



OFFICE OF THE DEPUTY JUDGE PRESIDENT

(HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION)
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C I R C U L A R

TO

1. **Permanent Judges of the High Court of South Africa, Gauteng Division, Johannesburg**
2. **Judges' Secretaries**
3. **Chief Registrar - Gauteng Division of the High Court, Pretoria and Johannesburg**
4. **Registrar: Motion Court Section**

DATE : 10 January 2022

RE : **DEFAULT JUDGMENTS AND THE NATIONAL CREDIT ACT**

Dear Colleagues

1. As a result of an unexpected development concerning the way in which default judgments are dealt with and the effect of that development on the workload of the Bench, I have scheduled a **Teams meeting for 16h15 on Wednesday 19 January 2022** to discuss this issue. It will be the sole agenda item. It is important that everyone attend, including judges in criminal trials.
2. Hitherto, the practice in respect of default judgments has been that, save in those special cases involving residential property, all default judgments have been disposed of by the registrar as contemplated by the Rules of Court.

3. This practice, and the effect of the Rules have now been challenged. A judgment in Pretoria, given on 12 June 2020: *Theu v First Rand Auto*, held that any default judgment that is founded on a matter regulated by the National Credit Act must be placed before a judge and the registrar has no jurisdiction to grant a judgment. Another decision in KZN held so too. These judgments rely on the dictum in a Constitutional Court case, *Nkata v Firstrand Bank 2016 (4) SA 257 (CC)* which held:

"[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 ...Second, it sought and obtained a default judgment from the registrar of the High Court, something that is incompatible with s 130(3) [of the NCA] which requires such matters to be determined by the court"

4. These judgments were apparently never specifically brought to the attention of the chief registrar until about September 2021. This issue is being picked up by the other Divisions around the country. Recently, the Judge President in the Free State Division issued a notice to state that all default judgment matters involving the NCA must be enrolled in the unopposed motion court.
5. Ledwaba DJP and I, and Jappie JP of KwaZulu-Natal, have had discussions about how to deal with the matter. Our view is that the Constitutional Court judgment must be complied with. There is no obvious basis upon which it could be distinguished and ostensibly until the Constitutional Court changes its mind or remedial legislation is introduced that is the position in law.
6. We are of the prima view that a hearing in the motion court is not necessary but that it will be sufficient that the registrar after checking the file for compliance, refers the file with her checklist to a judge for an endorsement. The judge will *de facto* issue the judgment.
7. A procedure can be set up in the Registry in terms of which all the Default Judgment applications granted in a given week are collated and put onto a roll for the Bench to deal with the following week. Assuming the Bench disposes of everything that flows in one week after the registrar has completed the initial assessment, the lead time to get DJs out will be extended by only one week to

four weeks after submission. That additional turnaround time would appear to be acceptable.

8. The real question before us is how to achieve that. The full complement of judges is already fully deployed. This is the gravamen of our discussion when we meet on 19 January 2022.

9. The statistics available to me at time of writing are thus:

1. Date	No of application received
28 June – 2 July	144
5 – 9 July	135
12 – 16 July	142
19 – 23 July	206
26-30 July	227
2 – 6 August	189
10 – 13 August	185
16 – 20 August	180
23 – 27 August	222
30 August – 3 September	194
6 – 10 September	225
13 – 17 September	172
20 – 24 September	145
Queries returned during the quarter	340
TOTAL	2706

10. These figures are the total number of requests for a Default Judgment, not the number granted. The proportion refused is negligible. For practical purposes we need to handle this volume per week. The highest number is 222. For our purposes, I shall assume we need to address 250 per week in as comfortable a way as possible.

11. On my estimate, the time that it will take to deal with a Default Judgment application under these circumstances is likely to be about the same time as it takes to deal with a straightforward unopposed motion. The fact that the matters shall have been sifted for obvious errors by the registrar should help speed things up, but given the mechanics of CaseLines, perhaps, not by much. If our cap of 40 matters per day per judge to prepare is a day's work, say 6.5 hours of reading,

the average preparation time per matter is about 10 minutes. Possibly, we might get through a DJ slightly quicker.

12. The workload implications are these:

- a. 250 matters at 40 per day is 6 days' work.
- b. If one judge were to be rostered for the week it means 50 per day for five days.
- c. If two judges are rostered it means 125 each at 31 per day for four days.
- d. Where will the judges be sourced?

13. I tabulate the options that are conceivable for your information. I am not married to any one option.

14. **Option 1:** raid the civil trial roll. This cannot be usefully done as the number of judges rostered just about matches demand. Occasionally we need to deploy the judge in the Settlement Court and elsewhere to assist, if they are short of work, and we need additional judges. As it is, the number of judges rostered range from 7 to 3. If we do not raid other courts for an 'idle' judge we risk embarrassment in the civil trial roll.

15. **Option 2:** recruit two pro bono Acting Judges. This is not viable because no practitioner who is not insane would give up a week of fee-earning time to perform this mind-numbing function. Plainly, the pro bono judges are prepared to make a financial sacrifice because they can get valuable experience – the only reward for their efforts. Indeed, an appreciation of this fact tells us that it will have to be the permanent judges (and the remunerated Acting Judges substituting for absent colleagues) who do this work. We too, are unlikely to want to face a week of this work either.

16. **Option 3:** the appeal judges each week each be given an equal number to do. This would probably entail the 6 – 7 days' work being done on Fridays. However, two of those judges are already in the Divorce court. In some weeks there are 9 judges rostered and in others as few as three. No consistency exists. The viability of this option is not apparent because it cannot be uniformly applied, even if it were tolerable to impose this additional burden on the appeal judges.

17. **Option 4:** each of the 38 judges on the establishment, permanent and acting, get allocated each week an equal share to do. That means we would each get (at a rate 250 per week) 7 matters to do. If the estimate of the reading time alluded to above is accurate, it means approximately 1 hour of additional work per week for each of us. This will be an irritant but may be the least painful all round.
18. **Option 5:** only the judges in civil court do them. Say, 28 judges each doing 9 each. That could be probably 1.5 hours a week each if the full roll reaches 250, and if a lesser number, say 5 – 6, an hour each.
19. **Option 6:** this space is open for suggestions. Please apply your minds to other possibilities.
20. This is a seriously difficult business to manage appropriately. We need to reach a sufficient consensus on the least painful way to deal with it. We are mindful that Judges in general are overloaded and we should be cautious not to exacerbate the situation. With this in mind, the Judge President is in the process of communicating with the Acting Chief Justice regarding the long promised review of the judicial establishments in the Superior judiciary.
21. Please let us not debate the principle in the meeting – what we need is a practical solution. This disjuncture between the Rules of Court which confers authority on the Registrar to grant orders and the apparent intention of the NCA shall be drawn to the attention of the appropriated decision makers, starting with the Heads of Court Conference.

Yours faithfully

*Dictated by the Deputy Judge President
Electronically transmitted, therefore no signature*

**ROLAND SUTHERLAND
DEPUTY JUDGE PRESIDENT**