REPUBLIC OF SOUTH AFRICA

IN THE HGH COURT OF SOUTH AFRICA

HELD AT PRETORIA

CASE NO: 46375/2020

DOH: 27 January 2025

DECIDED: 09 June 2025

1) REPORTABLE: NO

2) OF INTEREST TO OTHER JUDGES: NO

3) REVISED.

DATE **09 JUNE 2025**

SIGNATURE

In the matter between:

BMW FINANCIAL SERVICES SOUTH AFRICA (Pty) Ltd (Registration Number: 1990/004670/07) Applicant

And

BEULAH LIEBENBERG Respondent

(I.D NUMBER: 7[...])

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 09 June 2025.

ORDER

1. Condonation is granted for the late filing of the respondent's answering affidavit.
2. The application is upheld.
3. The respondent is ordered to pay the applicant the amount of R 170 181. 00 plus interest on the said amount at the rate of 0.75% above the prime overdraft rate per annum from date of summons to date of final payment.
4. Costs on the scale as between attorney and client at the Magistrates court scale.

JUDGMENT

Bam J

Introduction

1. This is an application for the recovery of damages against the respondent. The origin of the applicant's claim may be traced back to the installment sale agreement (agreement) concluded by the parties sometime in 2017. The respondent opposes the relief based on several points in *limine* which include, amongst others, lack of *locus standi* and reckless lending, the latter, as contemplated in Sections 81(1) and 81(3) of the National Credit Act[1] (the Act). The respondent further seeks condonation for the late filing of her answering affidavit.

Background

2. The common cause facts suggest that during November 2020, following the respondent's breach of the agreement, the applicant obtained an order by default authorizing, *inter alia*, the return of the vehicle. As the applicant's

[1] Act 34 of 2005.

damages had neither been established nor quantified at that stage, the issue was postponed. The vehicle was sold and the proceeds allocated to the respondent's account in terms of the agreement. Following the sale, the applicant caused a letter in terms of Section 127 of the National Credit Act, Act 34 of 2005 to be served upon the respondent calling upon the respondent to effect payment of the remaining amount, which the respondent failed to do leading to the present application.

Whether condonation should be granted to the respondent

3. The test whether condonation should be granted in any given case is the interests of justice. In this regard, the Constitutional Court has admonished that even though prospects of success should be considered, they are not decisive as demonstrated in *Turnbull-Jackson* v *Hibiscus Coast Municipality and Others*:

> 'In this Court the test for determining whether condonation should be granted or refused is the interests of justice. Factors that the Court weighs in that enquiry include: the length of the delay; the explanation for, or cause of, the delay; the prospects of success for the party seeking condonation; the importance of the issues that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice. It should be noted that although the existence of prospects of success in favour of the party seeking condonation is not decisive, it is a weighty factor in favour of granting condonation.'[2]

4. The applicant does not oppose the application. Given the importance of the issues involved and the negligible delay, it is in the interests of justice that condonation be granted.

Respondent's points in limine

5. The respondent raises the following points in *limine*:

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[2] [2014] ZACC 24, paragraph 23; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* (CCT45/99) [2000] ZACC 3; 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC) (30 March 2000), paragraph 3.

(i) Lack of locus standi

(ii) The alleged failure to comply with Rule 41A(2) (a)

(iii) Reckless lending and simulated transaction

6. The respondent recorded in her Heads of Argument that she is no longer persisting with the locus *standi* and the allegation dealing with failure to comply with Rule 41A(2)(a). In the circumstances, nothing further need be said about the two points. That leaves the points dealing with reckless lending and simulated transaction.

The alleged reckless lending and simulated transaction

7. I consider it convenient to deal with these two points simultaneously as they rely on the same facts. In brief, the respondent alleges that pursuant to the affordability analysis conducted by the applicant, it was found that she could not afford the vehicle. To bring the transaction within her affordability, the agent, acting on behalf of the applicant, reduced the monthly installments and added a residual payment, (the so called balloon payment) of R 58 047.00 without establishing whether she could afford the residual payment. She submits that the agreement was concluded recklessly. Thus, this court must declare it unlawful and set aside her rights and obligations as provided for in Sections 83(1) and (2) of the Act.

8. Briefly, a balloon payment refers to a portion of a loan that is deferred until the end of the loan term. The consumer typically does not make payments towards this portion. However, they will be required to make one final payment which is usually significantly larger than the installments paid during the term of the loan.

9. In advancement of the claim that the transaction was simulated, the respondent suggests that concluding a credit agreement for a vehicle she could not afford, had the effect thereof of undermining the purpose and policies of the Act. For these reasons, she argues that the agreement is

unlawful and must be pronounced as such by this court as provided for in Section 90(2) (a) of the Act.

10. I cannot agree with these contentions. The provisions of the Act in so far as reckless lending is concerned read:

‘80. (1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4)-
(a) the credit provider failed to conduct an assessment as required by section
81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or
(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated
that-
(i) the consumer did not generally understand or appreciate the consumer’s risks, costs or obligations under the proposed credit agreement;
(ii) entering into that credit agreement would make the consumer overindebted.
(2) When a determination is to be made whether a credit agreement is reckless or not, the person making that determination must apply the criteria set out in subsection (1) as they existed at the time the agreement was made, and without regard for the ability of the consumer to
(a) meet the obligations under that credit agreement; or
(b) understand or appreciate the risks, costs and obligations under the proposed credit agreement, at the time the determination is being made.

11. If one pauses for a moment, Section 80, subsections (1) and (2) are fact driven. What was required of the respondent was to substantiate her allegations with facts as they were at the time the credit transaction was

entered into. It can be accepted that the respondent has not provided any such information. Both allegations must fail as they are premised on the same bald claim. With regard to the claim that the agent informed the respondent that the inclusion of the balloon payment was to make cars affordable to consumers, this is hearsay evidence which, in terms of Section 3 of the Law of Evidence Amendment Act[3] is not admissible, unless the court concludes otherwise, based on the criteria set out in the section, that it is in the interests of justice to admit it. In the circumstances of this case, there is nothing before the court from which it may draw the conclusion that it is in the interests of justice to admit the hearsay evidence.

12. I may add that on her own version, the applicant was able to sustain the monthly installments from about March 2017 up to August 2020. This to me does not suggest reckless lending or anything about simulation but a change in the respondent's circumstances. The defences of reckless lending and simulated agreement then must fail.

Costs

13. The applicant sought the costs on the scale as between attorney and client. I grant the costs but on the Magistrates court scale.

Order

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[3] Act 45 of 1988.

N.N BAM J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Date of Hearing:	**27 January 2025**
Date of Judgment:	**09 June 2025**

Appearances:

Counsel for the Applicant:	**Adv S Webster**
Instructed by:	MacRobert Inc Brooklyn, Pretoria
Counsel for the Respondent:	**Mr W.R Ewart** (Attorney with right of appearance in the High Court) Ewart Attorneys c/o Herman Vorster Inc, Garsfontein, Pretoria