IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) NOT REPORTABLE.
(2) OF INTEREST TO OTHER JUDGES.
(3) REVISED.

Case Number: 57345/2014
5/6/2017

NEDBANK LIMITED **PLAINTIFF**

AND

TERRANCE BONNY MBAMBAO **FIRST DEFENDANT**

CHITHEKILE SYLVIA MBAMBO **SECOND DEFENDANT**

JUDGMENT

MOLEFE J

[1] The plaintiff seeks judgment against the first and second defendants for payment of R2 543 032.83, interest thereon at the rate of 10% to date of final payment and an order declaring Erf 1483 Meyersdale, Extension 12 Township ("the mortgaged property") to be specially executable in favour of the plaintiff.

The amount of R2 543 032.83 is the accelerated amount pursuant to the so called accelerated clause and not arrears.

[2] The plaintiff's claim is based on a loan agreement concluded with the defendants in terms of which the plaintiff advanced the sum of R2 590 000.00 to the defendant payable in monthly instalments of R27 601.10 from the first day of the month following the date of registration of the mortgaged bonds in favour of the plaintiff.

[3] The loan was secured by a first and second concern rig mortgage bonds in favour of the plaintiff that were registered over the defendants' mortgaged property. Accordingly, the loan agreement is a mortgage agreement as defined in section 1 of the National Credit Act 34 of 2005 ("the NCA"), a credit transaction in terms of section 8(4)(d) of the NCA[1] and a credit agreement in terms of section 1 (b) of the NCA.[2]

[4] The plaintiffs claim is reliant on clause 9.1 of the loan agreement entitling it to accelerate the payments of the full amount outstanding !Secured by the mortgage bonds in the event of the defendants failing to pay any amounts due in terms of the loan agreement on the due date.

[5] The plaintiff asserts that it duly performed all its obligations in terms of the loan agreement but alleges that the defendants failed to comply with their obligations in terms of the loan agreement and the mortgage bonds and in particular failed to punctually pay the monthly instalment due and payable by the plaintiff on 1 July 2014. On that basis, the plaintiff asserts that the full balance outstanding has become due and payable. On 9 July 2014 the plaintiff issued a certificate of balance as *prima facie* proof of the balance outstanding and owed by the defendants in the amount of R2 543 032.82 ("the accelerated amount") together with interest thereon.

[6] The following issues are common cause and are not disputed in the pleadings:

6.1. that the loan agreement was concluded between the parties and

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[1] Which provides that ..."an agreement.... constitutes a credit transaction If it is .... a mortgage agreement."

[2] Which provides that... "an agreement constitutes a credit agreement for the purpose of this Act if

that the first mortgage bond was registered on or about 11 September 2007 and the second mortgage bond registered on or about 5 July 2013 In respect of the defendants' immovable property.

6.2. that the plaintiff duly performed all its obligations in terms of the loan agreement and the mortgage bonds and more particularly that it paid the loan amounts to the defendants.

6.3. that the plaintiff has complied with the provisions of the NCA: that notices in terms of sections 127, 129, 130, and 130(3) of the NCA were given to the defendants and sent to both defendants' postal addresses and *domicilium* addresses.

The Stated case.

[7] At the trial on 13 February 2017 the parties by agreement requested the Court to adjudicate the action on the basis of the stated case Which provided:

"1. The defendants admit:

1.1 That in terms of the Mortgage Loan Agreement, annexure •A• to the particulars of claim, the instalments fell to be paid by the defendants on the first day of the month, and the instalments for July 2014 accordingly fell to be paid on 1 July 2014.

1.2 The Instalment for July 2014 was not paid on 1 July 2014 .

1.3 As at 8 July 2014, the balance outstanding was R2 538165.17, the accrued interest was R4 867.65, totalling R2 543 032.82, and the arrear amount was R28 020 .18 as reflected in a schedule regarding account number [….].

1.4 The defendants paid R28400.00 on 15 July 2014 being R379.82 in excess of the July instalment. as reflected in the aforesaid schedule.

1.5 The defendants admits the certificate of balance, Annexure “D” to the particulars of claim.

It Is.... a credit transaction, as described in subsection (4)."

2. The plaintiff's case is as reflected in paragraph 6.2 of the particulars of claim, and more particularly that common clause 9.1 of the mortgage bonds was triggered by the late payment of instalments by the defendants.

3. The plaintiff no longer seeks an order In terms 6f prayer C of the particulars of claim.

4. The issue between the parties is that which is enumerated in paragraph 7 of the particulars of claim read with paragraph 11 of the plea."

[8] In the premises the only issue to be adjudicated by the Court is whether In terms of the loan agreement and the mortgage bonds, the plaintiff was entitled to immediately claim from the defendants all the outstanding amounts with reference to clause 9.1 of the mortgage bonds.

[9] Paragraph 7 of the particulars of claim alleges:

"In terms of the Loan Agreement and the mortgage bonds, the Plaintiff is entitled to Immediately claim from Defendants all amounts outstanding and the Plaintiff is entitled to obtain a Court Order declaring the mortgaged property executable (paragraph 9.1 of mortgage bonds):

The defendants' plea to paragraph 7 of the particulars of claims was a bare denial.

[10] According to clause 20.1.1 of the loan agreement, the failure by the defendants to comply with any term, condition or undertaking in the loan agreement constitutes an event of default.

Clause 20.2.3 therefore provides as follows:

"20.2 where an event of default occurs. and the client fails to remedy the matter within the period, if any, stipulated by Nedbank at such time, Nedbank will....without diminution of any right that Nedbank may hereby or otherwise acquire, be entitled, at its sole discretion, to:

20.2.1cancel the facilities and all existing agreements with

immediateeffect, or 20.2.2 .....

20.2.3 claim immediate repayment for all amounts owing to Nedbank from whatever cause arising, all of whioh will become due and payable."

[11] Clause 9.1 of the mortgage bonds is to the same effect and provides:

"The capital of balance thereof, and all other moneys which may then be claimable or secured under this bond, and in terms of any and all other bonds passed by the mortgagor in favour of the mortgagor having been specially placed in default, whether the due date thereof shall have arrived or not (and the mortgagee will be entitled to have the mortgaged property declared executable), in the event of a failure by the mortgagor to timeously make any payment or perform any obligation in terms of this bond or comply with any demand made by the mortgagee or in any manner breach any loan or facility granted by the mortgagee or other obligation owed to the mortgagee.·

[12] According to the stated case the parties are in agreement that the defendants failed to punctually (or timeously) pay their July 2014 instalment on 1 July 2014. Counsel for the plaintiff submitted that the defendant's failure to punctually pay their July 2014 instalment constituted an event as envisaged in clause 9.1 of the mortgage bonds and also an event of default as envisaged in clause 20.1.1 of the loan agreement. It is the plaintiff’s contention that immediately when the defendants failed to timeously pay the July 2014 instalment on 1 July 2014, the full amount outstanding automatically became due and payable and the plaintiff became entitled to claim immediate repayment of the full amount outstanding in terms of clause 20.2.3 of the loan agreement.

[13] It was submitted on behalf of the plaintiff that clause 9.1 of the mortgage bonds is injunctive and determines when the full amount outstanding is accelerated, and directs that this happens *"forthwith and without the [defendants] having specially been placed in default'* and *inter alia* upon the defendants' failure to pay timeously. It is further submitted that clause 20.2.3 of the loan agreement is permissive as it determines what the plaintiff is entitled to do upon the

occurrence of a breach (or event of default) of the loan agreement, without diminution of any other rights that the plaintiff may have (which includes the plaintiff's rights in terms of clause 9.1 of the mortgage bonds), and directs that the plaintiff is entitled inter alia *"to claim immediate repayment of all amounts owing to [the plaintiff] from whatever cause arising, all of which will immediately become due and payable"* from the defendant.

[14] Defendants' counsel submitted that the plaintiff's claim boils down to an accelerated amount without any information being placed before the court, setting out the basis upon which the plaintiff was entitled to accelerate the bond. Counsel contends that from the statement of account, the defendants were not in default when the summons were issued and the plaintiff was therefore not entitled to accelerate the amount owing under the loan or the mortgage bonds.

[15] At paragraph 6.2 of the Particulars of Claim, which is the high watermark, the plaintiff alleges that the defendants failed to pay the instalments due and payable on 1 July 2014 but only on 15 July 2014 and it is this default which the plaintiff relies upon to claim the accelerated amount. The defendants, in the affidavit opposing summary judgment[3] denied that they failed to comply with their obligations in terms of the loan agreement and mortgage bonds and in particular that they failed to punctually pay the instalments due and payable to the plaintiff. They stated that they have been paying the instalments on a monthly basis and in excess of the amount of the monthly instalment.

[16] It is common cause that the plaintiffs cause of action is governed by the provisions of the NCA. Section 129 (3) of the NCA provides that:

> "a consumer may-
>
> (a) At any time before the credit provider has cancelled the agreement, the consumer can reinstate a credit agreement that Is in default by paying to the credit provider all amounts that are overdue, together with the credit providers' permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement."

[3] para 14 to 20.

[17] Defendants' counsel relied on *Nkata v First Rand Bank 2016 (4) SA 257* wherein the Constitutional Court had regard to the interpretation of the provision of the NCA in a way that give effect to its purposes. Cameron J singled out two poignant purposes[4] as follows:

> (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
> (e) addressing and correcting imbalances In negotiating power between consumers and credit providers."
>
> [94] The Act seeks to infuse values of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate. Unlike in the past, the sheer raw financial power difference between the credit giver and its much needed but weaker counterpart, the credit consumer, were not always rule roost. Courts are urged to strike a balance between their respective rights and responsibilities... ."

[18] Plaintiffs cause of action that it relies upon to constitute a breach is not that the defendants are in arrears but upon an instalment which was paid fifteen days late.

[19] In *Nkata supra,* the Constitutional Court found that the credit agreement was reinstated by operation of law because Ms. Nkata settled her bond arrears[5] despite being in arrears for a number of months. In the minority judgment (but this **passage** concurs with the majority judgment), Cameron J said the following at paragraph 59:

> "Historically, creditors in regard to properties which were mortgaged were entitled contractually to refuse late payment of home loan instalments. Only payment of the full outstanding accelerated amounts (not just arrears), would save a mortgagors property. Section 129(3) has drastically changed this. Justly so. It offers a consumer in dire circumstances a life line. It spares consumers the harshness of an era of debtor unfriendly

[4] Nkata at 280 to 281.

laws. It protects them who face the sale in execution of their properties by allowing them to reverse the credit providers election to foreclosure."

[20] At paragraph 100, Moseneke DCJ on behalf of the majority held the following:

> "Section 129(3) and (4) have Introduced a novel relief of reinstatement, which parts ways with the debt collection measures upheld. The relief is available when a credit agreement is in default but has not been cancelled by the credit provider. Once the consumer makes specified overdue payments, the agreement is reinstated. What is more, she may resume possession of the property that has been repossessed by the credit provider under the attachment order."

[21] The plaintiff *in* casu, based its cause of action only on the 15 days late payment of the July 2014 monthly instalment. Since the *Nkata* judgment was delivered in April 2016, the law is clear and unequivocal that until the credit agreement is cancelled, payment reinstates the credit agreement under section 129(3) of the NCA. The late payment of the defendants after the 1 July 2014 triggered section 129(3) of the NCA In my opinion, the plaintiff acted unlawfully by accelerating the loan agreement and persisting with this action. The effect of *Nkata* judgment is revolutionary in that it allows a consumer to keep its property simply by bringing up its arrears. *In* casu, the plaintiff no longer seeks the execution of the property but seeks the payment of the full accelerated bond amount.

[22] On 13 February 2017 and at the start of the trial, Counsel for both parties addressed argument against the backdrop of an undertaking to provide the court with written heads of argument duly supported by case law. The heads were prepared to deal with the two submissions advanced by the defendants' counsel and which both go to the bedrock of the findings made by this court. I am indebted to both counsel and thank them for the heads of argument.

[23] The first point is contractual and grounded In clauses 20 to 22 of the loan

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[5] 277 paras 76 and 79.

agreement. In argument, the plaintiffs counsel submitted that at the pre-trial held on 7 March 2016, as reflected in the pre-trial minutes, the defendants admitted paragraph 6 of the particulars of claim and the defendants were therefore precluded from relying on clauses 20 to 22 of the loan agreement. Furthermore, it was argued on behalf of the plaintiff that the purported defence was not pleaded and is an attempt to evade the consequences of the admission.

[24] Defendants' counsel argued that this submission is without merit and overlooks the fundamental distinction between the obligations to be performed by the plaintiff prior to and concurrent with the conclusion of the loan agreement and the mortgage bond and the conduct of the plaintiff as a pre-condition to institute legal action. In other words, the obligation of the plaintiff anterior to and concurrent with advancing the money and the plaintiff s legal contractual obligations posterior the conclusion of the loan agreement and where the plaintiff wishes to institute legal action.

[25] Clause 6.1 of the particulars of claim is to the following effect:

> "The Plaintiff duly performed all its obligations it) terms of the Loan Agreement (Annexure A) as well as the mortgage bonds (Annexure B and C) and more in particular, paid the loan amounts to the defendant."

[26] I agree with the argument of defendants' counsel that the obligation in terms of clause 6.1 above is anterior and concurrent with the conclusion of the loan agreement. It is clear that the defendants admitted clause 6.1 because the plaintiff did perform its obligations in terms of the loan agreement and the mortgage bonds as it did advance the loan amounts to the defendants. *Non-constant,* that the plaintiff performed its obligation as a pre-condition before it instituted this action.

[27] Similarly, clauses 20 to 22 are pre-conditions and are posterior conduct to clause 6.1 of the particulars of claim. Clause 20 is headed *Default by the Client* and it provides as follows:

> "20.1 The following will, in addition to the other events listed in the clients

agreements, the events of default, each of which is severable and distinct from the others:

20.1.1 If the client fails to comply with any term or condition undertaken in this agreement, or any other agreement entered *or* to be entered into with Nedbank; or

20.1.2 ....

20.1.3 .....

20.1.4 .....

20.1.5 .... ..

20.1.6 .....

20.1.7 .....

20.2 Where an event of default occurs and the client falls to remedy the matter within the period, if any, stipulated by Nedbank at such time, Nedbank will, in respect of all entitles that comprise the client, without diminution Of any right that Nedbank may hereby or otherwise acquire, be entitled, at its sole discretion, to:

20.2.1 cancel the facilities and all existing agreements with immediate effect; or

20.2.2 refuse to advance any further amounts to the client or suspend the availability of any of the facilities; or

20.2.3 claim immediate repayment of all amounts owing to Nedbank from whatever cause arising, all of which amounts will immediately become due and payable; or ... ."

[28] Clause 22 is headed *Required Procedure for Debt Enforcement* and provides as follows:

"22.2 Nedbank may approach the court for an order endofcing this Agreement Inly If, at that time, the client is in default and has been in

default under this Agreement at least 20 (twenty) business days and-

22.1 at least 10 (ten) business days have elapsed since Nedbank delivered a notice to the client as contemplated in clause 22;

22.2.1.1 in the case of a notice contemplated in clause 22, the client has-

22.2.1.2 not responded to that notice; or

22.2.1.3 rejected the notice by rejecting Nedbank's proposals."

[29] Clause 20.1.1 clearly refers to processes under the National Credit Act. Clause 22.2 stands on a different footing; this clause makes it incumbent upon the plaintiff to enforce the agreement only if the client is in default and has been in default at least twenty days and where at least ten business days have elapsed since the plaintiff delivered a notice as contemplated in clause 22 and the defendants have not responded to the notice. *In casu,* the defendants made payment on the 1 July 2014 but payment was made fourteen days late, Which fact would have made it impossible for the plaintiff to comply with clause 22 regarding the twenty business days period of default. On this basis alone, the action falls to be dismissed.

[30] The defendants' second issue is grounded upon the *Nkata* judgment. In the course of his argument, plaintiff's counsel submitted that the *Nkata* judgment applies only where there is reinstatement of the agreement *after cancellation* and due to the fact that plaintiff did not cancel the agreement, reinstatement cannot occur and therefore the *Nkata* judgment does not apply in this case. The defendants' second contention is to the effect that when the defendants paid their July 2014 instalment on 15 July 2014, the plaintiff lost any right that it had to accelerate the full amount and the credit agreement was reinstated by operation of law. The defendants rely on *Nkata* in support of the submission.

[31] Section 129(3) and (4) of the NCA (as they read prior to the amendment thereof by way of Act 19 of 2014, which had effect from 13 March 2015) provided:

(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 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 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 property In terms of section 27;

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

(c) the termination thereof in accordance With section 123.

[32] The Constitutional Court in *Nkata* at paragraph 100 held :

[100] Sections 129(3) and (4) have introduced a novel relief of reinstatement, which parts ways with the debt collection measures of old. the relief is available when a credit agreement is in default but has not been cancelled by the credit provider. Once the consumer makes specified overdue payments, the agreement is reinstated.....The evident purpose of section 129(3) is to urge on consumers to pay their overdue amounts, default charges and legal costs to their lenders and, in turn, consumers in good standing are rewarded with reinstatement of the credit accord and the return of their attached property."

[33] Once the required payments are made, reinstatement occurs by operation of law as provided at paragraph 105 of *Nkata:*

[105] The reinstatement occurs by operation of law. This is so because the wording of the provision is clear that the consumer's payment in the prescribed manner is sufficient to trigger reinstatement."

[34] The consumer is not required to pay the full accelerated debt to achieve reinstatement in terms of section 129(3)(a) of the NCA, but only the arrear instalments. This was confirmed in *Nkata* at paragraph [107] and [108}:

> "[107] Section 129(3)(a) requires the consumer to pay “all amounts that are overdue" before the credit agreement is reinstated. On the facts here, the mortgage bonds contained acceleration clauses that the Bank invoked, particularly in 2010, as soon as Ms Nkata fell into arrears. Once the acceleration clauses were invoked, the full extent of the mortgage debt was made due and payable and not just the arrear Instalments.
>
> [108] This prompts the question whether the right of reinstatement in terms of section 129(3)(a) requires the debtor to pay back the full accelerated debt or only the arrear instalments. I readily embrace the conclusion of the High Court that only the arrear instalments, and not the full accelerated debt, needed to be paid in order to effect reinstatement. This flows without more from the wording and purpose of the provision. Reinstatement is predicated on "a credit agreement that is in default." It is a rescue mechanism that is available to the consumer precisely when she has fallen into arrears and may be liable to pay the full accelerated outstanding debt.”

[35] In the present matter, the credit agreement was never cancelled by the plaintiff nor is it alleged in the particulars of claim that the agreement was cancelled. It is therefore common cause that the credit agreement was not cancelled. Therefore, when the defendants paid the arrear instalments in full, albeit two weeks later than the due date, the credit agreement was reinstated by operation of law and the defendants were rescued from their liability to pay the full accelerated outstanding debt. In the premises, I am satisfied that although the defence of reinstatement was not pleaded by the defendants, I am satisfied that the defendants have made out a case for reinstatement in terms of section 129(3)(a) of the NCA which effectively negated their default.

[36] Plaintiffs counsel further argued that even if the defendants have paid the arrear instalment, they failed to pay the *“reasonable costs of enforcing the*

agreement up to the time of reinstatement" and on this basis, their reinstatement defence should fail. I do not see any merit in this argument. The plaintiffs permitted default charges or reasonable costs would not be due and payable as the plaintiff has yet to give the defendants the requisite due notice (as per *Nkata)* of the reasonable legal costs, whether agreed or taxed.

Costs

[37] Defendants' counsel submitted that if the court dismissed the plaintiff's action on the contractual basis, dismissal of the action with party and party costs (including the costs of the two counsel) should be ordered and that if the action is dismissed on the basis of *Nkata* judgment, a dismissal of action together with attorney and client costs (including the costs of two counsel) should be ordered.

[38] In my opinion, the *Nkata* judgment is a landmark and seminal judgment impacting significantly on the rights of consumers in their relationship with their banks. The Constitutional Court has made it virtually impossible for a consumer to lose their homes in circumstances where even after a long period of being in arrears, if the consumer makes up those arrears and the agreement has not been cancelled, the agreement is reinstated. It is also significant in this case that on the eve of the trial, the plaintiff having persisted since the inception of summons in executing against the defendants' home, where the defendants had paid their monthly instalment two weeks late, and were no longer in arrears, abandoned execution of the property and relied only on the judgment debt.

[39] The award of costs is a matter wholly within the discretion of the court and this is a judicial discretion which must be exercised on reasonable grounds. Even the general rule, *viz* that costs follow the event, is subject to the overriding principle that the court has a judicial discretion in awarding costs. An award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have.[6]

[40] The defendants have argued that the proceedings by the plaintiff were an

[6] Pienaar v Boland Bank 1986 (4) SA 102 (O) at 116 B-C

abuse of court process, I have taken into consideration that the two defences relied upon by the defendants were not pleaded but were only submitted at the argument stage before the court. I had to request both counsel to prepare heads of argument to address the submissions on these defences. In the circumstances, I am not in agreement with the defendants' contention that the plaintiff abused court processes.

[41] In the premises, I make the following order:

1. *The plaintiff's action* is *dismissed.*

2. *The plaintiff to pay* costs *on* a *party-and-party scale, including the costs of two counsel.*

D S MOLEFE

Judge of the High Court

Gauteng Division, Pretoria

APPEARANCES:

Counsel for the Plaintiff: Advocate CP Wesley
Instructed by: Snyman De Jager Inc
Counsel for the respondents: Sam Shalom Choen & Etibele Letsapa
Instructed by: Ledwaba Attorneys
Date of Hearing: 24 February 2017
Date of Judgement: 5 June 2017