



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (LOCAL SEAT)

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

23/03/22
DATE


LEGODI JP

SIGNATURE

CASE NUMBER 2757/2021

In the matter between:

NEDBANK LIMITED

APPLICANT

And

MOLLENTZE, SAREL JOHANNES

RESPONDENT

In the matter between:

FIRSTRAND AUTO RECEIVABLES (RF) LIMITED

APPLICANT

And

RADEBE, SAKHILE ALPHEOS

RESPONDENT

BANKING ASSOCIATION SOUTH AFRICA

APPLICANT

(Admission as *amicus curiae*)

JUDGMENT

LEGODI JP (MPHAHLELE DJP AND LANGA J CONCURRING)

[1] A judgment by default may be granted and entered by the Registrar of a Division in the manner and in circumstances prescribed in the rules, and judgment so entered is deemed to be a judgment of a court of the Division.¹ The heading in section 23 of the Superior Courts Act referred to in the footnote above, is “*Judgment by default*”. Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar, a written application for judgment against such defendant: Provided that when the defendant is in default of a plea, the plaintiff shall give defendant not less than 5 days of his or her intention to apply for default judgment.² (My emphasis).

[2] Despite any provision of law or contract to the contrary, in any proceedings commenced in 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 31 apply, the procedures required by those sections have been complied with,
- (b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the courts, and
- (c) that the credit provider has not approached the court –
 - (i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction, or
 - (ii) despite the consumer –
 - (aa) having surrendered the property to the credit provider, and before that property having been sold,
 - (bb) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in the fulfilment of that agreement;

¹ Section 23 of the Superior Courts Act.

² Subrule 5(a) of rule 31 of the Uniform Rules of Courts

- (cc) complied with an agreed plan as contemplated in section 129(1)(a),
- (dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).³

[3] The two cases before us were referred to an open court by the acting registrar at Middelburg Local Seat. She did so as contemplated in Rule 31(5)(b)(vii) which provides that the registrar may in respect of a matter referred to her or him for default judgment, require that the matter be set down for hearing in an open court. In her referral, *inter alia*, she stated:

“The above matters were brought before the Registrar in terms of rule 31(5) of the Uniform Rules of court. These matters are referred to open court in the light of the fact that the sale agreements between the parties are governed by the National Credit Act no 34 of 2005.

*In the context of the following case laws which dealt with agreements governed by the NCA it was found that the Registrar did not have the powers or statutory authority to grant default judgment. **Theu v Firstrand Auto Receivables (RF) Limited and another [2020] ZAGPPHC 319***

Xulu v Standard Bank of South Africa Limited and others [2021] ZAKZPHC 51 (23 August 2021)

Nkata v Firstrand Bank Limited and others [2016] ZACC 12

A number of matters are referred to open court on a daily basis and in the light of the fact that this Division does not have a practice directive in this regard, hence the Registrar is referring these two matters to the DJP’s office”.

[4] The Banking Association of South Africa (BASA) admitted in these proceedings as *amicus curie*, in paragraphs 38 and 39 of their written heads of argument contended that ‘*if the registrar is considered to be sufficiently skilled to assess compliance at the first instance why not allow the registrar to grant the judgment and then rely on the reconsideration provision*’. Then in paragraph 39 of its written heads, BASA proceeded as follows: ‘*We are not familiar with the process of appointing registrars but*

³ Section 130(3) of the National Credit Act

suggest that a possible practical method of enquiry that the registrar is appropriately skilled and experienced is to ensure that the job specification has a part that is directed at the NCA matters, and that someone, perhaps the court manager, is charged with enforcing this. What can occur is that the unskilled Registrar is let loose on dealing with NCA default judgments’.

[5] I cannot agree more with the statement. Just for information, the requirements for the post of a Registrar is LLB degree or a four-year legal qualification and a minimum of two years’ legal experience after qualification. Superior court litigation experience is indicated as an added advantage. In the most recently advertised post of a registrar for the Gauteng Division, under the heading, “Key responsibility areas” amongst others, it is stated:

“To manage the criminal and civil trials, motions, pre-trials, mental health, petition, appeal and review processes. Attending to all quasi-judicial functions, namely, default judgments and taxations” (my emphasis)

[6] In addition, section 11(1) (b) (i) of the Superior Courts Act, 2013 provides that any appointment by the Minister in terms of paragraph (a) must be made-in consultation with the head of court. Paragraph (a) of section 11 (1) provides that subject to paragraph (b) the Minister must appoint for the Constitutional Court, Supreme Court of Appeal and each Division a court manager, assistant court manager, a registrar, assistant registrars and other officers and staff whenever they may be required for the administration of justice or execution of the powers and authorities of the said court. The objective in paragraph (b) (i) of section 11 (1) must be obvious. This must be on the assumption that each head of court knows better the calibre of candidates that are required for the effective and efficient administration of justice and for the execution of the powers and authorities of our courts.

[7] It is expected that after completion of the selection process and interviews of candidates, a report with recommendations would be submitted to the Minister or Minister’s delegated authority and he or she will in turn resort to the “in consultation” process with the head of court concerned as contemplated in paragraph (b)(i) of section 11 (1). Otherwise, any appointment without the express consent of the head of court will be invalid. Unfortunately, the officials dealing with the recruitment

processes seem to ignore this imperative in paragraph (b)(i) of section 11(1) which is simply meant to ensure that the appointment of officials with little practical experience in the administration of justice and lack of competence in dealing with the powers and authorities of the courts, is avoided. Section 23 read with Rule 31(5)(a) referred to in paragraph [1] of this judgment, in my view, is fortified by the involvement of the head of court in the appointment of registrars in terms section 11 (1) (b) (i) as this ensures reliance on the practical experience of such officers.

[8] One must commend the Registrar who referred the two cases to the DJP. Upon receipt of the referral and regard being had to the conflicting judgments and interpretations given to section 130(3) of the National Credit Act (hereinafter referred to as the Act) in other Divisions, it became necessary to constitute a full court. Subsequent thereto a directive was issued to the parties to deal with the following questions:

- “4.1 *Is section 130(3) of the NCA prohibitive of the Registrars from dealing with NCA matters despite section 23 of the Supreme Court Act read with rule 31(5)(a) of the Uniform Rules of Court?*
- 4.2 *Put differently, is there any legal basis to exclude the Registrars from granting judgment by default in NCA matters where such a request is confined to a specified amount of debt? If so, what is the legal basis for the contention?*
- 4.3 *Is the essence of the principle in Nkata to exclude the Registrars are from dealing with NCA matters? Or was the majority decision in Nkata case not confined only to cancellation or re-instatement of the credit agreement as envisaged in subsection (3) of section 129?*
- 4.4 *Can the sheriff attach and remove the credit consumer's or judgment debtor's movables including for example, a motor vehicle forming the subject of the credit sale agreement in terms of NCA after having obtained default judgment on liquidated claim as contemplated in rule 31(5)(a)? If the answer is no, what is the basis for the contention?*

4.5 *Is it prohibitive to obtain default judgment sounding in money for the amount due and payable under NCA read with rule 31(5)(a) without first resorting to cancellation of the agreement and return of the property forming the subject of an agreement under NCA?*

[9] Upon receipt of the written heads of argument, further directive to the parties was issued as follows:

- “1 *It is noted that from paragraph 4.30 of the written heads, the applicant (referring to the applicant in Nedbank matter) deals with the question whether the registrar can grant judgment sounding in money without first resorting to cancellation of the agreement and part of the agreement.*

2. *In the light thereof, the applicant is hereby directed to file written heads of argument by not later than 12h00 on Monday 21 February 2022 dealing with the question whether in terms of rule 31(5)(a) the registrar is competent to grant an order for cancellation and return of the movable property forming part of the agreement. Authority for the answer is required”.*

[10] The directive was sent without sending same to the attorneys for the applicant in the **First Rand Auto Receivables (RL)(PTY) Ltd (FirstRand)** matter. They were also later requested to deal with the questions quoted in the paragraph [7] above. We are grateful to the extensive written heads of argument filed on behalf of the parties and BASA, the latter having been admitted herein as a friend of the court.

[11] Two critical issues are for determination in these two cases. Firstly, is the correct interpretation which should be given to subsection (3) of section 130 of the Act seen in the context of section 23 of the Superior Courts Act and rule 31(5)(a) referred to in paragraph [1] above. The second question relates to whether the registrar is competent to grant judgment for cancellation and return of movable property forming part of a credit agreement.

Interpretation and application of section 130(3) of the Act

[12] In the judgments handed down in the KwaZulu Natal and Gauteng Divisions, the courts interpreted subsection (3) as prohibiting any registrar of a high court from granting default judgment in any matter where the Act is applicable. The decisions in

this regard were based on the word 'court' in subsection (3). Secondly, the decisions seem to have been based on the minority judgment of Jafta J in the case of **Nkata v FirstRand Bank Limited**⁴. The courts in the two Divisions dealt with what was held by Jafta J as if it was a view expressed by the majority judgment. In paragraph [166], Jafta J stated that, *'as a matter of law, no legal fees were due because the institution of the legal action without compliance with section 129(1) was irregular and the default judgment was a nullity because the registrar had no power to grant it'*. On the other hand, in paragraph [123] Jafta J held that **FirstRand** in **Nkata** matter *'...sought and obtained a default judgment from the registrar of the high court, something that is incompatible with section 130(3) which requires such matters to be determined by the court.'*

[13] BASA in its written heads contextualised the judgment of Jafta J as a matter of interpretation and took the view that Jafta J's judgment was a separate judgment from the majority judgment and that whilst Jafta J agreed with the order of the majority, he did so for different reasons as it appears in paragraph [163] of his judgment. According to BASA, the reasons articulated by Jafta J are somewhat confusing in that in paragraph [166] of his judgment he found that the fact that there was no compliance with the provisions of section 129(1), there was an irregularity in the granting of the default judgment by the registrar. Having come to this conclusion, he further found that the default judgment was a nullity because the registrar had no power to grant it as she or he was prohibited in terms of subsection (3) of section 130 of the Act.

[14] In the present **Nedbank** matter, counsel for the applicant argued that in **Nkata case**, the court was not called upon to answer whether section 130(3) of the Act prohibits the registrar from granting default judgment in matters falling under the Act. Instead, the question was whether the credit agreement in question had been reinstated and that the answer to the question had to be answered by interpreting the provisions of section 129(3)(a) and (4)(b) of the Act and not section 130(3). I tend to agree with this contention on behalf of Nedbank.

⁴ 2016(4) SA 257 CC.

[15] As correctly stated by Mr Tsatsawane SC in his written heads, the majority judgment in **Nkata** concluded that the bank instituted the proceedings against Ms **Nkata** and obtained judgment when notice in terms of section 129(1) was not given and this rendered the default judgment of no force and effect. The default judgment in **Nkata** matter would also have been of no force and effect even if it had been granted by a judge in open court, so was the argument made by Mr Tsatsawane on behalf of **Nedbank**.

[16] Section 129 deals with the required procedures before debt enforcement. Subsection (1) thereof requires the credit provider to 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 and with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring payments under agreement up to date and that subject to section 130(2) credit provider may not commence legal proceedings to enforce the agreement before first providing notice to the consumer as contemplated in paragraph (a) of section 129(1).

[17] The court in **Nkata** also had to deal with the question whether the consumer was entitled to reinstatement of the credit agreement after the consumer had rectified the default by paying to the credit provider all amounts that were overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement as contemplated in subsection (3)(a) of section 129.

[18] Perhaps it is necessary to revisit the method of interpretation. I find it necessary to deal first with the purpose of the Act insofar as it might be relevant. Its purpose in main, is to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry and to protect consumers. One way to achieve this purpose is to promote the development of a credit market that is accessible to all South Africans and in particular to those who have historically been unable to access credit under sustainable market as envisaged in paragraph (a) of section 3.

[19] Section 2 of the Act provides that ‘the Act must be interpreted in the manner that gives effect to the purposes set out in section 3. One such purpose for the interpretation of section 130 (3) in the present case, is as set out in paragraph (g) of section 3 of the Act. That is, to address and prevent over-indebtedness of consumers and to provide mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations. I deal briefly with paragraph (g) of section 3 later in paragraph [60] when I deal with the issue of costs and the delay likely to be occasioned by launching a substantive application for every default judgment under the Act.

[20] Where a provision of a statute is either sought to be interpreted or tested for constitutional validity, it may at times be appropriate to consider how another statute deals with a similar issue. But even under those circumstances, the latter statute cannot be any more than an interpretive aid. It is thus impermissible to use as a standard to be adhered to or to attach more weight to a word in a statute that is not being challenged.⁵

[21] Where a word is defined in a statute, the meaning ascribed to it by the Legislature must prevail over its ordinary meaning. If, however, there are compelling reasons, based on the contexts, to disregard the ascribed meaning, then the ordinary meaning of the word must be used. If a defined word or phrase is used more than once in the same statute, it must be given the same meaning unless the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply.⁶

[22] The word “court” is not defined in the Act. However, another statute in the present case, needs to be looked at to determine which interpretation must be given to the word “court” in section 130(3) of the Act. That statute is the Superior Courts Act No. 10 of 2013, (the Superior Courts Act) in particular section 23 referred to in

⁵ Independent Institute of Education (PTY) Limited v KwaZulu-Natal Law Society and Others [2019] ZACC 47 at para 15

⁶ Lieschiny v The State 2016 ZACC 41 2017 (2) SACR 193 (CC) at para 33

paragraph [1] of this judgment. The section makes it plainly clear that a default judgment granted and entered by the registrar is deemed to be a judgment of a court of the Division concerned.

[23] Nkosi J in paragraph [12] in the matter of **Xulu** cited in paragraph [3] of this judgment, expressed himself as follows:

“I consider it to be settled law that the registrar is not endowed with the powers under section 130(1) to (3) of the NCA to grant orders to enforce either a credit agreement or 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”.

[24] Nkosi J in coming to the conclusion as he did, relied on the judgment in **Nkata** case, in particular, Jafta J’s judgment referred to earlier in this judgment. He also relied on the cases of **Master of the High Court North Gauteng v Motala NO. 2012 (3) SA 325 (SCA)**, **Seleka v Fast Issuer SPV (RF) Limited and Another [2021] ZAGPPHC 128**, **Theu v Fist Rand Auto Receivables (RF) Limited & Another [2020] ZAGPPHC 319**. He came to the conclusion without making reference to section 23 of the Superior Courts Act.

[25] Mr Tsatsawane SC on behalf of Nedbank, Mr Green SC on behalf of BASA and Mr Du Plessis SC on behalf of First Rand, all dealt with Nkosi J’s judgment and the judgments in the cases referred to in paragraph [24] above. I tend to agree with their contentions. Starting with **Xulu**, no reference was made to section 23 of the Superior Courts Act. According to Mr Tsatsawane, the Legislature enacted section 23 fully aware of the existence of section 130(3) and the various case law relevant to the other aspects of the Act. With this knowledge, the Legislature in its wisdom, decided to enact section 23 without any limitations, so was the contention by Mr Tsatsawane on behalf of Nedbank. He further contended that the court cannot now in interpreting section 130(3) of the NCA, read-into it a limitation of the registrar’s powers vested in terms of section 23 when the Legislature could easily have done so if it wanted to.

[26] In section 23 of the Superior Courts Act the registrar is vested with the powers to grant and enter default judgment for as long as he or she does so in a manner in the circumstances prescribed in the rules. That rule, is Rule 31(5)(a) of the Uniform

Rules of Court. In **Erf 1382 Sunnyside (PTY) Ltd v Die Chip CC 1995(3) SA 659(T) at 660 E-G** referred to by Mr Tsatsawane in his written heads, Spoelstra J held that the intention of the rule is clear and that it confers the registrar with “*the power to make all orders and to adjudicate all those matters which previously had been decided by the court in terms of rule 31(2) and where no evidence was required to prove the amount of claim or the cause of action...*”

[27] To cause every matter under the Act to be brought on application in an open court for default judgment in circumstances where the registrar is entitled to deal therewith, will not be in the interest of justice and can only in my view, serve to frustrate the key purposes of the Act. Adv. H.R Fourie SC on behalf of the **FirstRand** in the present proceedings drew our attention to another important aspect. That is, an issue of costs. In the supplementary written heads of argument titled “*costs implication of a court hearing application for default judgment*” reference is made to the case **Eke v Parsons 2016(3) 37 CC at para [40]** wherein dealing with the object of court rules, it was held that the rules are to ensure a fair trial hearing, secure the inexpensive and expeditious completion of litigation and to ensure the interest of the administration of justice, is attained.

[28] Having alluded to this, Mr Fourie SC then proceeded to deal with specific case law where the court considered the costs implications of allowing the bank to first obtain judgment by default in respect of the monetary claim and to approach the court on a second application to declare the hypothecated immovable property specially executable. The court consequently held, inter alia, that there is a duty on the banks to bring their case in one single proceedings.⁷ In **Lindeijer and Another NNO v Buttler**⁸, the court had to consider whether an application for default judgment in respect of claims for a debt or liquidated demand would nevertheless be brought directly to court. The court acknowledged that the procedure in Rule 31(5)(a) is cheaper and a more convenient procedure. I agree. As clearly pointed out by Mr Fourie SC, where an application for default judgment is heard in open court, additional

⁷ ABSA Bank Ltd v Mokebe & 3 relateds matters 2016(6) SA 492 (GJ) at paras 13 and 26

⁸ 2010(3) SA 348 (EP) at para 5

costs are incurred, at least the costs of briefing counsel where applicable. I deal later in paragraph [60] with extent of such costs.

[29] The costs of bringing a substantive application for default judgment in an open court for enforcement in every matter under the Act, in my view, will be a burden on an already financially distressed consumer. That would only serve to defeat the purpose of the Act in particular, for the previously disadvantaged South Africans who in the past had problems in accessing financial credit facilities. Promotion and advancement of social and economic welfare, sustainable, efficient and effective credit market of those who have historically been unable to access credit, as envisaged in section 3(a) of the Act, would be made difficult to achieve due to the escalating costs if every time when the enforcement of credit agreement was to take place, the bank has to do so in an open court and by filing a substantive application.

[30] The nature of the work of the registrar in considering the granting of default judgment, is about procedural compliance. This too should be clear from the wording in subsection 3 of section 130. In terms of this subsection,(3) the “court” would only proceed to consider an application for default judgment after having been satisfied that: (a) in the case of proceedings in which sections 127, 129 or 131 apply, the procedures prescribed in those sections have been complied with, (b) that there is no matter arising under the credit agreement and pending before the Tribunal, that would result in an order affecting issues to be determined by the court, and (c) that the credit provider has not approached the court as in paragraph (i), (ii), (aa) to (dd) thereof.

[31] All of the above, amount to a checklist or ticking of the box without hearing evidence on a complicated issue or deciding on substantive law. In ***Du Plessis v Firstrand Bank Limited t/a Wesbank***⁹, Tlhapi J had an opportunity to examine where the registrar derives his or her authority from, in the granting of default judgments. She held:

⁹ (62570/2015) [2018] ZAGPPHC 2016 286 (2 May 2018)

“In terms of section 23 of the Superior Courts Act 10 of 2013, a Registrar of a court is entitled to grant default judgment where defendant has failed to defend the action after proper service of the summons and particularly of claim instituting action...”¹⁰

[32] In paragraph [15] of her judgment, Tlhapi J further stated that ‘by having necessary knowledge, he is in a position to make certain decisions as appears in rule 31(5)(b)(ii) to (vi)’. She further held that ‘it is evident in this process that there is inbuilt protection afforded to the litigant and consumers in that they are afforded the opportunity to approach the court for a reconsideration of the default judgment and where circumstances permit, to apply for rescission’.

[33] It would be very difficult for one to disagree with the conclusion reached by Tlhapi J in **Du Plessis** case. Therefore, the conclusion in **Xulu** referred to earlier in this judgment is not persuasive. The conclusion was reached without having regard to the imperative in section 23 of the Superior Courts Act. Furthermore, the conclusion was reached as if what was said by Jafta J in his separate reasoning, became the decision in the majority judgment. What has happened in the majority judgment is that the views expressed by Jafta J were noted without the majority expressing approval thereof. In any event, the issue relating to section 130(3), was not an issue to be decided in **Nkata**.

[34] In the case of **Theu v First Rand Auto Receivables (RF) Limited & Another** above, **Matebese AJ** also had an opportunity to consider section 130(3). In paragraph 20.2 of **Nedbank’s** written heads in the present proceedings, counsel put it this way: *“At first blush, the reasoning of this judgment (referring to the judgment in **Theu**), is attractive but on closer scrutiny, it does not matter’*. Having considered section 130(3) the court in **Theu** then came to the conclusion that section 130 makes no reference to the registrar, but only specific reference to “the court” and that therefore the registrar is precluded from granting default judgment in any matter falling under the Act.

[35] As previously indicated elsewhere in this judgment, the “court” is not defined in the Act and neither is it specifically defined in the Superior Courts Act. Therefore, plain

¹⁰ See para 5 in **Du Plessis’s** case

meaning should be given to the wording in section 23 of the Superior Courts Act. That is, any default judgment granted and entered by the registrar should be ‘deemed to be a judgment of a court of the Division’ in the manner and in the circumstances prescribed in the rules. The words “In the circumstances prescribed in the rules” in section 23 of the Superior Courts Act should be seen as reference to Rule 31(5)(a) of the Uniform Rules of Court in respect of which the registrar is authorised to grant a default judgment ‘where each of the claims is for a debt or liquidated demand’. In **Theu’s case**, the court in arriving at the conclusion as it did, relied on Jafta J’s judgment in **Nkata**. I find that Jafta’s minority judgment is not binding on this court for the reasons already stated.

[36] In paragraph 46 of his judgment, Matebese AJ held:

*“I agree with the reasoning of Jafta J in this regard. The legislature was in my view deliberate in its reference to the court in the section. It intended to achieve the objects of the Act and it could only ensure that the objects are achieved by entrusting the objective on the courts. The oversight function envisaged in the section is very important in achieving the objects of the Act. It is an oversight function that as authorities like **Kubyana** and **Sebola** have shown, requires much interpretative exercise. In my view if same is delegated to the office of the Registrar, it will lose its effectiveness”.*¹¹ (My emphasis).

[37] The statement: “*In my view if same is delegated to the office of the Registrar, it will lose its effectiveness*”, with respect misses the valid point made by Thlapi J in paragraph [15] of her judgment and paraphrased in paragraph [32] above. In other words, should a consumer feel aggrieved by the default judgment granted by the registrar, he or she has the opportunity to ask for reconsideration in the form of a rescission application. That is the “*inbuilt protection*” Thlapi J was talking about. In respect to what the court needs to be satisfied with under subsection (3)(a) of section 130, is procedural aspects in sections 127, 129 and 131 of the Act. It is not about complex legal issues or consideration of evidence on disputed issues. I am therefore not persuaded by reasoning in **Theu’s case**. I find that the registrar is not precluded from considering requests for default judgment and if satisfied with the procedure as

¹¹ See para 15 in Du Plessis’ case

stipulated in section 130(3), he or she may then grant default judgment as contemplated in sub-rule 31 (5) (a) read with section 23 of the Superior Courts Act. I now turn to deal with another issue.

Is the registrar in terms of rule 31(5)(a) competent to grant an order for the cancellation of credit agreement and the return of the moveable property?

[38] To interpret subsection (3) of section 130 as prohibiting the registrar from considering request for default judgments in any matter where the Act applies, would not only frustrate the object of a rule which has been effective, quick and inexpensive in dealing with default judgments, but it would also impede on the inherent powers of the court in section 173 of the Constitution. Burdening the courts with procedural issues that can easily, quickly and in a less expensive manner be dealt with by the registrar, is not in the interest of the administration of justice as contemplated in section 173 of the Constitution. Later in paragraphs [60] to [62] of this judgment I deal with the extent of the frustration and prejudice caused by interpreting section 130 (3) as prohibiting the registrars from dealing with the requests for default judgment where the Act applies.

[39] The parties have also been requested to deal specifically with this question. The question was prompted by the wording of rule 31(5)(a) which entitles the registrar to grant judgment by default where each of the claims, is for a debt or liquidated demand. The issue at hand is whether the registrar is empowered to grant default judgment for cancellation of a credit agreement and the return of movable property forming part of credit agreement on a debt or liquidated demand or claim.

[40] We are thankful for the written heads of argument filed in response to this question posed by the court. It was contended on behalf of Nedbank in the present proceedings that “a debt or liquidated demand” is not defined in the Uniform Rules of Court. It was further contended that in **Erasmus, Superior Court Practice, 2nd Edition at D1-271 rule 42 of the old Transvaal Rule of Court** “liquidated claim” is defined to include “a claim for a fixed and definite thing” such as for transfer or

ejection or for delivery of a specified movable or for cancellation of a contract". (My emphasis).

[41] The contention is that whilst the present rule 31(5)(a) does not contain such a definition, the definition given to "liquidated demand" in the past should be seen to apply to a "liquidated claim" in the present rule. We were further referred to the case of **Supreme Diamonds (Pty) Ltd v Du Bois, Regent Neckwear Manufacturing Co (Pty) Ltd v Ehrke**¹², wherein the court had an opportunity to deal with two claims in which the plaintiffs asked for default judgment in terms of rule 31(2)(a) for the return of certain diamonds and shirts. Whilst it was not the registrar who was dealing with the request for default judgment, Mr Tsatsawane SC on behalf of the Nedbank contended that because the consideration by the court in **Supreme Diamond** was that the main claims were vindicatory in nature and relate to the return of specified movable property¹³, this should be seen to apply to consideration of default judgment by the registrar under rule 31(5)(a). The basis for this is that the registrar should be competent to deal with such a request for default judgment because he or she is not required to deal with substantive issues and that only simple evidence on procedural issues, is required. In my view, simple evidence on affidavit is sufficient where the registrar has to satisfy himself or herself that debt procedural aspects in section 130(3) have been complied with, including consideration of specific terms of the credit agreement for cancellation and repossession clauses. This does not require an oversight of the court on substantive application.

[42] I find it necessary to consider the meaning of a "debt" in rule 31(5)(a). The Constitutional Court in the matter of **Makate v Vodacom Pty Ltd 2016(4) SA 121 CC [26 April 2016]** had to revisit the definition attached to the word a "debt" in other previous case law. In the matter of **Desai No v Desai**¹⁴, **F.H. Grosskopf JA** had an opportunity to deal with the definition of a "debt" under the Prescription Act 68 of 1969. He held that the term "debt" is not defined in the Act, but that in the context of section 10(1), it has a wide and general meaning, and "includes an obligation to do something or refrain from doing something". In coming to this conclusion, **Grosskopf JA** followed

¹² 1979 (3) SA WLD 444

¹³ See Superior Diamond at 445A

¹⁴ 1996 (1) SA 141 A

what was held in the matters of **Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd**¹⁵ and **Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere**¹⁶.

[43] However, the Constitutional Court in **Makate** had to deal with these previous Appellate Division decisions referred to above in the context of the Prescription Act and not in the context of rule 31(5)(a). In paragraph [85] of its judgment it cited with approval **Eskom supra** wherein it was held that the word “debt” in the Prescription Act, should be given the meaning as ascribed to it in the **Oxford English Dictionary**, that is:

“1. Something owed or due: Something (as money, goods or service) which one person is under obligation to pay or render to another. 2. A liability or obligation to pay or render something, the condition as being so obligated”.

[44] Thus, the Constitutional Court ascribed to “debt” “a more circumscribed meaning”. For this, the Constitutional Court in paragraph [86] of its judgment held: *“It is unclear whether the court in **Desai** intended to extend the meaning of the word “debt” beyond the meaning given to it in **Eskom**. If it did, it does not appear that this followed any submissions made to the court by the parties or any issue arising in the case. Nor, if that was the intention, did the court give consideration to the constitutional imperative in regard to the interpretation of statutes in section 39(2) of the Constitution”*

[45] Having expressed itself as above, the Constitutional Court in paragraphs [87] and [88] of its judgment then proceeded to deal with the constitutional interpretative imperative as follows:

*“87. Since the coming into force of the Constitution in February 1997, every court that interprets legislation is bound to read a legislative provision through the prism of the Constitution. In **Fraser, Van der Westhuizen J** explained the role of section 39(2) in these terms: “When interpreting legislation, a court must promote the spirit, purport and the objects of the Bill of Rights in terms of section 39(2) of the Constitution. This*

¹⁵ 1981 (3) SA 340 (A) at 344 F-G and

¹⁶ 1983 (1) SA 354A at 370B

court has made clear that section 39(2) fashioned as mandatory canon of statutory interpretation.

88. *It is apparent from **Fraser** that section 39(2) introduced into our law a new rule in terms of which statutes must be construed. It also appears from the same statement that this new aid of interpretation is mandatory. This means that courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provisions under Constitution implicated or affects rights in the Bill of Rights, then the obligation in section 39(2) is advanced. The court is duty bound to promote the purport, spirit and objects of the Bill of Right, in the process of interpreting the provision in question...*"

[46] I have already dealt with the object or purpose of the Act somewhere in this judgment. The object is to ensure *inter alia*, that those consumers who are already financially burdened, their situations are not exacerbated by the increase in legal fees and costs where in every matter for default judgment, the cancellation of a credit agreement and return of movable property under the Act, will require the attention of the court.

[47] Therefore, "*something-due as goods, one is under obligation to render to another*" as referred to in paragraph [85] in **Makate's** case, read together with "a debt" referred to in rule 31(5)(a) of the Uniform Rules, should be interpreted as entitling the registrar of a Superior Court to grant default judgments for cancellation of the credit agreement and the return of the movable property forming part of the credit agreement under the Act.

[48] Take it a step further as follows: In the matter of Nedbank under consideration, the consumer in terms of clause 15 of the credit agreement bound himself to the terms and conditions of the agreement. In term of clause 15.1 of the agreement and without prejudice to Nedbank's other rights, Nedbank may in terms of clause 15.1.4 cancel the agreement, take possession of the goods and claim from the consumer either an amount equal to the amount paid out to the consumer equivalent to the outstanding balance less the market value of the goods at the date of consideration of the agreement. This being part of the agreement for cancellation coupled with the return

of specific movable property, there can be no reason why the registrar should not be entitled to deal with the default judgment for cancellation and return of the movable property.

[49] In any case, the issue is academic insofar as it relates to Nedbank against the consumer, Mr Mollentze. He voluntarily surrendered the vehicle forming part of the credit agreement. Nedbank having sold the vehicle then approached the registrar to grant default judgment for the remaining amount due.

[50] Before I conclude on the topic under discussion, Mr Tsatsawane on behalf of Nedbank, in his written heads of argument drew our attention also to the cases of **Brooks and Another v Martin Brothers**¹⁷ and **Estale Phillips and Another v Corneilssen**¹⁸. In **Brooks**, the agreement in question made a provision for its summary cancellation in the event of a breach. The question before court in **Brooks** case was whether such a claim was a claim for a debt or liquidated claim. The court without dealing with the question directly, concluded that it was 'unnecessary for the plaintiffs to have the sanction of the court for the cancellation of the agreement.

[51] In **Estale Phillips**, the court was concerned with an application for cancellation of a sale of immovable property and it held:

"It appears that as long as a claim is for a fixed, certain, ascertained thing, it is a liquidated demand or looked upon for the purpose of the rule, as a liquidated demand.... Applications for the cancellation of sale of property are frequently made under the rules and there are numerous cases in which the application has been granted. In these applications something certain is asked, something that is fixed and the court knows exactly what is demanded".

[52] Relying on **Supreme Diamonds case**, Counsel for Nedbank then came to the conclusion that a claim for the return of a specified movable property constitutes a claim for a debt or liquidated demand and that the registrar is therefore competent to

¹⁷ 1974 (2) SA 39 (R)

¹⁸ 1913 CPD 922

entertain such claims because they are directed at a specified and identifiable movable property. I tend to agree. In whatever way one looks at it, whether it is for a debt or for a liquidated claim, it comes to the same conclusion.

The power and role of the registrar in performing quasi-judicial functions

[53] Starting with the definition of quasi-judicial functions, it means proceedings concluded by an administrator or executive official that is similar to a court proceeding or hearing. A court may review a decision arising from a quasi-judicial proceeding. It is a judicial act which is performed by an official who is either not a judge or not acting in his or her capacity as a judge¹⁹. According to **Merian-Webster Dictionary**, quasi-judicial means having a partly judicial character by possession of the right to hold hearings and conduct investigations into dispute claims and alleged infractions of rules and regulations and to make in the general manner of courts.

[54] The registrar's core functions are quasi-judicial in nature. Such functions are performed cognisant of rules 31(5)(a) and 70 of the Uniform Rules of Court which deal with default judgments and taxations respectively. The granting of a default judgment and the issuing of allocatur in taxation matters have the force of court order upon which execution can take place.

[55] Paragraph (b) of rule 31(5) sets out the process which the registrar should follow in performing his or her quasi-judicial functions. For example, (i) he or she may grant judgment as requested (ii) may grant judgment for part of the claim only or on amended terms, (iii) may refuse judgment wholly or in part, (iv) postpone the application for judgment on such terms as he or she may consider just (v), request or receive oral or written submissions, (vi) or may require the matter be set down for hearing in an open court. (My emphasis)

[56] Whilst the registrar is dealing with administrative functions which are procedural in nature, there are certain powers the registrar is vested with. The power to receive oral or written submissions is a very significant tool for the registrar. This process

¹⁹ Legal Information Institute

enables the registrar to satisfy himself or herself that procedural aspects are complied with and that relevant information is gathered before a decision to grant or refuse a default judgment is made. The request for oral or written submissions was referred to by counsel on behalf of Nedbank as a simple or minimum evidence in the granting of default judgment by the registrar.

[57] The powers of the registrar to grant default judgment is not in its nature a final determination that can be appealed against. It is a process which allows the party against whom a default judgment was granted to approach the court for rescission of such judgment. The rescission allows for an oversight of the court. In such an application the applicant is required to satisfy two requirements, namely, reasonable explanation for his or her absence and *bona fide* defence. This would normally be a situation where the defendant had either failed to file an appearance to defend or where he or she has failed to file a plea after having entered an appearance to defend and after having been served with a notice of bar.

[58] Many of the agreements under the Act have somewhat procedural safety valves in the event of a default. A provision is made for the credit provider to be entitled to ask for cancellation of the agreement in case of default coupled with the return of the movable property forming the subject of the credit agreement. This is not a substantive issue, but a procedural enquiry which amounts to ticking of the box.

[59] The registrar is conferred with powers in terms of Rule 31(5)(a) read with section 23 of the Superior Courts Act, to grant default judgments. Conferring the registrar with the powers to consider cases as stated above and where appropriate grant default judgment, is consonant with the purpose of the Act. It makes the process easy, quicker and most importantly cheaper for the consumer and thus making the financial credit more accessible. It also makes the banking institutions more profitable as many people are able to access the financial credits. It is a process that safeguards competing rights of the consumer and the credit provider. Making it difficult for the credit providers to enforce the terms and conditions of the credit agreements in the event of default by consumer, would result in many prospective consumers not sustaining their financial obligations.

[60] It could never have been the intention of the Legislature in section 130(3) that every time when a credit provider wishes to enforce the credit agreement due to default, he or she should launch a substantive application to be determined by the court and not by the registrar in terms of rule 31(5)(a). The delay and costs implications are enormous in resorting to substantive applications in every default judgment under the Act. This was made clear by both legal representatives on behalf of the banking institutions. A simple application for default judgment before the registrar is said to cost in the region of R500.00 whilst substantive application through court will cost in the region of R5000.00 to R10 000.00. The procedure under Rule 31(5)(a) read with section 23 of the Superior Courts Act, could only have been intended to avoid such enormous costs. The delay in having a substantive application for default judgments finalised in an open court, is also unacceptable. The court rolls are unnecessarily overcrowded and thus resulting in delayed finalisation of the matters under the Act. This is the kind of prejudice intimated in paragraph [38] of this judgment. In my view, it defeats the purpose of the Act as alluded to in paragraphs [18] and [19] of this judgment.

[61] During the special meeting of heads of court held on Friday 18 March 2022, Acting Judge President in a document presented to heads of court, expressed the frustration and challenges posed by the decision in **Xulu** case as follows:

"1...

2. *However, this has changed since the judgment in **Xulu v Standard Bank of South Africa Limited and Others** [2021] ZAKZPHC51 (23 August 2021) and other decisions in the Gauteng Division of the High Court which held that the registrars are not empowered to grant judgments where the provisions of s130(3) of the National Credit Act apply to those proceedings. This means that such applications must be dealt with by the judges either in open court or as chamber applications.*

3. *The problem has been exacerbated by the Supreme Court of Appeal judgment in **Standard Bank of South Africa Ltd vs Thobejane and others; Standard Bank of South Africa Ltd vs Qqirana NO and Another** (38/2019;999/2019) [2021] ZASCA92; [2021] 3 All Sa 812 SCA; 2021 (6) SA 403 SCA (25 June 2021) which in broad terms declared that a claim sounding in money, even falling within the jurisdiction of the Small Claims Court (R20 000.00) or District Court (R200 000) or Regional Court (R400 000) may be brought to the High Court. This has resulted in Judges being required to deal with default judgments for amongst others within the jurisdiction of the Small Claims Court.*

The judgment in our view indirectly took away the important recognised hierarchy of courts in our judicial system. As matters stand, in Pietermaritzburg High Court only, +-1000 of these default judgments awaiting to be dealt with. Our general office informed us that they at least issue about 60 of these matters per day". (My emphasis).

[62] What is happening in Maritzburg High Court is not an isolated challenge posed by **Xulu** and **Theu** decisions. The Gauteng Division in an effort to avert the impact brought about by the decisions in **Xulu** and **Theu** introduced a directive. As I understand it, the registrar will check procedural compliance regard being had to the simply evidence as is sometimes necessary when the registrar has to consider requests for default judgment in terms of rule 31(5)(a). Once the check list is completed in each file, the files are referred to available judges to consider the applications for default judgment.

[63] There is also another aspect to consider as was contended by the legal representatives on behalf of the banking institutions. If all these matters under the Act are brought in open courts, which courts are already flooded with many cases across all the spectrum of court rolls to deal with procedural issues, this would only serve to exacerbate the delay at a huge prejudice to the consumers. Additional costs and interests charged on the outstanding balance, would make it unaffordable to an already financially distressed consumer.

[64] Counsel on behalf of BASA bluntly put it this way: *"To cause every default judgment application which deals with procedural issues to be considered in an open court, would amount to turning judges into credit policemen and women and that this is a complete waste of a judge's time"*. I tend to agree.

[65] Empowering the registrar with the authority of a court in terms of section 23 of the Superior Courts Act, in my view, was meant to enable the registrar to deal with quasi-judicial functions including consideration and granting of default judgments in matters falling under the Act. All what is needed of a registrar is to have some sort of a check-list and in the event of any doubt, the registrar is at liberty to refer the matter to an open court in terms of Rule 31(5)(iv) as it has happened here.

[66] Consequently an order is hereby made as follows:

66.1 The two applications are hereby referred back to the registrar to deal therewith in the normal course under rule 31.

66.2 No order as to costs is made.


LEGODI JP

DATE OF HEARING: : 24 FEBRUARY 2022
DATE OF JUDGMENT : 23 MARCH 2022

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