IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

CASE NO: 17072/22

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE SIGNATURE

In the matter between:-

MUCHENJE, LAZARUS First Applicant

MUCHENJE, JANET Second Applicant

and

INVESTEC BANK LTD Respondent
(Registration no. 169/004763/06)

JUDGMENT

SKOSANA AJ

[1] The present application seeks a declaratory order that a supposed cancellation by the respondent of a written home loan agreement is invalid and in the same breath that such agreement be reinstated in terms of section 129(3) of the National Credit act 34 of 2005 ("NCA").

[2] The relevant facts are briefly that the applicants purchased immovable property described as Portion 4 (a portion of portion 1) of Erf 997 of Waterkloof Ridge Township, Registration Division JR, Province of Gauteng, held under Deed of Transfer T6001/2001("the property") with a loan from the respondent (Investec). For this purpose, a written home loan agreement was concluded and a mortgage bond registered over the property in favour of Investec. The initial capital amount lent to the applicant was R3 205 000-00 with the agreed monthly repayments being R29 115 -40 over 20 years.

[3] During 2020, the applicants fell into arrears and on July 2020 Investec issued a notice in terms of section 129 of the NCA ("*the s 129 notice*") by which it notified the applicants, among others, that they had defaulted in payment and

had remained so for more than 20 days. They then demanded the full outstanding amount in terms of the agreement which amounted to R3 152 615-13 with interest effective from 19 June 2020. The applicants had purchased another property at Morningside with Investec's financial assistance[1].

[4] The notice further stated that Investec will, subject to the provisions of the NCA, approach a court for an order to enforce the credit agreement. It concluded by saying that, should judgment be obtained against the applicants, execution against their properties will follow.

[5] Investec subsequently sought such judgment and on 14 May 2021, Davis J delivered a judgment order for payment of an amount of R3 152 615-13 plus interest and declared the property specially executable. He also authorized the issuance of a warrant of execution against the property and ordered that the property be sold at a sale in execution with a reviewable reserved price of R1 736 000-00.

[6] On 01 October 2021, Investec, through its attorneys, addressed what it termed a "*cancellation notice*" to the applicants in which it intimated that the total outstanding amount owed to them by the applicants was R3 334 177-05 plus interest. In this letter, Investec directed that the agreements are forthwith

[1] **The only relevance of the transaction relating to the Morningside property seems to be to clarify the transaction for the Waterkloof property and totality of figures referred in the loan agreement and other related documents**

cancelled as a consequence of the applicants' default and failure to pay as per the judgment order. However, the cancellation was not confirmed by a court.

[7] An interposing urgent application was instituted by the applicants against the sale in execution of the property which resulted in a settlement agreement which was made an order of court. Essentially, the settlement agreement provided for the acknowledgement of debt by the applicants as well as an undertaking to pay 4 instalments amounts in rectification of the applicants' default. The undertaken payments were the following:

[7.1] R300 000-00 on or before 11 November 2021;

[7.2] R90 000-00 on or before 30 November 2021;

[7.3] R200 000-00 on or before 15 December 2021 as well as settlement of the total outstanding amount on or before 15 February 2022;

[8] Such agreement also made provision for the continuation of payment of the monthly instalments in terms of the loan agreement in the amount of R25 380-83 as well as payment of all outstanding legal fees on or before 15 February 2022. My attention was also drawn to paragraph 6.1 of the settlement agreement to the effect that such settlement agreement did not constitute a novation or amendment of the written loan agreement. I am mindful though that the same clause also states that the settlement agreement does not amount to waiver or amendment of the "*judgments already obtained*".

[9] The above mentioned three payments were deposited into the Investec account in respect of the loan agreement, namely R300 000-00 on 17 November 2021, R90 000-00 on 18 December 2021 and R200 000-00 on 19 January 2022. Further, on 02 February 2022, a letter on behalf of the applicants was addressed to Investec's attorneys stating that all the required amounts had been paid as agreed including monthly instalments on the bond account. It also requested a bill of costs for any remaining legal fees for the applicants to decide whether they require the taxation thereof as well as any further arrears or costs. Finally, it also indicated that the applicants wish to reinstate the loan agreement.

[10] On 28 February 2022, Investec responded that the amount due and payable as on 15 February 2022 was R1 298 460-27 plus legal fees of 222 960-00. I am informed by the counsel for the applicants, Mr Felgate that the legal fees referred to in that correspondence related to the bill of costs of any other legal fees as the legal fees agreed upon in terms of the settlement agreement had already been fully paid. Further, such legal fees had not been taxed.

[11] The issues are somewhat crisp in this matter. First, I am to determine whether or not there was a legally valid cancellation of the loan agreement in the light of the sequence of events and the applicable principles of the law of contract. Both counsel agreed in principle that this aspect is dispositive of the

matter. The second issue is whether or not the applicants are entitled to reinstatement of the loan agreement in terms section 129(3) of the NCA.

CANCELLATION

[12] The cancellation relied upon by Investec is allegedly encompassed in the letter of 01 October 2021. The letter came after the judgment order of Davis J but before the settlement agreement. The judgment order which was preceded by a section 129(3) notice ordered payment of the outstanding amount with interest, the declaration of the property as specially executable and authorized its sale.

[13] After the cancellation notice of 01 October 2021, the application to stay execution of the judgment was settled in terms of the settlement agreement. The settlement agreement was made an order of court which places it on par with the judgment order.

[14] The settlement agreement, after referring to the judgment order, proceeds to state that the parties have now agreed to settle the matter and that such settlement follows upon the urgent application instituted by the applicants. As stated earlier, the settlement agreement made provision for payment by the applicants of three amounts as well as to settle the total outstanding amount including outstanding legal fees.

[15] What complicates the matter to some extent is that the settlement agreement makes provision for the continuance of payment of monthly instalments. It is hard to regard such provision as anything else but the reinstatement of the agreement. Actually, it is not possible to continue with such instalments unless the loan agreement is reinstated or re-arranged. The applicants, as I understand, not only paid the three amounts referred to above but also proceeded thereafter to pay the monthly instalments as stated in paragraph 4.2.2 of the settlement agreement[2].

[16] Clause 4.2.1.4 of the settlement agreement, which seem to call in addition for the payment of the total outstanding amount by 15 February 2022, makes no business sense. The applicants could not have been required to pay the three mammoth lumpsums in a period of about a month and thereafter be required to pay the full outstanding amount a month and a half later. Then on top of that, be required to resume and continue with monthly instalments. The only logical conclusion or reasonable inference that can be drawn is that the purpose of the first 3 sums was to remedy the default in payment and was to be followed by normal monthly instalments, all of which point to a reinstatement of the agreement. This also constitutes a businesslike construction of the settlement agreement[3].

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[2] **Albeit such payments were not strictly in accordance with time frame set out in the settlement agreement**

[3] **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)**

[17] This brings me to clause 6.1 of the settlement agreement which postulates that the settlement agreement does not constitute novation, waiver or amendment. The novation, waiver or amendment in question relates to, among others, judgments already obtained, the provisions of the written agreement, the written loan agreement and instalment sale agreement. This conglomeration of legal transactions spells out another complication to the matter in that:

[17.1] First, there are two judgments, being the judgment order of Davis J and the settlement agreement, which was made an order of court. The only logical and legally sound conclusion that one may come to is that the latest judgment must be honoured over the earlier one. As a matter of fact, the latest judgment (settlement agreement) refers to the earlier judgment and adopts the terms of the settlement agreement over it. The two court judgments/orders cannot co-exist in their entirety.

[17.2] Second, the reference to a written agreement or the written loan agreement in that clause can only be a reference to the original loan agreement. It therefore is an indication that such a loan agreement was still in existence and was being preserved by this clause. Similarly, the instalments sale agreement can only be a reference to the loan agreement. The cancellation notice of 01 October 2021 was therefore superseded by this settlement court order.

[18] Further, there is also merit in the contention by the applicants that Investec had sent a section 129 notice claiming specific performance, which resulted in the judgment order and they thereafter attended to execute on it. However, in between, Investec sent a cancellation notice. That amounts to approbation and reprobation contrary to the contractual principle of election. A party must make a clear election whether they want to enforce the agreement (specific performance) or to cancel it and claim damages[4]. In any event, the 'cancellation' was not sanctioned by the court while specific performance was.

[19] Moreover, Investec was enjoined not only by section 129(3) but also paragraph 18.1.17 of the loan agreement to follow certain steps before cancelling the agreement. As seen from clause 18.1.17 and 18.1.18 of the loan agreement, such steps include referral to a debt counsellor and other relevant notices. None of these steps were taken in relation to cancellation.

[20] Section 123(2) requires that, in the event of the consumer's default, the credit provider take the steps set out in Part C of Chapter 6[5] to <u>enforce and terminate</u> that agreement[6]. The right to cancel is based on contract law and section 129 merely provides a procedure for exercising the right[7]. Section 129(1)(b) prohibits enforcement of an agreement in legal proceedings before compliance with sub-section (1)(a) thereof and section 130. Section 129(2)

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[4] **De Villiers case (infra) footnote 7**
[5] **This covers sections129 to 133**
[6] **ABSA Bank Ltd v Havenga 2010 (5) SA 533 (GP) para 537C-D**
[7] **Havenga (supra)**

provides that sub-section (1) thereof does not apply to credit agreements that are subject to legal proceedings.

[21] Section 129(3) provides :

"*(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 and reasonable costs of enforcing the agreement up to the time the default was remedied."*[My emphasis]

[22] Investec does not, as I understand, seriously or at all dispute that the three lumpsum payments made by the applicants were intended to remedy the default but contends that there was cancellation before such payment and therefore such payments could not remedy the default. Hence it became pivotal to determine the legal validity of such cancellation. If the cancellation is invalid, then there is hardly a need for reinstatement.

[23] In addition, section 129(4) stipulates that a credit agreement may not be reinstated after the termination thereof in terms of sub-paragraph (c) thereof. Complementarily, section 130(3) provides as follows:

"*(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that—*

(a)in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) …

(c) that the credit provider has not approached the court—

(i)during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii)<u>despite the consumer having</u>—

(aa)…;

(bb)agreed to a proposal made in terms of section 129 (1) (a) and acted in good faith in fulfilment of that agreement;

(cc)complied with an agreed plan as contemplated in section 129 (1) (a); or

(dd)brought the payments under the credit agreement up to date, as contemplated in section 129 (1) (a)."

[24] Distinctly, section 130(3) requires the court, before determining a matter such as the present case, to satisfy itself of the factors outlined in paragraphs (a) to (c) thereof. Of relevance is paragraphs (a) and (c)(ii)(bb),(cc) and (dd), in that:

[24.1] In the present case, the judgment order of Davis J was preceded by a section 129 notice. There is no gainsaying that the process culminating in such judgment was for the enforcement of the loan agreement rather than the cancellation thereof. Otherwise, there would be no need for Investec to endeavor to cancel it later.

[24.2] The purported cancellation on the other hand was not preceded by the prerequisite notice. I am in agreement with Mr Felgate for the applicants that the word "*enforce*" in section 129(1)(b) denotes both claiming specific performance and cancellation[8]. Section 123(2) confirms this by reference to "enforce and terminate" in the same vein.

[24.3] The section 129(3) notice is a precursor not only to claiming specific performance but also to cancellation with a view to claim damages. As a matter of contractual law, cancellation ought to be followed by a claim for damages. None of that was done or overtly contemplated by Investec in its cancellation notice. Naturally, the terms of the settlement agreement are in stark contrast to such course.

[24.4] Section 130(3)(a) makes compliance with the prerequisite notice a compulsory condition for entertaining the present application. As indicated above, This fortifies the view that a new section 129 notice was required for the purposes of cancellation. Although premised on the same credit agreement,

[8] **ABSA Bank Ltd v De Villiers 2009 (5) SA 40 (C) paras 12-14**

cancellation constitutes a new cause of action with different remedies or consequences.

[24.5] As far as section 130(3)(c)(ii) is concerned, the settlement agreement constituted and was a result of either an agreed proposal in terms of section 129(1)(a) (paragraph (ii)(bb)) or the applicants complied with an agreed plan by paying in accordance with that plan(ii)(cc) or the payments under the credit agreement were brought up to date (para (ii)(dd).

[24.6] In other words, this court is not satisfied that Investec has not breached the conditions under para (c)(ii) of the NCA. Although, paragraph (c) of sub-section (3) refers to a credit provider approaching the court, I am of the view that those circumstances are relevant in the present case where a purported cancellation is challenged on the basis of non-compliance with the requirements of section 129(1). Moreover, in effect, the present proceedings amount to an anticipatory defence to a claim based on cancellation of the loan agreement.

[25] Section 130(4)(e) also enjoins this court to dismiss a matter where among others, the credit agreement is subject to an agreement and the consumer has complied with that agreement. This, in my view also supports the granting of the relief sought in that the credit agreement has not only been kept alive by the settlement agreement and/or subjected to it but also the settlement agreement has been substantially complied with by the applicants.

[26] In the light of the above, it is my view that the applicants have made out a case for a declaratory order that the 'cancellation' of the loan agreement is legally invalid. As stated earlier, the invalidity of the cancellation presupposes the continued existence of the loan agreement which makes reinstatement thereof unnecessary.

[27] It has been satisfactorily shown that payment in compliance with the settlement agreement was made by, on behalf of and to the credit of the applicants. The respondents' contention that the payments were not made by the applicants as contemplated in section 129(3) is logically and legally unsound especially where it is shown not only that Investec credited such amounts to the applicants' account but also that the authorized representative of the payer confirms it.

[28] The above is also confirmed by **Mostert** decision,[9] where it was held that payment may be made by a third party on behalf of the consumer, as long as it is clear that the third party makes the payment for the benefit of the debtor.

[29] On this score as well, and having found the purported cancellation to be invalid, it is my view that the default was remedied and the credit agreement was accordingly reinstated. The principle relating to reinstatement is plainly laid down in **Nkata** decision[10] where the Constitutional Court held that reinstatement occurs

[9] **Mostert & Others v Firstrand Bank t/a RMB Private Bank 2018 (4) SA 443 (SCA) paras 26-27**
[10] **Nkata v Firstrand Bank Ltd & Others 2016 (4) SA 257 (CC) para 105**

by operation of law and the consumer's payment in the prescribed manner is sufficient to trigger reinstatement. It also found that reinstatement occurs upon payment of all arrears that are due as well as permissible default charges and legal costs. It also confirmed that the right to reinstatement is predicated on the payment of the arrear instalments and not the full accelerated debt[11].

[30] I therefore find, for the sake of completeness, that the loan agreement was reinstated.

[31] I find no reason why costs should not follow the results nor was such argument presented to me.

[32] In the result, I make the following order:

[32.1] The purported cancellation by the respondent, dated 01 October 2021 of the written home loan agreement entered into by the parties on 14 April 2016 and bearing account number 238536/006 ("the home loan agreement") is declared invalid and of no force.

[32.2] The home loan agreement is reinstated by virtue of section 129(3)of the National Credit Act 34 of 2005.

[32.3] The respondent is ordered to pay the costs of this application.

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[11] **Nkata paras 108 & 109**

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DT SKOSANA

Acting Judge of the High Court

Pretoria

Date of hearing: 24 July 2023

Date of Judgment: 04 August 2023

APPEARANCES:

Counsel for the Applicant:	Advocate N Felgate
Instructing Attorneys:	Amina Rahman Attorneys
Counsel for the Respondent:	Advocate JE Smit
Instructing Attorneys:	Delberg Attorneys