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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 006920/2022

1. REPORTABLE: NO

2. OF INTEREST TO OTHER JUDGES: NO

3. REVISED: NO

DATE 15 June 2026

SIGNATURE

In the matter between:

**BMW FINANCIAL SERVICES (SOUTH AFRICA) (PTY) LTD
t/a ALPHERA FINANCIAL SERVICES**

Plaintiff

and

MALCOM BULELANI MLAZA

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 e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 15 June 2026

JUDGEMENT

VAN DER WESTHUIZEN AJ,

Introduction

1. This is an opposed application for summary judgment. The Plaintiff, a registered credit provider, financed the Defendant's purchase of a luxury Land Rover motor vehicle under a written instalment sale agreement ("the Agreement"). The Plaintiff contends that the Defendant fell into arrears, that it lawfully cancelled the Agreement, and that it is entitled to the return of the vehicle. It seeks summary judgment confirming the cancellation and directing the return of the vehicle, together with costs on the scale provided for in the Agreement.
2. The Defendant resists summary judgment on three principal grounds: first, a special plea of superannuation, founded on the contention that the summons, although issued in 2022, was only served on him some two years later in 2024; secondly, that the arrears pleaded in the summons were subsequently paid, so that the Plaintiff's cause of action has been extinguished or the Agreement reinstated; and thirdly, a foreshadowed special plea of reckless lending under sections 80 and 81 of the National Credit Act 34 of 2005 ("the NCA"). Council for the defendant also contended that the amount sought in the particulars of claim does not correspond with the summary judgment and as such the court cannot give summary judgment. The applicant for the plaintiff contains that they're only seek to have the vehicle repossessed and at this stage do not need to quantify the damages purportedly sustained by the plaintiff. I agree with this stance, and I am of the view that this court is in a position to grant summary judgment for repossession of the vehicle For reasons set out below.
3. The premise underpinning the Defendant's first and second defences is that the summons was not served upon him until 2024. That premise is decisive of much of

this matter and is, for the reasons that follow, wrong. I deal with the question of service first and in some detail, because once it is determined that effective service was effected in 2022, the superannuation and reinstatement defences fall away. I then deal with the remaining defences and with the test for summary judgment.

The Agreement and the relief sought

4. On or about 20 August 2021, and at Alberton, the Plaintiff and the Defendant concluded the Agreement, in terms of which the Plaintiff financed the Defendant's purchase of the Land Rover motor vehicle more fully described in the Particulars of Claim, the principal debt being R1 878 085.58. The vehicle was delivered to the Defendant.
5. In clause 15 of the Agreement the Defendant chose 1[...] C[...] Street, Brackenhurst X1, Alberton as his *domicilium citandi et executandi* ("the domicilium") for the service of legal process and notices. The significance of that choice, and of the consequences that the law attaches to it, appears below.
6. The Defendant breached the Agreement by failing to pay the monthly instalments timeously and in full. The Plaintiff dispatched a notice in terms of section 129(1)(a) of the NCA, cancelled the Agreement in accordance with clause 11 thereof (read with section 123 of the NCA), and instituted action by combined summons. The relief now pursued in the summary judgment application is confirmation of the cancellation of the Agreement and the return of the vehicle (Claim A); the Plaintiff's claim for any shortfall remaining after repossession and sale of the vehicle (Claim B) can, by its nature, only be quantified after the vehicle has been recovered and sold, and is not pursued at this stage. During argument I canvassed the issue of date of cancellation with the parties and the plaintiffs council concedes that add the agreement not being cancelled as above, it would have been cancelled by virtue of the particulars of claim that makes provision for cancellation and had been consequently served on the defendant on a date that the parties differ from each other, as far as proper service is concerned.

The relevant chronology

7. The salient dates, drawn from the pleadings, the returns of service and the practice notes of both parties, are these:

21 July 2022 – the summons is issued.

22 July 2022 – the combined summons is served by the Sheriff by leaving a copy at the main gate of the chosen domicile.

1 March 2023 – the Defendant makes a payment which, on his version, brought his account into credit.

16 October 2023 – the Sheriff serves the application for default judgment on the Defendant personally at the domicile.

20 July 2024 – the Sheriff serves the combined summons on the Defendant personally at the domicile.

10 October 2024 – the Defendant delivers a notice of intention to defend.

20 November 2024 – the Plaintiff delivers a notice of bar.

27 November 2024 – the Defendant delivers his plea.

19 December 2024 – the Plaintiff applies for summary judgment.

5 February 2025 – the Defendant delivers his affidavit resisting summary judgment.

8. The issues for determination are whether the Defendant has disclosed a bona fide defence or a triable issue, within the meaning of rule 32(3)(b) of the Uniform Rules of Court, sufficient to resist summary judgment. The threshold issue, on which the Defendant's principal defences turn, is when the summons was effectively served. This date has some relevance in as far as payment of rears in the year 2023 is concerned.

When was the summons served?

9. The Sheriff's return reflects that the combined summons was served on 22 July 2022 by leaving a copy at the main gate of the domicile chosen by the Defendant in clause 15 of the Agreement. A return of service by the Sheriff is

prima facie evidence of the facts stated in it, and stands until rebutted by clear and satisfactory evidence to the contrary. The Defendant has placed no evidence before the court to gainsay the return. His bald assertion that the summons was “only served” on him during the last week of September 2024 conflates two distinct events: the original service at the domicile in July 2022, and the further personal service of the same summons on him in July 2024. The return of 22 July 2022 therefore stands.

10. It is convenient to record at the outset that there were, in fact, three separate acts of service in this matter, each independently relevant: (a) the summons served at the domicile on 22 July 2022; (b) the application for default judgment served on the Defendant personally on 16 October 2023; and (c) the summons served on the Defendant personally on 20 July 2024.
11. Service at a chosen *domicilium citandi et executandi* is governed by rule 4(1)(a)(iv) of the Uniform Rules. That sub-rule has been amended twice in recent years, and it is essential to identify which version governs a given act of service, because the validity of a procedural step falls to be assessed under the rule in force when the step was taken. Amendments to the rules of court operate prospectively; they do not invalidate, with hindsight, service already effected under an earlier text.
12. The three versions are these. First, the original sub-rule, in force until 12 April 2024, provided that where a defendant had chosen a *domicilium citandi*, service could be effected “by delivering or leaving a copy thereof at the domicile so chosen.” Under that text, “leaving” a copy at the chosen address was expressly sufficient; there was no requirement that the copy be handed to any particular person, nor any minimum-age requirement.
13. Secondly, with effect from 12 April 2024 (GN R4477), the sub-rule was substituted to require delivery of a copy “to a person apparently not less than sixteen years of age” at the domicile, with no fallback for the case where no such person was present. Thirdly, with effect from 27 December 2024 (GN R5560 – the current text), the sub-rule requires delivery to a person apparently not less than sixteen years of age at the domicile, “Provided that if no person is present at the

domicilium, the sheriff may leave a copy at the aforesaid domicilium.” Under the current text, delivery is primary and leaving is a fallback.

14. The summons was served at the domicilium on 22 July 2022. That date falls squarely within the currency of the original sub-rule, which permitted service “by delivering or leaving a copy thereof at the domicilium so chosen.” The Sheriff’s return records precisely that: a copy was left at the main gate of the chosen domicilium. On the plain terms of the rule then in force, that was a permissible mode of service. “Leaving” was sufficient, and no more was required.
15. The settled principle reinforces this conclusion. A litigant who selects a *domicilium citandi et executandi* designates an address at which process may be served, and accepts the risk that process so served may not in fact come to his personal attention. Service at the chosen domicilium is good even where the defendant is absent, has left the country, has abandoned the premises, or cannot be found, and even where the property is a vacant stand: see *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A); *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W); and *Sandton Square Finance (Pty) Ltd v Biagi, Bertola and Vasco* 1997 (1) SA 258 (W). Actual receipt is not a requirement of valid service at a chosen domicilium; the party who chose the address bears the risk of non-receipt.
16. I am alive to the recent decision in *Nedbank Limited v Conco and Three Related Matters* [2026] ZAWCHC 38 (6 February 2026), in which the court refused default judgment in four matters in which the Sheriff’s returns recorded service at a chosen domicilium by affixing copies to a door, gate or post box. The reasoning in *Conco* is, however, directed at the current text of the sub-rule (as substituted with effect from 27 December 2024). The court held that, under that text, delivery to a person of at least sixteen years is primary and leaving is a fallback; that “leaving” is not “affixing”, affixing being expressly provided for in sub-paragraph (v) but deliberately omitted from sub-paragraph (iv); and that a return that merely records “affixed”, without detailing the location, time, method and rationale of the manner of service, does not demonstrate compliance.

17. *Conco* does not assist the Defendant, for three reasons. First, it construes a version of the rule that did not exist in July 2022 and that, by reason of the prospective operation of the amendments, has no application to service effected in 2022. Secondly, the present return records that a copy was left at the gate – the very mode of service that the original sub-rule expressly sanctioned – and not merely that a copy was “affixed”. Thirdly, and in any event, *Conco* is a decision of another Division and is not binding on this court; while its textual reasoning concerning the current rule is cogent, it is simply not engaged by a 2022 service governed by the original sub-rule.
18. Even if it were assumed, contrary to the above, that the 22 July 2022 service attracted the scrutiny that this Division has directed at domicilium service which leaves process exposed at an outer gate, the point would avail the Defendant nothing in this case, for two independent reasons.
19. First, the object of service – to bring the process to the attention of the defendant so that he may decide whether and how to respond – was indisputably achieved. The Defendant entered a notice of intention to defend, delivered a plea, and delivered an affidavit resisting summary judgment. A defendant who enters appearance and pleads over submits himself to the jurisdiction of the court and waives any irregularity in the manner in which the process was served upon him. He cannot, having engaged fully with the merits, simultaneously be heard to say that the very process to which he has pleaded never reached him.
20. Secondly, and independently, the summons was served on the Defendant personally on 20 July 2024 in terms of rule 4(1)(a)(i), and the application for default judgment had already been served on him personally on 16 October 2023. Personal service by handing a copy to the defendant after explaining the nature and exigency of the process is valid under every version of rule 4, and is the most reliable mode of service known to the law. Accordingly, even on the most cautious view, service of the summons on the Defendant was perfected no later than 20 July 2024, and his contention that he never received the process is untenable.

21. I find that effective service of the summons was effected on 22 July 2022, by leaving a copy at the main gate of the *domicilium citandi et executandi* chosen by the Defendant, in compliance with rule 4(1)(a)(iv) as it read at that date. That service was, in addition, fortified by personal service of the application for default judgment on 16 October 2023, by personal service of the summons on 20 July 2024, and by the Defendant's own appearance and plea. There is no merit in the contention that the summons was first served only in 2024. The factual foundation for the Defendant's superannuation and reinstatement defences therefore falls away.

The special plea of superannuation

22. The Defendant pleads superannuation, contending that the Plaintiff issued summons in 2022 but failed to serve and prosecute its claim for some two years, during which the Defendant made substantial payments, and that the action should accordingly be dismissed for want of prosecution. He relies on *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA), in which the requirements were restated as (a) a delay in the prosecution of the action; (b) that the delay is inexcusable; and (c) that the defendant has been seriously prejudiced thereby. The power to dismiss for want of prosecution is exercised sparingly and only in exceptional circumstances (*Sanford v Haley* NO 2004 (3) SA 296 (C)).
23. The plea is unsustainable. Its central factual premise – that service was delayed by some two years – is contradicted by the Sheriff's return, which records service the day after issue, on 22 July 2022. There was thus no delay in service at all. The "delay" of which the Defendant complains is, on analysis, the period between issue and the eventual set-down of the matter; but the Defendant himself entered appearance only in October 2024, whereafter the matter was prosecuted with reasonable expedition (notice of bar in November 2024, summary judgment application in December 2024). Any period before the Defendant's appearance cannot be characterised as inexcusable delay in circumstances where valid service had been effected and the Defendant had not entered the lists.

24. Nor is the third requirement – serious prejudice – satisfied. The “prejudice” relied upon is that the Defendant continued to make payments. But those payments were instalments contractually due under the Agreement. The discharge of a debt that one is in any event obliged to pay is not prejudice occasioned by delay. Moreover, the relief now sought is the return of the vehicle (Claim A), the entitlement to which flows from the cancellation of the Agreement and not from the precise quantum of arrears stated in the summons. The superannuation plea accordingly fails on each of the *Cassimjee* requirements.

Payment of the arrears: extinction and reinstatement

25. The Defendant contends that, having paid the arrears (and indeed brought his account into credit) on 1 March 2023 and thereafter, the Plaintiff’s cause of action has been extinguished, alternatively that the Agreement has been reinstated, so that the Plaintiff was obliged either to amend its Particulars of Claim or to issue a fresh summons on a new cause of action.
26. This defence, too, is answered by the finding on service. The Agreement was cancelled in terms of clause 11, read with section 123 of the NCA. Section 129(3) of the NCA permits a consumer to remedy a default, and so to revive an instalment agreement, only “at any time before the credit provider has cancelled the agreement”. Because effective service – and with it the perfection of the Plaintiff’s cancellation and claim for return of the vehicle – occurred on 22 July 2022, the Defendant’s payment of arrears on 1 March 2023 post-dated the cancellation and could not revive the Agreement. Payment made after cancellation does not resurrect a cancelled contract.
27. The Defendant’s reliance on the reinstatement jurisprudence does not assist him. In *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC), the Constitutional Court held that a credit agreement is revived by operation of law when the consumer pays all amounts that are overdue, together with permitted default charges and reasonable enforcement costs. *Nkata*, however, concerned a revival operating before the

agreement had been brought to an end, and turned upon whether the credit provider's enforcement costs had become due and payable. It does not avail a consumer who tenders payment only after a lawful cancellation. On the facts of this matter the cancellation preceded the payment of 1 March 2023, and section 129(3) afforded the Defendant no right of revival.

28. The contention that the Particulars of Claim ought to have been amended to reflect the later payments is misplaced. The Plaintiff does not, in Claim A, seek payment of the arrears; it seeks the return of the vehicle consequent upon cancellation. The figures pleaded in the summons – and the competing figures in the parties' subsequent correspondence – are not the measure of that relief. Claim B – for any shortfall after repossession and sale – can only be computed once the vehicle has been recovered and sold, and it is at that stage, and not before, that credit must be given for all payments made. The Defendant's payments are therefore neither ignored nor lost; they will be brought to account when, and if, Claim B is quantified. No triable issue arises.

The foreshadowed plea of reckless lending

29. The Defendant raises, as a "possible future special plea", an allegation of reckless lending in contravention of sections 80 and 81 of the NCA. The factual foundation advanced for it is a single averment in the Particulars of Claim – the conventional pleading formula that the Defendant's "full and further particulars and occupation are to the Plaintiff unknown" – from which the Defendant invites the inference that no affordability assessment was conducted.
30. The inference does not follow. A standard averment that a defendant's current particulars and occupation are unknown to a plaintiff at the time of pleading says nothing about whether an affordability assessment was undertaken at the time the credit was granted in 2021. The Defendant does not set out the facts that a reckless-lending defence requires – his income and financial position at the time of contracting, the assessment (or absence of assessment) actually undertaken, and the basis upon which it is said that the Agreement rendered him over-indebted. I

am mindful that there is a division of judicial opinion on whether a defence of over-indebtedness or reckless credit must, in order to resist summary judgment, satisfy the ordinary requirement of disclosing fully the material facts relied upon. It is unnecessary to resolve that controversy here, because on any view the Defendant has placed no facts whatever before the court: the allegation is bare, speculative and pleaded only as a defence he may in future raise. It does not meet the threshold and does not constitute a *bona fide* defence.

The remaining contentions

31. The Defendant foreshadowed two further contentions in his answering affidavit – a challenge to the authority of the deponent to the Plaintiff’s verifying affidavit, and a proposed special plea of unjustified enrichment – neither of which was pursued in argument. For completeness, neither has merit. The proper course for a litigant who wishes to challenge the authority of a person said to act for a party is to invoke rule 7(1); the deponent to a verifying affidavit is a witness, and the authority to litigate is that of the attorney of record, not the deponent (*Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA)). The Defendant delivered no rule 7 notice. The enrichment contention is equally unsustainable: the payments made by the Defendant were instalments contractually due under the Agreement, so that the Plaintiff was not enriched, still less unjustifiably so.

The test for summary judgment

32. Under rule 32, as amended, summary judgment may be granted where the defendant has not disclosed a bona fide defence. The defendant must satisfy the court, by affidavit, that he has a bona fide defence to the action, disclosing fully the nature and grounds of the defence and the material facts relied upon therefor: *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426. The amended rule requires a defendant to engage with the plaintiff’s verified cause of action and to set out, with sufficient particularity, facts which, if proved at trial, would constitute a defence (compare *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC)). As was said in *Breitenbach v Fiat SA (Edms)*

Bpk 1976 (2) SA 226 (T) at 227F, a defendant must set out facts which, if proved, will constitute an answer to the plaintiff's claim; if he does not do so he can hardly satisfy the court that he has a defence.

33. Applying that test, none of the defences raised by the Defendant survive scrutiny. The superannuation plea rests on a factual premise – delayed service – that is contradicted by the Sheriff's return and is in any event answered by the Defendant's own conduct. The reinstatement defence is bad in law, the Agreement having been cancelled before the arrears were paid. The reckless-lending allegation is unsupported by any material fact and is pleaded only as a contingency. The Defendant has admitted the conclusion of the Agreement, his receipt of the vehicle, and his failure to pay the instalments as they fell due. What remains is a series of denials and contentions that are either bad in law or unsupported by fact, and which, taken together, bear the hallmarks of a defence raised to delay the inevitable rather than to ventilate a genuine dispute. The Plaintiff is entitled to summary judgment in respect of Claim A.

Costs

34. The Agreement provides for the Defendant's liability for the Plaintiff's legal costs on the attorney-and-client scale. Where parties have agreed that costs are to be paid on a particular scale, the court will ordinarily give effect to that agreement, absent considerations of public policy or unconscionability, neither of which is present here. The Plaintiff is accordingly entitled to its costs on the scale as between attorney and client, as provided for in the Agreement.

Order

In the result, the following order is made:

1. Summary judgment is granted against the Defendant in respect of Claim A.
2. The cancellation of the instalment sale agreement concluded between the parties is confirmed.

3. The Defendant is directed forthwith to return to the Plaintiff the Land Rover motor vehicle described in the Particulars of Claim, failing which the Sheriff is authorised and directed to attach and recover the said vehicle and to deliver it to the Plaintiff.
4. The Plaintiff's claim for payment of any amount remaining due after the repossession and sale of the vehicle (Claim B) is postponed *sine die*.
5. The Defendant is ordered to pay the costs of the action and of this application on the scale as between attorney and client, as provided for in the Agreement.

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

Plaintiff's Counsel:	Advocate SG Webster, Pretoria
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