued first before proceeding with the merits of the action.

[31] On the first day of trial, being 6 October 2025, the point *in limine* was argued at length and counsel for the defendant relied on annexure N1 to the plea in support of the defendant's allegation that the plaintiff had failed to comply with the provisions of section 129 of the National Credit Act.

[32] Annexure N1 referred to in the defendant's plea, a memo from the Post Office, dated 22 June 2020, addressed to "to whom it may concern", from Takalani Lazarus (Manager) (First Memo). It records, *inter alia*, the following:

"I would like to confirm that the Post office does not deliver mail at Eco Park Estate as per the instruction from the Estate management.

Therefore, when we received the slips for delivery at 1[...] L[...] Street, Highveld X51 on the following dates; 29 May 2019 (RC: 32a 583 878 ZA and 4 July 2019 (PE. 895 941 255 ZA) from Hatfield Post Office, we were unable to notify the recipient and accordingly we returned the letter to the sender after 30 days."

[33] However, on the second day of trial (7 October 2025) the defendant uploaded a document under a section titled "Section 129 Notice letter", a memo dated 9 June 2020, in which it is addressed to "Bank" from Takalani Lazarus (Manager) (Second Memo) and records the following:

⁶ [2025] ZACC 10 (8 May 2025) at para 34.

“I would like to confirm that we Post office do not do delivery of mail at Eco Park Estate as per instruction from the Estate management.

We received the slips that was supposed to be delivered to 4[...] R[...] Court, L[...] street on the 04th March 2019 from Highveld Post Office but due to the reason mentioned above we could not do delivery of the slip RC 355279177ZA and after a month the parcel or letter must be sent back to the sender.”

[34] Counsel for the defendant submitted to the court that the purpose of the Second Memo was the following:

- a. It was uploaded to caselines essentially as a replacement of the First Memo, because First Memo was erroneously annexed to the plea, when in fact the Second Memo ought to have been annexed to the plea.
- b. It demonstrates that the plaintiff's section 129 notice was never received by the defendant by virtue of the fact that the Post Office does not deliver mail to the defendant's chosen *domicilium*, and
- c. It supports defendant's submission that provisions of section 130(3)(a) have not been complied with and as a result this court should dismiss the matter and call upon the plaintiff to serve the section 129 notice again in terms of section 130(4)(b) in line with the provisions of the National Credit Act and Constitutional Court authorities.

[35] In respect of the Second Memo, the plaintiff submits that the purpose of pleadings is to clarify the issues between the parties. The allegations in the plea must be of sufficient precision to enable the plaintiff to know what the case is he has to meet. In this regard, the plaintiff argues that the defendant cannot, therefore, rely upon a defence which is not pleaded, or which he is not allowed to incorporate into the plea by an amendment. In other words, a pleader cannot be allowed to direct the attention of the other party to one issue and then, at trial attempt to canvas another.

[36] The plaintiff submits that it is impermissible for the defendant to seek to rely on the Second Memo which did not form part of the pleadings. This constitutes new evidence and the proper discovery procedure ought to have been followed.

[37] I agree with the plaintiff in this regard. The defendant cannot rely on the Second Memo as it did not form part of the pleadings. In this regard, rule 28(1) of the Uniform Rules of Court mandates that parties intending to amend their documents must inform the other party of their intention and provide specific

details of the proposed amendments. This rule serves as a mechanism for procedural clarity, ensuring that all parties are aware of the changes proposed to the document. This allows for due consideration and response, without disrupting the ongoing litigation process.

[38] In other words, the defendant was supposed to have followed the procedure provided in terms of rule 28 which requires that any party intending to amend their documents must, by notice, inform the other party of their intention. Failure to do so by the defendant renders the Second Memo not admissible as evidence in these proceedings. Accordingly, this court will decide the merits of the section 129 notice based on the evidence in the First Memo.

[39] On the merits, the defendant submits that the provisions of section 130(3)(a) have not been complied with. As a result, this court should dismiss the matter and call upon the plaintiff to serve the section 129 notice again in terms of section 130(4)(b) in line with the provisions of the National Credit Act and Constitutional Court authorities.

[40] On the other hand, the plaintiff's argument in respect of its compliance with the provisions of section 129 of the National Credit Act, can be summarised as follows:

- a. The plaintiff argues that, as is common cause, in terms of the credit agreement, the defendant elected 4[...] R[...] Court, L[...] Street, Eco Park, Highveld as her chosen *domicilium* address, and for purposes of further discussions 1[...] L[...] Street does not appear;
- b. The plaintiff caused a section 129 notice to be sent to the defendant's chosen *domicilium* address by registered post;
- c. In terms of the proof of postage, being the registered letter slip, the notice was sent by registered post to the defendant's chosen *domicilium* address; and
- d. Further, in terms of the parcel tracking results, a first notification was sent to the defendant on 01 March 2019, at her chosen *domicilium* address, notifying her that a registered item awaits collection.

[41] Based on the above, the plaintiff submits that the defendant's challenge to the plaintiff's compliance with section 129 of the National Credit Act stands to be dismissed and judgment granted in favour of the plaintiff as sought.

- [42] The provisions of section 129 of the National Credit Act serves as the point of departure in determining compliance with section 129 notice procedure. In this regard, Section 129(1)(a) permits a credit provider to draw a consumer's default to their attention 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.
- [43] Section 129(1)(b)(i) precludes the credit provider from commencing any legal proceedings to enforce a credit agreement before first providing notice to the consumer, as contemplated in section 129(1)(a).
- [44] In this matter, the defendant does not deny that the section 129 notice was sent to her chosen *domicilium citandi et executandi* address, but contends that she did not receive the notice to collect the registered item from the post office because the post office does not deliver mail at her chosen *domicilium citandi et executandi* address. In my view the defendant's argument is flawed.
- [45] It is common cause that the defendant made a choice of where she would like to be served with notices under the agreement. She cannot now seek to avoid the consequences of her choice by belatedly arguing that the post office does not deliver mail at her chosen *domicilium citandi et executandi* address.
- [46] The law does not require that the section 129 notice come to the consumer's knowledge. In other words, it has now become settled law that a credit provider is not required to provide proof that the statutory notice in fact came to the knowledge of the consumer. Such a stance would perforce impose an undue burden on a credit provider. Proof of delivery of the statutory notice is satisfied by a written confirmation by the postal service of delivery to the relevant post office.
- [47] Once the credit provider shows that the notice was correctly sent to the consumer's chosen *domicilium* address, the risk that the consumer does not become aware of the notice thereafter lies with the consumer. The plaintiff has provided proof that the notice was correctly sent to the defendant's chosen *domicilium* address. In this regard, the plaintiff provided this court with a parcel tracking results which indicated that a first notification was sent to the

defendant on 01 March 2019, at her chosen *domicilium* address, notifying her that a registered item awaits collection.

[48] On this basis, I accordingly disagree with the defendant's proposition that there was non-compliance with the obligation imposed by section 129(1) of the National Credit Act.

Whether the plaintiff's claim should succeed

[49] The remaining issue which must be decided is whether the cancellation of the credit agreement and return of the Vehicle be confirmed as sought by the plaintiff.

[50] During argument, the defendant through her counsel belatedly attempted the allegation that the defendant's account is not in arrears. This was denied by the plaintiff. To this end, the plaintiff uploaded a certificate of balance to CaseLines on 6 October 2025. The defendant took exception to the certificate of balance being uploaded. The plaintiff submits that the purpose was to give the court an up-to-date glimpse of the account.

[51] I do not have any issue with the plaintiff uploading the certificate of balance. The certificate of balance is indeed helpful to this court because it serves, as correctly submitted by the plaintiff, as an up-to-date glimpse of the account.⁷ The plaintiff is therefore entitled to rely on the certificate of balance to apprise this court of the arrears and balance outstanding under the credit agreement.

[52] According to the certificate of balance, as at 1 October 2025, the defendant's vehicle account was in arrears in the sum of R273 249.85. The balance outstanding being R273 249.85. The veracity of this information was not in any way disputed by the defendant. The defendant did not produce any evidence to counter the veracity of the certificate of balance.

[53] Accordingly, it is my considered view that the defendant is in breach of the credit agreement between herself and plaintiff. She has failed to make payment instalments as agreed and the account is currently in arrears. It is common cause that the plaintiff has also failed to remedy the breach since 2019, being the date on which the plaintiff issued summons until 1 October 2025.

⁷ See also *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South Africa Ltd)* 2010 (6) SA 439 (SCA) at para 47.

[54] It follows therefore that the plaintiff is entitled to cancel the credit agreement between itself and defendant as well as the return of the Vehicle.

Conclusion

[55] The plaintiff has demonstrated it has complied with the notice requirements imposed by section 129(1) of the National Credit Act. Further, the plaintiff has demonstrated that the defendant is in breach of the agreement between itself and defendant. Accordingly, the plaintiff has made out a proper case for the relief sought.

Costs

[56] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. The plaintiff has been successful in this matter. As a successful party, I am of the view that the costs should follow the results.

Order

[57] In the result, I make the following order:

1. It is ordered that the instalment sale agreement entered into, on or about 22 August 2014, between the Plaintiff and Defendant is hereby cancelled.
2. The defendant is ordered to return to the Plaintiff a 2014 JEEP WRANGLER UNLTD SAHARA 3.6L V6 A/T motor vehicle with chassis number 1[...] and engine number E[...] to the Plaintiff within 14 days of the date of this Order, failing which the Sheriff is authorised to attach the vehicle wherever he may find same and hand the vehicle to the Plaintiff.
3. The judgment for the amount of damages that the Plaintiff may have suffered, together with interest thereon, be postponed *sine die*, pending the return of the vehicle to the Plaintiff and the subsequent valuation and sale thereof and the calculation of the amount to which the Plaintiff is entitled;
4. Interest on the amount referred to in paragraph 3 above means interest at a rate of 3.229% per annum below prime bank lending rate, from date of sale of the vehicle to date of payment.
5. The Defendant is ordered to pay the costs of this action proceedings, including the costs of counsel.

**M.D BOTSI-THULARE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearances:

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Instructed by:

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Date of Hearing:

6, 7 & 27 October 2025

Date of Judgment:

22 January 2026

