



CONSTITUTIONAL COURT OF SOUTH AFRICA

Nomsa Nkata v FirstRand Bank Limited and Others

CCT 73/15

Date of hearing: 19 November 2015

Date of judgment: 21 April 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter concerning the interpretation of section 129(3) of the National Credit Act (the Act). This provision allows debtors who face legal action because of non-payment under a credit agreement to reinstate the credit agreement by paying all amounts that are overdue as well as the default charges and reasonable costs associated with enforcing the agreement.

In 2005 and 2006, FirstRand Bank Limited (Bank) provided Ms Nkata, a businesswoman living in the Western Cape, with mortgage finance to buy a house. A few years later, Ms Nkata ran into financial difficulty and fell behind on her payments. The Bank responded by taking legal action. First, it attempted to bring the default to Ms Nkata's attention by way of notice under section 129(1) of the Act, but experienced difficulty finding the correct address. The Bank then applied to the Western Cape Division of the High Court, Cape Town (High Court) for default judgment. On 28 September 2010, the Registrar granted default judgment and authorised the Sheriff to attach and sell the house to recover the total outstanding debt.

The Bank and Ms Nkata later reached a settlement agreement. This delayed the sale of the house, subject to certain conditions. Ms Nkata caught up on her payments in March 2011 and applied, on an urgent basis, to rescind the default judgment against her, but the High Court refused her application. She fell behind on her payments again. Following numerous failed debt review applications, the Bank sold the house to a third party, Kraaifontein Eiendomme / Properties, on 23 April 2013.

Ms Nkata again approached the High Court for relief. She contended that by paying the outstanding debt in March 2011, she had reinstated the credit agreement. In January 2014, the High Court found in her favour. It ruled that the original credit agreement between Ms Nkata and the Bank had indeed been reinstated in March 2011. This prevented the Bank from selling her house. The sale of the house was therefore set aside.

The Bank appealed to the Supreme Court of Appeal. In March 2015 it reversed the High Court's order and decided the case in the Bank's favour. It held that Ms Nkata could not have reinstated her agreement, because her house had already been sold in execution.

In this Court, Ms Nkata again contended that her house should not have been sold because she successfully reinstated the credit agreement by paying the amounts owing in March 2011, in accordance with the Act. She further contended that she did not receive proper statutory notice of the default proceedings against her in 2010. The Bank contended that reinstatement did not occur because Ms Nkata failed to pay legal fees and other charges debited to her account, in addition to the amount she owed. In any event, the Bank contended that the credit agreement could not be reinstated after the default judgment and attachment in 2010.

The Socio-economic Rights Institute of South Africa (SERI) appeared as *amicus curiae*. It contended that the credit agreement was reinstated by operation of law before the house was sold.

The majority judgment, written by Moseneke DCJ (Jafta J, Khampepe J, Madlanga J, Nkabinde J, van der Westhuizen J and Zondo J concurring), held that the appeal against the Supreme Court of Appeal's decision must succeed with costs. It reasoned that, because the constitutional values of fairness and equality inform the purposes of the Act, an interpretation of the Act should strike the appropriate balance between the competing rights of the consumer and credit provider. The purpose of section 129(3), the majority held, is to encourage consumers to pay their overdue debts, default charges and legal costs. Consumers in good standing are rewarded with reinstatement of the credit agreement and the return of their attached property. The majority judgment held that Ms Nkata reinstated the credit agreement when she settled her bond arrears of R87 500 in full on 8 March 2011.

The majority judgment also held that the consumer is not compelled to give notice to, or seek the consent or cooperation of, the credit provider. The majority judgment further held that the consumer cannot be expected to take proactive steps to find out what legal costs need to be paid for reinstatement to take place. Nor can Ms Nkata be expected to initiate taxation on these costs or seek agreement with the credit provider on the quantification of these costs. The majority judgment held that the credit provider must take the necessary steps to recover the legal costs. These costs become due and payable only when they are reasonable, agreed or taxed, and on due notice to the consumer.

The majority judgment rejected the Bank's contention that Ms Nkata's right to reinstate the credit agreement was limited by the provisions of section 129(4) of the Act. Section 129(4) precludes a consumer from reinstating a credit agreement after the property has been sold pursuant to an attachment order. It also prevents a consumer from reinstating the credit agreement after the execution of any other court order enforcing that agreement or after cancellation of the credit agreement. The majority judgment found that, in this case, the sale in execution would not have prevented reinstatement because it took place in April 2013 – just over two years after Ms Nkata had cleared her arrears for the first time. Although the bonded property had been attached, no sale in execution occurred and no proceeds of the sale were realised at any time before she cleared her arrears in 2011. The majority judgment accordingly concluded that Ms Nkata was well within her rights to reinstate the credit agreement.

The minority judgment, written by Cameron J (Nugent AJ concurring), found that Ms Nkata had not reinstated the credit agreement. It reasoned that, by paying her arrears but not the Bank's legal costs, Ms Nkata had failed to pay all of the amounts required by section 129(3) for reinstatement. The minority judgment disagreed with the majority judgment's conclusion that, to recover costs, the Bank must take proactive steps – including demanding costs, establishing their reasonableness, and initiating taxation. The minority judgment instead found that the Act clearly puts the responsibility to pay all the outstanding amounts on the consumer; not the credit provider. This interpretation best gives effect to the plain language of the Act. And it strikes the balance between consumer and lender – a balance recognized by this Court's jurisprudence as an important purpose of the Act. It concluded that the appeal must fail because the Act requires advanced payment, not postponed, incomplete or partial payment. The fact that the legal costs had not been presented to Ms Nkata, taxed by the Bank or agreed to by the parties, did not mean that Ms Nkata was no longer required to pay them.

In a separate judgment, Nugent AJ agreed with Cameron J that the appeal must fail. Like Cameron J, Nugent AJ disagreed with the majority judgment's finding that section 129(3) requires the consumer to pay the legal costs only if they have been demanded and taxed by the Bank. Nugent AJ found that the purpose of section 129(3) is to throw the consumer who has defaulted a lifeline and not to provide a remedy for banks to recover their costs. Nugent AJ also found expecting a bank to tax and demand costs each time such costs are incurred is impractical. Finally, Nugent AJ held that section 129(3) does not require payment of costs only if they have become payable at the time the section is invoked. The section itself makes them payable as a condition for reinstatement if they have been incurred. Nugent AJ accordingly agreed with Cameron J that Ms Nkata's payment did not bring her within the protection of section 129(3) and that the order of the Supreme Court of Appeal was correct.

In a judgment concurring with the majority, Jafta J agreed with Moseneke DCJ that the appeal should be upheld and that the order of the Supreme Court of Appeal should be set aside. But he advanced additional reasons for his view. While he agreed that legal costs existed in fact, he disagreed that they constituted reasonable costs of enforcing the credit agreement. According to him, as a matter of law, no legal fees were due because the

institution of the legal action without compliance with section 129(1) was irregular. Jafta J held that there was non-compliance because the Bank's section 129(1) notice was served at an address different from the one appearing on the summons and the one Ms Nkata selected in the mortgage bond. As a result, the default judgment was a nullity because the Registrar had no power to grant it. Not only were the proceedings prohibited, but section 130(3) of the Act made the Court's competence to adjudicate the matter dependent on the court first being satisfied that there was compliance with section 129(1). In Jafta J's view, none of the submissions advanced by the Bank to counter the invalidity of the legal proceedings had merit.