South Africa: Western Cape High Court, Cape Town

Nkata v Firstrand Bank Limited and Others (14272/2010) [2014] ZAWCHC 1; 2014 (2) SA 412 (WCC) (16 January 2014)

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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT

Case No: 14272/2010

DATE: 16 JANUARY 2014

In the matter between:

NOMSA NKATA.....APPLICANT

And

FIRSTRAND BANK LIMITED.....FIRST RESPONDENT

SHERIFF IN THE DISTRICT OF DURBANVILLE.....SECOND RESPONDENT

KRAAIFONTEIN PROPERTIES / EIENDOMME.....THIRD RESPONDENT

WESTERN CAPE DEEDS OFFICE.....FOURTH RESPONDENT

Coram: ROGERS J

Heard: 21 October 2013

Delivered: 16 JANUARY 2014

JUDGMENT

ROGERS J:

Introduction

[1] This is an application for the rescission of a default judgment granted against the applicant ('Nkata') by the registrar of this court on 28 September 2010. Judgment was thereby granted against Nkata in favour of the respondent in the present proceedings ('FRB') for payment of R1 472 506,89 together with interest from 1 June 2010 to date of payment, allegedly owing to FRB in terms of a mortgage loan agreement secured by a mortgage bond over Erf 8832 Durbanville situated at 3[...] V[...] D[...] Street in Durbanville ('the property'). An order was also granted declaring the property to be executable for the amount of the judgment.

[2] Nkata seeks not only the rescission of the default judgment but also the setting aside of the writ of attachment issued by the registrar on 28 September 2010 and an order declaring the sale of the property in execution on 24 April 2013 to the third respondent ('Kraaifontein Properties') to be invalid. An interdict to restrain transfer of the property by the sheriff to Kraaifontein Properties was resolved by an undertaking pending judgment.

[3] The factual background to the matter is as follows. Nkata purchased the property in March 2005. The property was at that time undeveloped. Nkata obtained mortgage finance from FRB which resulted in the registration of a first bond in June 2005 and a second bond in May 2006. Nkata built a home on the property and took up occupation there with her two daughters during 2007. In the first bond Nkata chose the mortgaged property as her domicilium citandi et executandi. In the second bond she chose as her domicilium C/04 D[...] H[...], Rondebosch. This was the flat at which she was residing prior to the completion of the house she was building at the Durbanville property.

[4] During 2010 Nkata fell into arrears with her mortgage bond repayments. There were numerous telephone calls to her about this from the bank over the period March to November 2010. On 1 June 2010 FRB's attorneys, Cohen Shevel Fourie ('CSF'), in the person of Mr TO Price ('Price'), addressed a letter to Nkata in terms of s 129(1) of the National Credit Act 34 of 2005 ('the Act'). This letter was addressed to 2[...] V[...] D[...] Street (not 35 V[...] Doux Street, the address selected in the first mortgage bond). On 4 June 2010 a further s 129(1) was addressed to Nkata at 'c/o 4 D[...] H[...]' in Rondebosch (not C/04 D[...] H[...], the address selected in the second mortgage bond). Neither of these letters reached Nkata. The second was retrieved CSF on 14 June 2010 as an uncollected item.

[5] FRB issued summons on 5 July 2010. The summons alleged that her chosen domicilium was 35 V[...] D[...] Street in Durbanville. The summons alleged compliance with s 129(1)(a), annexing in purported proof of that allegation a copy of the notice sent to the Rondebosch address. On 9 July 2010 the sheriff attempted service at '4 D[...] H[...]' in Rondebosch. His return indicated that service at that address was unsuccessful because there was a block of flats there called Exmoore Court. FRB's attorneys were requested to supply the unit number. On 27 July 2010 the sheriff effected service at the Durbanville address by affixing a copy of the summons to the outer or main door.

[6] Nkata did not enter appearance to defend. On 4 August 2010 she approached a debt counsellor, and on 20 August 2010 she made an application for debt review. FRB alleges that she probably took these steps because she had received the summons. Nkata denied having received the summons.

[7] As already mentioned, default judgment was granted by the registrar on 28 September 2010. A writ authorising the sheriff to attach and take the property into execution was issued on the same day. (The judgment of the Constitutional Court in Gundwana v Steko Development & Others **2011 (3) SA 608** (CC), in which it was held that rule 31(5)(b) was invalid to the extent that it permitted the registrar (rather than a court) to declare a person's home executable, was only delivered on 11 April 2011.)

[8] According to Nkata, she only learnt of the judgment when she received a telephone call from an FRB employee in the first half of October 2010 informing her that the property was to be sold in execution. The sale was scheduled for 10 December 2010. On 13 October 2010 her then attorneys, Ahmen & Hamman Attorneys ('AHA'), emailed FRB urgently requesting a copy of the summons and judgment. On 19 November 2010 Nkata, through the offices of AHA, issued a rescission application ('the first application'). FRB delivered a notice of opposition, and answering and replying affidavits were filed. The matter was to have served before the duty judge on 10 December 2010. The application was postponed because the parties were discussing settlement. On the same day the first application was settled in terms contained in a draft order. The agreement was that the sale in execution of the property (scheduled for that very day) was cancelled. Nkata undertook to sign FRB's standard Quicksell mandate. She agreed that while the mandate was in place she would pay monthly instalments of R10 000. If the property was not successfully sold pursuant to the Quicksell mandate, Nkata was to pay the full arrears to FRB within 14 days of such expiry. If she failed to do so, FRB would be entitled to proceed to sell the property in execution forthwith. If she did pay the full arrears, FRB agreed not to sell the property but Nkata was obliged to resume payment of the full monthly instalment. Nkata was to pay the wasted costs of the cancelled sale and was also to pay the costs of the rescission application 'as taxed or agreed'.

[9] It was envisaged that this settlement agreement would be made an order of court. Nkata during March 2011 applied through the chamber book to have the settlement made an order of court but the duty judge declined to make an order, observing that the papers were incomplete and confusing and that there would need to be notice to FRB. Neither Nkata nor FRB took further steps to have the settlement made an order. Be that as it may, the property was not sold pursuant to the Quicksell mandate. Instead, and during March 2011, Nkata paid a lump sum of R87 500 which extinguished her arrears, and she resumed monthly payments. It appears that over the next 12 months she again fell into arrears but brought the account up to date in March 2012.

[10] In April 2012, shortly after extinguishing the arrears for the second time, Nkata asked FRB to agree to the rescission of the default judgment because the judgment was negatively affecting her credit record. FRB refused to agree. In May 2012 Nkata told FRB that she was battling to meet her monthly instalments. After visiting the Durbanville branch of the bank, she submitted a distressed debt application but the bank rejected the application, stating that the matter was under litigation. (The bank's internal records note, against the date 5 June 2012, that although Nkata's account was up to date, this was 'after years in arrears', that the bank had a judgment and that there was no justification for acceding to the distressed debt application 'with this lack of financial behaviour'.)

[11] Nkata then approached another debt counsellor, Johan Wepener. The latter was informed by FRB on 19 October 2012 that the mortgage loan was excluded from any debt review because it was 'under litigation'. On Wepener's advice, Nkata in December 2012 submitted a fresh distressed debt application but this was again rejected by the bank.

[12] Despite her financial difficulty, Nkata continue to pay the contractual instalments until February 2013, when she again fell into arrears. FRB then caused the property to be sold in execution, which sale was scheduled for 24 April 2013. According to the bank, its staff contacted Nkata on numerous occasions over the period February to April 2013 in an attempt to arrange for payment by her of the arrears. The bank alleges that she made promises which she did not keep.

[13] The sale in execution took place on 24 April 2013. The property was sold to Kraaifontein Properties for R1,086 million. According to the bank's records, her full debt as at 5 April 2013 was about R1 392 028, with the arrears being R33 716 (approximately three months' instalments). Kraaifontein Properties purchased the property with a view to renovating and re-selling it. They immediately erected a for-sale sign at the property. On the day following the sale in execution (25 April 2013) Nkata signed a monthly lease with Kraaifontein Properties to allow her to remain in occupation pending the re-sale. According to Kraaifontein Properties, Nkata agreed that they could arrange show houses. They started renovations immediately, which were completed in May 2013. According to them, Nkata did not say that she intended to seek rescission. On 2 May 2013 Kraaifontein Properties on-sold the property but registration has by agreement been suspended pending the outcome of the present application.

[14] On 3 May 2013 Nkata paid her first month's rent to Kraaifontein Properties. She failed to pay rent in June and July 2013.

[15] The present rescission application (the second such application) was issued on 13 May 2013. FRB and Kraaifontein Properties oppose the application. They were both represented at the hearing by Mr D van Reenen. Ms Dzai appeared for Nkata.

The rescission application

The merits

[16] In her founding affidavit Nkata alleged various deficiencies in FRB's action against her without indicating whether she brought the application in terms of rule 31(2)(b), rule 42 or the common law. Her criticisms were in summary the following:

[a] The summons was not properly served by the sheriff. He called at the property during working hours, when she was not there. He should have tried several times to gain entrance. (In the first application she added that because the property is surrounded by a high wall and the gate is locked when she is absent from the property, the sheriff could not have affixed the summons to the outer or main door.)

[b] Section 129(1) was not complied with because no notice in terms of that section was addressed to 35 V[...] D[...] Street.

[c] The summons failed to draw her attention to s 26(3) of the Constitution.

[d] The summons failed to disclose that the s 129(1) notice sent to the Rondebosch address had not been collected. Nkata alleged that an 'honest and bona fide legal representatives' would have sent the notice to her primary residence at 35 V[...] D[...] Street and would not 'have dishonestly hidden the fact' that the item sent to the Rondebosch address had not been collected. The allegation of compliance with s 129(1) was thus a 'fraudulent misrepresentation of facts'.

[17] I reject the first criticism. The sheriff's return is prima facie evidence of the truth of its contents. The sheriff is not required to attend at a chosen domicilium on several occasions in order to effect personal service; rule 4(1)(a)(iv) authorises the sheriff to 'leave' a copy of the process at the chosen domicilium. The main or outer door of the property, as mentioned by the sheriff in his return, does not necessarily connote the front door of the house; it would include the main entrance to the property.

[18] I also reject the third criticism. The summons was issued in July 2010. At that stage the governing decision was the judgment of the Supreme Court of Appeal in Standard Bank of South Africa Ltd v Saunderson & Others **2006 (2) SA 264** (SCA). In accordance with that judgment, the summons in the present case drew the attention of Nkata to s 26(1) of the Constitution. In Nedbank Ltd v Jessa & Another **2012 (6) SA 166** (WCC) Blignaut J (in a judgment delivered on 20 December 2011) held that the Saunderson rule of practice should be amplified to require the summons to contain an appropriate notification to a defendant that he or she is entitled to place information before the court regarding relevant circumstances within the meaning of s 26(3) of the Constitution and rule 46(1). (Pursuant to the Gundwana decision supra, rule 46(1) was relevantly amended with effect from 19 November 2010.) Blignaut J made clear in para 13 that his decision did not purport to have any retrospective effect.

[19] As to the fourth criticism, the allegation of fraud should not have been made. At the time summons was issued in the present case it was thought sufficient for a credit provider to establish that the s 129(1) notice had been dispatched by registered post to the selected address, not that it had reached the recipient. This view was endorsed by the Supreme Court of Appeal on 30 September 2010 in Rossouw & Another v FirstRand Bank Ltd **2010 (6) SA 439** (SCA). It was only on 7 June 2012 that the Constitutional Court held, in Sebola & Another v Standard Bank of South Africa Ltd & Another **2012 (5) SA 142** (SCA), that the credit provider needed to go further and establish that the notice had probably come to the attention of the recipient. (I do not intend to go into the controversy as to what exactly Sebola decided in that regard.)

[20] There is force, however, in the second criticism. At least for purposes of the first mortgage loan agreement, which was secured by the first mortgage bond, Nkata's selected address for notice of documents was the mortgaged property, ie 35 V[...] D[...] Street. The notice mistakenly addressed to 27 V[...] D[...] Street clearly did not comply with s 129(1). (The error was apparently caused by a faulty Windeed report which reflected that the street address corresponding to Erf 8832 Durbanville was situated at 27 V[...] D[...] Street.) It is unnecessary to decide whether the notice sent to the Rondebosch address ('4 D[...] H[...]') complied with the requirement

of the second mortgage loan agreement as secured by the second mortgage bond (C/04 D[...] H[...]). Even if it did, it was important in this case that there should have been compliance with the requirements of the first mortgage loan agreement, because by the time the notice was given Nkata was residing at the Durbanville address, not the Rondebosch address. I am satisfied that a registered item addressed to the Rondebosch address would not have come to her attention.

[21] The non-compliance with s 129(1) of the Act afforded Nkata with a bona fide defence to FRB's action. Whether in the event that defence would have been merely dilatory would have depended on Nkata's reaction after FRB gave due notice pursuant to a direction of the court in terms of s 130(4)(b) of the Act. A bona fide defence is an important component of showing good cause for rescission as contemplated in rule 31(2)(b). The non-compliance with s 129(1) also leads to the conclusion, in my opinion, that default judgment was 'erroneously' sought and granted within the meaning of rule 42(1)(a) (see Buys v Changing Tides 17 Pty Ltd NO & Others **[2013] ZAWCHC 150).** Compliance with s 129(1) is a substantive legal prerequisite for the valid institution of legal proceedings on a credit transaction to which the Act applies. The notice annexed to the summons (the notice addressed to 'c/o 4 D[...] H[...], Rondebosch') did not, ex facie the summons, constitute a valid notice in respect of the first mortgage loan agreement and bond on which FRB was suing. (The summons alleged that Nkata's chosen domicilium was 35 V[...] D[...] Street, and this was also the chosen address appearing in the first mortgage bond annexed to the summons. The summons contained no allegation that Nkata had selected the Rondebosch address for purposes of receiving all notices under the Act.)

[22] A further point which Nkata might have taken in her founding affidavit (she mentioned it in the first rescission application, which she annexed to her founding affidavit in the present application, but did not specifically adopt it, though it was addressed by Ms Dzai in argument) was that, as subsequently determined by the Gundwana judgment, rule 31(5), in terms of which the registrar granted default judgment, was invalid to the extent that it authorised the registrar (rather than the court) to declare immovable property specially executable where such property is (as was the case here) the home of a person. The court declined to make its declaration non-retrospective. However, Froneman J (who delivered the unanimous decision of the court) said that the mere constitutional invalidity of the rule was not in itself sufficient to 'undo everything that followed'. The debtor would have to apply for the rescission of the order granted by the registrar and would have to explain the reason for not bringing the rescission application earlier. The debtor would also have to set out a defence to the claim for judgment against him or her. 'It may be that in many cases those aggrieved may find these requirements difficult to fulfil' (para 58).

[23] I shall deal with the question of delay below. In regard to a defence, the constitutional invalidity of rule 31(5) would bear only on the order of executability, not on the order that Nkata pay FRB the amount owing. It is most unlikely in the present case that a court would have withheld an order of special executability of the mortgaged property had it granted the monetary judgment. The home which Nkata erected on the property is described by FRB as a 'luxurious'. The principal amounts secured by the two mortgage bonds totalled R1,48 million. Although Nkata battled at times to pay her monthly instalments (which exceeded R11 000), she was able to clear her arrears in March 2011 and again in March 2012 and to maintain her payments thereafter until February 2013. She was a business woman of some means. She is a supplier of hospital equipment. According to her first rescission application, she expected her monthly income as from January 2011 to be between R30 000 and R35 000. Her average monthly income over the preceding six months had been just under R20 000, with total living expenses (excluding the monthly bond payments) of about R5 000. She is also the co-owner (with her niece) of a property in St James. It is quite clear that, if she were required to vacate her home at 35 V[...] D[...] Street, she could afford to buy or rent more modest accommodation for herself and her two daughters. The constitutional right to housing is a right to 'adequate housing, not to housing that a mortgagor is unable to afford' (Absa Bank Ltd v Petersen **2013 (1) SA 642** (WCC) para 34; see also Standard Bank of South Africa Ltd v Hunkydory Investments 188 Pty Ltd & Others **2010 (1) SA 634** (WCC) para 30).

[24] In her replying affidavit Nkata alleged that FRB and its attorneys had failed to comply with s 22 of the Financial Intelligence Centre Act 11 of 2008 because they had not properly verified the street address of the mortgaged property. This complaint is without merit and I do not propose to say anything more about it.

[25] In conclusion on the merits, the only bona fide defence which Nkata would have had was that, because no s 129(1) notice was addressed to her at 35 V[...] D[...] Street, there had not been compliance with that section, compliance being a prerequisite for the issuing of summons.

Delay and related considerations

[26] The fact that Nkata had a bona fide defence to the action and that the judgment was erroneously sought and granted does not without more entitle her to rescission. In terms of rule 31(2)(b) a rescission application must be brought within 20 days of the defendant's acquiring knowledge of the default judgment. Even the first rescission application was slightly out of time. The current application was launched nearly two and a half years after Nkata learnt of the default judgment (which, on her version, was in the first half of October 2010). Although Ms Dzai sought to argue that the current application was merely a continuation of the previous one, that submission is untenable. The first rescission application was settled on the terms I have described. The fact that the settlement was not made an order of court is neither here nor there. There was an agreement, and the parties evidently acted on it. The current application was brought under a fresh case number. On her own version, Nkata has been aware of the default judgements since the first half of October 2010.

[27] Although rule 42(1) does not specify a time-limit, it is a discretionary remedy. Like all discretionary remedies, rescission under rule 42(1) must be sought within a reasonable period of time (see First National Bank of Southern Africa Ltd v Van Rensburg NO: In re First National Bank of southern Africa Ltd v Jurgens **1994 (1) SA 677** (T) at 681B-G). The same applies to rescission at common law (see Roopnarain v Kamalapathy & Another **1971 (3) SA 387** (D) at 391B-D). What is reasonable will depend on the circumstances of the case (Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz & Others **1996 (4) SA 411** (C) at 421F-H), but the 20-day period laid down in rule 31(2)(b) provides some guidance as a starting point. The reason for a time-limit is that there must be finality in litigation and that prejudice can be caused if rescission is not promptly sought. There is no reason in principle why a litigant should have more time when seeking rescission under rule 42(1) than under rule 31(2)(b). (In Smit v Olivier **[2011] ZAWCHC 414** Assheton-Smith AJ appears to have considered that a defendant is entitled as of right to rescission once he shows that the judgment was erroneously sought and granted, regardless of delay – see para 20. I am satisfied that that view of the legal position is wrong.)

[28] Nkata has not in the present case satisfactorily explained the lengthy delay in seeking rescission. The absence of a satisfactory explanation appears sufficiently, I think, from my summary of the facts. Even when she learnt in March 2013 of the sale in execution scheduled for 24 April 2013, she took until 13 May 2013 to launch the present application. By then the property had been sold in execution to Kraaifontein Properties and the latter had on-sold the property to a third party. Clearly there will be prejudice to third parties if the default judgment were to be rescinded.

[29] I thus consider that Nkata's prayer for condonation of her non-compliance with the 20-day limit in rule 31(2)(b) should be refused and that in the exercise of the court's discretion I should decline to entertain the application in terms of rule 42(1) or under the common law.

Peremption

[30] Quite apart from these considerations, FRB and Kraaifontein Properties contend that Nkata lost the right to seek rescission when she settled the first rescission application. I think that contention is correct. Although Mr van Reenen argued this aspect with reference to principles of compromise and estoppel, I think the relevant legal principles are those relating to prevention. The principles of peremption apply not only to appeals but also to the remedy of rescission (see Sparks v David Polliack **1963 (2) SA 491** (T) at 496D-F). The general principle is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate'. In order to show that a person has acquiesced in a judgment, the court must be satisfied upon the evidence 'that he has done an act which is necessarily inconsistent with his continued intention to have the case reopened or to appeal' (Hlatshwayo v Mare and Deas **1912 AD 242** at 259).

[31] Here Nkata initially decided to challenge the default judgment. One of the points she raised in the first application was the alleged non-compliance with s 129(1). Her conduct in settling that case on the terms I have described is entirely inconsistent with a continued intention on her part to have the case reopened by way of rescission.

Section 129(3) of the Act

[32] Although, for the reasons stated above, the application for rescission must fail, I raised with counsel during the course of argument the possible applicability of s 129(3) of the Act. I gave directions for the delivery of further affidavits on this question and also for the filing of supplementary submissions.

[33] Sections 129(3) and (4) provide as follows:

'(3) Subject to subsection (4), a consumer may –

(a) at any time before the credit provider has cancelled the agreement re-in?-state a credit agreement that is in default by paying to the credit provider 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; and –

(b) after complying with para (a), may resume possession of any property that has been repossessed by the credit provider pursuant to an attachment order.

(4) A consumer may not re-instate a credit agreement after –

(a) the sale of any property pursuant to –

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the determination thereof in accordance with section 123.'

[34] I raised the possible application of s 129(3) because it appeared from the papers that in March 2011 and again in March 2012 Nkata made payments to FRB which wiped out her arrears. Depending on the proper interpretation of ss 129(3) and (4), these events may have caused the mortgage loan agreements to be reinstated. If the mortgage loan agreements were reinstated, it might follow, as a necessary implication of the statutory scheme, that execution could no longer be levied against the property despite the existence of the default judgment. If (as happened) Nkata again fell into arrears in respect of the reinstated mortgage loan agreements, FRB would arguably need to obtain a fresh judgment and authority to execute after complying again with the provisions of s 129(1).

[35] The interpretation of ss 129(3) and (4) is not without its difficulties. Many of these are discussed in Brits Purging Mortgage Default: Comments on the Right to Reinstate Credit Agreements in terms of the **National Credit Act (2013**) 24 Stell LR 165. I shall only need to consider certain of the contentious issues.

[36] The first question which arises is what sum is contemplated by the phrase 'all amounts that are overdue' in **s 129(3)(a).** In the present case the mortgage bonds contained acceleration clauses. When Nkata fell into arrears during 2010, FRB invoked its right of acceleration. Thereupon the full amount of the mortgage debt fell due and payable, and it was on that basis that FRB was able to obtain judgment for the full amount and not only for the arrear instalments.

[37] In my opinion, the fact that a contractual acceleration clause has become operative does not, for purposes of **s 129(3)(a)**, obliterate the distinction between the arrear instalments and the full debt. The lawmaker must be taken to have been aware that most credit transactions concluded by banks and other financial institutions contain acceleration clauses as a standard provision. The right of reinstatement conferred by **s 129(3)(a)** would be rendered nugatory if the 'overdue' amount contemplated by **s 129(3)(a)** were the full accelerated debt rather than the arrear instalments. In most credit transactions there would be nothing to reinstate if the consumer could only 'reinstate' the agreement by paying the full debt. The very notion of reinstatement, in the context of **s 129(3)**, is that the consumer may put the agreement back into the position it was prior to his or her falling into default. This accords with certain of the stated purposes of the Act, namely of promoting responsibility in the credit market by encouraging 'the avoidance of over-indebtedness and fulfilment of financial obligations by consumers' (s 3(c)(i)), providing mechanisms 'for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations' (s 3(g)), and providing a 'consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements' (s 3(i)).

[38] It follows that, in order to effect reinstatement in terms of s 129(3)(a), Nkata did not need to pay the full accelerated debt but only the arrear instalments. It is common cause that she did so in March 2011 and again in March 2012. (The conclusion I have reached on this aspect accords with the obiter views expressed by Peter AJ in Nedbank Ltd v Fraser & Another and Four Others Cases **2011 (4) SA 363** (SGJ) para 41. See also Brits op cit at 179 and 181-182.)

[39] A credit agreement can only be reinstated if it has not already been cancelled by the credit provider. Mr van Reenen conceded

that there had been no cancellation here. That concession was correctly made. What FRB did was to seek specific performance of the mortgage loan agreements by relying on the acceleration clause. In the case of the loan of money, there may not be a material difference between the monetary amount claimable by the lender upon cancellation on the one hand and by way of specific performance of the accelerated debt on the other but conceptually there is a distinction between the two cases. Where an agreement is terminated by the credit provider because of the consumer's breach, the contract is terminated by the act of the credit provider (provided he has complied with the procedures laid down in the Act). The remedies then available to the credit provider are those provided by law where a contract has been terminated because of breach. Where the credit provider invokes an acceleration clause, the contract remains in force and the consumer is obliged to make specific performance of the accelerated indebtedness. If the consumer pays the accelerated indebtedness, the contract will be terminated not by the act of the credit provider but through performance by the consumer. (I therefore disagree with the view expressed by Hartle J in Dwenga v FirstRand Bank Ltd & Others [2011] ZAECELLC 13 para 21 to the effect that 'cancellation or termination is … necessarily implied' by the invocation of an acceleration clause. Once it is appreciated that the enforcement of an acceleration clause does not in law constitute a cancellation of the agreement, the difficulties mentioned by the learned judge in his obiter observations in footnote 36 of the judgment – to the effect that the enforcement of acceleration clauses is inimical to the purpose of the Act in promoting responsible consumer behaviour, a purpose served inter alia by holding out the possibility of reinstatement as a beacon of hope – fall away.)

[40] In any event, in terms of s 123 of the Act FRB could not lawfully have terminated the mortgage loan agreements without first complying with the requirements inter alia of s 130 read with s 129. I have already explained that there was not compliance in this case with s 129 of the Act.

[41] In order to effect reinstatement the consumer must not only pay all amounts that are overdue but also the credit provider's 'permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement'. In FRB's supplementary affidavit concerning s 129(3) it was stated that on 25 October 2010 FRB debited to Nkata's bond account an amount of R9 050 as a globular charge for the summons, default judgment, writ, attachment and the first sale in execution, inclusive of VAT and the sheriff's fees. On 21 February 2011 FRB debited a further amount of R14 498 to Nkata's bond account in respect of the first rescission application. According to the supplementary affidavit these were the fees of the attorney (presumably for drafting opposing papers) and counsel's day fee (presumably for 10 December 2010). On 1 March 2013 a sum of R4 000 was debited to the bond account in respect of the sale in execution which was scheduled to take place on 24 April 2013. FRB contended that these costs would have had to be paid in order for the mortgage loan agreements to be reinstated, and that they were not paid.

[42] I am prepared to assume for present purposes that FRB's costs of opposing the rescission application, like the costs of obtaining default judgment, form part of the reasonable costs of enforcing the credit agreement and that they would thus have to be paid before the credit agreement was reinstated in terms of s 129(3). The difficulty I have is that the costs which FRB debited to Nkata's bond account were not taxed nor quantified by agreement between the parties. Unless costs have been quantified by agreement, the official with the authority to determine the reasonableness and thus the recoverability of costs in high court litigation is the taxing master, acting in accordance with the rules of court (Composting Engineering Pty Ltd v The Taxing Master **1985 (3) SA 249** (C) at 250I-J). While taxation or agreement may not be a prerequisite for liability (this is established by the court order), execution in respect of costs cannot be levied until the costs have been taxed or the litigant has agreed to the quantification in writing (rule 45(2); see Phillips & Others v Van den Heever NO & Another 2007(4) SA 511 (W) paras 65-73). Even as between an attorney and his own client, the latter is entitled to insist on taxation if the attorney sues for payment of his fees and disbursements (Benson & Another v Walters & Others **1984 (1) SA 73** (A) at 84B). In the case of the first rescission application, the terms of the settlement specifically provided that Nkata would pay FRB's costs 'as taxed or agreed'. FRB does not allege that any of the legal costs debited to Nkata's bond account were taxed, and Mr van Reenen's supplementary submissions proceed on the basis that those costs were not taxed. There is also no evidence that Nkata agreed or was invited to agree to the quantification of the costs or that payment of the costs was even demanded from her. FRB simply debited the amounts to her account. I do not know whether Nkata examined her bond statements or understood what the debits related to (the narration was simply 'legal fee'). At no stage after October 2010 did FRB call for separate payment of the debited legal costs nor regard those debits as causing Nkata to be in arrears. FRB regarded her account as being 'up to date' following the payment in March 2011 and again following the payment in March 2012.

[43] It might be said that, although FRB's legal costs were not yet due and payable, Nkata could not reinstate the agreement until those costs (whatever they might turn out to be) were paid. This would mean that a consumer could not reinstate an agreement without proactively taking steps to find out what those costs were and either reach agreement with the credit provider on the quantification thereof or initiate a taxation. I do not believe that such an approach would be consistent with the purposes of the Act. If the credit provider wants to recover the costs of enforcing the agreement from the consumer, the credit provider must take the appropriate steps. If the credit provider does not do so, and if in the meanwhile the consumer pays the full amount of the overdue instalments and any other amounts already due and payable, the agreement would be reinstated in terms of s 129(3).

[44] In any event, FRB in the present case did not present the costs to Nkata and invite her to pay them. FRB simply debited the amounts to the bond account. If the amounts in question were owing by Nkata, it is clear from FRB's conduct that the bank was content to settle the costs by lending her the money through a debit to her bond account. I am aware that in the context of the common law in duplum rule it has been held that interest debited to a loan account does not lose its character as interest (see Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation) **[1997] ZASCA 94**; **1998 (1) SA 811** (SCA) at 828C-829H). However, that finding was made primarily on the basis that the commercial practice of capitalising unpaid interest could not have the effect of overriding a rule of positive law designed to protect borrowers from exploitation By contrast, in the context of rule 129(3)(a) it strikes me as untenable to say that where the credit provider is content to debit the costs of enforcing the agreement to the bond account and thus to 'capitalise' the legal costs, the consumer must nevertheless pay the full amount of the legal costs in order to obtain reinstatement of the credit agreement. By debiting the legal costs to the account rather than demanding separate payment thereof, the credit provider indicates to the consumer that the credit provider is content to lend the corresponding amount to the consumer and to receive repayment thereof in instalments as if the debited costs were part of the capital. For purposes of s 129(3)(a) the costs, if properly debited, lose their separate character as costs of enforcing the agreement. Put differently, the enforcement costs which the consumer must pay as contemplated in s 129(3)(a) in order to obtain reinstatement are those costs of which the credit provider is at that time requiring payment. (Again, this interpretation, rather than the one advanced for FRB, appears to me to give better effect to the purposes of the Act as set out in s 3.)

[45] The question then arises whether Nkata was precluded from reinstating the credit agreement by virtue of the provisions of s 129(4). I should interpose here to say that in my view it is not necessary, in order for there to be reinstatement in terms of s 129(3), that the consumer should have been aware of the statutory right of reinstatement and have made payment with the intention of reinstating the agreement. The agreement is reinstated by operation of law if the consumer as a fact makes the payments contemplated by s 129(3), unless reinstatement is precluded by virtue of s 129(4). I agree with the views expressed by Eksteen J in that regard in Nedbank Ltd v Barnard [2009] ZAECPEHC 45 at paras 14-15. See also Brits op cit at 170.)

[46] In terms of s 129(4)(a)(i) the consumer may not reinstate a credit agreement after there has been a sale of any property pursuant to 'an attachment order'. Section 129(4)(b) proceeds to state that reinstatement is not permitted after 'the execution of any other court order enforcing that agreement'. These two paragraphs thus contrast 'an attachment order' on the one hand and 'any other court order' on the other.

[47] If the property in the present case was sold in execution pursuant to an 'attachment order' as contemplated in s 129(3)(a) it would follow that there was no impediment to the reinstatement of the mortgage loan agreements in March 2011 or in March 2012, because the sale in execution only took place in April 2013. If the property was not sold pursuant to an 'attachment order', one would need to determine the meaning of the word 'execution' in s 129(4)(b); in particular, and where a credit provider who has a monetary judgment levies execution by causing property to be attached and sold in execution, does 'execution' merely require some step in the process to have been taken (such as the obtaining of a writ or the attachment of property pursuant to a writ) or does it require money actually to have been levied by way of the sale in execution?

[48] There is no definition in the Act of the expression 'attachment order'. That expression is used in ss 129(3)(b), 129(4)(a)(i) and 130(2)(a)(i). The word 'attachment' is used in s 132(1) in a context which envisages an order for attachment. It appears to me, from the way in which the terms 'attachment order' and 'attachment' are used in ss 129(3)(b), 130(2)(a)(i) and 132(1), that what is envisaged is an order entitling a credit provider to take repossession of movable goods which are the subject of an instalment agreement, secured loan or lease as defined in the Act. In relation to such agreements, the credit provider would need to obtain an order from the court if the consumer was not prepared voluntarily to surrender possession in terms of s 127. (This was the view expressed by Peter AJ in Fraser supra in an obiter observation in para 39. Absa Bank Ltd v De Villiers **2009 (5) SA 40** (WCC) contains a discussion regarding the prerequisites for obtaining an attachment order in this setting.[1])

[49] Where a credit provider obtains a monetary judgment against the consumer for the outstanding amount of the loan, the court order will not include an order for the attachment of any property. In such cases, the rules of court entitle the judgment creditor to obtain a writ of execution. The writ is addressed by the registrar to the sheriff. A writ of execution is not itself an 'order'. It is a process which may be issued where an order for the payment of money has been made. Even where the loan agreement is secured by mortgage bond and the court declares the bonded property to be specially executable, the court's order does not include an order for the attachment of the property. The order of executability merely entitles the creditor to levy execution on the immovable property in terms of rule 46 without first attempting execution against movables in terms of rule 45. The court does not order the immovable property to be attached; it is for the judgment creditor to determine how it will go about execution.

[50] Accordingly, I do not think that in the present case the default judgment granted by the registrar on 28 September 2010 constituted an order for the attachment of property nor did the default judgment acquire that character when FRB elected to obtain a writ of execution against the mortgaged property. It follows that s 129(4)(i) is not applicable.

[51] The question then is whether, by the time Nkata cleared the arrears in March 2011 and again in March 2012, there had been 'execution' of the default judgment (which was an order 'enforcing' the mortgage loan agreements). Mr van Reenen submitted that the obtaining of the writ of attachment on 28 September 2010 and the organising of the first sale in execution constituted 'execution' for purposes of s 129(4)(b) and that because these steps had already been taken by the time the arrears were cleared reinstatement was barred.

[52] Mr van Reenen referred me to the commentary on the word 'execution' in Claasen Dictionary of Legal Words and Phrases. The learned author refers to Reid & Another v Godart & Another **1938 AD 514** where De Villiers JA held that the word 'execution' meant 'carrying out' or 'giving effect' to the judgment and that it was thus not confined to a 'levy under a writ' but included other ways in which a judgment could be given effect to, for example 'by specific performance, by sequestration, by the passing of transfer, by the issue of letters of administration or by ejectment from premises' (at 514). The learned judge of appeal was not concerned with the point now in issue and was considering the word 'execution' in a rule of court. I nevertheless observe that the examples of execution given by him focus on the final event giving effect to the judgment, and not on prior procedural steps. For example, a levy is made under a writ when the sheriff actually raises money by selling attached property. In eviction proceedings, execution would be constituted by actual ejectment, not by the obtaining of a writ of ejectment.

[53] Although s 129(4)(a) is not applicable in the present case, it forms part of the context in which s 129(4)(b) must be interpreted. Where movable property is the subject of an instalment agreement, secured loan or lease, the movable property constitutes in effect the credit provider's security for the provision of credit, either through retained ownership or by way of a pledge. Reinstatement in such cases is not precluded merely because the credit provider has obtained repossession of the movable property through an attachment order or through the voluntary surrender of the property by the consumer; reinstatement is barred only if the credit provider has sold the movable property. If that is so in respect of the very property which is the subject of the credit agreement, I cannot conceive of a rational basis for the lawmaker to have made reinstatement more difficult for the consumer where the credit provider seeks to obtain satisfaction of a monetary judgment through execution. If 'execution' in s 129(4)(b) included the mere obtaining of a writ of attachment of movables or immovables or the attachment of goods by the sheriff, there would usually be very little time between the granting of the enforcement order and its 'execution' and thus very little scope for the consumer to purge his default. The common law principle is that a judgment debtor can purge his default at any time prior to the sale of attached property (see the authorities cited by Peter AJ in Fraser para 40, though at common law the full accelerated debt would have to be paid in order to avoid the sale in execution). In themselves, the steps of obtaining a writ and causing property to be attached are merely steps towards execution and can be undone at common law if the judgment debtor pays the full judgment debt. The judgment is only actually 'executed' when money is raised pursuant to a sale of attached property and paid to the judgment creditor. (Again, this view accords with the obiter remarks of Peter AJ in the Fraser case in paras 40-41. It also appears to be the view of Brits op cit at 177-178.)

[54] In the present case there was no execution against movable property. In regard to the immovable property, a writ of attachment was issued but no sale in execution had been held by the time Nkata cleared the arrears. In my view, therefore, 'execution' of the default judgment had not occurred by the time Nkata brought the account up to date.

[55] My conclusion is thus that the mortgage loan agreements were reinstated by not later than 8 March 2011 when the arrears were cleared for the first time. As foreshadowed earlier, I consider it to be necessarily implicit in s 129(3) read with s 129(4) that if a credit agreement is reinstated before the execution of a monetary judgment enforcing that agreement, the judgment can no longer be enforced. If the consumer again falls into arrears, the credit provider can only approach the court for an order enforcing the reinstated agreement after compliance with s 130. The earlier judgment cannot on this ground be rescinded but by operation of law it ceases to have any further effect.

[56] The remaining question is whether Nkata should be granted any relief, given that she did not specifically apply for relief based on s 129(3). In my opinion justice requires that she should be granted relief pursuant to the standard prayer for 'further and/or alternative relief'. FRB did not, in its supplementary affidavit, claim that it would be prejudiced (procedurally) if the s 129(3) point were adjudicated. The affidavits in the rescission application covered the history of the matter, including Nkata's allegations that she had cleared the arrears in March 2011 and again in March 2012. She communicated with the bank during 2012 with a view to obtaining

an agreed rescission of the default judgment or distressed debt relief. The bank refused to accede to these requests because it believed, erroneously as it turns out, that the default judgment was still enforceable. Nkata's purpose in bringing the present proceedings was to be relieved of the burden imposed on her by the default judgment and to obtain consequential relief in respect of the sale of her home. She misconceived her remedy but justice requires that the appropriate remedy now be granted, given that the issue has been fairly ventilated.

Conclusion

[57] I thus propose to grant an order declaring that the mortgage loan agreements were reinstated by not later than 8 March 2011 and that the default judgment of 28 September 2010 thereupon became of no force and effect, and to grant consequential relief as sought in prayers 4 and 5 of the notice of motion (declaring the sale of the property on 24 April 2013 to have been invalid and restraining transfer of the property to Kraaifontein Properties).

[58] Despite the fact that Nkata will now be obtaining relief which she may regard as comparable to the relief of rescission which she initially sought, that is as a result of a matter raised by the court, not by her. I do not think that she is entitled to her costs. On the contrary, I think she should be ordered to pay the costs of FRB and Kraaifontein Properties in respect of her failed rescission application, in regard to which those respondents have been successful. Not only did she fail in her bid for rescission but she made unwarranted allegations of fraud against FRB's attorney, allegations for which Nkata has tendered no apology.[2] The costs in favour of FRB and Kraaifontein Properties will cover the costs up to and including the hearing on 21 October 2013. Those costs should include the costs reserved when the matter was postponed on 6 June 2013. The matter was again postponed on 12 August 2013. That order is not in the file and I do not know whether any costs were reserved on that date. It appears that the postponement was necessary because both parties were guilty of delay in filing affidavits. To the extent that the costs of that postponement were reserved, the parties should bear their own costs. In respect of the supplementary affidavits and written submissions dealing with the s 129(3) point, I think the parties should bear their own costs.

[59] I make the following order:

[a] It is declared that on 8 March 2011 the mortgage loan agreements which the first respondent sought to enforce in case 14272/10 were reinstated in terms of s 129(3) of the National Credit Act 34 of 2005.

[b] It is declared further that pursuant to such reinstatement the default judgment granted by the registrar of this court on 28 September 2010, and the writ of attachment issued by the registrar on that date directing the sheriff to attach the mortgaged property, Erf 8832 Durbanville ('the property'), ceased by operation of law to have any force or effect as from 8 March 2011.

[c] It is declared, further, that, by virtue of the declarations in [a] and [b] above, the sale of the property by public auction on 24 April 2013 to the third respondent was invalid, and the said sale is set aside.

[d] The first, second and fourth respondents are restrained from causing transfer of the property to be registered in the name of the third respondent.

[e] The applicant shall pay the costs of the first and third respondents in opposing the rescission application, such costs to include all those incurred in the application up to and including the hearing on 21 October 2013. These costs shall include those reserved by the postponement of 6 June 2013 but not any costs which may have been reserved by the postponement of 12 August 2013 (in regard to the latter costs, the parties shall bear their own costs).

[f] No order is made in regard to the costs incurred by the parties in the filing of supplementary affidavits and written submissions after 21 October 2013 in relation to the applicability of **s 129(3)** of the **National Credit Act.**

ROGERS J

APPEARANCES

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1It was held in *Absa v De Villiers supra* that the Act has not altered the common law principle that goods supplied under an instalment sale agreement can only be recovered by the seller if the contract is cancelled. Since s 129(3)(a) precludes reinstatement where the credit agreement has been cancelled, the lawmaker's apparent assumption that there could be an attachment order prior to the cancellation of the credit agreement presents one of the conundrums in the interpretation of the relevant provisions. See the discussion in Brits *op cit* at 172-173 and footnote 38 and the academic writings there cited.

2The allegations of fraud were not limited to those summarised in para 16[d] above. In her replying affidavit Nkata alleged that FRB's attorneys had, by a 'cut and paste method', fraudulently altered the addresses on the envelopes of the registered items allegedly sent to her on 22 October 2010 and 26 February 2013 and that those envelopes did not relate to correspondence addressed to her at all. She based this allegation on the fact that according to the track-and-trace reports the items in question had supposedly been collected by a another recipient, a Mr Sauls. As explained by Price in a supplementary answering affidavit, Sauls was his firm's messenger who had retrieved the items from the post office after Nkata failed to collect them. Nkata or her attorney completely misunderstood the standard track-and-trace reports issued by the post office in that regard.