



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 12251/2023P

In the matter between:

BMW FINANCIAL SERVICES

Applicant

and

NDLANGISA FUNERAL SERVICES CC

First Respondent

LUNGISANI ROBERT NDLANGISO

Second Respondent

ORDER

The following order is made:

1. The application for condonation for the late filing of the summary judgment application is dismissed with costs on scale B.
2. The application for summary judgment is refused.
3. The respondents are granted leave to defend the main action.
4. The costs of the summary judgment application shall be costs in the cause.

JUDGMENT

Delivered: 9 July 2025

Masipa J

[1] This is an application brought in terms of Uniform rule 32 for summary judgment against the respondents for delivery of specified movable property and related relief arising from an instalment sale agreement. The application is accompanied by a condonation application.

[2] The respondents oppose the application on two primary grounds:

- (a) the application for summary judgment was filed outside the prescribed time period, and condonation should not be granted; and
- (b) the respondents have a bona fide defence relating to the payments made and the alleged dispute over arrears and allocation of payments.

[3] The applicant seeks repossession of a motor vehicle pursuant to an instalment sale agreement concluded with the first respondent, alleging breach arising from non-payment. The matter relates to an instalment sale agreement in terms of which the applicant seeks delivery of a motor vehicle. It is common cause that at the time the application for summary judgment was launched, the respondents had brought their account up to date, but this was after the default and the issuance of summons. It also seeks costs and ancillary relief. In opposing the summary judgment application, the respondents rely, inter alia, on the absence of arrears and their efforts to make payment to resolve the matter. Consequently, the respondents seek the dismissal of the condonation and summary judgment applications together with costs.

[4] The applicant instituted action proceedings against the respondents pursuant to their alleged breach of an instalment sale agreement. A notice in terms of s 129 of the National Credit Act¹ ("the NCA") was issued, and thereafter summons. The respondents entered an appearance to defend, and the applicant subsequently launched an application for summary judgment one day after the prescribed 15-day period.

¹ National Credit Act 34 of 2005.

[5] The applicant did not simultaneously file an application for condonation for the late filing and only did so eight months later. The respondents argued that they were entitled to oppose condonation as the application was out of time since it was not launched simultaneously with the summary judgment application. The reason proffered by the applicant for the delay was the unavailability of the deponent of the founding affidavit for signature, who was based in another province, causing a logistical delay. The explanation is that the affidavit had been timeously commissioned in Gauteng but delays arose due to the deponent's availability and physical transmission to KwaZulu-Natal for filing. Importantly, the application was electronically served within time.

[6] The delay is minimal and has been reasonably explained. Additionally, despite the application being launched out of time and therefore not in conformance with the provisions of rule 32, the respondents filed an opposing affidavit which dealt mainly with the merits of the summary judgment application. Their conduct was tantamount to a condonation/acceptance of the summary judgment application. As correctly argued by the applicant, the applicant could also have had recourse to the provisions of rule 30A. Additionally, it has been the practice that condonations be entertained despite being filed long after the main application. Any defect in the launching of the summary judgment application has been cured by the filing of a condonation application, which now falls to be determined.

[7] It is settled law that condonation is not granted as a mere formality. The test, as established in *Melane v Santam Insurance Co Ltd*,² requires consideration of four interrelated factors: the degree of lateness, the explanation therefor, prospects of success, and the importance of the case. While all four must be considered, strong prospects of success may justify condonation even where the delay is not entirely satisfactorily explained.

[8] However, the overriding consideration in this case is the absence of any discernible prospects of success. I am not persuaded that the applicant has shown such prospects of success. The core of the applicant's case rests on the

² *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-D.

enforcement of cancellation and return of the vehicle based on the respondents' failure to timeously meet their payment obligations under the agreement. The respondents had already remedied the arrears by the time the summary judgment application was filed. While it is true that default occurred, the agreement was effectively reinstated through conduct, and the matter is not one deserving of the stringent remedy of summary judgment.

[9] Although the applicant contends that the payments were unallocated or made after default was triggered, it does not convincingly establish the persistence of the breach as at the date of issue of summons. Instead, the evidence points to an account that had been brought up to date or substantially cured by the time enforcement was pursued. The continued pursuit of cancellation and repossession in these circumstances raises serious concerns about fairness and proportionality.

[10] The parties were requested to submit further heads to address whether the provisions of the NCA were applicable, secondly, whether the provisions of the Consumer Protection Act³ ('the CPA') applied and lastly, whether the matter invokes issues of public policy and public interest. In response to the invitation both parties filed supplementary heads.

[11] The applicant relied on *National Director of Public Prosecutions v Zuma*⁴ where it was held that the judicial function of the court is to confine its judgment to issues before it by deciding matters that are germane or relevant, not creating new factual issues or by making gratuitous findings against persons who were not called upon to defend themselves. The issues raised with the parties were germane to the issues in this matter and arose from the facts of the matter. There were accordingly no new facts arising. The issues raised are capable of consideration. In addition to this, the parties were afforded an opportunity to address these issues since they were raised with counsel in court and a view was formed that they be afforded sufficient opportunity to address them.

³ Consumer Protection Act 68 of 2008.

⁴ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 15.

[12] Although the applicant submitted that the CPA does not apply due to the application of the NCA (s 5(2)(d)), that does not negate the court's obligation to assess contractual enforcement through the lens of public interest. That assessment is independent of statutory protection and grounded in constitutional values.

[13] The applicant contends that it was entitled to proceed in terms of the instalment sale agreement, arguing that it retained a contractual right to cancel upon breach. The respondent referred to *ABSA Home Loan Guarantee Co (RF) (Pty) Ltd and Another v Moodley and Another*⁵ which held that only an act of breach was sufficient to initiate proceedings. However, this position cannot be viewed in isolation from the prevailing legal context. As the Constitutional Court made clear in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others*,⁶ the strict enforcement of contractual terms must yield to the overarching demands of good faith, fairness, and public policy.

[14] In this regard, *Beadica* held that “public policy demands that contracts freely and consciously entered into must be honoured”⁷. Applying those principles, I am of the view that it would be contrary to public policy for a credit provider to persist with enforcement action, particularly repossession, in circumstances where the defaulting party has rectified its breach prior to the matter being heard. Enforcement in such circumstances serves no purpose other than to punish the consumer, and is entirely at odds with the rehabilitative and equitable principles that underpin both the NCA and public policy. This court cannot lend its imprimatur to litigation that is pursued purely to vindicate a strict contractual right in the face of compliance.

[15] The public interest in this matter is real and not incidental. The applicant is a financial service provider inherently tied to serving vulnerable members of the public. In this case, it would be contrary to public interest and policy considerations to permit the applicant to enforce its rights strictly on the basis of past default, when the underlying indebtedness has been cured. The law does not operate in a vacuum. The purpose of credit regulation must be seen as encouraging good faith engagement and promoting consumer rehabilitation, not as punishing transient

⁵ *ABSA Home Loan Guarantee Co (RF) (Pty) Ltd and Another v Moodley and Another* [2023] ZAGPJHC 828.

⁶ *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC).

⁷ *Ibid* para 83.

default that has been remedied. Courts must remain alert to credit providers who weaponize technical breach for swift asset recovery, even where the rationale for enforcement has fallen away.

[16] Although the delay in filing the application for summary judgment is short and potentially excusable, there are no prospects of success in the summary judgment application itself. The applicant bears the onus to demonstrate that the respondents' opposing affidavit does not disclose a bona fide defence, and that the respondents have entered an appearance to defend merely for the purposes of delay.

[17] Against this backdrop, I find that the applicant's insistence on return of the vehicle despite having received the arrears is neither equitable nor in the public interest. This weighs decisively against granting summary judgment. The respondents have raised genuine disputes of fact regarding breach and compliance, and the matter is not suited to final relief on motion. The issues raised in defence disclose triable disputes of fact which ought to be ventilated at trial. Accordingly, both the applications for condonation and summary judgment must fail.

Order

[18] The following order is accordingly made:

1. The application for condonation for the late filing of the summary judgment application is dismissed with costs on scale B.
2. The application for summary judgment is refused.
3. The respondents are granted leave to defend the main action.
4. The costs of the summary judgment application shall be costs in the cause.

Masipa J

DETAILS OF THE HEARING

Matter heard on: 13 May 2025

Judgment Date: 9 July 2025

Appearance Details:

For the applicant: Mr D Moodley

Instructed by: Macroberts Incorporated

For the respondents: Ms C Jacob

Instructed by: Foster and Govender