**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: 81122/14**

4/8/2016

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

21/07/16.....
DATE

.....
SIGNATURE

In the matter between:

**SPHELI GLORIA NHLAPO** Applicant

and

**TOYOTA FINANCIAL SERVICES SA LTD** Respondent

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**J U D G M E N T**

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**MOGAGABE, AJ:**

INTRODUCTION

[1] The applicant seeks the rescission of the default judgment granted against her by the Registrar of this Court on 3 February 2015 in favour of respondent.

THE PARTIES

[2] The applicant ("Ms Nhlapo") is an adult female who at all times material hereto was residing at Stand No 4805, Kanyamazane, Extension 5, Nsikazi District, Mpumalanga Province, the respondent ("Toyota") is a company with limited liability duly registered as a financial services and credit provider as so defined in terms of section 40 of the National Credit Act 34 of 2005.

BACKGROUND

[3] On or about 18 November 2010 Ms Nhlapo and Toyota concluded a written instalment sale agreement ("the Agreement") regulated by the National Credit Act 34 of 2005 ("the NCA"), in terms of which Toyota sold to her a **Toyota Verso 160 SX** motor vehicle (hereinafter referred to as "*the vehicle*"). The purchase price of the vehicle was in the sum of R 285 472, 08. Ms Nhlapo paid an initial deposit in the sum of R68 000,00. The first instalment of R 3 964.89 was payable on 15 January 2011 and the balance thereof was payable in 72 equal instalments in the sum of R3 964,89 payable on each corresponding day of each consecutive month with the final instalment payable on 15 December 2016.

MS NHLAPO'S DEFAULT

[4] Ms Nhlapo duly paid the requisite monthly instalments as so stipulated in terms of the Agreement. In default of her monthly

financial obligations in terms of the Agreement, she failed to pay the requisite instalments for the months of July, August and September 2014, with the consequences that as at 16 September 2014 she was in arrears with her monthly instalment payments in the sum of R 8 139.09.

NOTICE IN TERMS OF SECTION 129 OF THE NCA

[5] In view of such breach of the Agreement by Ms Nhlapo, Toyota as so enjoined by section 129 of the NCA sent a letter notifying her of such default i.e. non-payment of the requisite monthly instalments in the sum of R 8 139.09 as at 16 September 2014 and advising Ms Nhlapo of her rights or options available to her in terms of the NCA. This section 129 Notice, dated 16 September 2014 was served on her at the address referred to in para 2 above which was her chosen *domicilium citandi et executandi* in terms of the Agreement, by the sheriff on 9 October 2014. The relevant parts thereof for present purposes read thus:

> "*In terms of section 129 read together with section 130 of the National Credit Act No 34 of 2005, we advise that you have not met your obligations to our client in respect of the above Agreement. This account is in default as indicated above. We are instructed to request and to demand, as we hereby do, that payment to the sum of R8 139,09 is made to Toyota Financial Services SA Ltd, immediately and that you provide satisfactory confirmation that you are in possession and control of the abovementioned goods.*
>
> *We request that you pay the amount directly into Toyota Financial Services SA Ltd's account.*
>
> *The amount payable may include permitted default charges and reasonable costs incurred by our client to enforce the agreement up to the date of your payment.*

*On receipt of this notice, the matter may be referred to: Toyota Financial Services, a debt counsellor, an alternative dispute resolution agent, the consumer court and the ombud, to resolve any dispute or to develop a plan that is acceptable to both parties, to bring outstanding payments up to date.*

*Unfortunately, should there be no response to this notice within 10 (ten) business days from date of it being sent to you by registered mail, and the amount due being unpaid for 20 (twenty) business days from date of postage of this notice, our client may approach a court to enforce its agreement.*

*Should no suitable arrangements be made to bring the account up to date and you do not respond to this notice, our client may file the details of your default and its enforcement actions with the credit bureaus within 20 (twenty) business days from the date of this notice.*

*'Should you fail to comply with the aforesaid the agreement is hereby cancelled."*

MS NHLAPO'S RESPONSE TO THE SECTION 129 NOTICE

[6] In response to this section 129 Notice, Ms Nhlapo on 15 October 2014 made payment to Toyota in the sum of R 8 140.00 thereby extinguishing the arrears in the sum of R 8 139.09 as so claimed or specified in the section 129 Notice. Such payment was made within the stipulated period of 10 business days from the date of receipt of the section 129 Notice.

[7] The nett effect thereof is that as from the date of payment thereof ie 15 October 2014, Ms Nhlapo had purged her default and brought her payments under the Agreement up to date.

OCTOBER DEFAULT

[8] However Ms Nhlapo did not pay her October 2014 instalments with the concomitant effect that as at 30 October 2014, she again fell into arrears with her payments in the sum of R 4 131.60. It is such default in respect of the month of October, which Toyota relied on for breach of the Agreement to commence litigation (ie issue summons) against her enforcing the Agreement.

COMMENCEMENT OF LEGAL PROCEEDINGS

[9] Without giving her any further section 129 Notice, Toyota issued summons against Ms Nhlapo on 6 November 2014 alleging that as at 30 October 2014 she was in arrears with her October monthly instalments in the said sum of R 4 131.60 and as a result of such breach of the Agreement it (Toyota) terminated the Agreement and sought confirmation of termination of the Agreement, return of the vehicle and damages.

[10] The summons were likewise served on her personally by the Sheriff on 14 November 2014 at the aforesaid address which also served as her chosen *domicilium citandi et executandi* according to the sheriff's return of service.

[11] Ms Nhlapo does not dispute that the summons was so served at this address, but however maintains that she never received same. In view of the

conclusion reached herein, I will accept that the summons were properly served.

DEFAULT JUDGMENT

[12] There being no notice of intention to defend filed by Ms Nhlapo so defending or resisting this action, Toyota then applied for default judgment against her which default judgment was so granted by the Registrar on 3 February 2015.[1]

SUBSEQUENT DEFAULTS AND PAYMENTS BY MS NHLAPO

[13] Subsequent to the issuing of summons Ms Nhlapo once more fell into arrears for the months of December 2014, January and February 2015 due to financial difficulties experienced as a results of having lost her job which was her only source of income. In purging such default she made payments to Toyota totalling R 19 100.00 paid as follows:

*3 March 2015 - R 4 100.00; 9 March 2015 - R 10 000.00 and 7 April 2015 R 5 000.00.*

[1] This order was granted in the following terms: (i) an order directing that the agreement is cancelled, (ii) an order directing the defendant to forthwith deliver to the plaintiff the Toyota Verso motor vehicle, (iii) an order authorising the plaintiff to apply to court on the same papers supplemented insofar as necessary for judgment in respect of any damages and further expenses incurred by plaintiff in repossessing the said vehicle which amount can only be determined once the vehicle has been repossessed by the plaintiff and has been sold; quantum portion postponed sine die and (iv) costs and sheriff's fees.

[14] I interpose to point out that such payments where accepted by Toyota despite the fact that the default judgment had already been granted on 3 February 2015 as outlined above in terms of which the Agreement was cancelled. Mr Welgemoed on behalf of Toyota submitted that such payments were allocated or credited to her account with Toyota for purposes of reducing any resultant damages, incurred by it in enforcing the Agreement. I note that Toyota had not as at the time of acceptance thereof repossessed the vehicle nor obtained judgment quantifying such damages as per the terms of the default judgment as so outlined above.[2] Needless to say such conduct on Toyota's part in accepting such payments appears to be inconsistent with the cancellation of the Agreement particularly as the Agreement does not confer this right in clear and unambiguous terms.

[15] Ms Nhlapo further avers that the reason she ceased making further payments (her last payment being made on 7 April 2015) was due to the fact that she was informed by the sheriff (apparently on 13 April 2015 when the sheriff repossessed the vehicle) that "her account had been closed and that even if she made any payments same would not go through or credited on her account."

WRIT OF EXECUTION

[16] Subsequent to the grant of the default judgment as aforesaid, the Registrar issued a writ of execution in enforcement of such default judgment

[2] above n1

authorising the sheriff to attach and take the vehicle into execution. Such writ of execution was executed by the sheriff on 13 April 2015 in terms of which the sheriff attached and removed the vehicle from Ms Nhlapo's possession. It is not clear from the papers as to when such writ of execution was issued ie whether same was issued prior to the payments so made in para 13 above or thereafter.

[17] Applicant claims that she was not aware nor had knowledge of the action so instituted against her or the default judgment so taken against her by Toyota until 13 April 2015 when the sheriff informed her likewise during the process of repossessing the vehicle, whereupon she then contacted Toyota about the matter and was advised of the default judgment so granted as well as the warrant of delivery issued for the repossession of the vehicle. In terms of Rule 35 (1) (b) a defendant is allowed to apply to court to set aside a default judgment within 20 days after she/he has knowledge thereof ie within 20 days after same was brought to her/his attention or obtained knowledge thereof. In the present matter, Ms Nhlapo avers that she first became aware or had knowledge of the default judgment on 13 April 2015 when the sheriff repossessed the vehicle. The application for rescission of judgment was dated 22 April 2015 and was served on 22 April 2015, entailing that same was launched within the prescribed time period. As such condonation in this regard was not necessary.

COMMON CAUSE ISSUES

[18] For purposes of this judgment it is important to highlight that it is common cause if not undisputed that Ms Nhlapo defaulted in paying the October 2014 instalment as so stipulated in terms of the Agreement with the attendant consequences that as at 30 October 2014 she was in arrears with her payments in the sum of R 4 131.60 as so alleged in the particulars of claim.

[19] It is further common cause that prior to so commencing such legal proceedings, Toyota did not give Ms Nhlapo a new or further notice in terms of section 129(1) of the NCA pertaining to her default in respect of the month of October.

[20] In the particulars of claim Toyota relied on the default by Ms Nhlapo to pay the October 2014 instalment in the sum of R 4 131.60 as a ground for breach on her part of the Agreement. However, it placed reliance on the said notice dated 16 September 2014 for purposes of compliance with section 129 (1) of the NCA.[3]

[21] The defence so raised or relied upon by Ms Nhlapo in this regard is based on Toyota's non-compliance with the provisions of section 129 (1) of the NCA by failing to give her the requisite statutory written notice as so

[3] Particulars of claim p 8 paras 10;11.1 and 11.2

contemplated therein, prior to the commencement of the legal proceedings as so outlined above.

[22] It was contended on behalf of Toyota that the case relating to the section 129 Notice by Ms Nhlapo only surfaced in the replying affidavit and was not raised in the founding affidavit and as such the Court is not entitled to have regard to or consider same. In my view this contention cannot hold sway in that the applicant raised or dealt with the issue of the section 129 Notice in response to averments in this regard made by Toyota in the answering affidavit. It is not an absolute rule that all essential averments must appear in the founding affidavit or that the Court will not allow an applicant to make or supplement his/her case in the replying affidavit. In any event no application to "strike out" such averments in the replying affidavit was made nor leave sought to file a fourth set of affidavits.

THE DEFENCE

[23] The defence so relied upon by Ms Nhlapo for rescission of the default judgment is predicated upon the provisions of section 129 (1) of the NCA. In essence the defence is to the effect that after having paid the arrear instalments in the sum of R 8 140.00 on 15 October 2014 as so outlined in para 6 above, Toyota was not entitled to commence litigation against her (ie issue summons) let alone apply for default judgment against her on the basis of her failure or default in paying the October instalment, without first issuing or giving her new or a further section 129 Notice relating to such October

arrears as so contemplated in terms of section 129 (1) of the NCA. In other words Ms Nhlapo contends that upon payment of the arrears in the sum of R 8 139.00 as so specified in the section 129 Notice dated 16 September 2014, she had purged her default or had brought her indebtedness in terms of the Agreement to Toyota (credit provider) up to date, and as such Toyota was enjoined in terms of the provisions of section 129 (1) of the NCA to give her a new or further notice in respect of her default for the month of October, prior to commencing litigation to enforce the Agreement with the attendant consequences that failure to do so precluded Toyota from commencing litigation against her or for that matter for the Court to have granted the default judgment.

TOYOTA'S SUBMISSIONS

[24] Mr Welgemoed submitted that having regard to the fact that Toyota had given Ms Nhlapo the requisite section 129 Notice as per the Notice dated 14 September 2014, it was not necessary for Toyota to issue or give her a new or further notice notwithstanding the fact that she (Ms Nhlapo) in response to or acting in compliance with such notice had made payment of the arrear amount claimed or specified in such notice, contending that such notice remained valid and in extant entitling the credit provider to rely on same in instituting legal proceedings to enforce the Agreement. In essence, so the argument runs, in instances where a consumer complied with such notice and paid her/his arrears in full as per such notice and thereafter defaulted again such notice does not lose its efficacy but remains valid and in extant by virtue

of such default. As such so submitted Mr Welgemoed, once Toyota had so issued or given Ms Nhlapo the said notice (dated 16 September 2016) as so contemplated in terms of section 129(1) of the NCA, it fulfilled its statutory obligations and it was unnecessary for Toyota to give a new or further notice to her. In developing this argument, he submitted that if a consumer in compliance with a section 129 Notice pays only her/his arrears and not her/ his current outstanding balance, the notice remains valid and in extant with the attendant consequence that there is no obligation on the credit provider to give another notice in respect of a subsequent default by the consumer ie in instances where a consumer defaults and pays her arrears in full and immediately thereafter defaults again.

[25] It is apposite for present purposes to set out the provisions of section 129(1) of the NCA which provide thus:

> "***129. Required procedures before debt enforcement.***
>
> *(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*
>
> *(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."*

[26] Section 129 (1) must be read in conjunction with section 130, the relevant part thereof which provides as follows:

"***130. Debt procedures in a court***

*(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and -*

*(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;*

*(b) in the case of a notice contemplated in section 129(1), the consumer has –*

*(i) not responded to that notice; or*

*(ii) responded to the notice by rejecting the credit provider's proposals; and*

*(c) in the case of an instalment agreement, secured loan or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.*

*(2) ...*

*(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that –*

*(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;*

*...*

*(4) In any proceedings contemplated in this section if the court determines that -*

*(a) ...*

*(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a) ... the court must –*

*(i) adjourn the matter before it; and*

*(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed"*

[27] The provisions of section 129 (1) of the NCA have been the subject of judicial scrutiny in the High Court, Supreme Court of Appeal and the Constitutional Court.[4]

[28] It is settled law that in terms of section 129 (1) (a) a credit provider is obliged to give the defaulting consumer written notice of such default prior to commencing legal proceedings to enforce a credit agreement. In other words the giving of such written notification as so contemplated in terms of section 129 (1) (a) is mandatory or necessary pre-litigation requirement. The nett effect thereof is that the section precludes the commencement of legal proceedings unless notice is first given. In peremptory terms the section declares that legal proceedings to enforce a credit agreement may not

[4] *Nedbank Ltd v Binneman* 2012 (5) SA 569 (WCC), *Balkind v Absa Bank* 2013 (2) SA 486 (ECG), *Kgomo v Standard Bank* 2016 (2) SA 184 (GP), *Rossouw v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) paras [30]-[32], *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA) para [14], *Absa Bank v Mkhize* 2013 (5) SA 227 (SCA) para [4], *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC), *Ferris and Another v Firstrand Bank Ltd* 2014 (3) SA 39 (CC), *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC). Nkata v FirstRand Bank 2016 (4) SA 257 (CC)

commence prior to a credit provider first providing notice to a consumer and meeting further requirements set out in section 130. [5]

[29] Any construction of the provisions of the NCA should be geared towards achieving its purposes as so commanded by section 2 thereof. The purposes thereof are "to promote and advance the social and economic welfare" of the citizens of this country, to "promote a fair, efficient, effective and accessible credit market and industry", and to protect consumers, by *inter alia* "promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers, addressing and correcting imbalances in negotiating power between consumers and credit providers" by amongst other things, "providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements and providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements"[6] In *Kubyana* the Constitutional Court stated that " there can be no doubt that the Act is directed at consumer protection", however, adding the caveat that this should not be taken to mean that the Act is biased in favour of the consumer without having any regard to the interests of credit providers and that the correct interpretation of section 129 is one that strikes an appropriate balance between the competing interests of both parties to a credit agreement"[7].

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[5] *Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA) paras [8] and [14], *Absa Bank v Mkhize* 2013 (5) SA 227 (SCA) para [4]; Sebola para 45, Kubyana paras 24 and 68 and Nkata para 168

[6] Section 3 of the NCA

[7] Kubyana paras 19, 20 and 21, Nkata paras 53, 93, 94 and 95

[30] In *Starita (aka Van Jaarsveld) v Absa Inc Ltd and Another*, Gautschi AJ made the following observation:

"*There is no time period specified in the Act for the continued validity of a section 129 notice, nor can one be implied. Its ongoing validity then depends upon the facts of the case. For instance, if the arrears specified in the notice were fully extinguished after the notice had been given, the notice could not then be utilised for any legitimate purpose if further arrears occurred thereafter*"[8] *(my emphasis)*

[31] In *Dwenga v Firstrand Bank Ltd and others*[9] Hartle J, fully aligned himself with the afore-quoted of Gautschi AJ in *Starita*, stating that such notice "has run its course so to speak and no longer has any efficacy".

[32] I agree with such pronouncements. It cannot be gainsaid when regard is had to the facts of the present case that when Ms Nhlapo had so fully extirpated the arrears so specified in the said notice, such notice lost its efficacy and validity with the attendant consequences that same could not be legitimately utilised or relied upon by Toyota for her subsequent default in respect of the October instalment payment, for purposes of complying with section 129 (1) (a).

[33] The said section 129 Notice called upon Ms Nhlapo to pay the arrear amount in the sum of R 8 139.09 as well to consider utilising the non-judicial dispute resolution mechanisms or options proposed therein in the event of her experiencing financial difficulties in paying same. In response thereto (within

[8] 2010 (3) SA 443 (GSJ) para 10
[9] (EL298/11, ECD298/11) [2011] ZAECELLC13 (29 November 2011)

the 10-business days so stipulated in the notice) she duly paid the full arrear amount which payments Toyota accepted. As such Ms Nhlapo acted in compliance with such notice and duly purged in full such default. Upon payment of these arrears her indebtedness to Toyota was brought up to date with the attendant consequences that the said notice so given in respect of such arrear payments or indebtedness fell by the wayside or became ineffective for purposes of subsequent defaults.

[34] Upon applicant so defaulting once again subsequent to purging her previous default (ie her default as per the said notice), Toyota was enjoined or obliged to issue a new or further notice to Ms Nhlapo as so contemplated in section 129(1)(a) of the NCA prior to commencing legal proceedings to enforce the Agreement. In failing to do so, Toyota acted in non-compliance with the peremptory provisions of section 129 (1) (a).

[35] In other words upon so extinguishing in full her arrears as so specified in the said notice it was incumbent upon Toyota in compliance with the provision of section 129 (1) (a), to give Ms Nhlapo a new or further section 129 Notice predicated on such subsequent or later default, as a mandatory pre-litigation step for the enforcement of the agreement

[36] As such it was in the circumstances impermissible and illegitimate for Toyota to utilise or place reliance upon the "old notice" in so commencing legal proceedings against Ms Nhlapo predicated on her default in not paying the October instalments (i.e falling once again in arrears with her October instalment payment), for purposes of complying with the peremptory

provisions of section 129 (1) (a) read with section 130 of the NCA without giving her a new section 129 Notice in this regard.

[37] I am fortified in this regard by the pronouncements of *Jafta JA in Kubyana* to the following effect:

*"the credit provider is not entitled immediately to exercise its rights under the agreement. It is first required to notify the consumer of the default and demand that the arrears be paid. If the consumer pays up the arrears, then the dispute is settled. But it may so happen that the default is occasioned by the consumer's financial difficulties. In that event, instead of enforcing the agreement, the credit provider must afford the consumer an opportunity to refer the agreement to one of the bodies listed in section 129 (1) (a)"*[10] *(my emphasis)*

[38] These pronouncements of Jafta JA clearly demonstrate that once a consumer extinguishes the arrears specified in the section 129 Notice, the dispute between the parties (ie between the credit provider and the consumer) becomes settled ie the consumer's indebtedness to the credit provider as so claimed in the section 129 Notice is purged or erased. In other words the consumer's obligations in terms of the agreement are brought up to date. The nett effect thereof is that once the dispute is so settled by payment of the arrears so claimed or specified in the section 129 Notice, the said notice falls by the wayside or loses its efficacy and can no longer remain in extant with

[10] Kubyana para 70

the concomitant effect that it will be impermissible or illegitimate for the credit provider to utilise same or place reliance thereon in respect of subsequent defaults by the consumer for purposes of compliance with the mandatory provisions of section 129 (1) (a).

[39] To hold otherwise would defeat the purposes of the NCA as so aforementioned and bring about harsh, inequitable, unjust and unfair consequences thereby undermining the purpose of the NCA to protect consumers by providing for a consistent and accessible system of consensual resolutions of dispute arising from credit agreements and providing for a consistent and harmonised system of debt enforcement. It is apposite in this regard to refer to the judicial sentiments of Moseneke DCJ pertaining to the values which the NCA seeks to infuse in the credit market place coupled with the responsibilities of credit givers to the following effect:

"*The Act seeks to infuse value of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate. Unlike in the past, the sheer raw financial power difference between the credit giver and its much-needed but weaker counterpart, the credit consumer, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities... Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The*

*resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit gives ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution"* [11]

[40] This in my view, entails that once a consumer has so settled the dispute between the parties by paying in full her arrears as so claimed in the section 129 Notice, a credit provider in the event of a subsequent default on the part of such consumer, bears the responsibility as a matter of achieving fairness, good faith, reasonableness and equality in the credit market, to act within the constraints of sections 129 (1) (a) and 130, to issue or give a new or further section 129 Notice for such default prior to commencing litigation enforcing the agreement.

[41] In light of the aforegoing, the failure by Toyota to give Ms Nhlapo a new section 129 Notice pertaining to her subsequent default in not paying her October instalment, and instead utilising or relying on the old notice for purposes of complying with the peremptory provisions of section 129 (1) (a) read with section 130 of the NCA, precluded it from commencing litigation against her to enforce the Agreement.

[42] This being so, the failure to give Ms Nhlapo a new or further Notice as so contemplated in section 129 (1) (a) of the NCA constitutes a *bona fide*

[11] Nkata para 94

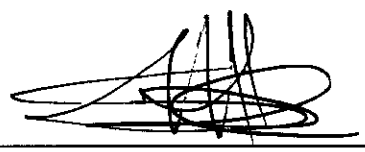
defence on her part entitling her to the relief sought herein i.e. rescission of the default judgment so granted against her by the Registrar.

[43] In the result the following order is made:

43.1 The default judgment granted by the Registrar of this Court against applicant under Case No 81122/2014 in favour of respondent is hereby rescinded as also the writ of execution issued in respect of the Toyota Verso SX motor vehicle with engine number IZRU235789 and chassis number NMTDE26R50R009633.

43.2 The applicant is granted leave to defend the action.

43.3 The respondent to pay the costs of this application.



**S J R MOGAGABE**
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

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|---|---|
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| INSTRUCTED BY | THOBELA ATTORNEYS<br>c/o Thobela Phaleng Inc<br>Pretoria |
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| DATE OF HEARING | 3 February 2016 |
| DATE OF JUDGMENT | ~~29 July 2016~~ 4/8/2016 |