REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42493/2015

1.	REPORTABLE:	YES
2.	OF INTEREST TO OTHER JUDGES:	YES
3.	REVISED:	YES

F.G. Barrie.

SIGNATURE

DATE: 5 May 2017.

In the matter between:

COLLEEN DE BRUIN Applicant

and

FIRSTRAND BANK LIMITED
t/a WESBANK Respondent

JUDGMENT

Barrie AJ:

INTRODUCTION

1. The applicant, Mrs Colleen de Bruin ("Mrs De Bruin") applies for the setting aside of a judgment ("the judgment") in favour of the respondent, FirstRand Bank Limited ("the bank"), trading as Wesbank, granted against her on 8 March 2017. The judgment was granted by the registrar of this court acting in terms of the provisions of rule 31(5) of the Uniform Rules of Court ("the rules").

2. The judgment arose from Mrs De Bruin's failure to keep up payments of instalments that she had agreed to pay in terms of an instalment agreement ("the instalment agreement" or "the agreement") that she concluded with the bank on 5 September 2014 for the purchase of a Chevrolet Captiva 2.4 LT motor vehicle ("the motor vehicle").

3. In terms of the orders forming part of the judgment:

   3.1 Mrs De Bruin was ordered forthwith to return the motor vehicle to the bank, failing which the sheriff of the court was authorised to attach and hand over the vehicle to the bank ("the attachment order");

   3.2 Judgment for damages in respect of damage that the bank may have suffered, together with interest thereon, was postponed *sine die*, pending the return of the vehicle to the bank, the subsequent valuation and sale thereof and the calculation of the amount to which the bank was entitled;

   3.3 Mrs De Bruin was to pay costs of R650,00, plus the sheriff's fees, to the bank;

   3.4 The bank was granted leave to apply for damages on the same documents duly supplemented by an affidavit in the event of a shortfall.

4. The sheriff of this court attached the vehicle on 8 April 2016 pursuant to the attachment order. Mrs De Bruin subsequently instituted the present proceedings in terms of a notice of motion served on the bank's attorneys on 13 May 2016. The notice of motion[1] specifies the principal relief that Mrs De Bruin seeks as orders:

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[1] In the "B" part thereof.

"*1.* *Rescinding and setting aside the whole of the orders and judgment granted by this Honourable Court on the 8th March 2016.*

2. *Granting the Applicant leave to defend the action instituted under the aforesaid case number.*

3. *Ordering that the Applicant is entitled to reinstate the credit agreement concluded between the parties on payment of the arrears due to date and the legal/administrative costs set out in section 129(3)(i) of the National Credit Act.*

4. *Ordering the Respondent to forthwith deliver to Applicant a 2013 Chevrolet Captiva 2.4 LT motor vehicle with chassis number KL1FC2U7CB034770 and engine number LE9120450041.*

5. *Ordering the sheriff of the court in whose jurisdiction the vehicle may be found to seize the vehicle and hand same to the Applicant.*

6. *Costs of suit.*

7. *Further and/or alternative relief.*"

5. The notice of motion[2] also gave notice of Mrs De Bruin's intention to seek urgent relief on 17 May 2016 to interdict the bank from selling the motor vehicle pending the outcome of the principal proceedings.

6. After receipt of the notice of motion the bank's attorneys gave an undertaking that the bank would not sell the vehicle and Mrs De Bruin's application for urgent relief did then not proceed. However, who is to be liable for the parties' costs in relation to the urgent application remains in dispute. Accordingly, apart from Mrs De Bruin's application for the principal relief contemplated in terms of her notice of motion, I have also to adjudicate on the liability for the costs of the urgent application.

7. Mr Z Omar of Zehir Omar Attorneys ("Omar Attorneys") appeared before me on behalf of Mrs De Bruin. Omar Attorneys acted for Mrs De Bruin throughout. Mr A P

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[2] In the "A" part thereof.

Bruwer appeared on behalf of the bank, instructed by Attorneys C F van Coller Inc. ("Van Coller Attorneys"), who, likewise, acted for the bank throughout.

FACTUAL BACKGROUND

8. The instalment agreement in terms of which Mrs De Bruin purchased the motor vehicle from the bank is a "*credit agreement*" and an "*instalment agreement*" as referred to in the National Credit Act, 34 of 2005 ("the NCA").

9. The total consideration payable for the motor vehicle (including accessories and an "*Initiation Fee*" of R1 140.00) was R310 640.00. Mrs De Bruin in terms of the agreement paid an initial deposit of R36 000.00 towards payment of this sum. With interest of R118 014.88 added to the balance, the total principal debt came to R392 654.88, payable in 72 equal instalments. The initial instalments were R5,589.03 per month[3], which included a monthly "*Service Fee*" of R57.00 and a monthly payment of R78.49 for a "*RETRENCHMENT BENEFIT*"[4].

10. Mrs De Bruin fell in arrear during mid-2015 after, so she states, being retrenched from her employment.[5]

11. Mrs De Bruin then entered into discussions with a Ms Van der Walt of the bank regarding bringing the arrears up to date. Arising from these discussions Mrs De Bruin continued to make payments through to March 2016. She never succeeded

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3 The monetary extent of the instalment from time to time depends, however, on a variable interest rate agreed as 3% above the bank's "*Prime Rate*" (defined with reference to the bank's "*Prime Rate*" published from time to time).

4 What exactly the "*RETRENCHMENT BENEFIT*" that Mrs De Bruin agreed to pay a monthly fee for encompasses, is not specified in the instalment agreement.

5 If the "*RETRENCHMENT BENEFIT*" is a benefit that Mrs De Bruin would have become entitled to if she were retrenched from her employment, and she was, in fact, retrenched, it appears that she, possibly, did not receive it. However, whether she did or did not was not canvassed in the papers, so I cannot comment definitively on it.

to get up to date. On the date of the judgment, 8 March 2016, the arrears amounted to R17 387.83.

12. The bank's summons was issued out of this court on 1 December 2015.

13. Mrs De Bruin did not enter an appearance to defend the matter. According to Mrs De Bruin she, after receiving the summons, spoke to a representative of Van Coller Attorneys by telephone. She describes the person she spoke to as "*an African gentleman whose name I cannot now recall*". She informed him that she had made arrangements with Ms Van der Walt for bringing the arrears up to date and intended to keep on paying her instalments. According to Mrs De Bruin the person she spoke to told her that he would take the matter up with the bank and would contact Mrs De Bruin in due course. This is, however, in dispute. In terms of affidavits before me from, respectively, Mr Ten Napel, the director of Van Coller Attorneys dealing with the matter, and Mr Nkandla, an administration clerk employed by Van Coller Attorneys, no "*African gentleman*" that could or would have conveyed what Mrs De Bruin avers was employed or associated with the firm of attorneys.

14. In these circumstances, Van Coller Attorneys applied for default judgment which, as referred to already, the registrar granted on 8 March 2016, leading to the sheriff's attachment of the vehicle on or about 8 April 2016.

15. Mrs De Bruin, on learning that the court had granted an order by default, consulted her attorney, Mr Omar.

16. E-mailed correspondence subsequently passed between a Ms Jasmine Omar of Omar Attorneys and a Ms Rosie Garrancho, who is described in her e-mails as a "*Specialised Collections Agent, Wesbank Motor Operations*".

17. In terms of the first e-mail, dated 3 May 2016 (presumably sent after some earlier communication between Ms Omar and Ms Garrancho), Ms Garrancho informed Ms Omar that Mrs De Bruin (referred to as "*our customer*") could settle the account pertaining to the motor vehicle by payment on or before 4 May 2016 of R260 512.77 made up as follows:

"*R254 457.27 balance*
R4 099.50 + outstanding legal fees
R1 215.00 + storage fees (08/04/2016 - 04/05/2016)
R741.00 + towing fees"

Ms Garrancho enquired whether Mrs De Bruin would be in a position to make payment.

18. Mrs De Bruin received a letter from the bank, dated 12 April 2016, on the next day, 4 May 2016. It also came from Ms Garrancho and informed Mrs De Bruin, among other things, that as at the date of the letter the outstanding balance of Mrs De Bruin's debt was R318 857.24 and the arrears R16 217.48. The letter further informed her that:

"*We have estimated the value of the Goods at R90,000.00, excluding VAT.*

If the Goods were secured by us by means of a court order and you wish to resume possession of the Goods, then you must, within 10 (ten) business days of receipt of this letter, pay the entire balance outstanding under the agreement inclusive of any costs, including legal fees, recovery charges and storage costs.

…

If you do not respond within 10 (ten) business days of receipt of this letter, we will have no option but to sell the Goods as soon as practically possible, for the best price reasonably obtainable, and proceed with the necessary steps to recover from you any shortfall (including any additional costs) on your account."

19. Ms Omar responded to Ms Garrancho's e-mail of 3 May 2016 on 5 May 2016. Her e-mail referred to the bank's letter to Mrs De Bruin of 12 April 2016 (that Mrs De Bruin must have supplied to Ms Omar in the interim). Ms Omar recorded that:

"… *our client will consider reinstating the credit agreement. We require the figures including all arrear sums and administration costs associated to reinstating the credit agreement.*"

20. Ms Garrancho responded promptly, on the same day. She recorded:

"*We require settlement in order to release the vehicle back to the customer.*

My email dated 03/05/2016 noted that our customer had time till the 04/05/2016 to settle the account. The settlement amount provided at the time which expired on the 04/05/2016 being R260 512.77*.*

Please can you advise me if our customer is in a position to make payment."

21. On Monday, 9 May 2016, Ms Garrancho followed-up her previous e-mail. She wrote to Ms Omar to the effect that:

"*I have not received a response to my email dated 05/05/2016.*

We are proceeding with the sale of the vehicle on public auction. The vehicle will be cleared for sale today."

22. This prompted Omar Attorneys to e-mail a formal letter to the bank. I quote the following excerpts:

"*Firstly, having concluded a credit agreement with your customer, you are bound to comply with the provisions of the National Credit Act. In this regard you are referred to the provisions of section 129(3) of Act 34 of 2005, which expressly permits a debtor to reinstate a credit agreement, even after judgment but before a sale in execution.*

Secondly in terms of section 129(3) all that a debtor must do to reinstate the credit agreement in the aforegoing instance, is to settle the arrears and the bank's reasonable legal costs. See in this regard the decision of Nkatha v FirstRand Bank Ltd CCT 73.2015 Constitution Court, judgment of Mr Justice Cameron made against your goodselves.

…

According to the attached letter, the arrears over the vehicle is the sum of R16 217.48, which sum our client tenders for the purposes of reinstatement of the agreement. Let us know what are the reasonable legal costs you have incurred in your recovery steps against our client.

In view of the threat that the vehicle is being sold, you are called upon to, by close of business today, provide us with an undertaking that you will not sell our client's vehicle. Failing the latter, we will be obliged to carry out our client's instructions to

seek an urgent interdict against the bank with an appropriate costs order. In view of FirstRand Bank having been alerted of the law in the Nkata case supra*, as recently as 21 April 2016, we will apply for a punitive costs order against the bank, should the bank persist in its stance.*

In addition to the above, we await the reasonable costs and confirmation that our client must pay same into the aforementioned bank account."

23. Ms Omar e-mailed the letter, which was dated 9 May 2016, to Ms Garrancho on 10 May 2016. A copy of the letter, dated 12 April 2016, that Mrs De Bruin had previously received from the bank, accompanied the letter.

24. Omar Attorneys' letter received an immediate response from Van Coller Attorneys, represented by Mr Ten Napel. He wrote back to Omar Attorneys on 10 May 2016 recording, among others, that:

"*As a result of your client's election not to defend the matter an Order was granted in our client's favour. A copy of the Order is attached for your attention. The credit agreement was duly cancelled. The vehicle was attached by the Sheriff on the 8th April 2016 (and not the 4th May 2016 as claimed in your letter).*

Our client is precluded by the provisions of Section 129(4) of the NCA from re-instating a credit agreement under the current circumstances. It is also not our client's policy to reinstate enforced credit agreements pursuant to the attachment of goods in terms of a Court Order.

Our client will proceed to clear the vehicle for sale, as it is expected to do under Section 127 of the NCA, if the account and our fees are not settled in full.

We also note your threat of making an urgent application to the High Court to have the sale stayed. With all due respect, there is simply no urgency. Your client received the summons and knew of the action since January 2016. She knew that an Order would be granted if she did not defend the action. The vehicle was also removed from her possession on the 8th April 2016, she has known for more than a month that the Bank would proceed to sell the vehicle on public auction to recover its loss.

Any attempt to stay or rescind the proceedings, albeit urgent or not, will be strenuously opposed and a costs Order on a punitive scale will be sought against your client."

25. Mr Ten Napel's letter, in turn, prompted Omar Attorneys to launch the application proceedings, including the urgent application that was to have been moved on 17 May 2016.

THE TERMS AND CONDITIONS

26. Clause 13 of the "*TERMS AND CONDITIONS FOR AN INSTALMENT AGREEMENT (Variable Rate)*" ("the terms and conditions") forming part of the instalment agreement provides, among others, that:

"***13. Breach***
13.1. If:
13.1.1. you do not comply with any of the terms and conditions of this Agreement (all of which you agree are material); or
13.1.2. you fail to pay any amounts due under this Agreement; or
13.1.3. ….(etc.)

then we may (without affecting any of our other rights) proceed with the enforcement or termination of the Agreement, as set out in the Act.

13.2. Upon the occurrence of any of the abovementioned events, we shall be entitled, at our election and without prejudice to:
13.2.1 claim immediate payment of the outstanding balance together with the interest and all amounts owing or claimable by us, irrespective of whether or not such amounts are due at that stage; or
13.2.2. take repossession of the Goods in terms of an attachment order, retain all payments already made in terms hereof by yourself and to claim as liquidated damages, payment of the difference between the balance outstanding and the market value of the goods determined in accordance with clause 11.5.2.3, which amount shall be immediately due and payable.

13.3. If we elect to enforce the Agreement, a notice will be sent to you, which will set out:
13.3.3. the details of your default;
13.3.3. the period within which we require you to rectify the default; and
13.3.3. your rights to refer this Agreement to a debt counsellor, alternative dispute resolution agent, Consumer Court or an Ombudsman with jurisdiction, with the intention of resolving any disputes or developing and agreeing on a plan to bring your payments under this Agreement up to date.

13.4 ….

13.5. Should we elect to terminate this Agreement in terms of section 123 of the Act, the same procedure set out in 13.3. above, will be followed prior thereto.

13.6. Before termination of the agreement you are entitled to reinstate the agreement in respect of which you are in default, by paying all overdue amounts, as well as our permitted default charges and reasonable costs up to the time of reinstatement

13.7 ….

13.8. If we sell the Goods pursuant to an attachment order or you surrender the Goods to us, and the nett proceeds are insufficient to settle all your obligations under the Agreement, we may approach the court for an order enforcing any of

your remaining obligations under this Agreement.

11.8 … "[6]

27. Clause 11 of the terms and conditions bears the heading "*Voluntary Surrender*". Because clause 13.2.2 refers to clause 11.5.2.3, that clause is relevant. To understand it in context, it is necessary to refer to somewhat more than clause 11.5.2.3. Clause 11, provides that:

"*11.1. You may terminate this Agreement at any time by giving us written notice and by surrendering the Goods to us.*

11.2. Once we are in possession of the Goods, we will within ten (10) business days appoint an appraiser to value the Goods, and we will advise you of the valuation.

11.3. You may withdraw your written termination of the Agreement within ten (10) business days after receiving the valuation, and resume possession of the Goods, unless you are in default with your obligations under the Agreement, or you may request us to sell the goods.

11.4. If you do not respond to the valuation notice within ten (10) business days of having received it, we will proceed to sell the Goods.

11.5. After selling the goods, we shall:
11.5.1. credit or debit you with a payment or charge equivalent to the proceeds of the sale, less any expenses reasonably incurred by us in connection with the sale of the Goods; and
11.5.2. give you a written notice stating the following:
11.5.2.1. the settlement value of the agreement immediately before the sale;
11.5.2.2. the gross amount realised on the sale;
11.5.2.3. the nett proceeds of the sale after deducting our permitted default charges and reasonable costs allowed under 11.5.1; and
11.5.2.4. the amount credited or debited to your account

11.6 You will be liable to us for any amount that is outstanding after the Goods have been sold, our reasonable costs incurred in connecttion with the sale of the Goods and for interest calculated on these amounts, from the date of demand until the date of final payment.

11.7 If you do not pay us any amount that is outstanding after the sale of the Goods, you will be in breach."

28. Clause 22.6. of the terms and conditions, appearing under the heading "***General***", provides that:

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[6] References in the terms and conditions to the "*Act*", are to the National Credit Act, 34 of 2005, "*as amended from time to time*".

"*22.6. This is the whole Agreement and no changes or cancellations will be valid unless it is in writing and signed by both parties or is voice-logged by us and subsequently reduced to writing.*"

The clause is relevant only because in argument before me the bank relied on it on the basis that whatever Mrs De Bruin states she might have agreed with its representatives regarding her bringing her instalments up to date, or whatever, it was not binding.

29. The bank's particulars of claim attached to the summons served on Mrs De Bruin made no mention of any cancellation of the instalment agreement prior to the summons being issued, nor did the particulars of claim purport to effect a cancellation of the agreement. The bank's prayers in terms of the particulars of claim, however, included a claim for cancellation. The prayers were for:

"*A. cancellation of the credit agreement;*

B. an order directing the Defendant to forthwith return to the Plaintiff a 2013 Chevrolet Captiva 2.4 LT motor vehicle with chassis number KL1FC2U7CB034770 and engine number LE9120450041, failing which the sheriff is authorised to attach the vehicle wherever he may find same and to hand the vehicle to the Plaintiff;

C. that judgment for the amount of damages that the Plaintiff may have suffered, together with interest thereon, be postponed sine die*, pending the return of the vehicle to the Plaintiff, the subsequent valuation and sale thereof and the calculation of the amount to which the Plaintiff is entitled;*

D. interest on the amount referred to in prayer B at the rate of 3% per annum above the prime bank lending rate namely 9.75 per cent per annum from date of cancellation to date of payment;

E. costs of suit;

F. further and/or alternative relief."

30. The registrar, in granting the judgment on 8 March 2016, did not grant the bank's prayer for cancellation. It does not appear from the papers before me what the

reason was. The bank could, potentially, have utilised the avenue open to it in terms of rule 31(5)(d) to set the matter down for reconsideration by the court and in that manner it could have obtained cancellation of the instalment agreement by court order, as it had set out to do in terms of the summons. It did, however, not do so.

31. The order granted in terms of the judgment for the return of the vehicle to the bank is not of necessity predicated on a cancellation of the agreement – the bank is in terms of clause 13.2.2, read with clause 11, entitled to take "*repossession*" of the motor vehicle (which is, after all, the bank's property) without having to rely on any cancellation of the credit agreement.

32. The bank elected to obtain cancellation by court order[7]. It did not achieve cancellation in that manner. The credit agreement, accordingly, remained extant after 8 March 2016. It had not been cancelled by the time that Mrs De Bruin, represented by Omar Attorneys, on 10 May 2016 tendered to pay the arrears owing in respect of the credit agreement. It remained extant at the time when Mrs De Bruin's application papers were served on Van Coller Attorneys, despite the contents of their letter of 10 May 2016. That letter did not purport to effect any cancellation of the credit agreement – Van Coller Attorneys referred to a supposed prior cancellation, that had not, in fact, taken place.

MRS DE BRUIN'S RIGHTS TO REMEDY HER DEFAULT AND TO REINSTATE THE INSTALMENT AGREEMENT

[7] The court's power to grant an order cancelling a contract on the basis of a prior material breach thereof is firmly entrenched – see **Christie's Law of Contract in South Africa** (7th ed. by GH Bradfield) Ch.14.5 at p 636. Such an order is usually justified with reference to the judgment in **Sonia (Pty) Ltd v Wheeler** 1958 (1) SA 555 (A). That case dealt with a party's seeking cancellation/rescission of a contract on the basis of the counter-party's misrepresentation that had induced the contract, which may stand on a different footing than the *ex nunc* cancellation that may arise from a breach of contract. However, the considerations that render the option of a judicial (as opposed to an extra-judicial) cancellation necessary or desirable, as referred to in the judgment of Price AJA at 561A – E, apply equally.

33. The Constitutional Court in **Nkata v FirstRand Bank Ltd**[8] addressed the rights of a consumer to reinstate a credit agreement in terms of section 129(3) of the NCA. It also addressed interpretation of section 129(4) of the NCA.

34. These provisions were amended by the National Credit Amendment Act, 19 of 2014, that came into operation on 13 March 2015.

35. Sections 129(3) and (4), prior to amendment on 13 March 2015, provided that:

"*(3) Subject to subsection (4), a consumer may:*

(a) at any time before the credit provider has cancelled the agreement re-instate 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 reinstatement; and

(b) after complying with paragraph (a), may resume possession of any property that had 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 sesction 127;

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

(c) the termination thereof in accordance with section 123."

36. The **Nkata** judgment has now, and for purposes of the case before me, to be read and understood in the light of the current wording of these provisions. Sections 129(3) and (4) now provide that:

"*(3) Subject to subsection 4, a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges*

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8 **Nkata v FirstRand Bank Ltd** 2016 (4) SA 257 (CC).

and reasonable costs of enforcing the agreement up to the time the default was remedied.

(4) A credit provider may not reinstate or revive 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 termination thereof in accordance with section 123."

37. The conclusions that the Constitutional Court arrived at by majority judgment, applied to sections 129(3) and (4) of the NCA in their present form, are:

37.1 For a consumer to exercise his/her right in terms of section 129(3) to remedy a default of the consumer's obligations in terms of a credit agreement does not require that the consumer has to give notice to, or seek the consent or co-operation of, the credit provider. The consumer may disclose his/her intentions to the credit provider, but it is not a prerequisite to exercising the statutory right to remedy the breach.[9]

37.2 It is, however, (quite clearly) required that the right in terms of section 129(3) be exercised before the credit provider cancels the agreement.[10]

37.3 The words "*all amounts that are overdue*" in section 129(3) refer only to arrear instalments and not to the consumer's full indebtedness if the credit provider has invoked an acceleration clause to demand payment of the full outstanding debt.[11]

37.4 That a credit provider has invoked the provisions of an acceleration clause in the relevant credit agreement is not necessarily indicative that the

9 **Nkata v FirstRand Bank Ltd** 2016 (4) SA 257 (CC) par [104] and [105].
10 **Nkata v FirstRand Bank Ltd** 2016 (4) SA 257 (CC) par [104] and [110]
11 **Nkata v FirstRand Bank Ltd** 2016 (4) SA 257 (CC) par [108] and [109].

agreement has been cancelled. Whether the credit agreement has, as a matter of law, been cancelled, depends on the particular facts that pertain in every instance.[12]

37.5 Unless the credit provider's "*reasonable costs of enforcing the agreement*" and "*prescribed default administration charges*" have become payable by being quantified[13] [14], and by due notice of the quantified sums having been given to the consumer, the consumer has to pay only the arrears."[15]

37.6 The provisions of section 129(4)(a) that prevent a consumer from exercising his/her section 129(3) right after the sale of property "*pursuant to an attachment order*" or a sale "*pursuant to a surrender of property in terms of section 127*", do not include the preliminary steps of the credit provider's obtaining an order to attach property, its having the property attached and/or taking possession of the property, or its taking steps to sell such property in terms of its rights in terms of the credit agreement and/or

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12 **Nkata v FirstRand Bank Ltd** 2016 (4) SA 257 (CC) par [110].

13 **Nkata v FirstRand Bank Ltd** 2016 (4) SA 257 (CC) pars [122] and [123]. In the case of the costs of enforcing the agreement, quantification can occur by agreement or by taxation. If the consumer agrees to costs that are not reasonable, the consumer's agreement will not render the agreed amount payable.

14 By parity of reasoning "*the credit provider's prescribed default administration charges*" will also not have to be paid, unless they have been quantified and due notice in this regard has been given to the consumer. The prescribed default administration charges are the default administration charges prescribed by regulation 46 of the National Credit Regulations, 2006, promulgated in terms of Government Notice R489 of 2006. Regulation 26 provides that:

"*The credit provider may require payment by the consumer of default administration charges in respect of each letter necessarily written in terms of Part C of Chapter 6 of the Act. Such payment may not exceed the amount payable in respect of a registered letter of demand in undefended action in terms of the Magistrate's Courts Act, 1944 in addition to any reasonable and necessary expenses incurred to deliver such letter.*"

15 Regulation 47 of the credit regulations is, conceivably, also relevant to the quantification exercise that the credit provider has to undertake. It provides that:

"*For all categories of credit agreement, collection costs may not exceed the costs incurred by the credit provider in collecting the debt: (a) to the extent limited by Part C of Chapter 6 of the Act, and (b) in terms of (i) the Supreme Court Act, 1959, (ii) the Magistrate's Court Act, 1944, (iii) the Attorneys Act, 1979; or (iv) the Debt Collectors Act, 1998, whichever is applicable to the enforcement of the credit agreement.*"

arising from a surrender in terms of section 127. The limitation "*applies only when proceeds from a sale in execution have been realised*".[16]

37.7 The provisions of section 129(4)(b) that prevent a consumer from exercising his/her section 129(3) right after "*the execution of any other court order enforcing that agreement*", do, likewise, not include the preliminary steps of the credit provider's obtaining an order to attach property, its having the property attached and/or its taking possession of the property, and/or its taking steps to sell such property in terms of its rights in terms of the credit agreement or arising from a surrender in terms of section 127. The bar again "*applies only when proceeds from a sale in execution have been realised*".

37.8 If the consumer makes the payments required in terms of section 129(3), provided that payment is made before the credit provider has cancelled the agreement, the consumer's prior default is remedied by operation of law.[17]

37.9 Once the consumer has remedied his/her default by payment in accordance with section 129(3) any prior judgment or attachment of property arising from the consumer's prior default ceases, by operation of law, to have any force or effect.[18]

38. What is relevant to this matter is that Mrs De Bruin's entitlement to remedy her default of her obligations in terms of the instalment agreement does not arise only

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16 **Nkata v FirstRand Bank Ltd** 2016 (4) SA 257 (CC) pars [130] and [131]. It is, possibly, debatable when "*proceeds from a sale in execution have been realised*". Presumably, that stage would have been reached when delivery of the property to the execution sale purchaser has taken place and the proceeds of the sale paid over to the sheriff or payment thereof secured to the satisfaction of the sheriff.

17 **Nkata v FirstRand Bank Ltd** 2016 (4) SA 257 (CC) par [104], [105] and [110]. The word "*reinstate*" previously used in section 129(3) had, accordingly, to be understood as "*remedy a default*", as the section now provides.

18 **Nkata v FirstRand Bank Ltd** 2016 (4) SA 257 (CC) par [131] and [136].

in terms of section 129(3), read with section 129(4) of the NCA. She also has a contractual right arising from clause 13.6 of the terms and conditions. Because the wording of the clause closely follows the wording of section 129(3) before it was amended on 13 March 2015, the **Nkata** judgment is directly relevant to how it should be interpreted and applied.

MRS DE BRUIN DID NOT EFFECT PAYMENT OF THE ARREARS : SHE TENDERED PAYMENT

39. If Mrs De Bruin had prior to launching the present proceedings paid the bank the sums that were overdue on the instalment agreement (i.e. the arrears), plus the R650.00 costs granted in terms of the judgment, her claims for relief would, in accordance with the **Nkata** judgment, have been incontestable[19]. However, she did not pay; she tendered to pay.

40. Applying the authority of the **Nkata** judgment to Mrs De Bruin's situation that arose after the sheriff had attached the motor vehicle (and keeping in mind that the bank had not cancelled the instalment agreement), it was not sufficient for her merely to tender payment to exercise her statutory right to remedy her default. Mrs De Bruin had to effect payment of the arrears and the R650.00 costs. If she had done so, she would have remedied her default in accordance with section 129(3) and the bank would have had to allow her again to take possession of the vehicle.

41. The same applies to Mrs De Bruin's right to reinstate the agreement in terms of clause 13.6 of the terms and conditions. Failing her actually making payment, the instalment agreement was not reinstated and she was not entitled to be put back in possession of the motor vehicle.

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[19] The sheriff's fees that she had to pay in terms of the judgment had not yet become due and payable.

42. The conclusion that Mrs De Bruin should have made payment, as opposed to tendering to do so, disposes of a substantial part of the relief that Mrs De Bruin seeks through these proceedings. The conclusion does, however, not dispose of the matter in its entirety.

THE BANK FAILED TO PROVIDE MRS DE BRUIN WITH THE FIGURES SHE REQUIRED TO ENABLE HER TO EXERCISE HER RIGHTS : SECTION 110 OF THE NCA

43. Ms Omar on 5 May 2016 requested the bank to provide the figures associated with reinstating the agreement, including all arrear sums and administration costs. On the same day Ms Garrancho, in effect, refused to do so; Ms Garrancho failed to provide the information that Ms Omar had requested, making it clear that the bank required payment of the full outstanding principal debt that was due.

44. Omar Attorneys on 10 May 2016 conveyed Mrs De Bruin's tender to pay the arrears specified in the bank's letter of 12 April 2016 to the bank, at the same time requesting to be informed of what the bank's reasonable legal costs regarding the recovery steps against Mrs De Bruin were. The response from Van Coller Attorneys was to insist that not only Mrs De Bruin's entire accelerated indebtedness to the bank be paid in full, but also their fees.

45. Section 110 of the NCA, under the heading "*Statement of amount owing and related matters*", provides that:

> "*(1) At the request of a consumer, a credit provider must deliver without charge to the consumer a statement of all or any of the following-*
>
> *(a) the current balance of the consumer's account;*
>
> *(b) any amounts credited or debited during a period specified in the request;*

(c) any amounts currently overdue and when each such amount became due; and

(d) any amount currently payable and the date it became due.

(2) A statement requested in terms of subsection (1) must be delivered-

(a) within 10 business days, if all the requested information relates to a period of one year or less before the request was made; or

(b) within 20 business days, if any of the requested information relates to a period of more than one year before the request was made.

(3) A statement under this section may be delivered-

(a) orally, in person or by telephone; or

(b) in writing, either to the consumer in person or by sms, mail, fax, email or other electronic form of communication, to the extent that the credit provider is equipped to offer such facilities, as directed by the consumer when making the request.

(4) A credit provider is not required to provide-

(a) a further written statement under this section if it has, within the three months before the request is given, given such a statement to the person requesting it; or

(b) information in a statement under this section more than three years after the account was closed.

(5) On application by a credit provider, the Tribunal may make an order limiting the credit provider's obligations to a consumer in terms of this section if the Tribunal is satisfied that the consumer's requests are frivolous or vexatious."

46. Section 129(3) of the NCA has to be read in conjunction with section 110, which provides the consumer with the means to ascertain from the credit provider the information that he/she requires to ascertain what needs to be paid in terms of section 129(3) by way of "*all amounts that are overdue*" and also, in given circumstances, "*the credit provider's prescribed default administration charges*", if the credit provider has debited these to the account. The NCA, however, provides no immediately available remedy to such a consumer if the credit provider fails to provide the required statement that it is obliged to render in terms of section 110 of the NCA.

47. The **Nkata** judgment established that a consumer who wants to exercise his/her statutory right in terms of section 129(4) of the NCA to remedy a default is not compelled to seek the co-operation of the credit provider. That does not, of course, mean that, if the consumer does seek the credit provider's co-operation, the credit provider is not obliged to provide it in accordance with section 110. However, the consequences of a credit provider's failing or refusing to provide the required figures in such circumstances are not provided for.

48. A consumer who makes a request in terms of section 110 for purposes of his/her remedying a default in accordance with section 129(3), but who is then not supplied with the required figures, will often, if not invariably, be faced with a well-nigh impossible task. If, as is the case here, the credit agreement does not specify how interest is calculated, the consumer will have to access the credit regulations. He/she will then be confronted with the complexities of the interest calculations prescribed in terms of regulation 40 of the regulations. Moreover, if, as is the case here, the credit agreement provides for a variable interest rate linked to the bank's "*Prime Rate*", ascertaining what that rate has been from time to time, insofar as it might be relevant to the calculations that the consumer will have to do, may, depending on the consumer's ability to access information that a credit provider bank may have published regarding its interest rates, not be straightforward at all.

49. From where I sit, this is a *lacuna* in the NCA which cannot be addressed by inventive "purposive" interpretation, e.g. to the effect that if a consumer requests a statement of account expressing his/her intention to act in terms of section 129(3) to remedy a prior default, the credit provider's rights will be suspended until the required information is provided in accordance with section 110. I have, accordingly, to conclude that in such circumstances the consumer will have him/herself to calculate what the relevant "*amounts that are overdue*" are to enable payment to be made in accordance with section 129(3). This leads to the further

conclusion that despite the bank's failure to provide Mrs De Bruin with the information that she required to exercise her statutory right in terms of section 129(3), she was not relieved, in order to remedy her default, of the obligation to make payment in accordance with section 129(3).

50. The question that now arises is whether the fact that the instalment agreement in terms of clause 13.6 of the terms and conditions included a contractual provision of similar import than section 129(3), makes a difference.

51. Insofar as any particular provision of the instalment agreement is to be interpreted in the light of the document as a whole and the circumstances attendant upon its coming into existence, the existence of the NCA, and that its provisions, including section 110, applied to the agreement, are relevant. In interpreting clause 13.6 of the terms and conditions the fact that the bank was in terms of section 110 under a statutory obligation to provide, on request, a statement of account specifying, among others, "*any amounts currently overdue and when each such amount became due*", *any amounts credited or debited during a period specified in the request*" and "*any amount currently payable and the date it became due*", is a circumstance that I have to have regard to in attributing meaning to clause 13.6 of the terms and conditions.

52. In the circumstances, to give business efficacy to clause 13.6 of the terms and conditions, it can quite readily be implied that, once Mrs De Bruin, represented by her attorneys, had on 5 May 2016 requested "*the figures including all arrear sums and administration costs associated to reinstating the credit agreement*" with the stated intention of, potentially, reinstating the credit agreement, the bank was obliged to provide the figures and, in so doing, to co-operate towards enabling Mrs De Bruin to achieve reinstatement of the agreement in accordance with clause 13.6 of the terms and conditions. The bank's failing and, in effect, refusing to do so was

a breach of its obligations in terms of the instalment agreement. The breach took the form of *mora creditoris*, i.e. default on the part of a creditor to provide necessary co-operation to enable the debtor to perform.[20]

53. The bank's stance, taken on 5 May 2016 per Ms Garrancho when Omar Attorneys requested the figures required to enable Mrs De Bruin, potentially, to reinstate the agreement, was quite unequivocal. The bank required payment of the full accelerated amount of R260 512.77, and that was that. The bank not only failed to co-operate to enable Mrs De Bruin to act in accordance with clause 13.6 of the terms and conditions, it made it quite clear that it would not accept payment of only the arrears (and administrative charges) as sufficient for Mrs De Bruin to achieve reinstatement of the instalment agreement. This was compounded by the bank's on 9 May 2016 informing Mrs De Bruin and her attorneys that it was going to proceed with the sale of the vehicle, and was confirmed in terms of Van Coller Attorneys' letter of 10 May 2016.

54. Ms Garrancho's e-mails of 5 and 9 May 2016, as well as Van Coller Attorneys' letter of 10 May 2016, were a repudiation and material breach of the bank's obligation to co-operate towards enabling Mrs De Bruin to utilise the contractual right accorded to her in terms of clause 13.6 of the terms and conditions to reinstate the agreement, by paying what the clause specifies has to be paid. In these circumstances, Mrs De Bruin could, potentially, have accepted the repudiation and terminated the instalment agreement arising from the bank's breach of contract. She, however, opted for seeking that the bank comply with its obligations by instituting the present proceedings, in so doing (again) tendering "*to pay to Respondent all arrear amounts including the reasonable costs to have the credit agreement reinstated*".

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[20] See **Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd** 1984 (3) SA 861 (W) at 877B – 880C.

55. The tender to pay the R16 217,48 that the bank had specified as the arrears in its letter of 12 April 2016 would by 9 May 2016 probably have been insufficient to cover the arrears until that time. That is irrelevant. The bank had made it clear that even a tender of whatever was payable to pay all overdue amounts, the default charges and reasonable costs, would not be accepted and would not, from its perspective, result in the reinstatement of the agreement.

56. Murray J in **Major's Estate v De Jager**[21] stated that:

> "*If a creditor makes it clear that no tender, even in legal form, will be accepted, he waives the formalities of such tender, and the debtor is protected against costs if he has sent the cheque, or had even merely expressed his willingness to pay. If the grantor of an option repudiates* in toto *the claim of the person endeavouring to exercise the same, he cannot claim at the same that such person must fulfil an obligation which is imposed as a condition precedent in the option itself: his repudiation dispenses with such fulfilment.*"

57. In his doctoral thesis **Mora Creditoris as Vorm van Kontrakbreuk** the late Professor AB de Villiers expressed criticism of the references to waiver, repudiation[22] and a condition precedent in the above *dictum* from **Major's Estate v De Jager**.[23] Prof De Villiers', nevertheless, agreed with the substance of what Murray J stated. Prof De Villiers ascribes the excusing of the debtor's insufficient tender with reference to the common law principle that the debtor's obligations are "relaxed" if the creditor falls into *mora creditoris*.[24]

58. The bank can, accordingly, not argue that Mrs De Bruin's tender's fell short (and it did not do so).

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[21] **Major's Estate v De Jager** 1944 (TPD) 96 at 103-104.

[22] In relation to the facts that pertained to **Major's Estate v De Jager**, and not as invariably being inapplicable to circumstances when *mora creditoris* arises.

[23] See A B de Villiers **Mora Creditoris as Vorm van Kontrakbreuk** (thesis, Stellenbosch University, 1953) at p 142.

[24] See De Villiers *op. cit.* at pp 144-149.

59. The bank's providing possession of the vehicle to Mrs De Bruin is reciprocal to Mrs De Bruin's obligation to make payment of the instalments in terms of the instalment agreement. Arising from Mrs De Bruin's default the bank was quite entitled to seek possession of the vehicle, as it did through the attachment order. However, arising from the bank's repudiation of the agreement on and since 5 May 2016 and its continued *mora creditoris* by failing to provide the figures that Mrs De Bruin requested on 5 May 2016, coupled with its stance that it would not accept payment of only the arrears, administrative charges and legal costs as achieving reinstatement of the agreement, Mrs De Bruin was relieved of her obligation to make payment of the instalments.[25]

60. The bank's repudiation of its obligations was repeated in terms of its answering papers delivered in these proceedings and is of a continuing nature[26]. In the circumstances, Mrs De Bruin's obligations to pay instalments to the bank in terms of the instalment agreement, was suspended and will remain suspended until the bank complies with its obligation to provide the figures that Omar Attorneys requested from the bank on 5 May 2016.

61. If Mrs De Bruin at this time again elects to pursue payment in terms of clause 13.6 to achieve reinstatement of the instalment agreement, the arrears that she will have to pay will be the arrears that were payable in May 2016. Mrs De Bruin's obligation to pay the monthly instalments will only recommence if she acts in terms of her tender and pays the arrears and other charges[27] (within a reasonable time of the bank providing her with the wherewithal to do so in terms of the figures that were

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[25] See De Villiers *op. cit.* pp 235-252; **BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk** 1979 (1) SA 391 (A) at 418B-419H; **Erasmus v Pienaar** 1984 (4) SA 9 (T) at 24C-25E.

[26] Despite its annexing a statement of Mrs De Bruin's account to its answering affidavit. The statement included amounts for legal fees (and interest on these) that were not, in accordance with the **Nkata** judgment, yet due and payable, as well as entries for storage and towing fees, that are not, on the face of the figures, included in what Mrs De Bruin would have had to pay to reinstate the agreement in terms of clause 13.6 of the terms and conditions.

[27] Which does not include storage charges. The bank has since 5 May 2016 been storing the vehicle for its own account.

requested on her behalf) and the bank has restored possession of the vehicle to her.

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62. As referred to already, my conclusion that Mrs De Bruin's tender to make payment of the arrears plus other charges was not sufficient to entitle her to obtain possession of the motor vehicle again, disposes of a substantial part of the relief that Mrs De Bruin seeks through these proceedings. Mrs De Bruin is not entitled to orders rescinding the attachment order, nor to delivery of the vehicle, nor to an order that the sheriff should deliver the vehicle to her. If, however, she exercises her rights in accordance with section 129(3) of the NCA or clause 16.3 of the terms and conditions (in the latter instance, if the bank provides its necessary co-operation towards enabling her to do so), and makes payment of what should be paid, she will become entitled immediately to be restored to possession of the vehicle, with the concomitant that the attachment order will no longer be of force or effect.

63. Mrs De Bruin is entitled to declaratory relief to the effect that she is entitled to reinstate the credit agreement on payment of the arrears due and, insofar as these may, by the time of her effecting payment, have been appropriately quantified and become due for payment, the bank's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time of payment.

64. The order forming part of the judgment to the effect that judgment for damages arising from damage that the bank may have suffered be postponed *sine die*, was, in all circumstances, premature, as was the order granting the bank leave to apply for damages on the same papers, supplemented by affidavit evidence. Those

orders proceeded from the premise that the bank was already entitled to damages, which it was not.

65. These were, in effect, orders "*… erroneously granted in the absence of any party affected thereby*" as contemplated in terms of rule 42(1)(a) of the rules. Accordingly, albeit that Mrs De Bruin is not entitled to have the whole of the judgment rescinded and set aside, she is entitled to rescission of the orders[28]. They have, accordingly, to be set aside and Mrs De Bruin should be granted leave to defend the action[29].

66. Mrs De Bruin has achieved substantial success in her application and is entitled to her costs. As regards the issue of liability for the costs of the urgent application that was not proceeded with, taking into account the bank's intentions to dispose of the vehicle that had been conveyed to Mrs De Bruin and her attorneys early in May 2016, she was fully entitled to approach the court for urgent relief and her costs, accordingly, include any costs attendant upon her having sought such urgent relief.

67. In all these premises, I order as follows:

67.1 The application for the relief specified in paragraphs 4 and 5 of the applicant's notice of motion is dismissed.

67.2 Paragraphs 2 and 4 of this court's judgment of 8 March 2016 under case number 42493/2015 are set aside.

67.3 The applicant is given leave to defend the action that the respondent, FirstRand Bank Limited t/a Wesbank, instituted against her in this court

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[28] Paragraphs 2 and 4 of the judgment.

[29] Which does not detract from the fact that the attachment order and the order granting the bank its costs of R650.00, plus the sheriff's fees (until the time of judgment), stand.

under case number 42493/2015, provided that the applicant delivers notice of intention to defend within 10(TEN) days of the handing down of this judgment.

67.4 It is declared that the applicant is entitled to reinstate the instalment agreement concluded between her and the respondent on 5 September 2014 by making payment to the respondent within 10 (TEN) days of the respondent's delivering a statement of account to Mrs De Bruin specifying all amounts that were overdue on the instalment agreement on 5 May 2016, plus interest until 31 May 2016, and all other sums that were, as at 5 May 2016, due and payable in terms of section 129(3) of the National Credit Act, 34 of 2005;

67.5 The respondent shall pay the applicant's costs of the application, including costs incurred by the applicant in relation to the urgent application specified in Part B of the applicant's notice of motion.

F. G. Barrie.

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F G BARRIE AJ
Acting Judge of the High Court

APPEARANCES:

LEGAL REPRESENTATIVE FOR THE APPLICANTS: MR Z OMAR

ATTORNEYS FOR APPLICANT: ZAHIR OMAR ATTORNEYS

COUNSEL FOR RESPONDENT: MR A P BRUWER

ATTORNEYS FOR RESPONDENT: C F VAN COLLER INCORPORATED

DATE OF HEARING: 24 OCTOBER 2016.