Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE:

SIGNATURE
_

Case no. 43927/2020

In the matter between:

NEDBANK LIMITED Plaintiff/Applicant

and

ALPHEUS MALEME PHETO Defendant/Respondent
(Identity number: […])

JUDGMENT

The judgment and order are published and distributed electronically.

P A VAN NIEKERK, AJ

INTRODUCTION:

[1] Applicant is a public company that trades as a commercial bank and is also a registered credit provider duly registered as such in terms of the National Credit Act 34 of 2005 ("NCA").

[2] On 4 September 2020 Applicant instituted action against Respondent in this Court. In the Particulars of Claim Applicant framed two claims referred to as "CLAIM 1" and "CLAIM 2" respectively. Both claims were found on home loan agreements entered into between Applicant and Defendant in respect of two different immovable properties. Mortgage bonds were registered over the properties in favour of Applicant for purposes of security of the Respondent's obligations in terms of the home loan agreement. The home loan agreements are standard agreements in terms whereof the Respondent was obliged to effect monthly payments on the outstanding capital, and the home loan agreement contained the usual terms in terms whereof the Applicant would be entitled to enforce obligations arising from the agreement in the event of Respondent defaulting on his obligations in terms of the agreement.

[3] It is common cause that Respondent was in arrears with the payment of the monthly installments in respect of both agreements when the action was instituted, and the Applicant applied for default judgment against the Respondent as there was no notice of

intention to defend the action served. For purposes of the application for default judgment a notice of application in terms of Rule 31(2)(a), Rule 46(1)(a)(ii) and rule 46A(8)(e) together with an affidavit in support of such application was served on Respondent's residence on 16 July 2021 whereafter Respondent gave notice of his intention to oppose such application and which was followed by an Answering Affidavit which was filed on 29 March 2022. This application for default judgment will hereafter be referred to as "the application".

[4] In the Answering Affidavit filed on behalf of Respondent a point of jurisdiction was raised which is not relevant any longer, and Respondent further set out facts relating to his sosio-economic circumstances. Respondent further disclosed that he was in the process of disposing of the property which was subject to CLAIM no. 1 in the action and averred that he intended to apply the proceeds of such disposal to settle the liabilities and arrears under CLAIM 1 of the Applicant's action.

[5] In respect to CLAIM 2 Respondent stated that the property was worth in excess of R4 million, that he has transferred the amount of R60 000.00 towards the account of the loan agreement during June 2021 and that the arrears at that stage then amounted to R29 000.00, which, so argued the Respondent, did not entitle Applicant to execute against this property as it would have amounted to an arbitrarily deprivation of property. From the contents of the Respondent's answering affidavit it is clear that the Respondent accepted that he was in arrears, accepted his liability to pay the arrears and comply with the terms of the agreement, and that he attempted to alleviate his financial difficulties by disposing of one of the properties.

[6] The matter was set down for hearing in this Court on the opposed motion court roll of 30 January 2023 for purposes of seeking the relief claimed in the application.

[7] When the matter was called for hearing on 1 February 2023 Respondent appeared in person and contended that the agreement was reinstated. This issue of reinstatement of the agreement was not previously raised by Respondent in the Opposing Affidavit referred to *supra*, resulting the presiding Judge standing the matter down for hearing to Friday, 3 February 2023 for purposes of a statements of account to be delivered by the Applicant to the Respondent in order to pursue the issue of reinstatement further.

[8] It must further be mentioned that, at the stage when the matter was set down on 30 January 2023, Respondent had finally disposed of the property subject to CLAIM 1, settled the arrears and outstanding bond in respect of such property, and the claim was not further proceeded with by the Applicant.

[9] When the matter was called again on Friday 3 February 2023 the issue of reinstatement was not proceeded with by Respondent but on then Respondent raised an issue with the *modus* of service of the notice as contemplated in terms of Section 129 of NCA. This resulted in the matter being postponed by the presiding Judge and an order was made that the required Notice in terms of Rule 129 of NCA be reserved on the Respondent by way of sending such notice per email to the Respondent's attorneys of record.

[10] On 13 February 2023, in compliance with the order of 3 February 2023 referred to *supra*, Applicant's attorney of record sent a letter to Respondent's attorneys of record which

served as the Notice in terms of Section 129 of NCA. For purposes of this judgment it is important to note the contents of such letter, which is therefore quoted herein as follows:

> *"**FINAL DEMAND: NOTICE OF DEFAULT IN TERMS OF SECTION 130(4)(b) & SECTION 129(1) OF THE NATIONAL CREDIT ACT NO 34 OF 2005 ("THE NCA") AND NOTICE OF SUS0PENSION OF CREDIT FACILITY***
>
> | | | |
> |---|---|---|
> | ***PRODUCT TYPE*** | *:* | *HOME LOAN ACCOUNT* |
> | ***ACCOUNT NO*** | *:* | ***8001351485201*** |
> | ***TOTAL ARREARS AS AT 06/02/2023*** | *:* | *R154 571.63* |
> | ***CURRENT INTEREST RATE:*** | | *9.50% per annum* |
>
> ---
>
> *We act on behalf of NEDBANK LTD who has instructed us to address this letter to you.*
>
> *We confirm that legal action has been instituted in the Pretoria High Court and falls under Case Number: 43927/2020, attached hereto is a Court order dated 06/02/2023 postponing the matter in terms of S130(4)(b).*
>
> *We confirm that you are in default with the terms of your Agreement and demand payment of the outstanding balance plus interest at the current interest rate, calculated from the date of this letter to the date of payment, both days inclusive.*
>
> *If you are a natural person, you may contact a debt counselor, an alternative dispute resolution agent, Consumer Court or an ombud with jurisdiction to resolve any dispute or develop and agree on a plan to bring your account up to date.*
>
> *Please note that you will be unable to access further credit while under debt review or business rescue.*
>
> *Please note that we are entitled to approach the court for an order to enforce the Agreement if you are in default for at least 0 business days and 10 business days have elapsed since we delivered this notice to yourself and you have not responded to the notice or rejected our proposals. Your agreement will be cancelled without any further notice, unless an agreed arrangement is concluded with the bank prior to the expiry of the 10 (ten) business days of the date of this*

letter. All legal and associated costs will also be for your account. When your account has a credit balance, the credit facility will be cancelled.

Notice of intention to supply adverse information to a credit bureau in terms of ***Regulation 19(4) of the Regulations made in terms of the National Credit Act No. 34 of 2006 ("NCA").***

Notice is hereby given of Nedbank Limited's (hereinafter referred to as the bank) intention to supply adverse information as defined in the NCA in respect of your non-payment/negative payment performance behaviour in relation to your Account, and in respect of the total outstanding debt of the Agreement, to a credit bureau.

Please be further advised that in terms of Regulation 19(4)(a) and (b) of the Regulations promulgated in terms of the NCA, adverse information includes:

(a) adverse classifications of consumer behaviour, which are subjective classifications of consumer behaviour and include classifications such as "delinquent", "default", "slow paying", "absconded" or "not contactable"; and

(b) adverse classification of enforcement action, which are classifications related to enforcement action taken byt hê Credit Provider, including classifications such as handed over for collection or recover, legal action, or write-off.

If you are unable to meet the requirements of this final demand, we urge you to contact us immediately at the number provided and we shall do all we can to help you in resolving this matter.

Yours faithfully"

[11] Following the aforesaid quoted fresh section 129 NCA notice, the Respondent effected a payment of R150 000.00 to the arrears account in respect of CLAIM 2 on 8 March 2023. In the application it is common cause that this payment followed the Notice in terms of Section 129 of NCA as quoted *supra*.

[12] Applicant thereafter served a further affidavit in order to re-enroll the application for hearing persisting in the relief which it initially sought, being a default judgment on the

outstanding balance in terms of CLAIM 2, and execution against the property. For purposes of such re-enrolment, a "re-enrolment affidavit" was served in support of the application, and the matter was re-enrolled for hearing in the opposed motion court of this Court for the week commencing 28 February 2023 and was allocated for hearing on 29 August 2023.

[13] In the re-enrolment affidavit an updated valuation report of the immovable property which is the subject matter of remaining CLAIM 2 was provided, together with an updated amount on the arrears of the municipal account and a certificate reflecting an outstanding amount of R1 701 310.08 on the loan amount was also attached. According to the balance certificate, the arrears amount at that stage amounted to R75 968.69.

[14] In the re-enrolment affidavit it was further disclosed that statements in respect of the loan account were provided to Respondent and a copy of such statements for the period 12 March 2021 to 20 April 2023 was annexed to the re-enrolment affidavit. On the basis that the account was in arrears Applicant then persisted in applying for the relief in terms of the application as set out *supra*.

[15] When the matter was called for hearing on 29 February 2023 Respondent was represented by Counsel who then commenced to argue that the agreement was reinstated in terms of Section 129(4) of NCA. However, no Heads of Argument was filed in support of this argument, and it became apparent that this was the primary defense set up by Respondent against the relief which Applicant sought. After some debate on the issue I ruled that both parties be entitled to file Supplementary Affidavits and Supplementary Heads of Argument solely on the issue whether or not the agreement

was reinstated as contended for on behalf of the Respondent. For this purpose, the matter stood down to Thursday, 31 August 2023.

[16] On 30 August 2023 Respondent filed a Supplementary Affidavit wherein the following was stated:

(i) On 31 January 2023 the "balance" on the account (referring to the arrears amount) was R133 497.77, as was certified by Plaintiff on that date;

(ii) Respondent paid R150 000.00 towards the loan on 8 March 2023;

(iii) After payment of the amount R150 000.00 on 8 March 2023, Respondent received an email dated 23 March 2023 from Plaintiff, informing Respondent as follows:

"Good day,
"without prejudice"
We refer to the above mentioned matter.
We take of payment made on 8 March 2023 in the amount of R150 000.00, however we confirm further that your account is still in arrears with R32 185.49 and legal fees in the amount of R23 460.00.
Kindly attent to make payment before the 1 April 2023 to settle all arrears and legal fees on your account to avoid further legal action.
Your account will be re-instated.
Kindly revert to us by close of business on 27 March 2023.
***Kind regards**"*

(iv) Respondent then further stated in paragraph 7 of the Supplementary Affidavit as follows:

> *"On 8 March 2023 I paid R150 000.00 towards the loan. The applicant replied with an email dated 23 March 2023. In terms of the email the applicant acknowledged payment and further stated that I was still in* (sic)

*R32 185.49 and legal fees in the amount of R23 460.00. Attached is the email marked "**NED-AMP2**". When I paid R150 000.00 I was also paying monthly installment for February 2023. Although I had received a notice on 13 February 2023, I did not have regard to its contents because I already knew the balance and I assumed that I had to pay that amount only to find that in fact the balance in the notice is R154 571.63. If any, the balance of R5 000.00 is the big scheme of things* (sic) *is de minimis and cannot be a sufficient reason to approach court. In any event, it consists of legal costs."*

(v) On 25 May 2023 Applicant's attorneys of record sent an email to Respondent's attorneys of record, which reads:

*"**Re: NEDBANK LIMITED // PHETO A.L***
Good day,
We refer to the aforementioned matter.
We have noted that your client has made a large payment and our client would like to enter into an arrangement to settle the outstanding arrear amount to date.
Currently your client is in arrears with an amount of R75 515.89. kindly provide us with your client's proposal to make an arrangement, in order to not incur further legal costs.
We trust your find the above in order.
Yours faithfully,

(vi) On 12 June 2023 Respondent's attorney of record replied by way of an email, which reads:

*"**IN RE: NA167 NEDBANK/PHETO AM: BOND ACCOUNT 8001351485201***

1. *We acknowledge and refer to your letter dated 25 May 2023 and email of 23 March 2023.*
2. *We request the breakdown of R75 515.89 before providing comprehensive to the above letter and email.*

3. *On 08 February 2023 the arrears on the certificate of balance was R115 496.22.*
4. *On 08 March 2023 our client paid R150 000.00 towards the arrears and the bond. This amount covered the monthly instalment for the month of March 2023 and slightly more. At that moment the account was reinstated.*
5. *The legal costs which emanate from the application to compel are subject to taxation and must be excluded from the equation for purposes of calculation of arrears and/or the moment of reinstatement. In terms of your email dated 23 March 2023 legal costs were in the sum amount of R23 460.00. Our client is offering R18 000.00 for the legal costs to obviate the need for taxation. If this offer is accepted payment will be made within 5 working days from the date of communication of the acceptance.*
6. *We hope you find the above in order. Therefore, before we provide you with comprehensive reply to both your letter and email we request breakdown of the above mentioned amount, and whether you accept our above mentioned offer for legal costs.*

Yours faithfully"

[17] Applicant filed a Supplementary Affidavit on the issue of the alleged of the reinstatement of the agreement, and therein made the following statements:

> *"1.2.1 The R150 000.00 lump sum payment of 8 March 2023 made by the Respondent, resulted therein that the arrears on the account "excluding legal fees" was paid advanced (sic) at one point. But at this point the Respondent has made <u>no</u> payment towards legal fees incurred to enforce the agreement. A letter was directed to the Respondent detailing the legal fees due and requested payment thereof."*

[18] The aforesaid affidavit thereafter aver that Respondent again became in arrears with some payments, and it is common cause that on the day before the application was

called, Respondent again effected a payment on the arrears amount as a result of which the arrears at that stage amounted to R7 000.00.

[19] Both parties filed Heads of Argument on the issue of the alleged reinstatement of the agreement. In the Respondent's Heads of Argument it was submitted that legal fees were included in the calculation of every notice served by the Applicant on the Respondent, and specifically that the amount of R154 571.63 reflected on the notice dated 13 February 2023 referred to *supra*, included legal fees. It was further submitted in the Respondent's Heads of Argument that the legal fees, at the time when the Respondent effected the payment of R150 000.00, was not yet due and payable as it was neither agreed nor taxed, and by implication the Respondent submitted that he settled the arrears on the account on 13 February 2023 and also paid a portion of the costs.

[20] Relying on the judgment of **Nkata v FirstRand Bank Ltd & Others**[1] and quoting from paragraphs [105] to [123] of that judgment, it was submitted that, applying the principles of the **Nkata**-judgment, by operation of Section 129 of NCA the agreement between the Applicant and the Respondent was reinstated on 8 March 2023 and that the matter has thus "died". By submitting that the matter has "died" I accepted that the Respondent submitted that, due to the alleged reinstatement of the agreement, Plaintiff cannot continue to seek an order for default judgment and claim cancellation of the agreement and further seek judgment for the outstanding balance in terms of the loan agreement and/or seek an order for execution against the property as the agreement was reinstated

[1] *2016 (4) SA 257 (CC)*

and Applicant was thereafter obliged to again follow the provisions of Section 129 and/or Section 130 of NCA in order to enforce any "new arrears".

[21] In support of the aforesaid argument, based on the **Nkata**-judgment, Respondent further submitted:

[21.1] The Section 129 notice dated 13 February 2023 notified the Respondent of an arrears amount of R154 571.63. This included legal costs;

[21.2] When the Respondent pad the amount R150 000.00, the shortfall of R4 571.63 was in reality made up of legal costs, which was added to the arrears calculation and which, at that time when the payment of R150 000.00 was made, was not due and payable same having not been agreed upon by the parties nor taxed. In particular, the following submissions were made in the Heads of Argument filed on behalf of Respondent:

> *"22. The Plaintiff should have communicated with the Defendant to save the amount of R25 576.64 in legal fees is outstanding (the Plaintiff if views the amount of reasonable should say so)(sic). The Defendant should have reacted to that if agrees (sic) with amount it becomes an amount due to payable in terms of Section 129 of the NCA.*
>
> *23. If the Defendant does not agree, it had to be referred for taxation before it could be due and payable".*

[22] On behalf of Applicant it was submitted that the amount of arrears did not include any costs, that the Respondent has never paid any costs, has never tendered to pay reasonable costs, and thus cannot rely on Section 129 of NCA which clearly provides for reinstatement only in the event that the defaulting party pays <u>all</u> (own accentuation) arrears and costs.

[23] The issue is therefore whether or not on the available facts it can be found that reinstatement of the agreement did take place as contemplated in terms of Section 129(4) of NCA on 8 March 2023 when the amount of R150 000.00 was paid by Respondent pursuant to the Sections 129 and 130 notices in terms of NCA dated 13 February 2023.

[24] Two sets of statements of account in respect of the loan agreement was provided. The first set is a set of statements which was annexed to the re-enrolment affidavit already referred to *supra*, for the period 12 March 2012 to 20 April 2023. This statement of account includes as a debit an item referred to as “legal fees” and reflects various “legal fees” debits being effected on different dated by the Applicant. It is clear that the “legal fees” debits were added to the capital balance of the account, and reflected in the arrears balance and drew interest as calculated from time to time by the Applicant.

[25] A second set of statements for the period 12 March 2012 to 29 August 2023 was also supplied by Applicant, where the outstanding balance on the account as well as arrears were calculated without inclusion of any debits in relation to “legal fees” and under a separate heading “legal fees” the specific amount and corresponding date when each “legal fees” were debited are reflected.

[26] When these two sets of accounts are analysed in relation to the date of the alleged reinstatement being 8 March 2023, the following transpires:

(i) In the first set of statements (where “legal fees” were included) the outstanding arrears amounted R175 576.49 on 2 March 2023, and after the payment of R150 000.00 was made on 8 March 2023, the account reflects an arrears

balance of R25 576.47. According to the separate statement of “legal fees” incurred to that date amounted to R23 937.35;

(ii) When the second set of accounts (where “legal fees” are not included) are analysed in a similar way, it reflects an arrears balance of R136 510.08 on 2 March 2023 and after payment of the amount of R150 000.00 on 8 March 2023 it reflects that the account is not in arrears any longer and that there is in fact an amount of R13 498.92 to the credit of the arrears account. The implication therefore is that, based on an analysis of this account, Respondent paid the arrears capital on the loan account (excluding “legal fees”) and paid R13 498.92 towards “legal fees” on 8 March 2023.

[27] Applicant asserted throughout the proceedings that the “total arrears” on 13 February 2023 amounted to R154 571.63 and did not include any legal fees and that Respondent, when paying the amount of R150 000.00 on 8 March 2023, had not yet paid any legal fees. This was pertinently submitted in paragraph 1.2.1 of the Applicant’s Supplementary Affidavit as well as in the correspondence referred to in paragraph __ *supra*. This statement of Applicant is patently incorrect. A proper perusal of the account statements annexed to the re-enrolment affidavit clearly illustrate that the arrears balance calculation of R154 571.68 done on 13 February 2023 included all legal fees debited against the account before that date and that the “legal fees” accrued interest.

[28] In the **Nkata**-judgment referred to supra, and specifically paragraphs [105]; [121] and [122] of that judgement, it was held that an agreement may be reinstated by operation of the law without the consumer paying any legal costs. In that judgement it was held that the payment by the consumer “triggers” reinstatement under Section 129(3) of NCA. In

that case the consumer paid all arrears but not costs, and it was held that the failure to pay costs did not preclude the reinstatement of a credit agreement under the following circumstances:

(i) Where the costs were not yet taxable, due or payable when the arrears were paid;

(ii) Where no notice was given to the consumer of the nature and extent of the legal costs to enable the consumer to determine if the costs are reasonable;

(iii) Where costs were not agreed with the consumer.

[29] Paragraph [123] of the **Nkata**-judgment reads as follows:

> *"Properly understood, section 129(3) does not preclude reinstatement of a credit agreement where the consumer has paid all the amounts that were overdue but has not been given due notice of the reasonable legal costs, whether agreed or taxed, of enforcing the credit agreement. The legal costs would become due and payable only when they are reasonable, agreed or taxed, and on due notice to the consumer".*

[30] On the facts before me, it is clear that the Applicant has not provided due notice to Respondent on the nature, extent or balance of legal costs prior to 8 March 2023 when Respondent effected the payment of R150 000.00. In other words, the costs were not taxed, Applicant and Respondent did not agree on the costs, and Respondent was not placed in a position to determine whether or not any costs unilaterally debited by the Applicant were reasonable in the circumstances.

[31] In my view, the aforesaid factual matrix applicable to the matter *in casu* is on all fours with the **Nkata**-judgment.

[32] A perusal of the Notice in terms of Section 129 of NCA dated 13 February 2023 sent to the Respondent's attorney of record pursuant to the order of Court dated 30 January 2023 simply refers to an arrears amount of R154 571.63 and no reference is made of the costs. A Notice in terms of Section 129 of NCA is clearly a notice *inter alia* intended to enable the consumer to remedy any breach of the agreement and to comply with the provisions of Section 129(4) of NCA. Where such a notice does not contain the necessary information to enable the consumer to agree on the costs, make a reasonable tender for costs, or even attempt to distinguish between arrears and costs, the consumer cannot be penalised when simply settling the arrears and not paying all costs which the credit provider deems due and owing to it.

[33] In my view the *onus* of proof that the consumer has not complied with the provisions of Section 129(4) of NCA rests squarely on the credit provider for the following reasons:

(i) It is the credit provider that is in possession of all the necessary information which would enable the consumer to determine the amount outstanding in respect of arrears as well as all costs as required in terms of Section 129(4) of NCA;

(ii) In terms of the **Nkata**-judgment, the onus rests on the credit provider to provide the consumer with due notice, and there is no duty or onus on the consumer to elicit the relevant information from the credit provider.

[34] Applicant failed to prove that that there was no compliance with the requirements for reinstatement as required in terms of Section 129(4) of NCA. In the result, I find that the agreement was reinstated on 8 March 2023.

[35] Costs incurred up to and including 8 March 2023 were costs which the Applicant incurred in enforcing the Respondent's obligations in terms of the agreement. However, having found that the agreement became reinstated on 8 March 2023, I can find no reason why the principle that costs should follow the event should not apply *in casu* and I therefore am exercising my discretion in this regard by ordering the Applicant to pay the Respondent's costs incurred from 9 March 2023.

[36] I make the following order:

1. **The application is dismissed;**
2. **It is declared that the agreement entered into between Applicant and Respondent under loan agreement account number 8001351485201 became reinstated on 8 March 2023 as envisaged in terms of Section 129(4) of the National Credit Act;**
3. **Respondent is ordered to pay the Applicant's costs up to and including 8 March 2023;**
4. **Applicant is ordered to pay costs incurred from 9 March 2023 to date.**

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P A VAN NIEKERK

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Appearances:

For the Applicant:	**Adv C L MARKRAM- JOOSTE**
Instructed by:	**HACK STUPE & ROSS ATTOTNEYS**
For the Respondent:	**Adv K M MOLEMOENG**
Instructed by:	**MACBETCH INC**