IN THE HIGH COURT OF SOUTH AFRICA,
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 1570/21 (and 2909/14)

In the matter between:

RUTH OLLINA GUGULETHU SNOTHILE XULU	Applicant
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent
SHACKLETON CREDIT MANAGEMENT (PTY) LTD	Second Respondent
SHERIFF JOHANNESBURG CENTRAL	Third Respondent

ORDER

The following order shall issue:

(a) The default judgments and / or court orders granted by the Registrar of this court, on 22 April 2014 and 12 October 2016 under case number 2909/14, respectively, be and are hereby rescinded;

(b) All execution steps taken pursuant to the above court orders be and are hereby set aside, and

(c) Costs against the Second Respondent.

JUDGMENT

NKOSI J,

[1] This is an application for rescission (based on the provisions of rule 42, alternatively, common law grounds) of two default judgments granted by the registrar of this court, on 22 April 2014 and 12 October 2016, respectively, together with an order setting aside all execution steps taken pursuant thereto, and costs against the second respondent. The second respondent only opposes the application.

[2] The application has its sequel from a written instalment sale agreement concluded between the applicant and the first respondent, on 25 September 2012 ("the credit agreement"). The credit agreement relates to the purchase of the motor vehicle, described as a 2011 BMW 118i 5 Door A/T with specified engine and chassis numbers.

[3] The applicant subsequently breached the credit agreement by failing to pay the monthly instalments thus triggering the terms which entitled the first respondent to approach a court for the cancellation of the credit agreement and the immediate return of the vehicle.

[4] On 22 April 2014, the registrar granted a default judgement (the first one) against the applicant and in favour of the first respondent for, inter alia, confirmation of termination of the credit agreement and the return of the vehicle (annexure "FA1"to the founding affidavit). Once the vehicle had been repossessed, assessed, valued and sold on public auction, the registrar granted a further default judgment or order (the second one) for payment of damages and further expenses in an amount of R 320 920.64 ostensibly incurred when the net proceeds of the sale of the vehicle were insufficient to discharge the applicant's obligations under the credit agreement (annexure "FA2" to the founding affidavit).

[5] Apparently, the applicant did not attempt to resolve the matter until the claim was ceded to the second respondent who also attempted, through its lawyers between 2017 to 2021, to contact the applicant in order to reach a settlement, but to no avail (annexure

"JAB6" to the answering affidavit). The status quo prevailed until the writ was issued attaching funds held in the applicant's credit account on the First National Bank, on 10 February 2021. The third respondent executed on the writ issued pursuant to the second default judgment and no relief is sought from him.

[6] The default judgment orders are impugned primarily on two grounds. Firstly, the applicant contends that the aforesaid orders were erroneously sought and erroneously granted in her absence, as contemplated by rule 42 of the Uniform Rules of Court, alternatively, the common law, because the registrar does not and did not have the powers to grant them under s 130(3) of the National Credit Act 34 of 2005 ("the NCA"). This, therefore, renders the court orders null and void.

[7] Secondly, it was irregular for the first respondent to approach this court, for the second default order, without giving the applicant any further notification of those proceedings, since she had a right to be heard and to give her version of events. In addition, the applicant claims that the summons commencing action never came to her attention despite the sheriff's return of service pointing to the contrary (annexure "FA5" to the founding affidavit). The applicant says she only became aware of the legal proceedings and default judgments against her for the first time, around 12 February 2021, when the second respondent attached her bank account.

[8] In its reply, the second respondent vehemently disagrees with the applicant's claims as these are misleading. It avers that all the procedural requirements envisaged in the NCA were met and /or complied with before and after approaching the court for the relief sought but the applicant failed to respond despite being served with the requisite notifications.

[9] The second respondent contends that the default judgments which are impugned were not granted erroneously as the registrar was authorised (in terms of rule 31(5)*(b)* of the Uniform Rules of Court, read with s 23 of the Superior Courts Act 10 of 2013) to do so, after proper service of the summons to the applicant, which she failed to defend. The

second respondent further contends that the first respondent was entitled to supplement its papers as authorised by the court, and approach court without further notice to the applicant in order to apply for the shortfall that was due to it.

[10] It is undeniable that the credit agreement in question is a credit agreement which is governed by the NCA. It is also in plain sight that, in any proceedings in which a court is approached for an order to enforce such an agreement, compliance with the provisions of s 130(1) and (3) is peremptory and has to be alleged and proved. Likewise, when the legal relief that is required is merely an order enforcing the remaining obligations of a consumer under a credit agreement, compliance with s 130(1)*(a)* and *(b)*, s 130(2)*(a)* and *(b)* and s 130(3)*(a)* to *(c)* has to be alleged and proved.

[11] The issue for determination is whether or not the two default judgments were erroneously sought and erroneously granted in the absence of the applicant, in terms of rule 42 of Uniform Rules of Court in that:

(a) The registrar did not have any powers under s 130(3) of the NCA to grant the orders against the applicant as the statute only empowers the court, not the registrar, to determine the matter;

(b) There has not been proper service of the combined summons to the applicant; and

(c) The application papers, in seeking the second default judgment were not served on the applicant.

[12] I consider it to be settled law that the registrar is not endowed with any powers under s 130(1) to (3) of the NCA to grant orders to enforce either a credit agreement or the remaining obligations of a consumer in terms of a credit agreement. I believe the question of that power has been sufficiently or thoroughly broached and trammelled in a number of court judgments.[1]

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[1] See *Master of the High Court North Gauteng v Motala NO* 2012 (3) SA 325 (SCA); *Nkata v FirstRand Bank* [2016] ZACC 12, 2016 (4) SA 257 (CC), 2016 (6) BCLR 794 (CC) paras 163 to 189 of Jafta J's judgment; *Seleka v Fast Issuer SPV (RF) Limited and another* [2021] ZAGPPHC 128; *Theu v FirstRand Auto Receivables (RF) Limited and another* [2020] ZAGPPHC 319.

[13] It appears to me that the question still lingers in the minds of some litigants. Counsel for the second respondent contends, in his written submissions, that the applicant's reliance on a lack of authority by the registrar under s 130(3) of the NCA, is misplaced because the provisions of s 130 only applies when:

(a) A credit provider approaches the court for an order to enforce a credit agreement; and,

(b) In the case of the instalment agreement, the consumer has not surrendered the relevant property to the credit provider as contemplated in s 127 of the NCA,

[14] Counsel further submits that the first respondent did not approach the court in terms of s 130, and did not seek an order to enforce a credit agreement (the agreement was cancelled) but sought default judgment pursuant to a liquidated demand which included the delivery of goods (rule 31(5) of the Uniform Rules of Court; s 23 of the Superior Courts Act; and *Allied Bakeries (Pty) Ltd v Pitzer*[2]).

[15] I am inclined to respectfully disagree with the submission. It appears to me that, even in instances where a credit provider approaches a court for an order of cancellation of a credit agreement governed by the NCA, the provisions of s 130(1) to (3) cannot be wished away.

[16] The narrow approach, proposed above, seems to be contrary to the spirit and purport of the NCA. Section 130(3) of the NCA provides as follows:

'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;

(b) . . .

(c) . . .' (my emphasis)

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[2] *Allied Bakeries (Pty) Ltd v Pitzer* 1962 (1) SA 339 (SR).

[17] Obviously, there are instances where the registrar has not been empowered, and cannot consider matters in respect of which the NCA apply. Such matters can only be dealt with by the courts (and not by the registrars) as contemplated in s 130(1) to (3). That applies to any proceedings commenced in a court, regardless of the type of default, the type of the credit agreement and the contemplated relief sought by the credit provider.

[18] The cases referred to in paragraph 12 above contain the sound exposition of the current law on the subject. See, also the recent decision of the Supreme Court of Appeal, in *FirstRand Bank Limited t/a Wesbank v Davel (University of Free State Law Clinic* (as *amicus curiae*).[3]

[19] From the aforegoing, I hold the view that the registrar had usurped powers she does not have and that both default judgments fall to be set aside. The second and third issues, therefore, become academic. I need to indicate, however, the following: firstly, that although some reliance was placed on common law as an alternative for the relief sought, not one iota of evidence was tendered to prove the same; secondly, that there was proper service of the combined summons; and thirdly, that the second default judgment (for damages) also becomes a nullity on a further and different ground that the first respondent failed to serve the application on the applicant.[4]

[20] Insofar as the costs of suit are concerned, such normally follow the result. The applicant achieved a wholesome success in the matter and there are no reasons to deny her costs.

[21] In the result, I grant the order in accordance with the amended notice of motion in the following terms:

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[3] *FirstRand Bank Limited t/a Wesbank v Davel (University of Free State Law Clinic* (as *amicus curiae*) [2019] ZASCA 168, [2020]. All SA 303 (SCA).
[4] See *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) para 9 at 301J to 302A.

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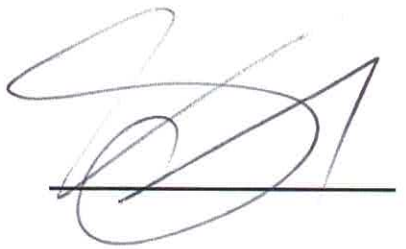

NKOSI J

APPEARANCES

DATE OF HEARING	:	03 AUGUST 2021
DATE JUDGMENT HANDED DOWN	:	23 AUGUST 2021
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