Reportable:	**YES** / NO
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

CASE NO:	**260/2017**
DATE HEARD:	**20 APRIL 2018**
DATE DELIVERED:	**25 APRIL 2018**

In the matter between:

NDLAZI, JOSEPH Applicant

and

WESBANK, A DIVISION OF FIRSTRAND BANK LIMITED Respondent

Coram: Olivier J

JUDGMENT

Olivier J:

[1.] During October 2015 the applicant, Mr Joseph Ndlazi, and the respondent, Wesbank, a division of Firstrand Bank Limited, concluded a written instalment sale agreement in terms of which it was agreed that the respondent would finance the applicant's purchase of a vehicle. It seems to be common cause that the particular agreement constituted a credit agreement, to which the provisions of the **National Credit Act**[1] ("*the Act*") are applicable.

[2.] During June 2016 the applicant fell into arrears with the payment of the monthly instalments in respect of the particular account. When the applicant received the

[1] 34 of 2005

respondent's notice in terms of section 129(1) of the Act he contacted the respondent's attorneys, and was referred to the respondent.

[3.] The respondent subsequently instituted an action, claiming *inter alia* cancellation and an order for the repossession of the vehicle. Summons was served on the applicant's brother on 14 February 2017. According to the applicant he received the summons on either 15 or 16 February 2017. The applicant then again contacted the respondent's attorney, and was once again told to deal directly with the respondent.

[4.] According to the applicant he then made an offer, telephonically, to a representative of the respondent to pay an amount of R150 000.00, but it was rejected. I will revert to the alleged offer in due course.

[5.] The applicant then appointed debt counsellors and applied for debt review. The debt counsellor directed various e-mails to the respondent's attorney, to which I will also revert.

[6.] On 6 March 2017 default judgment was granted, *inter alia* for cancellation of the agreement and repossession of the vehicle.

[7.] During March 2017, and within the applicable prescribed period, the applicant lodged an application for rescission of the default judgment. That application was withdrawn during June 2017, according to the applicant due to certain deficiencies in his founding affidavit in that application, more specifically because the contents of that affidavit were according to him not correct in all respects. Also the defence raised by the applicant in the present application was not raised in that affidavit.

[8.] The applicant lodged the present application on 30 November 2017, seeking rescission, and also condonation for the fact that this application was brought outside the period prescribed in Uniform Rule 31(2)(b).

[9.] It is trite that, for purposes of condonation, the applicant has to explain the fact that the application was brought outside the prescribed period and has to satisfy this court that he has a *bona fide* defence, and that the granting of condonation should not cause prejudice that could not adequately be addressed with an appropriate costs order[2].

[10.] It is equally trite that an applicant seeking rescission furthermore has to explain the fact that no notice to defend was filed within the applicable prescribed period, and must show that the application for rescission is *bona fide* and not for purposes of delay[3].

[11.] Before considering the evidence in this application it must unfortunately be said that differences between the contents of the applicant's founding affidavit in the initial application and his founding affidavit in the present application have put a question mark against his credibility.

11.1 In his first affidavit the applicant claimed not have received the notice required by section 129(1) of the Act, while he now admits having received it prior to the service of summons.

11.2 His admission in the present affidavit that he received the summons well within the *dies induciae* is irreconcilable with the version in his first affidavit, according to which the existence of the summons had only come to his attention after the default judgment had already been granted.

11.3 According to the first affidavit the offer upon which his defence is now based was made to the respondent's attorney (and not to the respondent itself), and only after the default judgment had already been granted (and in other words at a time when the instalment sale agreement had already been cancelled by virtue of one of the orders in that judgment). His present

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[2] Compare **Pansolutions Holdings Ltd v P&G General Dealers and Repairers CC** 2011 (5) SA 608 (KZD) at 611F

[3] Compare **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 (O) at 476 to 477

version is of course that the offer was made during a telephone call to the respondent itself and that it was made before default judgment, and therefore before termination of the agreement and, rather significantly, within the time constraints of section 129(3) of the Act, upon which his defence is now based.

11.4 The applicant blames these glaring inconsistencies on his "*state of mind*" at the time of deposing to the first affidavit. He does not elaborate on what his "*state of mind*" was or on what had caused it. He does not attempt to describe the contradictions as innocent mistakes, which raises the question whether he had intentionally (albeit because of his "*state of mind*") misrepresented the facts.

11.5 The absence of a proper explanation in this regard is exacerbated by the blatant misrepresentation in the present founding affidavit regarding the applicant's knowledge of respondent's banking details, an issue to which I will also revert in due course.

[12.] In explanation of the fact that the present application has not been lodged timeously the applicant states that, after the withdrawal of the initial application for rescission, his attorney required "*a further deposit*" before proceeding with the new application, and that he was only able to raise the necessary funds by 27 October 2017.

[13.] He offers no explanation for what had become of the R150 000.00 that he, according to him, had wanted to pay to the respondent, and why the further deposit could not have been paid from that money. The amount of the "*further deposit*" that was allegedly demanded has not been disclosed.

[14.] Be that as it may, according to the applicant his attorney then arranged an appointment with counsel for 2 November 2017. According to him a further consultation took place between his attorney and counsel on 21 November 2017,

after which he was required to provide "*further instructions*", which he provided on 23 November 2017.

[15.] As already mentioned the present application was then lodged on 30 November 2017. The applicant's explanation of the approximately 5 month period between the withdrawal of the initial application and the lodging of the present application leaves much to be desired and was in my view justifiably labelled as "*bald and sketchy*" by the respondent's counsel, Mr Olivier. The applicant also did not bother to obtain a confirmatory affidavit by his attorney to substantiate his explanation.

[16.] He offered no explanation of attempts that he had made, if any, between March and October 2017 to raise funds with which to pay his attorney, or of why he had not been able to raise the necessary funds before the end of October 2017.

[17.] In my view the applicant has not "*furnish(ed) an explanation of his default sufficiently full to enable the Court to understand*"[4] why it took so long to lodge this application.

[18.] Mr Olivier also contended that the applicant's failure to give notice of his intention to defend the action was wilful, because he knew that he had to give such notice if he wished to defend the action, and what the period was within which he would have to do so, and because on his own version (of the rejection of his offer) he would have known that the respondent was not going to budge.

[19.] The applicant denied having been aware of the obligation to give notice of his intention to defend, or of the *dies induciae*, and claimed not to have read the summons "*in detail*" when he received it. When regard is had to the contents of the e-mails that the debt counsellor sent to the respondent's attorney on behalf of the applicant, and the repeated references therein to the issue of the *dies induciae*, it is very difficult to believe what the applicant says in this regard.

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[4] **Silber v Ozen Wholesalers (Pty) Ltd** [1954] 2 All SA 296 (A) at 302 (Also reported as 1954 (2) SA 345 (A))

[20.] The applicant's version is also, however, to the effect that he assumed that the debt counsellor was going to take up the issue of the summons with the respondent's attorney.

[21.] This explanation is to an extent borne out by the debt councillor's e-mails, dated 3 and 10 March 2017, to the respondent's attorney, in which it was made clear that, if the respondent's attorney did not sign a form (apparently for purposes of debt review) the action would be defended.

[22.] Receipt of these e-mails is not disputed. The deponent for the respondent, however, and apparently in explanation of the fact that the e-mails were never responded to, contends that summons had already at that stage been issued and that, accordingly, the particular debt had at the time of the receipt of the e-mails already been excluded from the debt review process in terms of the Act.

[23.] It appears, in fact, from one of the e-mails that the application for default judgment had already been lodged on 1 March 2017. When the e-mail of 3 March 2017 was received, and made it clear that the debt counsellor was under the misapprehension that debt counselling was still possible, the respondent's attorney did not inform the debt counsellor of the fact that debt counselling was no longer possible, or of the pending application for default judgment. Instead the application for default judgment was proceeded with, and default judgment obtained while the respondent's attorney knew that the debt counsellor was acting on behalf of the applicant and could relay to him the respondent's intention to proceed with an application for default judgment. In terms of Uniform Rule 19(5) the applicant would at that stage still have been entitled to file a notice of his intention to defend, which would have prevented the granting of default judgment.

[24.] Even if it is to be assumed that the applicant knew of the requirement to file a notice of intention to defend within a specific time, there is no reason not to accept that the applicant believed that the debt counsellor was going to deal with

the summons and its requirements. It is, as already said, to an extent borne out by the contents of the debt counsellor's e-mails.

[25.] On the evidence I am therefore not prepared to find that the applicant had wilfully and deliberately decided not to defend the action.

[26.] This brings me to the defence raised by the applicant. In his founding affidavit it was set out as follows:

24.1 It was only when default judgment was granted, including an order of cancellation of the agreement, that the agreement was effectively terminated.

24.2 Prior to that an offer had been made to the respondent *"to pay an amount of R150 000.00 on* (the) *account"*. This amount would have been sufficient to cover the arrears as far as the instalments were concerned, and *"probably also the ... default administration charges and the reasonable costs of enforcing the agreement up to that point in time"*.

24.3 The offer was rejected by a representative of the respondent. However, in terms of section 129(3) of the Act the respondent had been obliged to accept the offer, and to provide the applicant with details of a bank account into which he could make the payment.

24.4 Had the respondent done so, the applicant would have made the payment and the agreement would then in terms of the provisions of section 129(3) have been reinstated by operation of law.

[27.] The provisions of section 129(3) of the Act read as follows:

> *"Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement,*

remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied."

[28.] The provisions of subsection (4) are not applicable in the present matter.

[29.] The provisions of clause 13.6 of the agreement are, according to the copy annexed to the founding affidavit, more or less similar to those of section 129(3), but the applicant has not in his founding affidavit relied on (or even referred to) those contractual provisions in support of his application.

[30.] Insofar as the provisions of clause 13.6 may nevertheless be relevant, they would have to be interpreted with the provisions of section 129(3) of the Act in mind[5].

[31.] As regards the requirement in section 129(3) that the agreement must not have already been cancelled, the present founding affidavit contains an averment that this agreement was cancelled when default judgment was granted, which would of course have been before the offer was allegedly made. This averment was admitted in the answering affidavit. It is also borne out by the fact that the default judgment included an order reading "*Cancellation of the Agreement*" (As opposed to an order confirming a prior cancellation).

[32.] Mr Olivier nevertheless argued that the agreement had in fact been cancelled when the summons was served. In support of his submission he referred to the averment in paragraph 18 of the particulars of claim that "*.... The Plaintiff (had) elected to cancel the Agreement, alternatively cancels the Agreement herewith*".

[33.] It is trite that service of summons could serve as notice of cancellation[6]. The first problem is, however, that the averment had been made in the alternative. The

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[5] Compare **De Bruin v Firstrand Bank Limited t/a Wesbank** [2017] ZAGPJHC 132 (5 May 2017) para's 38 and 51

order of cancellation may suggest that the main averment was abandoned, otherwise one would have expected an order confirming a cancellation, rather than an order cancelling the agreement. Secondly the admission regarding the cancellation has not been withdrawn. In the circumstances I will proceed on the basis that the agreement was cancelled through the default judgment.

[34.] In his founding affidavit the applicant failed to provide particulars of the date of the telephone call during which he allegedly made the offer, or of the lady (representative of the respondent) to whom the offer had been made. This left the respondent with no other option than to deny the allegation of an offer.

[35.] In his replying affidavit the applicant then claimed to have forgotten the person's name, but made an allegation that records of his cell phone calls would substantiate the fact of that call. To date there has been no attempt to disclose those records, or to explain why it could not be done.

[36.] The question is also why the respondent would have rejected an offer of an amount which would, it seems to be common cause, have been far more than the arrears.

[37.] Even if it were however to be assumed, for the moment, that the applicant has provided sufficient detail of the alleged offer, the defence would in my view be destined to fail. The reason for this is simply that the applicant did not in fact pay the arrears. That is what the provisions of section 129(3) required him to do. The provisions required payment, and not merely a tender of payment[7], and the fact that the representative of the respondent had according to the applicant rejected the offer is therefore irrelevant for purposes of a defence based of the provisions of section 129(3) of the Act. For the same reason the applicant's submission that the respondent had been obliged to accept his offer, is wrong in law.

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[6] See **Nedcor Bank Ltd trading *inter alia* as Nedbank v Mooipan Voer & Graanverspreiders CC** [2002] 3 All SA 477 (T) para 13; **Alpha Properties (Pty) Ltd v Export Import Union (Pty) Ltd** 1946 WLD 486 at 519-520

[7] Compare **De Bruin,** *supra* (footnote 4), para's 39 and 40

[38.] Mr Eilert pointed out that that the *dictum* in the majority judgment in **Nkata v FirstRand Bank Limited and Others**[8] that the "*consent or cooperation*" was not required for the purposes of payment in terms of section 129(3) is not applicable here, because in that matter the arrears had been paid. Only the costs and charges remained outstanding. He also pointed out that dicta in the main judgment suggested that a tender of payment would be sufficient[9].

[39.] Mr Eilert did not, however, explain why, if the cooperation of the credit provider is not required for purposes of payment of the costs and charges, it would be a requirement for payment of the arrears. I can conceive of no reason why not. In fact, the majority **Nkata** judgment was to the effect that, whereas payment of the overdue amounts was a requirement of section 129(3), the same would not apply to costs and charges if the credit provider has not quantified and demanded payment thereof first[10].

[40.] It is clear from the majority **Nkata** judgment that, for purposes of section 129(3) of the Act, the consumer's position as regards the arrears must be distinguished from the consumer's position as regards the costs and charges. The consumer is expected to be the "*protagonist*"[11] as far as the overdue amounts are concerned and is expected to know or to establish what the total of these amounts is and to pay it. As far as costs and charges are concerned, and due to the nature thereof, the provisions of section 129(3) do not require the consumer to "*take proactive steps to find out what the costs would be for reinstatement to be effected*"[12]. If the credit provider has not itself taken steps to have the costs and charges quantified and demanded, payment thereof would not be a requirement for reinstatement in terms of section 129(3).

[41.] The *dictum* in para [70] of the main judgment in the **Nkata** matter that "*at least*" a tender of payment of the costs would be required for reinstatement, must be

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[8] [2016] ZACC 12 para [104]
[9] See para's [68] to [70]
[10] See para's [123] to [125]
[11] See para [104]
[12] See [122]

seen in this light. It has nothing to do with requirement in section 129(3) of payment of "*all amounts that are overdue*".

[42.] Section 129(3) affords a consumer who would otherwise, according to the normal contractual principles, have committed a breach which would actually have afforded the innocent party with an election whether or not to proceed with the agreement, an extraordinary remedy. As long as the innocent party has not yet cancelled the contract, the guilty party would in effect be the one who has the option which the innocent party would normally have had, had the provisions of the Act not been applicable[13]. In my view the word "*paying*" in section 129(3) should therefore be interpreted, as far as the arrears are concerned, to require actual payment thereof. This is, in my opinion, also the clear implication of the majority **Nkata** judgment.

[43.] It is not necessary to consider whether the applicant's alleged offer "*to pay an amount of R150 000.00 on* (the) *account*" could in any event be said to have been intended to convey not only a tender of payment of the arrears, but also of whatever the amounts of the costs and applicable charges were. The fact is that no payment was actually made in respect of the arrears. Nothing prevented the applicant from making payment, at the very least, of an amount which would have fully settled the arrears[14]. On his own version he knew that the amount which he according to him had available, would have been sufficient to settle the arrears. There is in any event no indication in the founding affidavit that the applicant had attempted to obtain particulars of the arrears amount before making the offer, or that he would not have been able to obtain those particulars from the respondent.

[44.] The reason for not having made the payment is, in view of the above, not really relevant, at least not for the purposes of section 129(3) of the Act. The

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[13] Compare **Mostert v Firstrand Bank t/a RMB Private Bank** (198/2017) [2018] ZASCA 54 para [25]
[14] If it is to be assumed, for the moment, that the applicant did not have particulars of the charges and costs at that stage.

applicant's version in this regard can in any event, in my view, safely be rejected on the papers:

39.1 In his founding affidavit he emphatically stated "*I did not, and still do not, possess any bank details of the Respondent*", and explained that the monthly instalment "*was always deducted by way of a debit order*".

39.2 In the answering affidavit the respondent's deponent exposed this version to be complete false. It appeared that the applicant had in fact, in the past, on more than one occasion made payments into the bank account of the respondent.

39.3 In his replying affidavit the applicant admitted those payments, and also that what he had said in his founding affidavit was "*unfortunately not correct*". No explanation was tendered for this and the only inference that can be drawn is that the applicant had in his founding affidavit deliberately misrepresented the facts in this regard.

39.4 The new explanation in the replying affidavit, *viz* that the account of the respondent that the payment would have had to be made to, would have depended on the particular bank the payment would be made from, makes no sense. He never said that the R150 000.00 would have been paid from a different account to the one that he had in the past successfully made payments from.

[45.] Even if the applicant's explanation of the late application could be regarded as sufficient, which in my view is not the case, his application for rescission therefore stands to be dismissed on the basis that he has not shown, even *prima facie*, that the defence raised by him would succeed were he to be given leave to defend.

[46.] As far as costs are concerned the normal position would be that they would follow the result. Mr Olivier conceded, however, that on the facts of this matter, and with specific reference to the fact that the respondent's attorney did not respond to the e-mail of 3 March 2017, the respondent should bear its own costs. No costs order will therefore be made.

[47.] In the premises the following order is made:

The application is dismissed.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Applicant:	**ADV A EILLERT** (Instructed by **L K Sullaphen & Associates**)
For the 1st and 2nd Respondent:	**ADV A D OLIVIER** (Instructed by **Duncan & Rothman Inc.**)