IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable	**Yes**
Of Interest to other Judges	**Yes**
Circulate to Magistrates:	**Yes/No**

Case No.: **4526/2021**

In the matter between:

MENEZI LUSAPHO GCASAMBA Applicant

and

MERCEDEZ-BENZ FINANCIAL SERVICES SA (PTY) LTD First Respondent

SHERIFF, BLOEMFONTEIN WEST Second Respondent

CORAM: N. SNELLENBURG, AJ

HEARD ON: 5 MAY 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15 August 2022 at 11H00.

Summary: It is not competent for the Registrar of the High Court to grant default judgments in matters to which the National Credit Act 34 of 2005 applies. National Credit Act 34 of 2005 – s130(3).

INTRODUCTION

[1] This judgment turns around the competency of the Registrar of the High Court to grant default judgments in matters to which the National Credit Act 34 of 2005 [NCA] applies.

[2] The application under consideration involves an opposed application for rescission of a default judgment granted by the Registrar on 3 November 2021 where a credit provider enforced a credit agreement resorting under the auspices of the NCA. In terms of the order, the first respondent's termination of the credit agreement was confirmed; the return of the vehicle, forming the subject matter of the credit agreement, to the first respondent was authorised; cost of the suit was awarded to the first respondent; and leave was granted to the first respondent to approach the Court after the vehicle was repossessed and sold to claim damages and ancillary relief which need not be recorded for purposes hereof.

[3] Even though the application is made in terms of Uniform rule 42 [Rule 42], alternatively the common law, alternatively '*any other applicable rule of law*', the heads of argument and oral submissions on behalf of the applicant concentrated only on a rescission in terms of Rule 42.

[4] The main issue serving for determination is whether it is competent for the Registrar of the High Court to grant default judgments or make any orders in matters resorting under the National Credit Act 34 of 2005.

BACKGROUND FACTS

[5] On 25 April 2018 the first respondent, a credit provider duly registered as such in terms of the applicable provisions of the NCA, and the applicant, concluded an

instalment sale agreement [the agreement] in terms whereof the first respondent sold a 2014 used Mercedes-Benz [the vehicle] to the applicant. The agreement is a credit agreement to which the NCA applies.

[6] In the credit agreement, the applicant selected …….. Road, Bloemfontein as his domicilium citandi et executandi where all notices must be sent in terms of the provisions of s96 and s129(5) and (6) of the NCA.

[7] In terms of the agreement the first respondent reserved ownership of the vehicle until the applicant fulfilled all his obligations under the agreement. The applicant failed to meet his obligations under the credit agreement and fell in arrears.

[8] On 5 August 2021 the first respondent addressed a s129(1) notice, dated 4 August 2021, to the applicant by delivering the notice by pre-paid registered post to the applicant's chosen domicilium address. On 23 August 2021 the SA Post Office sent the first notification to the recipient, being the applicant, to collect. At that stage the arrears were R86 186.97. The applicant did not respond to the notice.

[9] As result of the applicant's breach of the agreement and failure to respond to the notice in terms of s129, the first respondent was entitled to cancel the instalment sale agreement; obtain the return of the vehicle and proceed in terms of Chapter 6, Part C of the NCA. The first respondent exercised this election and issued summons against the applicant wherein it claimed confirmation of the termination of the agreement, the return of the vehicle with leave to approach the Court after the vehicle had been sold for damages and ancillary relief if necessary. At that stage the arrears were R105 658.85 and the outstanding balance which became immediately due and payable amounted to R299 476.97 with interest as agreed to accrue on the outstanding amount.

[10] The Sheriff effected service of the combined summons on 14 October 2021 at the applicant's chosen domicilium address, to wit …….. Road, Bloemfontein on Me Farao, a domestic worker ostensibly a responsible person and not less than 16 years of age, of and in control of the chosen domicilium citandi in the absence of the applicant.

[11] On 29 October 2021 the first respondent applied for a default judgment in terms of Rule 31(5) together with a warrant for delivery of goods, in line with the practice for default judgments of that ilk that was followed in this Division at the time.

[12] On 3 November 2021 the Registrar granted the default judgment referred to in paragraph 2 above and issued a warrant for delivery of goods.

[13] At the end of November 2021 the Sheriff repossessed the vehicle.

THE APPLICANT'S CASE

[14] The applicant describes himself in the founding affidavit as an adult male practicing attorney.

[15] The applicant does not dispute breaching the agreement, nor the arrear amount.

[16] The applicant concedes that the domicilium address recorded in para 6 above was selected by him in the agreement as domicilium address for service of all notices. It is also conceded by the applicant that he never changed this address in terms of the provisions of s96 of the NCA. The applicant states in his replying affidavit that he had neglected to 'inform' the first respondent of his new address.

[17] According to the applicant he only became aware that summons was issued, and the order granted, when the Sheriff repossessed the vehicle. To this end the applicant states in his founding affidavit that he vacated the residential address he had selected as domicilium citandi in the agreement, during April 2021.

[18] After unsuccessful attempts to convince the first respondent to abandon the judgment and being informed by the first respondent's attorneys on 17 December 2021 that their instructions were to execute the judgment granted in their client's favour, the applicant issued this application.

[20] The applicant contends that the s129 notice was not '*served*' on him as he was no longer resident at the domicilium address.

[21] As far as service of the combined summons is concerned, the applicant questions the Sheriff's return of service in light thereof that the residence was, according to him, vacant until November 2021 when the new tenant moved in. To this end the applicant tendered a confirmatory affidavit of the new tenant, Dr. Thabiso Rapapali, as annexure to his replying affidavit.

[22] The applicant premised the application, both in terms of his reliance on Rule 42(1)(a) and the common law, on the following grounds:

22.1 Firstly the applicant contends that the judgment was erroneously sought by first respondent because the combined summons was served at an address where he no longer resided and which, according to him, was vacant when the service was effected. The applicant therefore contends that he was not given 'notification' of the proceedings against him as result of which he was deprived of the right to be heard.

22.2 Secondly, the applicant contends that the s129 notice was not 'served' on him as result of which the judgment was erroneously granted. The contention is premised on the fact that he was no longer resident at the chosen domicilium address when the notice was delivered by pre-paid registered post. As result the applicant states that he was denied the opportunity to exercise his rights in terms of the NCA to pursue the options

in the s129 notice. He complains that he was denied his constitutionally entrenched right to defend the action and to have his day in Court.

22.3 Thirdly, the applicant contends that the Registrar does not have the power to grant default judgments in matters resorting under the auspices of the NCA. The applicant relies on the fact that the Judge President subsequently issued a directive that all applications for default judgments in matters resorting under the auspices of the NCA must be heard in open court, although it is conceded that this directive only followed after the default judgment in question had already been granted. The applicant placed reliance on the concurring judgment by Jafta J in *Nkata v FirstRand Bank Ltd*[1] [**Nkata**] as well as the judgments in *Tseu v FirstRand Auto Receivables (RF) Limited and another* (89371) [2020] ZAGPPHC 319 (12 June 2020) [**Tseu**] and *Xulu v Standard Bank of South Africa Limited* (1570/21; 2909/14) [2021] ZAKZPHC 51 (23 August 2021) [**Xulu**].

THE FIRST RESPONDENT'S CASE

[23] The applicant selected the domicilium address in terms of the relevant provisions of the NCA. The applicant did not change this address by delivering to the first respondent a written notice of a new address by hand, registered mail, or electronic mail as envisaged by s96(2) of the NCA.

[24] The s129 notice was duly delivered to the applicant as required by s129(1) read with s129(5) and (6) of the NCA, proven by the 'track and trace report' of the SA Post Office which was appended to the combined summons. Delivery of the s129 notice satisfied the requirements of s129(7) of the NCA and complied with the requirements enunciated in Sebola and Another v Standard Bank of South Africa

1 *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) (2016 (6) BCLR 794; [2016] ZACC 12).

Ltd and Another[2] [**Sebola**] as explained in Kubyana v Standard Bank of SA Ltd[3] [**Kubyana**].

[25] The summons was duly served on the applicant by the Sheriff at the applicant's chosen domicilium address on Me Farao, a domestic worker ostensibly a responsible person and not less than 16 years of age, of and in control of the chosen domicilium citandi in the absence of the applicant. This constitutes proper service.

[26] The Registrar is empowered to grant default judgments in terms of the provisions of s23 of the Superior Courts Act 10 of 2013 read with Uniform rule 31(5).

[27] Rule 42 affords the Court a discretion to refuse to set aside a judgment even when the requirements for rescission are satisfied. The first respondent contends that the Court should, in the exercise of its discretion, refuse to set aside the default judgment if it holds that the Registrar was not empowered to grant the judgment, as the applicant was properly notified of the intended legal action and his failure to defend the action was wilful.

DISCUSSION

[28] In terms of Uniform rule 42(1)(a) the Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[29] In *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*[4], Streicher JA explained that if a party is procedurally entitled to an order, it

2 *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) (2012 (8) BCLR 785; [2012] ZACC 11)
3 *Kubyana v Standard Bank of SA Ltd* 2014 (3) SA 56 (CC) (2014 (4) BCLR 400; [2014] ZACC 1).
4 *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) ([2007] ZASCA 85) paras 25 – 27.

cannot be said to have been granted erroneously in the absence of another party, regardless of subsequently disclosed defence.[5]

[30] Once the judicial requirements for a rescission in terms of Rule 42(1)(a) are however satisfied, an applicant is entitled to rescission of the order or judgment. Unlike an application for rescission in terms of the common law or Rule 31, an applicant is not required to show 'good cause' in the sense of an explanation for his default and a bona fide defence if the requirements for rescission in terms of Rule 42(1)(a) are satisfied.[6] Lastly, an application for rescission in terms of either Rule 42 or the common law must be made within a reasonable time after the applicant acquired knowledge of such judgment.

[31] For reasons that follow, the default judgment was erroneously granted since the Registrar of the High Court is not competent and not empowered to grant any order or judgment in a matter to which the NCA applies. In light of this conclusion, it is not necessary to consider the other grounds advanced by the applicant as the judgment, warrant of attachment and the subsequent attachment must in my view be set aside.

[32] The question regarding the Registrar's power to grant default judgments in matters to which the NCA applies has been the subject of various judgments during the recent past. The views of the different courts are not in harmony with one another.

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5 Also see *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA); (921/2017) [2018] ZASCA 170 (30 November 2018) para 18 and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113; [2003] ZASCA 36).

6 *Ferris and Another v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) para 13. The requirements for rescission in terms of common law are trite. The applicant must show good cause by (a) giving reasonable explanation of default; (b) showing that application made bona fide; and (c) showing bona fide defence to plaintiff's claim which prima facie has some prospect of success. Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113; [2003] ZASCA 36): dictum in para 11.

[33] Some of the more prominent judgments which concluded that the Registrar was not empowered to grant default judgments in matters to which the NCA applies are *Tseu*[7], *Xulu*[8] and *Seleka v Fast Issuer SPV (RF) Limited and Another* (46620/20) [2021] ZAGPPHC 128 (10 March 2021) [**Seleka**]. These judgments all referred to and relied on Jafta J's concurring judgment in *Nkata*[9].

[34] In *Nedbank Limited v Mollentze; FirstRand Auto Receaivables (RF) Ltd v Radebe and Another* 2022 (4) SA 597 (ML); (2757/2021) [2022] ZAMPMHC 5; (23 March 2022) [**Mollentze**] the Full Court, Mpumalanga Division, Middelburg however reached a different conclusion, namely that empowering the Registrar with the authority of a court in terms of s23 of the Superior Courts Act, was meant to enable the Registrar to deal with quasi-judicial functions including consideration and granting of default judgments in matters resorting under the NCA.[10] As appears from para 3 of the aforesaid judgment, two cases were referred by the Acting Registrar at the Middelburg Local Seat to be heard in open court in terms of Rule 31(5)(b)(vii) in light of the judgments in *Tseu* and *Xulu* above, as well as the judgment in *Nkata*[11] which, in terms of the Registrar's referral, found' that the Registrar did not have the powers or statutory authority to grant default judgments in matters concerning agreements governed by the NCA. The Full Court in *Mollentze* held, inter alia, that Jafta J's judgment was not binding on it as it was a minority judgment that was merely taken note of by the majority judgment and the court in *Nkata* was not called upon to answer whether s130(3) of the Act prohibits the registrar from granting default judgment in matters falling under the Act.

[35] I respectfully disagree with the reasoning and conclusions of the Full Court, Mpumalanga Division, Middelburg in *Mollentze*. My reasons appear from the discussion below.

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7 Para 22.3 above.
8 Ibid. Para 22.3 above.
9 *Fn* 1 above.
10 Mollentze above at para 65.
11 Fn 1 above.

[36] I arrive at my finding that it is not competent for the Registrar of the High Court to grant default judgments in matters resorting under the NCA for the following reasons. Firstly, I consider the matter to have been settled by the Constitutional Court. That being so, all courts are bound by the dictum. Secondly, the proper interpretation of the applicable provisions of the NCA leaves no doubt that the legislature intended only a Court, as opposed to anybody else i.e., the Registrar, to grant judgments and/or orders in matters to which the NCA applies.

THE CONSTITUTIONAL COURT ESTABLISHED THAT A DEFAULT JUDGMENT GRANTED BY THE REGISTRAR IS INCOMPATIBLE WITH THE PROVISIONS OF S130(3) OF THE NCA

[37] *Nkata*[12] was heard on 19 November 2015 and the judgment delivered on 16 April 2016. *Nkata* concerned the correct interpretation of ss129(3)(a) and 129 (4)(b) of the NCA. The majority judgment was penned by Moseneke DCJ. Jafta J wrote a concurring judgment containing additional reasons he relied upon, which Moseneke DCJ noted.[13] Jafta J held as follows at paras 169-173-

> "[169] *Parliament has considered compliance with s 129(1) to be so important that it deemed it necessary to preclude a court from adjudicating the dispute until the court itself is satisfied that there was compliance. Notably, it is the court that must be satisfied and nobody else. This signifies that legal proceedings to which the Act applies must be determined by the court only.*
>
> [170] *Furthermore, s 130(3) precludes a court from deciding the case unless it is satisfied that the notice requirements in s 129 have been complied with*. Section 130(3) provides:
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> '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* —

12 *F*n 1 above.
13 *Nkata* above at para 75.

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with; . . . . ' [Emphasis added.]

[171] If it appears to the court that the credit provider has not complied with s 130(3)(a) or that it is not positively satisfied that there was compliance, the court must —

(a) adjourn the matter before it; and

(b) make an appropriate order setting out steps the credit provider must complete before the matter may be resumed.

[172] Later in Kubyana, we reaffirmed the principle that the court is precluded from deciding a matter unless it is satisfied that the procedures stipulated in ss 129 and 130 are met. We said:

'The text of this section reveals that in the event of the consumer being in default of her repayments of the loan, the credit provider is obliged to draw the default to the attention of the consumer. The section prescribes that the notice given to the consumer must be in writing. It further stipulates what the notice must contain. The notice must propose the options available to the consumer who is in financial distress and unable to purge the default. It must point out that, at the election of the consumer, the credit agreement may be referred to a debt counsellor, dispute resolution agent, consumer court or ombud. The purpose of the referral must also be stated in the notice.

The purpose of the referral is to resolve whatever disputes may have arisen from the credit agreement and also to agree on a plan to cure the default and bring the payments up to date. Furthermore, the section makes reference to s 130 which governs the institution of litigation for enforcing credit agreements. Section 129(1) lays down two conditions which must be met before the credit provider may institute litigation. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before —

- first providing notice to the consumer; and
- meeting further requirements set out in s 130.'

[173] Here the legal fees claimed by the bank arose in circumstances where the bank had acted in breach of the Act in a number of respects. First, it failed to give notice as required by s 129(1) read with s 130(1). *Second, it sought and obtained a default judgment from the registrar of the High Court, something that is incompatible with*

> *s 130(3) which requires such matters to be determined by the court.* Third, the bank sought and obtained the default judgment without satisfying the court on compliance with s 129. Fourth, the bank caused a writ to be issued, an attachment to be effected and Ms Nkata's home to be advertised for sale in execution on account of an invalid judgment. Fifth, the bank opposed Ms Nkata's application for the rescission of that judgment."

[Own emphasis added]

[38] *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others,*[14] [**University of Stellenbosch Legal Aid Clinic]** followed after *Nkata*. It was heard on 3 March 2016 and the judgments handed down on 13 September 2016.

[39] In *University of Stellenbosch Legal Aid Clinic* the Constitutional Court was called upon to consider an application for confirmation of a High Court order that ss65J(2)(a) and 65J(2)(b)(i) of the Magistrates' Courts Act[15] were 'inconsistent with the Constitution and invalid to the extent that they fail to provide for judicial supervision of the issuing of an emoluments attachment order against a judgment debtor'. In his dissenting judgment (the first judgment), Jafta J explained the effect of Part C [Debt enforcement by repossession or judgment (*ss*129-133)] of the NCA. Two concurring majority judgments were delivered by Cameron J and Zondo J (as he then was) respectively (referred to as the second and third judgments). Both Cameron J and Zondo J also concurred with the judgment of the other. In the second judgment, Cameron J 'gratefully' adopted the exposition of the background facts and of the *statutory* and *constitutional provisions* as dealt with by Jafta J.[16] As stated, Zondo J also concurred with this judgment.[17]

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14 *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) (2016 (12) BCLR 1535; (2016) 37 ILJ 2730; [2016] ZACC 32 [***University of Stellenbosch Legal Aid Clinic***].

15 Magistrates' Court Act 32 of 1944.

16 *University of Stellenbosch Legal Aid Clinic* supra at note 4.

17 The first concurring majority judgment: Cameron J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring); the second concurring majority judgment: Zondo J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring).

[40] Considering the reasoning by the Court in *Mollentze* above, it is necessary to recite Jafta J's exposition in some detail -

> "[15] The democratic dispensation rendered legislation that governed the credit markets ill-suited to an economy open to the entire population. The black population was afforded the opportunity to participate in the financial credit market, both as creditors and consumers of credit. The democratic government realised that the credit market was the lifeblood of economic development. This is because credit enabled consumers to acquire assets like houses, cars and furniture which they could not afford without credit finance. Many overextended themselves in debt they could not repay. Unscrupulous and reckless credit providers also entered the market and offered small loans without any form of security, in contrast to banks. In return they charged exorbitant interest which raised the amount owing rapidly within a short span of time, with disastrous consequences for debtors who perpetually remain in the hole of debt.
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> [16] Parliament intervened by passing the National Credit Act and by so doing overhauled the previous credit legislation. This legislation came into effect in three phases. The objects of the National Credit Act are to —
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> > '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 . . .'[18]
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> [17] The National Credit Act seeks to protect consumers by a number of means including the promotion of responsible borrowing that avoids overindebtedness, prevention of reckless credit-granting by credit providers, encouragement of consumers to fulfil their financial obligations and provision of a consistent and accessible system of consensual resolution of disputes arising from credit agreements.
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> [18] But the National Credit Act does not only protect and advance the interests of debtors. It also promotes the interests of credit providers. For it may only achieve

18 Section 3 of the National Credit Act.

the goal of a 'fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market', if the Act strikes the right balance in advancing the rights of consumers on the one hand and credit providers' interests, on the other.

[19] The National Credit Act has introduced a reformed framework that regulates the credit market from the moment money is lent up to the point of initiating legal proceedings to enforce the terms of the credit agreement. The institution of litigation is governed by part C of ch 6. Where a debtor has defaulted in repaying a debt, part C obliges the credit provider first to pursue a consensual resolution of the dispute before instituting legal proceedings. Section 129(1) demands that notice be given to the consumer, drawing her attention to the default and proposing that if the consumer so wishes, she may refer the matter to a debt counsellor with the intent that the parties may resolve the dispute and agree on a plan to bring payments up to date.[19]

[20] A major reform introduced by part C is to freeze the credit provider's contractual and common-law rights. At common law the credit provider is entitled to approach the courts immediately upon the debtor's default. In effect part C suspends the exercise of the right of access to courts by the credit provider until the consensual-resolution process has run its course or the debtor fails to take part in that process.

[21] In Sebola, this court affirmed the suspension of the rights to approach courts in these terms:

> 'Section 129(1)(a) requires a credit provider, before commencing any legal proceedings to enforce a credit agreement, to draw the default to the notice of the consumer in writing. It has been described as a gateway provision, or a new pre-litigation layer to the enforcement process. Although s 129(1)(a) says the credit provider may draw the consumer's default to his or her notice, s

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19 Section 129(1) provides:

'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.'

> 129(1)(b)(i) precludes the commencement of legal proceedings unless notice is first given. So, in effect, the notice is compulsory.'[20]

[22] Both ss 129(1)(b) and 130(1) preclude the credit provider from instituting litigation before satisfying their requirements. The National Credit Act considers compliance with those requirements to be so pivotal to debt collection that it even suspends the exercise of judicial power by the courts to adjudicate disputes arising from credit agreements. In this regard s 130(3)(a) provides:

> '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; . . . .' [Emphasis added.]

[23] What emerges from the text of this section is the fact that it supersedes 'any provision of law or contract to the contrary' *and obliges a court to adjudicate a dispute arising from a credit agreement 'only if the court is satisfied'* that the procedures required by ss 127, 129 and 131 have been complied with. If not, the power to adjudicate remains suspended until there is compliance with the steps set out in the court order that adjourns the proceedings.

[24] Section 130(4) governs the situation where a credit provider has instituted the proceedings without complying with the procedure in s 129. Again in peremptory language, this *section mandates the court to adjourn the hearing before it* and 'make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed'.[21]

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20 *Sebola* supra at para 45.

21 Section 130(4) provides:

> 'In any proceedings contemplated in this section, if the court determines that—
> (a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;
> (b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(u), or has approached the court in circumstances contemplated in subsection (3)(c) 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;

[25] The scheme that emerges from a close examination of ss 130(3) and (4) is that in all proceedings to which the National Credit Act applies, the court is required first at the commencement of the hearing to enquire into whether there was compliance with s 129. For it may adjudicate the case only if so satisfied. *Notably it must be the court and the court alone that is satisfied that there was compliance. Furthermore, it must only be the court that determines the case and grants judgment. The court's satisfaction that there was compliance constitutes a jurisdictional fact which must exist before the court may continue with the hearing. For the court to be satisfied, the relevant section requires facts which show that there was compliance to be placed before the court*.

[26] *In the eyes of the National Credit Act, the existence of this jurisdictional fact is a prelude to the continuation of the hearing and determination of the matter by the court. Absent the jurisdictional fact, the court must adjourn the proceedings and direct that certain steps be followed. The section leaves it to the discretion of the court to determine steps that are appropriate to a particular case. Once the matter is adjourned, the hearing may only resume if the credit provider has taken all steps specified in the court order*.

[27] Of relevance to the present matter is the impact of ss 129 and 130 of the National Credit Act on the procedures set out in ss 57 and 58 of the Magistrates' Courts Act. *The latter sections empower a clerk of the court to adjudicate and grant judgment in favour of the credit provider in certain defined circumstances. This is inconsistent with s 129 read with s 130. In terms of s 129 read with s 130 it is only the courts*

(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may —
  (i) adjourn the matter, pending a final determination of the debt review proceedings;
  (ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or
  (iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b);
(d) there is a matter pending before the Tribunal, as contemplated in subsection (3)(b), the court may —
  (i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or
  (ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or
(e) the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter.'

> *which decide a matter to which the National Credit Act applies*. This conflict must be resolved with reference to s 172 of the National Credit Act."[22]
>
> [Own emphasis added]

[41] As stated above, the majority judgment 'gratefully' adopted the exposition of the background facts and of the *statutory* and *constitutional provisions* as dealt with by Jafta J.[23]

[42] The difference between the second judgment (first concurring majority judgment) and the minority judgment was explained by Cameron J to be (a) '[T]he first judgment [Jafta J's judgment] assumes, without affirming definitively, that the Constitution requires judicial supervision when orders issued from a court are executed and finds that this is how the contested provision ought to be properly interpreted'; and (b) together 'with associated relief, the High Court granted an order striking down certain words in s65J(2)(a), (b)(i) and (b)(ii) of the Act 'to the extent that they fail to provide for judicial oversight over the issuing of an emolument[s] attachment order against a judgment debtor'. The first judgment would deny this order confirmation (the other relief the applicants obtained remains intact). Instead, it parses the provision at issue to render it conformable with the assumption that judicial oversight is constitutionally necessary'.

[43] The difference between the second concurring majority judgment and the minority judgment by Jafta J relates to the issuing of emoluments attachment orders in the Magistrates' Court. Jafta J held that the Court issued emoluments attachment orders in terms of the relevant provisions of the Magistrates' Court Act, whilst the third judgment (second concurring majority judgment) held that the Court's power in terms of the section under consideration is not to issue an emoluments attachment order itself, but its role is to authorise that someone else issue the

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22 Section 172(1) provides:
'If there is a conflict between a provision of this Act mentioned in the first column of the table set out in Schedule 1, and a provision of another Act set out in the second column of that table, the conflict must be resolved in accordance with the rule set out in the third column of that table.'

23 *University of Stellenbosch Legal Aid Clinic* supra at note 4.

emoluments attachment order. There were sections where the Court issued such orders, but that was not the case with the impugned sections the Court was called upon to consider.

[44] Jafta J's exposition of the statutory and constitutional provisions as adopted by the second judgment (first majority concurring judgment), specifically in relation to the impact of ss 129 and 130 of the NCA in the context of judicial oversight in the debt enforcement and execution, is in my view part of the reasoning necessary for the decision of the issues before the Court and thus part of the ratio decidendi, as opposed to being obiter dicta.[24] The decision is therefore in my view binding.

[45] What *University of Stellenbosch Legal Aid Clinic* establishes with regards to the issue under consideration can be summarised as follows:

45.1 Both ss129(1)(b) and 130(1) preclude the credit provider from instituting litigation before satisfying their requirements.

45.2 The National Credit Act considers compliance with those requirements [ss129(1)(b) and 130(1)] to be so pivotal to debt collection that it even suspends the exercise of judicial power by the courts to adjudicate disputes arising from credit agreements.

45.3 What emerges from the text of s130(3) is the fact that it supersedes 'any provision of law or contract to the contrary' and obliges a court to adjudicate a dispute arising from a credit agreement 'only if the court is satisfied' that the procedures required by ss127, 129 and 131 have been complied with. If not, the power to adjudicate remains suspended until there is compliance with the steps set out in the court order that adjourns the proceedings.

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[24] *Camps Bay Ratepayers' & Residents' Assoc v Harrison* 2011 (4) SA 42 (CC) (2011 (2) BCLR 121; [2010] ZACC 19) para 28-30 and *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 316 – 317.

45.4 Section 130(4) mandates the court, in peremptory language, to adjourn the hearing before *it* and to make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed for it [the court] may adjudicate the case only if so satisfied.

45.5 It must be the court, and the court alone, that is satisfied that compliance has been met. Furthermore, only the court may determine the case and grant judgment.

45.6 The court's satisfaction regarding the required compliance constitutes a jurisdictional fact which must exist before the court may continue with the hearing. For the court to be satisfied, the relevant section requires facts to be placed before the court which show that compliance has been met. The existence of this jurisdictional fact is a prelude to the continuation of the hearing and determination of the matter by the court. Absent the jurisdictional fact, the court must adjourn the proceedings and direct certain steps to be followed.

45.7 Section 130(3) leaves it to the discretion of the court to determine steps that are appropriate to a particular case. Once the matter is adjourned, the hearing may only resume if the credit provider has taken all steps specified in the court order.

45.8 The impact of s129 and 130 of the NCA is that only courts decide matters to which the National Credit Act applies.

[46] None of the judgments referred to in paras 33 and 34 and specifically the Full Court judgment in *Mollentze* considered *University of Stellenbosch Legal Aid Clinic*.

[47] To conclude, the dictum in *University of Stellenbosch Legal Aid Clinic* is to my mind binding precedent and dispositive of both this matter as well as any doubt regarding whether the Registrar is competent/empowered to grant default judgments in matters resorting under the NCA. The position is settled: legal proceedings to which the NCA applies must be determined by the Court alone and nobody else.

ASCERTAINING THE LEGISLATIVE INTENTION WITH SECTION 130(3) OF THE NCA AND THE MEANING TO BE GIVEN TO "COURT' AS USED IN THE SECTION

[48] If I am wrong in concluding that Jafta J's findings in *University of Stellenbosch Legal Aid Clinic* are binding, it should unquestionably have strong persuasive force, especially since the detailed statutory exposition of the debt enforcement provisions of the NCA enshrined in the minority judgment was adopted by the first concurring majority judgment in *University of Stellenbosch Legal Aid Clinic*. The third judgment by Zondo J (second concurring majority judgment) is also instructive. Whilst the judgment admittedly deals with the Magistrates' Courts Act, Zondo J undertakes a detailed interpretive analysis of relevant sections in that Act to determine what the 'court's' role is with regards to the issuing of emoluments attachment orders. The judgment holds that if it is the 'court' that issues the emoluments order, there will be judicial oversight, if it someone else, i.e., the Clerk or Registrar, there will be no judicial oversight unless prior to issuing there is judicial intervention by the 'court'.

[49] In the event that the findings regarding s130(3) of the NCA in *University of Stellenbosch Legal Aid Clinic* do not constitute binding precedent, I agree with Jafta J that s130(3) in mandatory terms provides that the Court, and nobody else, i.e., the Registrar, must satisfy itself that there has been compliance before the Court may determine the matter. Whilst one Division of the High Court, however constituted, is not bound by a decision of another Division of the High Court, a judgment by a Full Court in another Division will usually have strong persuasive

value. Regardless of the aforesaid and not taken lightly, I respectfully reach the conclusion that *Mollentze* should not be followed.

[50] The question at hand is what meaning should be given to "*the court*" in s130(3) of the NCA.

[51] Section 39(2) of the Constitution of the Republic of South Africa, 1996 ["the Constitution"] enjoins every court when interpreting legislation to promote the spirit, purport and objects of the Bill of Rights. This principle is a 'mandatory constitutional canon of statutory interpretation'.[25]

[52] The meaning of the provisions in an Act must be ascertained, having regard to the scheme of the Act as a whole, and to the object and purpose of the legislation underpinning the provisions being interpreted.[26]

[53] A fundamental tenet of statutory interpretation is that recourse is first had to the plain, ordinary grammatical meaning of the words in question. "There are three important interrelated riders to this general principle, namely (a) statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred above in (a)"[27].

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25 Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd 2014 (2) SA 603 (CC) para 40; Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae) 2007 (3) SA 484 (CC) para 43.

26 See Mistry v Interim Medical and Dental Council of South Africa and Others 1998 (4) SA 1127 (CC) paras 17 – 18.

27 *Chisuse v D-G, Dept of Home Affairs* 2020 (6) SA 14 (CC); (2020 (10) BCLR 1173; [2020] ZACC 20) para 47; *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

[54] The purposive approach was described in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*,[28] to encompass:

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."

[55] Another well-established principle of statutory construction is that the legislature must be taken to be aware of the nature and state of the law existing at the time when legislation is passed.[29]

[56] Section 2 of the NCA provides as follows with regards to the interpretation of the Act-

> '(7) Except as specifically set out in, or necessarily implied by, this Act, the provisions of this Act are not to be construed as-
> (a) limiting, amending, repealing or otherwise altering any provision of any other Act;
> (b) exempting any person from any duty or obligation imposed by any other Act; or
> (c) prohibiting any person from complying with any provision of another Act.'

[57] The background, purpose, and scheme of the NCA were lucidly traversed in *Sebola* and *Kubyana* as well as by Jafta J in *University of Stellenbosch Legal Aid Clinic*.

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28 *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*, 1950 (4) SA 653 (A) at 662G - 663A and referred to with approval in the minority concurring judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); (2004 (7) BCLR 687; [2004] ZACC 15) para 89.

29 *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) ([2015] ZASCA 93) para 13; *Road Accident Fund v Monjane* 2010 (3) SA 641 (SCA) para 12; *Marine & Trade Insurance Co Ltd v Workmen's Compensation Commissioner* 1972 (1) SA 535 (N) at 538D.

[58] In addition to the aforesaid judgments Navsa JA's discussion of the purpose of the NCA in *FirstRand Bank Limited t/a Wesbank v Davel*[30] is similarly instructive:

> "[12] I turn to a consideration of the relevant provisions of the Act. It is necessary to have regard, first, to the purpose of the Act and, second, to all of the material parts of its extensive and rather convoluted provisions. The relevant part of the long title of the Act states that the Act was promulgated, inter alia, 'to promote a fair and non-discriminatory market place . . . [and] to provide for the general regulation of consumer credit and improve standards of consumer information'.

Section 3 spells out the Act's purpose:

> 'The purposes of this Act are 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, by—
>
> . . .
>
> (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
>
> . . .
>
> (f) improving consumer credit information and reporting and regulation of credit bureaux;
>
> (g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
>
> (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
>
> (i) 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.'
>
> The Act has as one of its main purposes the protection of the interests of consumers.'
>
> …….

30 *FirstRand Bank Limited t/a Wesbank v Davel* (1229/2018) [2019] ZASCA 168 (29 November 2019).

Navsa JA *inter alia* deals with s122, quotes ss123, 127 (in relevant parts), 128, 129, 130(1) and 130(3) in paras 13 – 18 and then continues-

> [19] *It is clear from these provisions that the legislature was intent on ensuring that sufficient protections are provided to ensure that, upon termination of a credit agreement, a consumer is protected.* The Act provides mechanisms for a consumer to challenge the estimated values and the price realised upon a sale of goods after either a surrender of the goods by a consumer or the repossession of the goods after action has been taken by the credit provider. As can be seen from the provisions set out above, the Act also provides for enforcement of the rights of credit providers. *Its purpose is directed to ensuring, as far as is practically possible, an equality of arms*.
>
> [20] Significantly, s 131, under the heading 'Repossession of goods', provides as follows:
>
> > 'If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127(2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order.' (My emphasis.)
>
> This section makes the aforesaid provisions applicable to the situation where the credit provider took the initiative to repossess the goods sold in terms of a credit agreement. It can only do so after fulfilling the prescribed steps set out in ss 127 and 129. It is distinct from the situation where a consumer initiates the termination of the agreement and the return of the goods purchased."
>
> [Own emphasis added]

[59] Section 6 of the Superior Courts Act[31] deals with the constitution of High Courts. In Civil Procedure in the Superior Courts[32] the author observes that in statutes the difference between use of the word "court" and "judge" usually reflects the difference of sitting in 'open court' or 'in chambers'. To this end Schutz JA suggested in *Pretoria Portland Cement Co Ltd and Another v Competition*

31 Superior Courts Act 10 of 2013.

32 Civil Procedure in the Superior Courts (Electronic version), Derek Harms, last updated March 2022 – SI 73 (product developer: Tiger Chetty) - discussion of the Uniform Rules of Court Uniform, Rule 1, Definitions.

Commission and Others[33] that where a Judge's services are properly engaged, legislation should refer to a court and not a Judge.

[60] When ascertaining the legislative intention with s130(3) purposively in its proper context, s130(3) requires that there must be judicial intervention by the Court before proceedings that have been commenced by a credit provider may be determined. Following that, the proceedings must be determined by the Court. The section therefore requires judicial oversight before the proceedings initiated by a credit provider may be determined. The section is expressly formulated in a way that shows that the Court may or may not determine the matter, depending on whether the Court is satisfied that there has been due compliance with the matters mentioned in the section. There cannot be judicial intervention or judicial oversight if the Court is not involved.[34]

[61] The section clearly provides a mandatory judicial intervention to 'ensure that, upon termination of a credit agreement, a consumer is protected'. The Court's role is clearly and expressly spelt out, just as it is spelt out in other sections of the NCA dealing specifically with debt enforcement by repossession and judgment, notably for instance s131.

[62] The meaning of '*court*' in s130(3) cannot be interpreted to impliedly include anybody else performing the functions therein contained.

[63] The '*court*' in s130(3) of the NCA clearly refers to a Judge sitting in open court.

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33 Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA) para 40.

34 *University of Stellenbosch Legal Aid Clinic, supra* (third judgment by Zondo J) at para 203: '….. I also conclude that under the Act there are cases where the court authorises the issue of emoluments attachment orders and there are cases where emoluments attachment orders are issued without any court intervention. *This means that there is judicial oversight in those cases where it is the court that authorises the issuing of emoluments attachment orders but there is no judicial oversight in those cases where emoluments attachment orders are issued without any prior intervention of the court*. I am, therefore, of the view that, to the extent that the Act makes provision for the latter category of cases, it is inconsistent with s 34 of the Constitution and is, therefore, constitutionally invalid.' [Emphasis added]

[64] Insofar as reliance is placed on s23 of the Superior Courts Act, the section does not purport to empower the Registrar to grant default judgments in matters that are reserved for the Court i.e., matters resorting under the NCA. To this end, s23 of the Superior Courts Act provides as follows:

> ”A judgment by default may be granted and entered by the registrar of a Division in the manner and in the circumstances prescribed in the rules, and a judgment so entered is deemed to be a judgment of a court of the Division.”[35]

[65] Had the legislature intended that a function in terms of s130(3) could or should be performed by anyone else, as opposed to the Court, the section would have provided for that in express terms.

[66] There is no indication nor justification for the suggestion that the legislature intended “*court*” as used in s130(3) to have a different meaning from what is usually understood when reference is made to a court or that it must be read to include that the functions may be exercised by another person i.e., the Registrar.

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35 Rule 31(5) provides:
‘(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, who 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 a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than five days' notice of the intention to apply for default judgment.
(b) The registrar may-
(i) grant judgment as requested;
(ii) grant judgment for part of the claim only or on amended terms;
(iii) refuse judgment wholly or in part;
(iv) postpone the application for judgment on such terms as may be considered just;
(v) request or receive oral or written submissions;
(vi) require that the matter be set down for hearing in open court:
Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.
(c) The registrar shall record any judgment granted or direction given.
(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after such party has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.’

[67] Following the reasons set out above, the reasoning in *Mollentze* that lead the Court to conclude that the Registrar should be competent to grant default judgments in matters resorting under the NCA is not consonant with the legislative intent and clear meaning of s130(3).[36]

[68] It is thus clear that the reasoning in *Mollentze*, to the effect that the consumer's rights would be protected should the Registrar grant a default judgment because the consumer is entitled to apply for rescission of that judgment at which juncture the Court will consider the matter, is not consistent with the legislative intention of s130(3). The debt enforcement provisions in the NCA, and specifically the provisions of s130(3) are by design intended to be proactive and the obligation for judicial intervention before the matter can be heard is reserved for the Court as is determining the matter thereafter. The fact that a consumer may apply for rescission after the default judgment was granted without the Court's judicial intervention prior to the judgment, is reactive. The legislature intends the Court to intervene (judicial oversight) before a judgment is granted, not thereafter.

[69] In the premises the Registrar did not have the authority and was thus not competent to grant the default judgment, since the matter was governed by the provisions of the NCA.

[70] The matter of costs remains for consideration. The issue of costs is truly within this court's discretion.[37] The default practice in litigation is that costs ordinarily follow the result. For the reasons that follow it would be appropriate in this matter that each party bears his/its own costs.

[71] There was an ill-conceived attempt by the applicant to introduce further documents into evidence by appending the same to the heads of argument filed on his behalf. Conduct of this nature is unacceptable and disapproval of the

36 Mollentze, para 41, 57 and 65.
37 Mkhatshwa and Others v Mkhatshwa and Others 2021 (5) SA 447 (CC) para 17 and footnote 12.

applicant's conduct finds expression in the cost order. I record that the counsel who appeared before me was not responsible for drafting of the heads of argument.

[72] In addition, I take into consideration that the first respondent followed the practice that governed applications for default judgments in matters resorting under the NCA in this Division at the time. Due to the differing views of courts regarding the competency of the Registrar to grant default judgments in matters resorting under the NCA, the first respondent's opposition to the application was not unreasonable in the circumstances.

[73] For the reasons mentioned above I make the following order:

1. The default judgment and/or order granted by the Registrar of the Court against the applicant under case number 4526/2021 on 3 November 2021 be and is rescinded.

2. Any executions steps taken pursuant to the above order be and is rescinded and set aside.

3. The 2014 Mercedes Benz E200 (W212) motor vehicle with engine number: ……. and chassis/VIN number: ……. shall immediately after issue of this order be released and returned to the applicant by the second respondent.

4. Each party is to pay their own cost of these proceedings.

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N SNELLENBURG, AJ

APPEARANCES

On behalf of the Applicant:	Adv. Z Nyezi
Instructed by:	Gcasamba Attorneys Inc, Bloemfontein
On behalf of the first respondent:	Adv. K Nhlapo-Merabe
Instructed by:	Strauss Daly Attorneys, Bloemfontein