

SOUTH AFRICA / JUDGMENT

**Nedbank Limited v Mashaba (2023/0345755;
2023/047197; 2023/047199; 2023/048901;
2023/053583; 2023/059144) [2024] ZAGPJHC
33; 2024 (3) SA 155 (GJ) (12 January 2024)**
[2024] ZAGPJHC 33

COURT

South Gauteng High Court, Johannesburg

BEFORE

B M Gilbert

CASE / FILE NUMBER

2023/0345755; 2023/047197; 2023/047199;
2023/048901; 2023/053583; 2023/059144

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FLYNOTES:

CIVIL PROCEDURE – Default judgment – By registrar
– Where credit agreement involved – Instalment agreements concluded with bank for financing of motor vehicles – Registrar can grant default judgments or otherwise deal with applications for default judgment as provided for in Uniform Rule 31(5)(b) in those NCA matters where High Court has jurisdiction – Attorneys are first to approach the registrar for default judgment – Should the applicant for default judgment seek to approach open court directly, without first placing the matter before the registrar in terms of Rule 31(5), it must have good reason to do so, supported where necessary by the appropriate facts.

REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, JOHANNESBURG
Case
No: 2023-034575

REPORTABLE: Yes
OF
INTEREST TO OTHER JUDGES: Yes
In

the matter between: NEDBANK
LIMITED
Applicant
and
MASHABA,
ERICK
Respondent
AND
Case
No: 2023-047197
In

the matter between: NEDBANK
LIMITED
Applicant
and
MAMADI,
MOYAHABO JONATHAN
Respondent
AND
Case
No: 2023-047199
In

the matter between: NEDBANK
LIMITED
Applicant
and
MASHABA,
VINCENT
Respondent
AND
Case
No: 2023-048901
In

the matter between: NEDBANK
LIMITED
Applicant
and
TSHOFELA,
THOBELA
Respondent
AND
Case
No: 2023-053583
In

the matter between: NEDBANK
LIMITED
Applicant
and
THE
MARKETING AND MEDIA GUYS (PTY) LIMITED
Respondent
AND
Case
No: 2023-059144
In

the matter between: NEDBANK
LIMITED
Applicant
and
MDLADLA,
ARCHIBALDE HLAKANIPHANI
Respondent

JUDGMENT

This judgment is a revised version of the judgment handed down on 12 January 2024, correcting certain typographical errors.

Gilbert AJ:

1. The applicant in each of the actions seeks default judgment on instalment agreements concluded between it and the respondent for the financing of motor vehicles. The applicant bank is the same in all the matters, and the same attorneys and same counsel were briefed in each matter by the applicant.

2. The instalment agreements fall within the ambit of the National

Credit Act, 2005 (“the NCA”). The applicant as credit provider either seeks cancellation of the particular instalment

agreement and the return of the motor vehicle that had been financed under the agreement or, where the term of the instalment agreement

has already expired, payment of the outstanding balance by the consumer.

3. As the claims are each for ‘a debt or a liquidated demand’,^[1] ordinarily application would be made to the registrar for default judgment in terms of Uniform Rule 31(5). The applicant in these

actions has not sought default judgment from the registrar. Instead the applicant has enrolled these matters for default judgment in the unopposed motion court. These are not instances where the registrar had in the exercise of its powers in terms of rule 31(5)(b)(vi)

required the applications to be set down for hearing in open court.

4. Upon the matters being called before me on the unopposed roll, I enquired of applicant's then counsel whether the registrar should have been approached, as provided for in rule 31(5), rather than enrolled for hearing in open court.
5. Although each of the claims fall within the jurisdiction of the magistrates' courts, the High Court, as it has concurrent jurisdiction, cannot decline to entertain the matters.[2] But what is not clear is whether the registrar may grant default judgment in terms of rule 31(5) where the proceedings fall within the ambit of the debt enforcement procedures prescribed in the NCA. If the registrar cannot do so, then the applications for default judgment were appropriately enrolled in open court. On the other hand, if the registrar can do so, then consideration needs to be given to whether the registrar should first have been approached, rather than open court burdened with applications that can be competently decided by the registrar.
6. Section 130 of the NCA is headed 'Debt Procedures in a Court'. Sections 130(1) and (2) provide for the circumstances in which a credit provider can approach the court to enforce a credit agreement. Section 130(3) provides for what 'the court' must be satisfied of before it determines the matter. Section 130(4) provides for what 'the court' either must or may do if it makes certain determinations.
7. As section 130(3) requires that the 'the court' be so satisfied, the issue that arises is whether the registrar can fulfil the role of 'the court', and so determine the matter and grant default judgment, or whether it is an open court that is required to do so.
8. There are conflicting decisions across the Divisions of the High Court, and, as will appear below, there is no binding precedent in this Division.
9. In light of the importance of the issue and the prevalence of these types of matters, the applications were adjourned to enable the applicant to make written submissions.
10. The Banking Association of South Africa ("BASA") subsequently obtained leave to be admitted as amicus curiae given the importance of the issue to the banking industry.
11. Both the applicant bank and BASA made extensive written submissions as well as oral submissions at a subsequent hearing. I am indebted to them and their legal teams for their useful contributions.
12. I first consider by way of an overview of the various decisions whether there is binding precedent in this Division.
13. In *Du Plessis v Firststrand Bank Limited trading as Wesbank*[3] the consumer defendant applied for rescission of default judgment granted by the registrar on the basis that the registrar was not competent to do so as it was not 'the court' as required by section 130 of the NCA. Tlhapi J for this Division found that the registrar was competent to grant default judgment, and so refused to rescind the default judgment. The court did so after considering

section 23 of the Superior Courts Act, 2013 and rejecting submissions on behalf of the defendant for rescission that Jafta J in a minority judgment in *Nkata v FirstRand Bank* 2016

- (4) SA 257 (CC) and again in a minority judgment in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016
- (6) SA 596 (CC) had found that it was only for a court, and not the registrar, to determine NCA claims as required by section 130 of the NCA.
14. But decisions would then follow in this, and other, Divisions that went the other way and found that the registrar was not competent to grant default judgment in NCA actions.
15. In *Theu v First Rand Auto Receivables (RF) Limited*[4] Matebese AJ in this Division reasoned, having raised the issue *mero motu* and having subsequently received written submissions from the parties, with particular reference to the statements made by Jafta J in his minority judgment in *Nkata*, that the oversight function required by section 130 requires much interpretative exercise and so could not be done by the registrar but must be done by the court.[5] In that matter too the consumer had approached the court to rescind a default judgment that had been granted against her by the registrar. As the court found that the registrar had no power to grant the default judgment, it declared the default judgment a nullity and set aside the warrant issued pursuant to that default judgment. In addition the credit provider was ordered to pay the costs of the rescission application.
16. Thereafter Mabuse J in *Seleka v Fast Issuer SPV (RF) Limited and Another*[6] for this Division similarly rescinded a default judgment that had been granted by the registrar, again with the credit provider to pay the costs. Again the court relied upon the remarks made by Jafta J in *Nkata*. [7]
17. It is not only this Division that has found that the registrar cannot grant default judgment. Nkosi J in the KwaZulu-Natal Division, Pietermaritzburg in *Xulu v Standard Bank of South Africa Limited and Others*[8] similarly set aside a default judgment because the registrar had granted the default judgment. The court, with reference to Jafta J's minority judgment in *Nkata* and also to the judgments in *Theu* and *Seleka*, considered the issue to be settled that the registrar was not competent to grant default judgments in NCA actions as section 130 required that 'the court' determine the matter.
18. None of *Theu*, *Seleka* or *Xulu* referred to the earlier decision of Du Plessis and its reasoning.
19. The full court decision of the Mpumalanga Division in *Mollentze*[9] followed. The decision is important for several reasons. Firstly, as a decision of the full court, while not binding in this Division, from the perspective of precedent it is to be considered highly persuasive. Secondly, whereas in the preceding matters the issue had been decided in the context of rescission proceedings, the full court had been specifically constituted to squarely consider *inter alia* whether the registrar was competent to grant default judgments in NCA matters in terms of rule 31(5), and which it did after hearing argument from both the applicants in that matter and BASA. Thirdly, the full court specifically considered the earlier decisions of

Theu, Seleka and Xulu and their reliance on Jafta J's minority judgment in Nkata, as well as the decision to the contrary in Du Plessis.

20. The full court, having considered these various decisions, preferred the reasoning in Du Plessis, and found that the registrar was both able (who should be suitably skilled) and competent in terms of section 130 to grant default judgments pursuant to rule 31(5). The full court found in paragraphs 14 and 15 that the statements that had been made by Jafta J in his minority judgment in Nkata were effectively distinguishable, and obiter.
21. Notwithstanding the persuasively pragmatic view adopted by the full court in Mollentze, Snellenburg AJ in Gcasamba[10] declined to follow Mollentze. The court in Gcasamba reasoned in paragraphs 45 and 46 that the issue had been resolved by Jafta J's judgment in University of Stellenbosch, which the preceding judgments, including the full court judgment in Mollentze, had not considered, and which was consistent with Jafta J's earlier minority judgment in Nkata that it is only a court, and not the registrar, that may carry out the section 130(3)

determination.

22. Snellenburg AJ further found in paragraph 48 that even if Jafta J's findings in University of Stellenbosch were not decisive, that he in any event agreed with Jafta J that section 130(3) is in mandatory terms and it is the court, and not the registrar, that must satisfy itself that there has been compliance as required by section 130(3).
23. Subsequently Dreyer AJ for the Eastern Cape Division in Ngandela v ABSA Bank Limited and Another[11] agreed with Gcasamba and declined to follow Mollentze. The court in Ngandela described the full court decision in Mollentze as an outlier and incorrect in its decision that what was stated in Nkata was obiter. The court found that what was stated by Jafta J in Nkata was binding. The court too aligned itself with the decisions of Theu, Seleka and Xulu.
24. Insofar as our Gauteng Division is concerned, following Mollentze the court in Nonyane v Nedbank[12] was of the view that it was so clear, based upon what Jafta J had said in Nkata, that the registrar could not grant default judgment, that when the court rescinded the default judgment that had been granted by the registrar in that matter, it ordered the credit provider to pay costs on a punitive scale because in the court's view the credit provider's opposition to the rescission was frivolous or unreasonable. No reference was made in the short judgment to the full court decision in Mollentze, which supported the credit provider's position.
25. I am required to follow those decisions of this Division of a single judge unless I am of the view that they are clearly wrong. In the present instance, those decisions are not consistent. The reasoned decision of Du Plessis goes one way. The subsequent decisions of Theu, Seleka and Nonyane go the other way. Although the latter decisions are more recent, the earlier decision of Du Plessis is affirmed by what must be treated as the highly persuasive full court decision in Mollentze. In the circumstances, in my view, I am not required to, nor am I able

to, decide that one or other of the line of decisions in this Division is clearly wrong.

26. It remains necessary to consider whether what was stated by Jafta J in his minority judgments in *Nkata* and *University of Stellenbosch* is decisive of the issue. As appears above, *Gcasamba* and *Ngandela* for the Free State and Eastern Cape Divisions respectively found this to be so. On the other hand, the full court in *Mollentze* found not, as had previously this Division in *Du Plessis*.
27. *Nkata* was concerned with the correct interpretation of sections 129(3) and 129(4)(b) of the NCA. An issue was whether it was necessary for the consumer to have paid certain legal costs before a credit agreement was re-instated. Section 129(3) provides that a consumer may remedy a default under the credit agreement by payment to the credit provider, at any time prior to its cancellation, of 'all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement'. The legal costs at issue as claimed by the credit provider included the costs of the credit provider obtaining default judgment from the registrar in terms of rule 31(5).
28. The majority judgment written by Moseneke DCJ upheld the appeal, finding in paragraph 123 that the legal costs would become due and payable only when they are reasonable, agreed or taxed, and on due notice to the consumer. As this had not taken place, the majority judgment found that it was not necessary for the consumer to have paid them before by the operation of law the credit agreement was re-instated in terms of section 129(3). Nothing was said in the majority judgment on whether the registrar was competent to grant judgment in terms of section 130, and so whether the costs of obtaining such default judgment were costs lawfully incurred by the credit provider in obtaining that default judgment.
29. Jafta J in his separate judgment concurring that the appeal should be upheld agreed that the legal costs were not due but for reasons different to that advanced in the main judgment of Moseneke DCJ. Jafta J found that for a variety of reasons, which are specified in paragraph 173 of his judgment, costs that had been incurred by the credit provider were not recoverable as they had not been lawfully incurred, and so the consumer did not have to pay them to have the credit agreement re-instated in terms of section 129(3).

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30. One of those reasons specified by Jafta J in paragraph 173 of this judgment, is that the credit provider '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'. This statement features centrally in decisions such as *Gcasamba* that the findings by Jafta J are decisive and binding in relation to the present issue.

31. For the sake of completeness, in a dissenting judgment dismissing the appeal, Cameron J (in which Nugent AJ concurred and who wrote his own separate judgment), found that it was necessary for the consumer to first pay, or at least tender, payment of the costs before the credit agreement would be re-instated. They disagreed with the majority

judgment that the legal costs would become due and payable only when they are reasonable, agreed or taxed, and on due notice to the consumer, and so need not be paid for the credit agreement to be re-instated. Cameron J in his judgment said nothing about the competence of the registrar to grant default judgment. As appears below, Nugent J in his separate judgment expressed reservations about Jafta J's findings.

32. The full court in Mollentze was of the view that what was stated by Jafta J in his minority judgment was not binding. It agreed with submissions made by the applicant that the court in Nkata was not called upon to answer whether section 130(3) prohibited the registrar from granting default judgment in NCA matters.[13] It appears that full court was therefore of the view that it was unnecessary for the court to have made any findings in relation to the registrar's powers in terms of section 130(3),[14] and so what was said by Jafta J in Nkata was effectively obiter. Similarly counsel in this matter submit that the issue of whether the registrar could grant default judgment was not an issue before the court.
33. I have doubt about these particular reasons why what Jafta J said is obiter. His finding that the registrar could not have granted judgment was a central part of his reasoning in finding that the costs that had been incurred by the credit provider were not recoverable and so need not be paid in terms of section 129(3) before the credit agreement was re-instated. Depending on the method of abstracting the rationes decidendi from a judgment (or in the case of courts of more than one judge, the judgments, if more than one judgment has been delivered), which is not a straight-forward issue and about which there are differing views, [15] Jafta J's findings may constitute rationes decidendi[16] if it was the only judgment of the court in the matter. That this was one of several reasons underpinning his finding that the costs incurred were unlawful, each of which may be dispositive and which were not subsidiary, does not preclude that reason from being a ratio decidendi abstracted from the case.[17]
34. But Jafta J judgment is not the only judgment in Nkata. I agree with the submissions by counsel, and as found by Tlhapi J in Du Plessis[18] and then subsequently in Mollentze,[19] that the fact that the majority judgment in paragraph 75 of its judgment 'noted' the additional reasons given by Jafta J in his minority judgment does not make those additional reasons part of the binding rationes decidendi to be taken from the decision.
35. As pointed out in Du Plessis[20] and by counsel, Nugent AJ in paragraph 158 of his separate judgment in Nkata cautions that Jafta J's statement that the default judgment is null and void including for the reason that the registrar could not grant judgment is going down 'untrodden paths'.

36. Whatever may be concluded in relation to whether Jafta J's statements would constitute *rationes decidendi* if his judgment was the only judgment, in the present instance what Jafta J said is not part of the majority judgment. Although Jafta J agreed with the majority judgment that legal costs were not payable, he did so for different reasons. His reasons, including that the registrar was unable to competently grant default judgment because of section 130, were not adopted by the majority. Jafta J's concurrence that legal costs were not payable were not necessary for the majority judgment of Moseneker DCJ to constitute the order of the appeal court upholding the appeal i.e. even if Jafta J had not concurred in the judgment of Moseneker JA, that judgment would still constitute the judgment of the majority of the court, resulting in the order upholding the appeal. Accordingly Jafta J's reasons are not included in the *rationes decidendi* of the decision.[21]
37. It follows that I disagree with Ngandela[22] and Nonyane[23] that what was found by Jafta J in *Nkata* is binding and decisive. I agree with the full court decision in *Mollentze* that Jafta J's statements are not binding, albeit not entirely for the same reasons.
38. I also disagree with Gcasamba[24] and Ngandela[25] that what was said by Jafta J in *University of Stellenbosch* in relation to section 130 is decisive and binding. I am of the view that what was said by Jafta J as to the registrar's inability to grant default judgment in NCA matters do not constitute *rationes decidendi*. As appears above, this is consistent with the decision of Du Plessis in this Division.
39. In *University of Stellenbosch* the court was concerned with the constitutionality of sections in the Magistrates' Courts Act 1944 dealing with the issue of emolument attachment orders, and particularly whether judicial supervision of execution by the court was required. In two concurring judgments the majority found that judicial supervision was required and that as the relevant sections,
- properly interpreted, did not provide such judicial supervision by the court as it was the clerk of the court that issued the attachment
- orders and not the court, the relevant provisions were unconstitutional. Jafta J in a third judgment differed from the concurring majority judgments in that he accepted that judicial supervision was required, but the sections could, and should, be interpreted that it was the court, and not the clerk of the court, that issued the orders and so the sections did provide for judicial supervision.
40. During the course of his judgment, Jafta J made various introductory statements in relation to the manner in which the NCA as a form of consumer protection legislation must be interpreted in order to advance its purposes. It was during the course of doing so that Jafta J said in relation to section 130, including in paragraph 25 that '(n)otably 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'.

41. Apart from Jafta J's statements not forming part of the majority judgment and for that reason not constituting *rationes decidendi*, they were not necessary for the decision that he reached and, with respect, constitute material extraneous to the essential reasoning

for his finding.[26] Section 130 of the NCA is concerned with the judicial process resulting in judgment, as distinct from execution. Jafta J himself recognised this distinction, as appears from paragraphs 33 and 34 of his judgment. The former is the subject of these proceedings, particularly whether the registrar is able to carry out the judicial process required by section 130. In contrast, University of Stellenbosch was concerned with the latter, which is execution, and particularly in the form of emoluments attachment orders issued in terms of the Magistrates' Courts Act,

43. As there is no binding precedent in this Division on the issue (as the decisions of single judges of this Division are conflicting, as the full court decision in Mollentze although highly persuasive is not binding and as the statements by Jafta J in his minority judgments in Nkata and University of Stellenbosch are obiter), I am required to determine the issue. I do so cognisant that obiter statements from higher courts, particularly emanating from the Constitutional Court, are highly persuasive.[27] That though begs the question what would constitute the obiter of that court when the statements do not emanate from the majority judgment.
44. The position adopted by the applicant and BASA, consistent with Mollentze, is that the registrar does have the power to grant default judgments in NCA matters and that the full court decision of Mollentze should be followed.
45. Mollentze is persuasive, particularly in its pragmatism. My reservation with the decision, as raised with counsel, was that if section 130 of the NCA did require judicial oversight, numerous decisions have held in relation to other instances that it was for the court to exercise judicial oversight, and that someone else, such as the registrar, could not do so.[28] That a judgment by default granted by the registrar in terms of the Uniform Rules is deemed to be a judgment of the court in terms of section 23 of the Superior Courts Act does not equate to the registrar's determination being the same as the judicial oversight required by those decisions.
46. I also expressed some reservation whether the obligations and powers of the court as referred to in section 130(4) could meaningfully and appropriately be undertaken and exercised by the registrar, rather than in open court. Section 130(4)(a) provides that if the court determines that the credit agreement is reckless as described in section 80 of the NCA, the court must make an order declaring the credit agreement reckless and may together with that order set aside all or part of the consumer's rights and obligations under the agreement as the court determines just and reasonable in the circumstances, or suspend the terms and effect of that credit agreement. This does not appear to be a duty or power that is readily capable of being discharged or exercised by the registrar. So too in relation to several of the other powers of the court as referred to in terms of section 130(4), such as where the

credit agreement is subject to a pending debt review or debt re-arrangement order or agreement or where the matter is pending before the National Consumer Tribunal.

47. In response to these reservations, BASA in particular developed its argument as follows:

47.1. section 130 of the NCA does require an oversight role but that role is not that of ‘judicial oversight’ in the form of a judge in open court;

47.2. there is no constitutional imperative that requires the oversight function to be fulfilled under section 130 to be confined to that of a judge in open court. This in contrast to the judicial oversight function as is required when the order is in relation to the execution against the debtor’s property, for example in orders declaring residential property executable or emoluments attachment orders. This, so the submissions go, is why the reliance on Nkata and University of Stellenbosch is misplaced.

47.3. the references to the ‘court’ in section 130 are necessarily to be interpreted as including the registrar, based inter alia upon the ordinary meaning of the word and that the registrar is as part of the court. The submissions further rely on section 11(1)(a) of the Superior Courts Act, which provides that a registrar must be appointed for each Division and describes what is required of a registrar, including to do “whatever may be required for the administration of justice or the execution of the powers and authorities of the said court”;

47.4. that the powers conferred upon the registrar in terms of rule 31(5)(b) are wide enough to enable the registrar as part of the court to fulfil the functions required of ‘the court’ in terms of section 130;

47.5. as the registrar had no power to grant judgments other than in respect of default judgments, the fulfilment by the registrar of its section 130 oversight function as ‘the court’ must be considered in that context. Issues such as whether the credit agreement is reckless, subject to a pending debt review or a debt re-arrangement order or agreement or whether the matter is pending before the National Consumer Tribunal, and the appropriate order to be made in those circumstances in terms of section 130(4) would not ordinarily arise in default judgment applications as typically that is something that would be placed before the court by the defendant consumer. As the defendant consumer is in default of appearance to defend or of delivery of a plea, these issues would not ordinarily arise in applications for default judgment in terms of rule 31(5)(a). In any event, the credit provider is required to place before the court certain information that would disavow the existence of at least some of these instances, such as appears from section 129(3)(b). Should these issues arise, then the registrar has sufficient powers in terms of rule 31(5)(b), including to require the matter to be set down in open court.

48. I have doubts that the registrar is structurally part of the court in the sense submitted by BASA upon its interpretation of the Superior Courts Act. But I do favour the submissions, which align with those of the applicant, that the oversight required by section 130 is not the kind of ‘judicial supervision’ as contemplated in the judgments that deal with judicial supervision of execution orders, and which oversight can be adequately performed by the

register using its prescribed powers in terms of rule 31(5)(b)(i) to (vi). This appears to accord with what Tlhapi J was expressing in paragraph 15 of her judgment of this Division in *Du Plessis*, which is that the function undertaken by the registrar is administrative and which the registrar is able to effectively discharge by having the necessary knowledge to make decisions and by exercising its prescribed powers in terms of rule 31(5)(b)(i) to (vi). This was also found in *Mollentze* in paragraphs 30 and 31 that the nature of the work of the registrar in considering the granting of default judgment is about procedural compliance.

49. The majority judgment in *University of Stellenbosch* affirmed in paragraph 129 that the Constitution requires judicial supervision where an applicant seeks an order to execute against or seize control of the property of another person. In that matter, the emoluments attachment orders that were the subject of the decision were execution orders against the debtor's wages. In foreclosure proceedings, the execution orders are against the debtor's home. *Nkata* was a matter relating to the execution on the debtor's home. In contrast, in the present instance in those matters where the applicant seeks the return of the vehicle, the order relates not to the debtor's property but to the applicant's property as the applicant as the credit provider has reserved ownership of the vehicle until it is paid.
50. The parties have not placed before me any facts why a particular interpretation would be contrary to the purpose of the NCA, or prejudicial to the banking industry. The facts would have to have been in affidavits filed by the parties. The applicant bank in each of the matters did not file any affidavits. In any event, the averments in their particulars of claim went no further than the usual averments relating to their cause of action. *BASA* in their only affidavit, being that in support of being admitted as an amicus, did not advance any facts. The Supreme Court of Appeal in *Mpongo* emphasised in paragraphs 11 to 14 that material facts needed to be adduced to support arguments presented about litigation dynamics and their supposed implications for constitutional values, such as section 34 of the Constitution.
51. Based on what is before me, I agree with the reasoning in *Du Plessis*[29] and *Mollentze*[30] that the purposes of the NCA will not be undermined by the registrar fulfilling the role of the court as required in section 130, and that the powers conferred upon the registrar in terms of rule 31(5)(b) are sufficient to enable it to effectively fulfil that role.
52. The decisions to the contrary, such as *Theu* and *Seleka* in this Division, and *Gcasamba* and *Ngandela* decided after *Mollentze*, rely heavily on what was said by Jafta J in *Nkata* and *University of Stellenbosch*. For the reasons given above, I do not find these statements binding. I am not alone in this, as appears from *Du Plessis* in this Division and the full court decision in *Mollentze*. Nugent AJ in paragraph 75 of his separate judgment in *Nkata* had his reservations about Jafta J going down 'untrodden paths'. Cameron J in paragraph 128 of his concurring majority judgment in *University of Stellenbosch* expressed his disagreement with the overall approach of Jafta J in that matter. Further, as submitted by the applicant and *BASA*,

Nkata and University of Stellenbosch are distinguishable as those matters dealt with constitutive imperatives in the context of execution orders on the property of a person other than the credit provider, such as the debtor.

53. Applicant's counsel, relying on Du Plessis,[31] makes the point that the NCA does not divest of the registrar of the powers conferred upon it by the Superior Courts Act. There is merit in this. Section 23 of the Superior Courts Act[32] expressly provides for the registrar to grant default judgment in certain instances, being those that fall within the ambit of rule 31(5)(a).
54. Section 172(1) of the NCA specifies when the NCA will prevail over other legislation in the event of a conflict. The Superior Courts Act is not one of the listed instances in section 172(1) where the NCA will prevail.
55. In any event, there is no conflict. Section 2(7)(a) of the NCA expressly provides that "(e)xcept as specifically set out in, or necessarily implied by, this Act, the provisions of this Act are not to be construed as ... limiting, amending, repealing or otherwise altering the provision of any other Act". This would in any event accord with the usual principles relating to the interpretations of statutes. When interpreting section 130 of the NCA, the section is to be read in a manner that is consistent with and does not give rise to a conflict with section 23 of the Superior Courts Act. This can be done by interpreting the reference to 'the court' in section 130(3) of the NCA as including the registrar.
56. The opening words of section 130(3) require that 'the court' determine the matter '(d)espite any provision of law or contract to the contrary'. This admittedly gives scope for an argument that section 130(3) prevails over section 23 of the Superior Courts Act, and so the determination required by the section must be in open court. But once it is accepted that the kind of oversight required is not the kind of 'judicial supervision' such as is required over the granting of execution orders and that the purposes of the NCA can be advanced without requiring every application for default judgment in an NCA matter to be heard in open court, [33] there is no need to read section 130(3) of the NCA as being in conflict with section 23 of the Superior Courts Act, rather than consonant with it.
57. I therefore find that the registrar can in terms of rule 31(5) grant default judgments, or otherwise deal with applications for default judgment as provided for in rule 31(5)(b), in those NCA matters where the High Court has jurisdiction. In doing so, I have particularly had regard to what I must accept as the highly persuasive nature of the full court decision of Mollentze, where the court was squarely called upon to deal with the issue, and which prevails over the obiter statements that were made by Jafta J during the course of his minority judgments in Nkata and University of Stellenbosch.
58. The applicant submitted that if I should find that the registrar does have the power to grant default judgments in NCA matters in terms of rule 31(5), the court should nevertheless grant default judgment. BASA submitted that the applicant for default judgment should have an election whether to approach the registrar or set down the application in open court.

59. Madlanga J for the Constitutional Court in SAHRC in paragraph 42 recognised the “huge problem” arising from the clogging up of High Court rolls with matters falling within the jurisdiction of the magistrates’ courts. While the default judgments in NCA actions to be considered by the registrar in terms of rule 31(5) are not confined to matters falling within the jurisdiction of the magistrates’ courts, the point made about the clogging up of High Court rolls with matters that may appropriately be determined elsewhere, such as in this instance the registrar, remains good. The full court in Mollentze also described why it was pragmatically appropriate for the registrar in performing its quasi-judicial functions to determine the applications rather than in open court, including from a costs perspective and in relieving an open court from having to do so.
60. Madlanga J further pointed out in paragraph 36 of SAHRC that in the absence of a constitutional challenge, ‘the division of labour mandated by the Legislature between courts in respect of their jurisdiction must be honoured.’ Should a court have jurisdiction such as in terms of section 21 of the Superior Court Act to decide a matter, then it cannot decline to do so on the basis that it is over-burdened and the parties should go elsewhere.
61. Analogously in the present instance. The division of labour mandated between open court and the registrar must be respected, including by the attorneys representing the credit providers in NCA matters and by the registrar.
62. The attorneys are first to approach the registrar for default judgment – not because the court does not have jurisdiction or competence to hear application for default judgment but because of the described division of labour between open court and the registrar. Should the applicant for default judgment seek to approach open court directly, without first placing the matter before the registrar in terms of rule 31(5), it must have good reason to do so, supported where necessary by the appropriate facts, as cautioned in Mpongo. What may constitute good reason is not something to be decided now.
63. The registrar too must fulfil its part of the mandate. The registrar cannot, routinely, require the matter to be heard in open court simply because it is an NCA matter. Nor can it do so because it may be over-burdened.[34] The registrar is permitted to consider NCA actions where they fall within the ambit of rule 31(5), and to perform the oversight function required by section 130 of the NCA, including to appropriately exercise the powers that it has in terms of rule 31(5)(b)(i) to (vi), and it should do so. Should the registrar require a matter to be heard in open court in terms of rule 31(5)(b)(iv), it should give sufficient reasons. Although the applicants’ counsel in his heads of argument and during his oral submissions sought specific relief in relation to the performance by the registrar of its functions, this is not an appropriate occasion to do so.
64. Accordingly, the matters are to be removed from the roll and so enable the applicant to approach the registrar in terms of rule 31(5)(a).

65. Accordingly, in each of the matters, the applications are removed from the roll, with no order as to costs.

B M GILBERT

Acting Judge of the High Court

Gauteng Division, Johannesburg

Dates of hearings: 06 September 2023 & 29 November 2023 Date of judgment: 12 January 2024

Counsel for the applicant in each matter: M Reineke Instructed by: Hainsworth Koopman Inc,

Pietermaritzburg c/o Nkotchoe Attorneys, Midrand Counsel for the respondents: No appearance

for any of the respondents Counsel for Banking Association of South Africa: I Green SC P

Ngcongco I Hayath Instructed by: Edward Nathan Sonnenbergs Inc

[1] Nedbank Limited v Mollentze 2022

(4) SA 597 (ML) (“Mollentze”) at para 47; Gcasamba v Mercedes-Benz Financial Services SA (Pty) Limited and Another 2023

(1) SA 141 (FB) (“Gcasamba”) at para 37.

[2] Standard Bank of South Africa Limited and Others v Mpongo and Others 2021 (6) SA 403 (SCA) (“Mpongo”) and subsequently affirmed on appeal to the Constitutional Court in South African Human Rights Commission v Standard Bank of South Africa Limited and Others 2023

(3) SA 36 (CC) (“SAHRC”).

[3]

[2018] ZAGPPHC 286 (2 May 2018).

[4]

[2020] ZAGPPHC 319 (12 June 2020).

[5] Paras 45 to 49, with reference to paragraph 173 of Nkata.

[6]

[2021] ZAGPPHC 128 (10 March 2021).

[7] Nkata supra at para 173.

[8]

[2021] ZAKZPHC 51 (23 August 2021).

[9] Above.

[10] Above.

[11]

[2023] ZAECELLC 6 (31 March 2023).

[12]

[2023] ZAGPPHC 367 (6 March 2023).

[13] Para 14 and 33.

[14] Para 15.

[15] Hahlo & Kahn *The South African Legal System and its Background* (Juta) 1968 at p 260. See also the discussion in *Pretoria City Council v Levinson* 1949

(3) SA 305 (AD) at pp 316 and 317.

[16] Applying what appears to be preferred approach by Schreiner JA, as he then was, in *Pretoria City Council* above, at 317.

[17] *Turnbull-Jackson v Hibiscus Coast Municipality* 2014

(6) SA 592 (CC) at 619C/D.

[18] Above, para 12.

[19] Para 33.

[20] Para 14.

[21] Per Greenberg JA in *Fellner v Minister of the Interior* 1954

(4) SA 523 (A) above, at 538E to 539C, which applied in this instance appears to be consistent with what was held by the majority

judgment

of Centlivres CJ (Fagan JA concurring) at 532D to 533A in that matter. See also the discussion in *Hahlo & Kahn* above, at

274, 275.

[22] Para 6 to 11.

[23] Para 5 to 7.

[24] Para 46.

[25] Para 18.

[26] *R v Crause* 1959

(1) SA 272 (A) at 281B/C.

[27] Turnbull-Jackson above, at 616B.

[28] As in the many cases precluding the registrar from grant default judgments and execution orders in foreclosures on residential

immovable property. Or, as held in *University of Stellenbosch*, in the context of the issue of emoluments attachment orders, which could not be done by the clerk of the magistrates' court.

[29] Para 15.

[30] Para 27.

[31] Para 8.

[32] And its predecessor, section 27A of the Supreme Court Act, 1959, which was in force when the NCA came into effect on 1 June 2007.

[33] Mollentze at para 19, 27 to 29, 59 and 60.

[34] The full court of this Division in *Nedbank Ltd v Mateman* [2007] ZAGPHC 295; 2008

(4) SA 276 (T) at 286B-D rejected an argument initiated by the registrar that the workload of the court, and by implication by the registrar, constitutes a valid reason for refusing to hear a matter that falls within its jurisdiction. This was subsequently affirmed by the Supreme Court of Appeal in *Mpongo* and then on further appeal by the Constitutional Court in *SAHRC*.

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Prepared on 12 October 2026 · Esheria