





IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case number: 32048/2020

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

In the matter between:

**WIKUS PIETERSE**

**Applicant**

v

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

**First Respondent**

**Second Respondent**

In re:

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

**Plaintiff**

And

**WIKUS PIETERSE**

**Defendant**

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## JUDGMENT

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### MOSOPA, J

1. This application is brought in terms of Rule 6(12)(a) of the Uniform Rules of Court, to stop the sale/auction (which was supposed to take place on 6 April 2021) of a 2012 BMW M5 (F10) with engine number 21680142 and chassis/VIN WBSFV920X0DX14779, pending the final adjudication of the rescission of judgment application instituted by the applicant, in respect of the judgment obtained by the respondent. This matter is only opposed by the first respondent.
2. On 6 April 2021, when this matter was before me, only the Notice of Motion, Founding Affidavit and annexures were before me and I was informed that the first respondent had recently served the applicant with its answering affidavit. I then ordered the first respondent to instruct the auctioneers (second respondent) not to proceed with the auction which was scheduled to take place on the same day at 10h30, until the matter is finalized. I then stood the matter down to 9 April 2021 for argument and to afford the applicant time to reply to the first respondent's answering affidavit. On 9 April 2021, I heard argument and reserved judgment in this matter.

### URGENCY

3. When the matter was stood down to 9 April 2021, I did not make any determination as to the urgency of the matter, as I only had the Notice of Motion, Founding Affidavit and annexures before me. I then on that date heard arguments in respect of urgency and I then held that the matter was urgent.
4. The first respondent did not inform the applicant of the date of the auction of the 2012 BMW M5 (F10) ("the vehicle"), despite this request being made by the applicant's attorneys to the first respondent's attorneys. It was only on 1 April 2021, when the applicant went through the website of the second respondent,

that he realized that the vehicle was scheduled to be sold on auction on 6 April 2021, with no further details. More details of the sale of the vehicle became apparent from the second respondent's website on 4 April 2021, indicating that the auction was scheduled to take place on 6 April 2021 at 10h30.

5. I was then of the view that if the matter is not heard then, the applicant will not be afforded substantial relief at a hearing in due course (*see Rule 6(12)(b); Luna Meubel Vervaardigers (Edms) Bpk v Makin t/a Makin Furnitures Manufacturers 1977 (4) SA 135 (W) at 137F*).

#### BACKGROUND

6. On or about 2 October 2018, the applicant and the first respondent entered into a written sale agreement in terms of which the first respondent sold the vehicle to the applicant.
7. On 22 July 2020, the first respondent issued combined summons against the applicant, mainly for breach of the sale agreement by the applicant, and the cancellation of the agreement, after the notice in terms of section 129 of the National Credit Act 34 of 2005 ("NCA") had been served on the applicant on 19 June 2020.
8. The respondent brought an application for default judgment against the applicant. This application was heard on 8 December 2020, before Lukhaimane AJ and an order for default judgment was granted in favour of the respondent, confirming the cancellation of the agreement and the return of the vehicle by the applicant to the respondent within seven (7) days of the default judgment order.
9. I must at this stage pause to mention that the applicant's erstwhile attorney withdrew from the matter before the default judgment was obtained by the respondent. On 10 February 2021, pursuant to the warrant in terms of the default judgment obtained, the respondent repossessed the vehicle from the applicant.



10. On 3 March 2021, the notice in terms of section 127(2) of the NCA regarding the valuation of the vehicle by the respondent, was sent to the applicant.

## DISCUSSION

11. When the matter first served before me, only the first respondent was cited. The second respondent was not cited as a party initially, but was only cited as a party in the applicant's replying affidavit. The second respondent was cited as a party without an application for joinder having been made. However, no legal objection was raised by the first respondent in respect of this procedural aspect and the issue never arose in argument. I am of the view that there was no issue in respect of the citing of the second respondent as a party despite there being no joinder application.
12. It is noteworthy to mention that the applicant continued paying his debt to the first respondent even after the application for default judgment was granted. An amount of R18 000,00 was paid on 1 February 2021 and the amount of R25 000,00 on 2 March 2021 into the first respondent's account. No further payments were made after that, I must also pause to mention that after the vehicle was repossessed from the applicant, a further payment of R25 000,00 was made by the applicant.
13. The applicant contends that he paid all the arrear amounts, totaling R99 333,00, as at 2 March 2021 and as such, he is not in default of the terms and conditions of the agreement and that he never gave the first respondent a notice to terminate the agreement. However, this is a clear admission on the part of the applicant, that at the time of the application for default judgment, he was in arrears and as such, the first respondent was entitled to the default judgment.
14. It must be understood that this current application is not about the re-instatement of the agreement, but rather stopping the sale/auction of the vehicle. The applicant does not indicate where the vehicle must be kept in the event that the application is successful, as he has not sought relief for the vehicle to be returned to him.

15. What is common cause between the parties is the following:

15.1. On 19 June 2020, when the first respondent issued the notice in terms of section 129 of the NCA, the applicant was in default of the agreement and the arrear amount was R25 275,30;

15.2. When summons was issued against the applicant on 23 July 2020, the arrear amount was R41 767,37;

15.3. Several payments were made by the applicant, after summons was issued, in the following amounts:

15.3.1. 21 August 2020 – R8 735,00

15.3.2. 5 October 2020 – R8 795,00

15.3.3. 30 October 2020 – R9 000,00

15.3.4. 30 November 2020 – R9 000,00

Totaling R35 533,00

16. Despite all these substantial payments made by the applicant, at the time of the default judgment, the applicant was still in arrears, in terms of the amount stated in the summons, but had extinguished the debt in the amount of R25 275,30 indicated in the section 129 notice dated 19 June 2020.

17. From the time the applicant received the section 129 notice and the combined summons, the applicant paid four (4) separate instalments during August, October and November 2020. No payment was made in September 2020 and I take it that this non-payment was addressed when the applicant made two payments in October 2020. However, what is not clear is whether these payments were made towards only the arrear amount or towards the arrear amount and the monthly instalment. The first respondent contends that the applicant neglected to make payments towards the monthly instalments after the section 129 notice was sent.

18. In the matter of ***Kubya v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC)*** at paras 34-35, the Constitutional Court, when dealing with the purpose of

the section 129 notice and the obligations of a reasonable consumer, observed the following;

*“[34] ... Section 129 aims to establish a framework within which the parties to the credit agreement, in circumstances where the consumer has defaulted on her obligations, can come together and resolve their disputes without expensive, acrimonious and time-consuming recourse to the courts. However, this form of dispute resolution is possible only if both come to the table; the credit provider must avoid hasty recourse to litigation and the consumer must seek to rectify her default in a reasonable and responsible manner.*

*[35] If the credit provider complies with the requirements set out in [31] to [33] above and receives no response from the consumer within the period designated by the Act, I fail to see what more can be expected of it. Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement. It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a “harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.” Indeed, if the consumer has unreasonably failed to respond to the section 129 notice, she will have eschewed reliance on the consensual dispute resolution mechanisms provided for by the Act. She will not subsequently be entitled to disrupt enforcement proceedings by claiming that the credit provider has failed to discharge its statutory notice obligations.”*

#### STEPS TAKEN BY APPLICANT AFTER RECEIPT OF S129 NOTICE

19. The applicant, after receiving the section 129 notice, contacted the first respondent by email, dated 3 July 2020, and informed the first respondent of his financial situation and undertook to make payments.
20. Ms Masoane of Strauss Daly Attorneys, representing the first respondent, confirmed receipt of this email and informed the applicant that his account had



already been handed over for legal proceedings and advised that he voluntarily surrender the vehicle to avoid further legal fees.

21. On 17 July 2020, the applicant enquired whether it would be possible for him to make arrangements to pay off the outstanding amount over a three (3) month period. The response from the first respondent's representative, dated 20 July 2020, was that if the applicant paid 50% of the arrear amount immediately, he could then pay the remaining 50% over a period of three (3) months.
22. Following this agreement regarding the payment of the arrears, the applicant made two payments in July 2020, in the amounts of R17 000,00 and R3 000,00, for a total amount of R20 000,00. At that stage, the arrear amount in terms of the section 129 notice was R25 275,30. Thus, the applicant paid more than the 50% the parties agreed on. Further payments of R8 735,00 (21 August 2020), R8 798,00 and R9 000,00 (5 and 30 October 2020) and R9 000,00 (30 November 2020) were made by the applicant. Despite all these payments and the agreement reached by the parties in respect of the restructuring of the debt, the first respondent nonetheless proceeded to enforce the debt by instituting summons against the applicant on 27 July 2020 – only seven (7) days after the debt restructuring agreement was reached.
23. The applicant reasonably responded to the section 129 notice and over and above that, made payments amounting to more than what was agreed upon. The applicant did not eschew reliance on the consensual dispute resolution mechanism provided by the NCA, for the reasons I have provided above. It is for this reason that I am of the considered view that this application should succeed.
24. I elect not to make a determination as to whether there are prospects of success in the application for rescission of the default judgment obtained in favour of the first respondent, at this stage.

## COSTS

25. Costs of this application, in my considered view, must be determined when the rescission application is considered.

## ORDER

26. I therefore make the following order;

1. The first respondent is interdicted from selling/auctioning or causing the sale/auction of the 2012 BMW M5 (F10), with engine number 21680142 and chassis/VIN number WBSFV920X0DX14779 ("the vehicle"), pending the final adjudication of the applicant's rescission application of 18 March 2021;
2. The first respondent is to confirm to the applicant's attorney, in writing, within five (5) days of this order, that it has instructed the second respondent not to proceed with the sale/auction of the vehicle;
3. Costs to be costs in the rescission application.

A handwritten signature in black ink, appearing to read 'MJ Mosopa', is written over a horizontal line.

**MJ MOSOPA**  
**JUDGE OF THE HIGH**  
**COURT, PRETORIA**



Appearances:

For the applicant: Adv H Krige  
Instructed by: Buks Croukamp Attorneys

For the respondent: Adv V Olivier  
Instructed by: Strauss Daly Inc.

Date of hearing: 9 April 2021  
Date of judgment: Electronically transmitted