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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**

DATE

SIGNATURE

Case number **20321/2017**

In the matter between:

ABSA BANK LIMITED

Applicant

And

RICHARD CHINYAMA NJOLOMBA
(Identity Number: [...])

First Respondent

KAMONA MULANGESA NJOLOMBA
(Identity Number: [...])

Second Defendant

Case number: **39655/2017**

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

And

BRIGHT MBALE

Respondent

Case Number: **40453/2017**

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

And

KABITO BAKER KIWANUKA

First Respondent

ANISHA BABIRYE KIWANUKA

Second Respondent

Case Number: **00435/2018**

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

And

MARRION THOMAS

Respondent

Case Number: **24653/2017**

In the matter between:

CHANGING TIDES 17 (PROPRIETARY) LIMITED N.O
(Registration No. 2001/009766/07)

Applicant

And

FOURIE, JODY WESLEY
(Identity Number: [...])

First Respondent

FOURIE, MELLISA CELESTE
(Identity Number: [...])

Second Respondent

Case Number: **41765/2017**

In the matter between:

CHANGING TIDES 17 (PROPRIETARY) LIMITED N.O
(Registration No. 2001/009766/07)

Applicant

And

HAYLEE GAENOR LUNDBERG
(Identity Number: [...])

Respondent

Case Number: **44904/2017**

In the matter between:

CHANGING TIDES 17 (PROPRIETARY) LIMITED N.O
(Registration No. 2001/009766/07)

Applicant

And

NKETLE, TISETSO GERTRUDE
(Identity Number: [...])

First Respondent

YONANA, SIMPIWE SAMUEL
(Identity Number: [...])

Second Respondent

Case Number: **45113/2017****CHANGING TIDES 17 (PROPRIETARY) LIMITED N.O**
(Registration No. 2001/009766/07)

Applicant

And

SANGWENI, PORTIA NTOMBIFUTHI
(Identity Number: [...])

First Respondent

SANGWEN, SIPHIWE BRANDON
(Identity Number: [...])

Second Respondent

SUMMARY: Interpretation: [National Credit Act 34 of 2005](#) — section 129(4) - relates specifically to enforcement of that type of credit agreement that has a movable assets as its subject matter. The section does not preclude reinstatement or revival of a mortgage agreement in terms of **section 129(3)**

JUDGMENT

FISHER J

[1] These matters all came before me in the unopposed motion court. Each is for default judgement in terms of rule 31(5). They have in common that they relate to credit agreements which are subject to the National Credit Act (NCA) and are all in respect of loans where the indebtedness is secured by means of a mortgage bond over immovable property. In each case the applicants concede that it must be assumed that the mortgaged property is the primary residence of the debtor. They are thus all what are commonly known as “*home loans*”. Furthermore each credit agreement – as is usual for this type of loan, has a provision which allows for what is known as the “*acceleration*” of the indebtedness under the loan in the event of the debtors default. Put simply, this means that the loan provides for all periodical payments under the loan agreement to become immediately payable in one lumpsum in the event of default.

[2] None of the agreements have been cancelled by the applicants. Each of the applicants seeks a money judgment in respect of the accelerated debt in each instance. The applicants do not seek, at this stage, that the properties be declared executable. There is an acknowledgment on behalf of each applicant that they are not, for one reason or another, entitled at this stage to such an order. They each contend however that they are entitled to a money judgment for the debt owing under the agreement given the default in each instance and given that all the legal and contractual requirements for such judgment have been met.

[3] There have, of late, been salutary moves in the statutes, case law, rules, and practice directives to introduce a measure of flexibility into the execution process where it is sought to execute against the home of a debtor. These laws and rules emanate from an accepted need to promote the objects of our Bill of Rights and especially the requirement that all relevant circumstances be considered before depriving a person of his or her home. They include the requirement that immovable property not be executed against without judicial oversight being brought to bear thereon¹ and the recent introduction of rule 46A into the Uniform Rules which requires that the court “*consider alternative means of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence*” The cases have required stringent adherence to notice and service requirements and the furnishing of details in relation to the steps taken to manage the indebtedness of the debtor. Recent amendments to rule 46 of the Uniform Rules require the consideration by the court of alternative means of satisfying the judgment debt. These changes impose an even more rigorous investigative function on a court faced with an application for a declaration of executability and require still more information to be forthcoming in relation to the debtor’s circumstances and the value of the property. This assists in setting appropriate reserve prices and other sale conditions in the event of execution against the property becoming necessary. However, the process has, as its main endeavour, to maintain the mortgage loan and the rehabilitate the debtor if at all possible.

¹ Rule 46

[4] Pivotal to the court's function in preserving the credit agreement and thus the debtor's home, is section 129(3) of the NCA, which affords to the debtor rights that he did not have before the advent of the NCA. It provides that notwithstanding that a debtor has fallen into arrears he *"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."* Thus, even after judgment, the debtor is entitled to remedy any default by paying the arrear amounts together with default charges and reasonable costs of enforcing the credit agreement². Indeed, in relation to immovable property this right endures until the proceeds from the sale have been realised.³ A debtor experiencing financial difficulties is thus given greater leeway in relation to the maintenance of the agreement.

[5] Moseneke DCJ writing for the majority in *Nkata*, had the following to say in relation to this new dispensation created by the NCA:

"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, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities. Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. But the human condition suggests that it is not always possible — particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes do. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at

² *Nkata v Firststrand Bank Ltd* 2016 (4) SA 257 (CC) at para [1]

³ *Id* at para [131]

play in the dispute is not only the profit motive, but also the civilised values of our Constitution".⁴

[6] An applicant who has not yet been able to comply with the requirements for obtaining a declaration of executability in terms of rule 46, (which requirements it must be acknowledged have become increasingly onerous) but who has in terms of its agreement the right to seek judgment, will generally seek to obtain judgment for the accelerated indebtedness and to postpone the declaration of executability so that the processes set out in rules 46 and 46A can be undertaken in due course if this becomes necessary. The courts, in this and other divisions, have adopted different approaches in relation to the granting of such relief. Some judges have granted the money judgment as a matter of course and, in the same vein, others have refused it. Some have granted it with conditions which relate to staying execution in respect of movables. These varying approaches have been undertaken on the basis of the assumption of discretion in relation to the granting or declining of such relief at that stage.

[7] In *Firststrand Bank Ltd v Zwane* and two other matters,⁵ Van der Linde J found that the court has discretion to postpone such a claim for judgement where a declaration of executability is still to be considered. He reasoned, on the basis of *ABSA Bank Ltd v Lekuku*,⁶ that the practice manual that proposed personal service on the debtor in the event of execution being sought in respect of a primary residence had previously survived a validity attack and that this meant that the same flexibility should maintain in respect of judgments being sought in respect of mortgage loans. He also

⁴ Id at para [94]

⁵ Handed down in this court on 29 July 2016 – cases 18581/2016; 19362/2016; 30634/2015

⁶ (32700/2013) [2014] ZAGPJHC244 (14 October 2014)

had resort to the Constitution and specifically section 26⁷ and section 173⁸. The learned judge was however careful to emphasize, in this context, that for a court to decline to give judgment should not be seen as a signalling of inroads into the principle that contracts should be honoured and enforced.⁹ The approach taken was, in essence, based on the assumption that the right to reinstatement of the agreement is negatively affected by an order for a money judgement under the agreement.

[8] The practice manual at paragraph 10.17 as recently amended¹⁰ now contains a directive that is to be read in conjunction with the amended rule 46A¹¹. The directive expressly precludes the granting of a default judgment for a money claim where it is necessary to postpone the claim for a declaration of executability.

[9] The central reason given in the practice manual for this approach, is that if a money judgment is given and the judgment debtor's movables executed against, section 129(4)(b) of the NCA will preclude the debtor from reinstating the credit agreement by paying the arrears.¹²

⁷Section 26: (1)Everyone has the right to have access to adequate housing.
(2)The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3)No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

⁸ Section 173: The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

⁹ *Zwane* (supra) at [18]

¹⁰ With effect from 1 March 2018

¹¹ 46A came into effect on 22 December 2017

¹² 10.17 (1) [1] reads as follows: "NB: Default judgment should not be granted for the amount and the order for execution only postponed as this will defeat the object of postponing the matter i.e. to allow the consumer to take advice and seek to make arrangements to bring the arrears up to date or purge the default. (FRB v Various Debtors 2016 (6) SA 400 (GJ) para 46 and Petersen para 7. See Ntsane. Also see Maleke and Lekuku.) The creditor should not seek and the court (not registrar) should not give any money judgment (either for the accelerated total balance or otherwise) unrelated to an order declaring the property executable; if a money judgment is given and then executed against

[10] Were this construction of section 129(4)(b) correct, there would indeed be compelling reasons to avoid piecemeal execution as a matter of general practice. As stated above, the right to reinstate the agreement is essential to the preservation of the mortgaged property and the operation of rule 46A. If this right is lost, the process contemplated in rule 46A would be rendered nugatory.

[11] In all these applications, the applicants argue that, whilst the court is expressly given a discretion to postpone the declaration that the immovable property may be executed upon, it does not have discretion to postpone the granting of the money judgment sought by the applicants. They rely in this regard on the abiding principle that they are entitled to enforce their contractual rights. This was the finding by this court (*per* Lamont J) in *Firststrand Bank Limited t/a First National Bank v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another*.¹³ The learned judge stated as follows in this regard:

*“As far as the first defendant is concerned, the fact that the registrar has no power to declare immovable property executable in no way impacts on the rights of the plaintiff to judgment for the money claim. The plaintiff is in the same position as any commercial creditor.”*¹⁴

[12] The learned judge continued in this vein categorically as follows:

*“There is accordingly no question of judicial oversight of the right of a plaintiff to payment of the money due to it”*¹⁵.

[13] The point was made in this case that a creditor who lends money and does not obtain security in the form of a mortgage could not have been intended by the rule

movables, that precludes the debtor from reinstating the bond by paying the arrears: NCA s.129(4)(b).” (Emphasis in text)

¹³(2014/10545) [2014] ZAGPJHC 117 (4 June 2014)

¹⁴ *Id* at para [15]

¹⁵ *Id* at para [17]

maker to be in better position than a secured creditor.¹⁶ It is, with respect, difficult to argue against this assertion.

[14] The meaning of section 129(4) of the NCA and especially the effect of section 129(4)(b) is thus pivotal to the relief sought by the applicants.

[15] The proper approach to the interpretation of documents is as set out in summary by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”¹⁷ (Footnotes omitted.)

¹⁶ *Id.* at para [16]

¹⁷ 2012 (4) SA 593 (SCA) at [18]. See *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2014] 1 All SA 517, 2014 (2) SA 494, [2013] ZASCA 176 [12]; *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* [2014] 1 All SA 375 (SCA) [10]–[17]; *Kingswood Golf Estate (Pty) Ltd v Witts-Hewinson* [2014] 2 All SA 35 (SCA) [19].

[16] This approach was succinctly stated by Unterhalter AJ (as he then was), in *Betterbridge (Pty) Ltd v Masilo and others NNO*, as “a unitary endeavour requiring the consideration of text, context and purpose.”¹⁸

[17] In these matters before me, it is argued on behalf of all the applicants that rules 46 and 46A, far from militating against the granting of a judgement before a declaration of executability, in fact, envisage a procedure where a money judgement has already been taken. In terms of rule 46(1)(a), a return of process against movable property, is to be a first step of execution against immovable property. It is argued thus, that this could not be in contemplation if the taking of a money judgement separately should not to be entertained. Furthermore on a linguistic and sensible reading thereof, rule 46A proceeds from the assumption that a “*judgment debt*” already exists. Rule 46A(1) provides: “*This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.*” Rule 46A(2)(a)(ii) enjoins a court to consider alternative means of “*satisfying the judgment debt*”. Reference is pertinently made to “*judgment debtor*” and “*judgement creditor*” throughout the rule. All this strongly conveys that it is contemplated that judgment has been taken under the credit agreement before the process set out by the rule is implemented.

[18] Indeed the interpretation of section 129(4)(b) posited by the practice manual is irreconcilable with rules 46 and 46A and the common law and leads to the difficulties of law and logic which are referred to in 949 Cottage Lane (*supra*).

¹⁸ [2015] JOL 33113, 2015 (2) SA 396 (GNP) [8].

[19] Access to credit is a vital part of any modern commercial system. Central to the national credit system are instalment agreements¹⁹, secured loan agreements,²⁰ leases²¹, credit facility agreements²² with banking institutions, such as those which allow for credit transactions using credit cards and electronic payment functions to operate, and mortgage agreements²³.

[20] Understanding the purposes of the NCA is vital to the interpretative process. Such purposes are set out in some detail in section 3 of the NCA and, importantly for present circumstances, include “*ensuring consistent treatment of different credit*

¹⁹ ***'instalment agreement'*** means a sale of movable property in terms of which-

- (a) all or part of the price is deferred and is to be paid by periodic payments;
- (b) possession and use of the property is transferred to the consumer;
- (c) ownership of the property either-
 - (i) passes to the consumer only when the agreement is fully complied with; or
 - (ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and
- (d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.

²⁰ ***'Secured loan'*** means an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person-

- (a) advances money or grants credit to another, and
- (b) retains, or receives a pledge to any movable property or other thing of value as security for all amounts due under that agreement;

²¹ ***'lease'*** means an agreement in terms of which-

- (a) temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer;
- (b) payment for the possession or use of that property is-
 - (i) made on an agreed or determined periodic basis during the life of the agreement; or
 - (ii) deferred in whole or in part for any period during the life of the agreement;
- (c) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred; and
- (d) at the end of the term of the agreement, ownership of that property either-
 - (i) passes to the consumer absolutely; or
 - (ii) passes to the consumer upon satisfaction of specific conditions set out in the agreement;

²² ***'credit facility'*** means an agreement that meets all the criteria set out in section 8 (3);

²³ ***'mortgage agreement'*** means a credit agreement that is secured by the registration of a mortgage bond by the registrar of deeds over immovable property;

products and different credit providers”²⁴ and “providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements”²⁵.

[21] The NCA is aimed at regulating the operation of the debtor/creditor relationship throughout the life of the agreement. The NCA thus deals with the management and preservation of credit agreements so as to meet the purposes of the NCA. Its focus is not on the execution process after judgment has been taken. The statutory and regulatory processes after judgment are well entrenched generally and in relation to the preservation of residential mortgaged property, and the purpose of the NCA is not to re-traverse this territory.

[22] The larger proportion of credit agreements occur in the consumer sectors where vehicles and household goods are purchased on credit or credit card facilities are extended by banks. The aim of the NCA is to keep these agreements in place, if at all possible, and, if not, to bring the agreement to an end in a manner that is as fair as possible to the parties with reference to the type of agreement in issue.

[23] In keeping with the purpose of *ensuring consistent treatment of different credit products and different credit providers*, special recovery provisions are set out in relation to the various types of credit facility. Chapter 6 of the NCA deals with “*Collection, Repayment, Surrender, and Debt Enforcement*”. It is divided into three parts: Part A which deal with *Collection and repayment practices* (sections 124 – 126B); part B which deals with “*Surrender of Goods*” (sections 127 and 128); and part C which deals with “*Debt Enforcement by Repossession or Judgment*” (sections 129 – 133).

[24] Section 129 deals with the preliminary notice and demand procedures which

²⁴ Section 3(b) of the NCA.

²⁵ Section 3(l) of the NCA

must be undertaken before a creditor can embark on any debt recovery process. Sections 129(1) and (2) deal with notifications which must be given to the debtor in the case of his default.

[25] Section 129(3) gives to all consumers the right to maintain the agreement's force by paying the arrears and wasted costs at any time up to cancellation. In the case of agreements which involve the acquisition of movables, the reinstatement would involve the restoration of the movables. It stands to reason then, that if the movable has been disposed of as part of the enforcement and recovery process, the credit agreement cannot be reinstated. Section 129(4) must be read in this context. It bears repetition here:

"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.

[26] The agreement which may not be reinstated or revived by the credit provider in terms of this section is one pursuant to which property has been repossessed by attachment order or surrendered and then sold by the credit provider. The agreement contemplated is thus of a type where movable property has been acquired. It is not a reference to a mortgage agreement.

[27] Section 129(4)(b), on the construction provided for in the practice manual, is assumed to relate to all credit agreements and thus to a mortgage agreement. This has led to the assumption being made that section 129(4)(b) has the effect that, whenever any form of execution is levied pursuant to a judgment debt which arises from any credit agreement, no matter how paltry the recovery, this will trigger a situation where the rights afforded by 129(3) are no longer available to a debtor.

[28] This construction in the context of mortgage loans is anomalous. The purpose of section 129(3) is to allow for a reinstatement of the agreement at any time up to cancellation provided this has not in the interim become legally impossible. The purpose of section 129(4) is to describe the, somewhat obvious, position that where the subject movable has been legally repossessed and sold to a third party, the agreement can no longer be reinstated on its terms. It goes no further than this.

[29] We know however that a different position has been prescribed where immovable property is acquired under a mortgage agreement. In this case the maintaining of the mortgage agreement will only become impossible when the immovable property has been sold and transferred to the third party purchaser.²⁶ If execution takes place in respect of movable property of the judgment debtor, this will not create a situation where the mortgage agreement in respect the debtor's home cannot be reinstated. This would be contrary to the stated purposes of the NCA. Indeed it may arise that a debtor has immovable property other than his home. There is, to my mind, no reason why this property should not be executed on before and in the stead of resort to the residence of the debtor, provided the provisions of rule 46(1) are met. This surely cannot have the result that that the right to reinstate the agreement will be lost.

[30] The language used in section 129(4) accords with this interpretation. It confines its applicability to a specific enforcement and debt recovery process which is peculiar to instalment agreements, secured loans, and leases – i.e to transactions which involve dealing with movable property. That 129(4)(b) relates to this specific type of agreement and does not pertain generally to credit agreements, is conveyed by the use of the qualifier “*other*” – i.e the “*execution*” contemplated by subsection (b) is in respect of relief other than the sale of the goods surrendered or attached. This train of meaning is further clarified by the use of the identifier “*that*” which serves to restrict the agreement to that which is referred to in the antecedent subclause (4).

²⁶ *Nkata* (supra) at [131]

[31] Thus the whole of section 129(4)(b) relates to only one type of agreement – i.e. one which relates to the particular enforcement procedures which entail recovery of goods by way of specific attachment or surrender procedures as a first stage; the sale of the goods as a second; and finally the obtaining of an order in terms of the agreement to recover the balance of the amount due under that agreement.

[32] This meaning is fortified when one moves to section 130, which makes specific mention of instalment sales, secured loans and leases, and especially by section 130(2) which provides for the enforcement of the remaining obligations of the consumer under the credit agreement after the repossessed movable property has been sold and the proceeds are insufficient to discharge the debt under that agreement. has court order of the remaining provisions of such an agreement after the sale of the movable in issue if the proceeds of the sale of such goods were insufficient to discharge the consumers obligations under the agreement. Section 130(2) reads as follows:

“ In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if-

- (a) all relevant property has been sold pursuant to-
 - (i) an attachment order; or
 - (ii) surrender of property in terms of section 127; and
- (b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.” (Emphasis added)

[33] It is clear when sections 129(4) and 130(2) are read together, that the order referred to in section 130 is that which is contemplated in 129(4)(b) – i.e. “*the execution of any other court order enforcing that agreement.*”

[34] Thus, properly construed with reference to its language and purpose, section 129(4)(b) relates exclusively to the instalment sale, secured loan, and lease variety of credit agreement which are singled out for debt enforcement by sale of the movable

property which is their subject matter and further resort to judgment for the balance remaining after the sale of such property. Section 129(4) does not touch on the process of general execution against other assets of the debtor after judgement and it finds no application in the case of a mortgage agreement²⁷.

[35] The right to reinstate a credit agreement at any time up to cancellation which is afforded all debtors – including those subject to mortgage loans - is thus not limited by section 129(4) should judgement be taken under a mortgage loan and executed on.

[36] Even if section 129(4) were ambiguous and capable also of the interpretation which the practice manual attributes to it, the process of determining its meaning activates the constitutional duty to promote the spirit, purport and objects of the Bill of Rights²⁸. Clearly the meaning attributed to section 129(4)(b) by the practice manual is in conflict with the Bill of Rights: it sets up an unnecessary impediment to maintaining the right to housing (section 26) and trammels free access to courts by credit providers seeking to enforce their rights. (section 34)

[37] In *Nkata (supra)* Moseneke DCJ was careful to deal with the fact that, in the case of mortgage loans, the right to reinstate is, as a natural incidence of the execution process, limited to when the proceeds of a sale in execution of the mortgaged property have been received. It stands to reason that it will be at this stage that the property has officially been registered into the name of the new purchaser. In this regard the learned judge, writing for the majority held as follows:

*“The High Court was correct that the barrier to a revival of the credit agreement applies only when proceeds from a sale in execution have been realised. Only then would the revival be of no use to either party.”*²⁹ (Emphasis added.)

²⁷ A further instance of special provisions being prescribed for a particular type of credit agreement is section 123 which deals with special enforcement measures for credit facilities.

²⁸ Section 39(2) of the Constitution .

²⁹ *Nkata* at [131]

[38] It seems the same position does not maintain in the enforcement provisions which are the subject of section 129(4)(b). Because this process involves the sale of the repossessed goods to third parties it appears that the usual legal principles pertaining to transfer of ownership to the purchasers of such goods would apply and it would not be necessary for the proceeds to have been received by the judgment debtor for the right to reinstatement to be at an end.

[39] It must be borne in mind that in *Nkata* the inquiry was what was required of a consumer to reinstate a contract. *Nkata* is not authority for the proposition that section 129(4) applies to mortgage loans.

[40] The construction which is placed on section 129(4) in the judgment, creates no tension between sections 129(4) on the one hand and the Constitution; rules 46 and 46A and the common law on the other. It furthermore allows for a creditor to seek payment otherwise than by resort to executing against the debtors residential property if there are substantial alternative assets to be had. Why, for example, should a creditor not have the right to execute against valuable shares, vehicles, or cash reserves of a debtor merely because there is a mortgage loan in place? Furthermore, different considerations apply to immovable property owned by the debtor which is not his place of residence. There seems to be no reason why the court's should not declare this property to be executable in the interim to the consideration of the application against the primary residence. Also, if the judgment debtor has access to funds or assets of value, it would seem to be in accordance with general principle and ultimately to his advantage and that of his family that he is put to employing those funds to meet the important indebtedness under the mortgage loan so that his home can be preserved.

[41] Conversely, It would seem to be an exercise in futility for a creditor to sell by auction household goods that have little value. I am advised by way of affidavit by FirstRand, that at least in relation to the larger financial institutions, the sale of movables is not generally resorted to. If, however, resort is had, by an unscrupulous

judgment creditor, to putting the movables of a clearly impecunious person on sale purely for the purpose of intimidation or the frustration of measures which may be devised to avoid the sale of the debtors home – there are remedies available to curb this conduct. Such circumstances would indeed be a proper matter for a court to exercise the discretion it is given to suspend execution under rule 45A.

[42] In *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at para [40] Mogoro J stated:

“It is difficult to see how the collection of trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated, possibly permanently, especially where other methods exist to enable recovery of the debt.” (Emphasis added.)

[43] There is however, in the absence of cogent circumstances that could translate into the rendering of a debtor homeless, no reason to delay giving judgment in relation to an indebtedness to which a judgment creditor is entitled in terms of substantive law. Such an approach cannot, with respect, serve the stated aims of the NCA or the Rule of Law. With respect, I do not believe that it can simply be assumed, as a general proposition, that the fact that the money judgment is taken against a debtor will ineluctably lead to the debtor becoming homeless or even that this event will be more likely. The court will, in any event, seek to avoid this result in its ultimate inquiry as contemplated by rules 46 and 46A, which expressly is in no way affected by the fact that there is a judgment. Indeed, the execution process is such that it can yield valuable information for the court as to the true circumstances of the respondent for the purposes in due course of the rule 46A process. This is implicitly recognised by rule 46(1)(a), which provides for the issue of a return of process against the movable property of the judgment debtor from which it appears that there is insufficient property to satisfy the writ. Whilst this measure ensures that the immovable property is not executed upon without a resort to the movables, it also has the effect that it elicits a return from the sheriff and also perhaps an opportunity to seek some form of engagement or co-operation if it has not previously been forthcoming from the debtor.

[44] To my mind, *Lekuku* also does not present any implicit or express impediment to these findings. This case deals in essence with service provisions in foreclosure matters and not, as in the practice directive in issue here, with the blanket refusal of relief to creditors under circumstances where a case is made out and where there is no danger of foreclosure at this stage of the proceedings. In *Lekuku* the court *dealt with the issue of service thus*:

*“The introduction of a procedural step in the service of process in our constitutional milieu serves as a safeguard that primary residences are not lost through inadequate service. It does not undermine the domicilium clause as that address remains the central point where the creditor and the Deputy Sheriff must find the debtor. The question to be answered is whether the introduction of a procedural requirement running parallel with the domicilium clause is permissible. This issue should be analysed using the paradigm referred to in *Brisley v Drotosky* 2002 (4) SA 1 (SCA). The starting point is not whether the court has a discretion to refuse to enforce the domicilium clause but whether the introduction of such a procedural step concerning the domicilium clause offends the commercial transaction in an unduly trammelled manner. No case has been made out that defining the service of process in foreclosure matters by way of Practice Directive restricts commercialism or results in a court assisting a party to go back on the express provisions of the contract.”³⁰*
(Emphasis added)

[45] Thus, in *Lekuku*, there was the clear and, with respect, correct finding that the the issue of service was procedural and remained so notwithstanding the contractual choice of a *domicilium* address. In these matters it is submitted by the applicants that the direction that judgment may not be granted until the declaration of executability is granted is substantive law which cannot be displaced by a practice directive. I am inclined to agree with this submission.

³⁰ *Lekuku* at [25]

[46] In *Universal City Studios Inc and Others v Network Video (Pty) Ltd*³¹ Corbett JA in dealing with a High Court's power to regulate its own process dealt with the distinction between procedure and substantive law thus:

*"There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice (see Stuart v Ismail 1942 AD 327; Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 783A -G; also Ex parte Millsite Investment Co (Pty) Ltd 1965 (2) SA 582 (T) H at 585 - 6; Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 (W) at 461F - 462H). It is probably true that, as remarked in the Cerebos Food case (at 173E), the Court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw (cf Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A) at 781C - H; Botes v Van Deventer 1966 (3) SA 182 (A) at 198H; Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 (PC) at 836B; Salmond Jurisprudence 11th ed at 503 - 4; Paton Jurisprudence 4th ed para 127). Salmond (op cit at 504) states that: "Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. It is difficult to compose a closer definition of the distinction than this"*³²

[47] To attach the right to enforce contractual terms to the discretionary question of whether the mortgaged property should be declared executable, creates an uncertainty as to when or even if judgment can ever be granted for the indebtedness under the contract. In effect, it seeks to create adiscretion in relation to the application of the substantive law where none exists. This strikes at the very heart of these commercial contracts. It is not merely a procedural regulation of process. What is posited is that a postponement of uncertain duration and effect be given across the board in each instance where the debtor's residence is the security for the debt and without consideration of any other factor. This fails to draw a distinction between the right to judgment on the one hand and the right to execute on the other.

[48] Whilst the NCA aims to correct imbalances by providing additional rights and protections to the consumer, it also aims to ensure that South Africa's credit market

³¹ 1986 (2) SA 734 (A)

³² Id at p 754G

becomes and remains “*competitive, sustainable, responsible [and] efficient*”.³³ This must not be forgotten in the navigation of the special considerations which must, of necessity, apply to the execution process where the homes of creditors are in jeopardy of foreclosure.

[49] I find that the applicants, in each instance, are entitled to the orders that they seek in relation only to the money judgements. I respectfully agree with Lamont J in *949 Cottage Lane* that there is no reason to dictate that there be judicial oversight in relation to these matters as there is no danger of foreclosure at this stage. This said, even if it could be argued that the court has discretion to postpone the judgment sought, there is, to my mind, no basis made out for such relief in each of the cases before me.

[50] In relation to the costs in each matter, attorney and client costs have been awarded where provided for in the agreement and pressed for on behalf of the applicant.

[51] In each instance an advisory recordal which serves to inform the respondent of the fact that the agreement may be reinstated notwithstanding the taking of judgment is recommended to be included in each order.

I thus grant the following orders under each of the following cases:

Case Number: 20321/2017

³³ Section 3 of NCA

1. The respondents are jointly and severally liable to the applicant in the amount of R725 423.21 together with interest thereon at the rate of 9.10% per annum, capitalized monthly, from 29 March 2017 to date of payment;
2. The respondents are to pay the costs of suit on an attorney and client scale such liability to be joint and several.
3. The balance of the relief sought is postponed *sine die*.
4. The respondents are hereby advised that if they pay the arrear amounts owing under the agreements (i.e. the total of all instalments 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) which amounts can be obtained from the applicant, the respondents can resume paying the usual instalments under the agreement in the normal course of such agreement.

Case Number: 39655/2017

1. The respondent is liable to the applicant in the amount of R941 981.86 together with interest on this amount at the rate of 11.70% per annum calculated daily and compounded monthly from the 10th of October 2017
2. The respondent is to pay the cost of suit.
3. The balance of the relief sought is postponed *sine die*.
4. The respondent is hereby advised that if he/she pays the arrear amounts owing under the agreement (i.e. the total of all instalments 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 so remedied - which amounts can be obtained from the applicant) the respondent can resume paying the usual instalments under the agreement in the normal course of such agreement.

Case Number: 40453/2017

1. the respondents are liable to the applicant in the amount of R1 454 248.00 together with Interest on this amount at the rate of 12.50% per annum calculated daily and compounded monthly from the 4th of October 2017;
2. The respondents are to pay the cost of suit which liability is to be joint and several.
3. The balance of the relief sought is postponed *sine die*.
4. The respondents are hereby advised that if they pay the arrear amounts owing under the agreements (i.e. the total of all instalments 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) which amounts can be obtained from the applicant, the respondents can resume paying the usual instalments under the agreement in the normal course of such agreement.

Case number: 00435/2018

1. The respondent is liable to the applicant for the amount of R1 357,148.50 together with interest on this amount at the rate of 10.70% per annum calculated daily and compounded monthly from the 27th of December 2017;
2. The respondent is to pay the costs of suit.
3. The balance of the relief is postponed *sine die*.
4. The respondent is hereby advised that if he/she pays the arrear amounts owing under the agreement (i.e. the total of all instalments 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 so remedied - which amounts can be obtained from the applicant) the respondent can resume paying the usual instalments under the agreement in the normal course of such agreement.

Case Number: 24653/2017

1. The respondents are liable jointly and severally to the applicant for the amount of R449 624.58 together with interest on this amount at the rate of 11% per annum, compounded monthly in arrear from 1 May 2017 to date of payment.
2. The respondents are to pay the cost of suit which liability is to be joint and several.
3. The balance of the relief sought is postponed *sine die*.

4. The respondents are hereby advised that if they pay the arrear amounts owing under the agreements (i.e. the total of all instalments 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) which amounts can be obtained from the applicant, the respondents can resume paying the usual instalments under the agreement in the normal course of such agreement.

Case Number: 41765/2017

1. The respondent is liable to the applicant for the amount of R621 693 together with Interest thereon at the rate of 8.80% per annum, compounded monthly in arrear from 1 October 2017 to date of payment;
2. The respondent is to pay the costs of suit.
3. The balance of the relief is postponed *sine die*.

The respondent is hereby advised that if he/she pays the arrear amounts owing under the agreement (i.e. the total of all instalments 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 so remedied - which amounts can be obtained from the applicant) the respondent can resume paying the usual instalments under the agreement in the normal course of such agreement.

Case Number: 44904/2017

1. The respondent is liable to the applicant for the amount of R1, 974, 928.13 with Interest thereon at the rate of 10.90% per annum, compounded monthly in arrear from 26 October 2017 to date of payment.
2. The respondent is to pay the costs of suit.
3. The balance of the relief is postponed *sine die*.
4. The respondent is hereby advised that if he/she pays the arrear amounts owing under the agreement (i.e. the total of all instalments 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 so remedied - which amounts can be obtained from the applicant) the respondent can resume paying the usual instalments under the agreement in the normal course of such agreement.

Case Number: 45113/2017

1. The respondents are liable jointly and severally to the applicant for the amount of R1 131 885.29 with interest thereon at the rate of 10.90% per annum, compounded monthly in arrear from 1 October 2017.
2. The respondents are to pay the cost of suit which liability is to be joint and several.
3. The balance of the relief sought is postponed *sine die*.
4. The respondents are hereby advised that if they pay the arrear amounts owing under the agreements (i.e. the total of all instalments 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) which amounts can be obtained from the applicant, the respondents can resume paying the usual instalments under the agreement in the normal course of such agreement.

**FISHER J
HIGH COURT JUDGE
GAUTENG LOCAL DIVISION**

Date of Hearings: Unopposed Motion Court : 19 to 23 February 2018

Judgment Delivered: 05 March 2018

APPEARANCES:

For the Applicants: Adv V Fine in case: 20321/2017.

Instructed by Tim Du Toit & Co.Inc.

Adv R Carvalheira in cases: 39655/2017; 40453/2017; 00435/2018.

Instructed by Glover Kannieappan Incorporated.

Adv S Van Aswegen in cases: 24653/2017; 41765/2017; 44904/2017; 45113/2017

Instructed by Strauss Daly Inc.

For the Respondent: Cases are all unopposed.