THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 394/2019

In the matter between:

FIRSTRAND BANK LIMITED	**APPELLANT**
And	
MINETTA CECILIA PETRONELLA MCLACHLAN	**FIRST RESPONDENT**
ROSHEN MAHARAJ	**SECOND RESPONDENT**
KOMARIE MAHARAJ	**THIRD RESPONDENT**
ABSA BANK LIMITED	**FOURTH RESPONDENT**
STANDARD BANK OF SOUTH AFRICA	**FIFTH RESPONDENT**
WESBANK LIMITED	**SIXTH RESPONDENT**

Neutral citation: *FirstRand Bank Ltd v McLachlan and Others* (394/2019) [2020] ZASCA 31 (01 April 2020)

Coram: SALDULKER, SWAIN, SCHIPPERS and MBATHA JJA and EKSTEEN AJA

Heard: 12 March 2020

Delivered: 01 April 2020

Summary: National Credit Act 34 of 2005 (NCA) – debt review – rescission of order for debt review granted in the magistrate's court – monthly instalment insufficient to cover interest – debt review order void – rescission order not appealable.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Tsoka, Windell JJ and Reyneke AJ, sitting as court of appeal):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following order:

'The appeal is dismissed with costs.'

JUDGMENT

Mbatha JA (Saldulker, Swain and Schippers JJA and Eksteen AJA concurring)

[1] This appeal raises two issues: firstly, the powers of the magistrate's court in making a debt review order in terms of s 86(7)*(c)*(ii) of the National Credit Act 34 of 2005 (the NCA); and secondly, whether the rescission of a debt review order, by virtue of it being null and void, is appealable.

[2] On 25 November 2011 the magistrate's court, Westonaria (the magistrate's court) granted a debt review order in terms of s 86(7)*(c)*(ii) in favour of the second and third respondents (the respondents), Roshen and Komarie Maharaj. The respondents complied with the order until June 2017, when the appellant (the bank) brought an application for the rescission of the order in terms of rule 49(8) of the Magistrates' Court Rules on the ground that it was void *ab origine*. The magistrate upheld the application and rescinded the debt review order. In an appeal to the Gauteng Division of the High Court, Johannesburg, the order of the

magistrate was set aside. The present appeal, with the special leave of this Court, is against the order of the high court.

[3] The facts giving rise to the appeal are common cause. In or about September 2006 the bank and the respondents entered into a written Grant of Loan Agreement (the Loan Agreement), in terms of which the bank advanced an amount of R2.1 million to the respondents to purchase an immovable property secured by a mortgage bond. The monthly instalment was fixed at R20 335,07, inclusive of 10,05 per cent interest per annum calculated daily and compounded monthly. The interest was variable at the instance of the bank.

[4] In 2010 the respondents found themselves in a financial predicament as a result of which they lodged an application for debt review in terms of s 86 of the NCA with the first respondent (the debt counsellor), who prepared a debt repayment proposal. The proposal was duly referred to a magistrate (the debt review court) in terms of s 86(8)(*b*) of the NCA. A debt review order was subsequently granted as set out earlier. In granting the debt review order the debt review court did not, however, adopt the repayment proposal submitted by the debt counsellor.

[5] In terms of the order, the respondents were declared to be over-indebted and their obligations were re-arranged. With regard to the Loan Agreement, the monthly instalments were reduced to R8 185,50 per month and the period was extended to 261 months. There was some dispute as to whether the debt review court also varied the interest rate, which was fixed at 12,55 per cent for the duration of the repayment period and, if so, whether the bank had agreed to the rates. Both the magistrate and the high court found, however, that the interest payable immediately prior to the debt review order had been fixed in terms of the Loan Agreement at 12,55 per cent and that there had accordingly been no change

in the interest rate. This issue is not decisive in the present appeal and I shall accept the finding of the courts below for purposes of this judgment.

[6] The effect of the debt review order, however, was that the monthly instalment would not even cover the monthly interest accruing on the outstanding balance. A calculation of interest alone on the balance due on 25 November 2007, calculated at 12,55 per cent, would have required a repayment of almost R22 000 per month, substantially more than the R8 185,50 which was ordered by the court. In order to achieve a payment of R8 185, 50 per month as stipulated in the debt review order, the interest rate would have to be reduced to 4,5 per cent per annum. In the result, it was factually impossible for the respondent to service the interest on a monthly basis, let alone the capital amount owed. The consequence of this order was that the debt owing under the Loan Agreement has grown to more than R3 million since the granting of the debt review order. Self-evidently, at the conclusion of the repayment term a substantial amount will remain due.

[7] In October 2016 the Western Cape Division of the High Court delivered judgment in *Nedbank Limited v Jones and Others* [2016] ZAWCHC 139; 2017 (2) SA 473 (WCC). In *Jones* the following order was made:

'A. A magistrate's court hearing a matter in terms of s 87(1) of the National Credit Act 34 of 2005, does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and any order containing such a provision is null and void.

B. A re-arrangement proposal in terms of s 86(7)*(c)* of the National Credit Act that contemplates a monthly instalment which is less than the monthly interest which accrues on the outstanding balance does not meet the purposes of the National Credit Act. A re-arrangement order incorporating such a proposal is ultra vires the National Credit Act and the magistrate's court has no jurisdiction to grant such an order.'

The judgment in *Jones* prompted the application for rescission which was founded firmly on the conclusions in *Jones*.[1] The appellant contended that it first became aware of the nullity of the debt review order when the judgment in *Jones* was delivered and that the application for rescission was therefore brought within the one year period provided for in rule 49(8). This contention was upheld in the high court and is not disputed in the present appeal.

[8] It is accordingly necessary first to consider the merits of the conclusion in *Jones*. This requires an interpretation of the NCA. The principles which find application to the interpretation of statutes are well settled and were summarised in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[2] In the case of the NCA, s 2(1) enjoins a court when interpreting the NCA to do so in a manner that gives effect to the purpose of the Act as set out in s 3 thereof.

[9] The NCA was promulgated against the background of a history of inequality in bargaining power which often resulted in large credit providers imposing their will, unreasonably, upon vulnerable credit consumers. The purpose of the NCA, broadly speaking, is therefore to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry.[3] It provides for the protection of credit consumers against

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[1] See also *Nedbank Limited v Norris and Others* [2016] ZAECPEHC 5; 2016 (3) SA 568 (ECP).

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at 603F-604B this Court stated:
'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.'
See also *Theron v Premier, Western Cape* [2019] ZASCA 6 para 19-21.

[3] Section 3 of the NCA provides:
'**Purpose of Act**
The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –
(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
(b) ensuring consistent treatment of different credit products and different credit providers;

the historical abuses by credit providers in a manner articulated in ss 3*(a)-(i)*. For purposes of the present inquiry three of these protections are of particular significance. Section 3*(d)* is directed at promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers. Sections 3*(g)* and *(i)* are directed pertinently at the protection of over-indebted consumers. Section 3*(g)* seeks to protect over-indebted consumers by providing mechanisms for resolving their over-indebtedness 'based on the principle of satisfaction by the consumer of all responsible financial obligations'. In similar vein s 3*(i)* seeks to protect consumers by '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 the credit agreement'.

[10] Sections 86-88 set out the procedure for the debt review of a consumer who is found to be over-indebted as envisaged in s 79 of the NCA.[4] Where a debt

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(c) promoting responsibility in the credit market by –
(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by –
(i) providing consumers with education about credit and consumer rights;
(ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
(f) improving consumer credit information and reporting and regulation of credit bureaux;
(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
(i) 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.'

[4] Section 79(1) provides:
'**Over-indebtedness**
(1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's –
(a) financial means, prospects and obligations; and
(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.

counsellor has found the consumer to be over-indebted they may issue a proposal recommending that the magistrate's court make an order:

'(ii) that one or more of the consumer's obligations be re-arranged by –

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) . . . .'[5]

A debt review court may, pursuant to such a proposal, 'make an order re-arranging the consumer's obligations in any manner contemplated in s 86(7)*(c)*(ii)'.[6]

[11] The legislature's declared purpose with the procedure set out in ss 86 and 87 is to provide a mechanism for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations (s 3*(g)*). Debt counsellors (in terms of s 86(7)*(c)*) and magistrates (in terms of s 87 (1)*(b)*(ii)) are mandated to seek an equitable balance between the respective rights and obligations of credit providers and consumers (s 3*(d)*) in order to establish a debt restructuring and enforcement which places a priority on the eventual satisfaction of all responsible consumer obligations assumed under the credit agreements (s 3*(i)*). Responsible obligations in the context of the Act, are all those obligations lawfully undertaken[7] under a credit agreement which are not reckless as envisaged in s 80.[8] It has not been suggested that the Loan Agreement was either reckless or unlawful.

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[5] Section 86(7)*(c)*(ii).
[6] Section 87(1)*(b)*.
[7] Sections 89-91 provide for unlawful agreements and provisions contained in a credit agreement which would be unlawful.
[8] Section 80(1) provides:
'**Reckless credit**

[12] Two features emerge from these provisions as they appear in their context within the scheme of the NCA. Firstly, the debt review court is empowered to 're-arrange' (s 86 (7)*(c)*(ii)) or 'restructure' (s 3*(i)*) the consumer's obligations under the credit agreement. It is not empowered to alter or amend the obligation. Hence, in *Norris* Goosen J held that 'a re-arrangement order does not, and cannot, extinguish the underlying contractual obligations'.[9] This conclusion must be endorsed.

[13] Secondly, in re-arranging the obligations the debt review court is enjoined to do so with due deference to the legislative purpose articulated in ss 3 *(d)*, *(g)* and *(i)* of the NCA.

[14] The obligations undertaken in this matter are twofold. Firstly, the repayment of the capital sum advanced and secondly, the payment of interest at the agreed rate on the outstanding balance of the capital from time to time.

[15] The point of departure in any re-arrangement must of necessity be the provisions of the NCA and in particular s 3 as set out earlier. Where s 86(7)*(c)*(ii)*(aa)* empowers a magistrate to re-arrange the debt repayment by extending the period and reducing the monthly instalments 'accordingly' it envisages a reduction in the monthly instalment, with a concomitant extension of the repayment period, which would have the effect that all the obligations

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(1) A credit agreement is reckless if, at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, other than an increase in terms of section 119(4) –

(a) the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time; or

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that –

(i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or

(ii) entering into that credit agreement would make the consumer over-indebted.'

[9] *Norris* para 44.

assumed under the credit agreement would be satisfied at the conclusion of the extended period.

[16] In *Seyffert and Seyffert v FirstRand Bank Limited* [2012] ZASCA 81 this Court considered a proposal by a debt counsellor which had been rejected by a credit provider. It held:

'The proposal envisaged payments from October 2009 when the balance owing was apparently R203 786,18 and, clearly, even with regular payments of the suggested instalment, the debt would not have been discharged within that period. Close examination of the proposal reveals that it is based on the monthly instalment being used to discharge some of the interest as it accumulated with no payments being made in respect of the capital amount of the loan. In the result there would be a balance of R28 898,64 still due in September 2029. Not even the accumulating interest (which the debt counsellor set at 10 per cent per annum) would have been covered by payment of the proposed instalments.'[10]

It proceeded to conclude:

'Their restructuring proposals were simply, as the court below found, "devoid of economic rationality", and would have left a substantial part of the debt unpaid.'

[17] These remarks are equally apposite to the debt review order in this case. For the reasons set out earlier a debt review order which does not result in the satisfaction of all responsible obligations assumed under the credit agreement during the repayment period does not meet the purposes of the NCA. In the result I agree with the conclusions reached in *Jones* which must be endorsed.

[18] Reverting to the facts of this case, the debt review court did not specify in terms of which sub-provision of s 86(7)*(c)*(ii) it purported to act. Counsel on behalf of the respondents, however, acknowledged that the order purports to be in accordance with s 86(7)*(c)*(ii)*(aa)*. As recorded earlier the debt review court did not make an order in accordance with the proposal of the debt counsellor.

[10] *Seyffert* para 10.

Rather, it reduced the monthly instalments substantially from that proposed by the debt counsellor and extended the period for repayment beyond that which the debt counsellor had envisaged. The reduction of the monthly instalment was so substantial that it does not remotely cover the monthly interest due in terms of the order. Such an order does not serve to protect the interests of the consumer who would, at the end of the period, be left with a substantial debt which they would in all likelihood be unable to pay. The debt review order is therefore *ultra vires* the provisions of the NCA and was accordingly void *ab origine*.

[19] The high court, considered, however, that whereas the debt review order was issued prior to the judgment in *Jones*, the findings of the court in *Jones* were of no application at the time when the debt review order was made. In this respect the high court erred. Neither the findings in *Jones* nor in *Norris* created new law. These judgments merely pronounced on the meaning of the NCA, as it was promulgated in 2005.[11] Before us counsel for the respondents did not contend otherwise. The reasoning of the high court can therefore not be sustained. In the result the rescission order was correctly granted.

[20] By virtue of the conclusion to which I have come on the first issue the appealability issue pales into insignificance. I shall accordingly deal briefly with this aspect.

[21] The law on which judgments are appealable is settled. I am in full agreement with the counsel for the appellant that the rescission order granted by the magistrate's court was not appealable in terms of s 83*(b)* of the Magistrates' Court Act 32 of 1944. It was an interlocutory order, which placed the parties back in the position in which they were before the re-arrangement order was granted.

[11] See *Finbro Furnitures (Pty) Ltd v Registrar Deeds Bloemfontein and Others* [1985] 4 All SA 388 (AD); 1985 (4) SA 773 (A) at 804D.

This Court in *HMI Healthcare Corporation (Pty) Ltd v Medshield Medical Scheme and Others* [2017] ZASCA 160 stated in para 18:

'It is plain that a rescission order does not have a final and definitive effect. In *De Vos v Cooper & Ferreira* this court expressed the view that "[s]o 'n bevel [that is, a rescission order] het immers nie enige finale of beslissende uitwerking op die geskilpunte in die hoofgeding nie". The rescission order simply returns the parties to the positions which they were in prior to the ex parte order being granted. *De Vos* relied inter alia on *Gatebe v Gatebe* and *Ranchod v Lalloo*. In *Gatebe*, De Villiers JP held:

"The order therefore does not dispose of the main case or of any of the issues in the main case, and therefore has not the effect of a definitive sentence in this behalf. It still remains to consider whether it has not the effect of a definitive sentence in that it causes irreparable prejudice. Here again it seems to me to be clear that an order merely rescinding a default judgment does not cause irreparable prejudice, for in the definitive sentence the effect of the decision can obviously be repaired."' (Footnotes omitted.)

[22] The judgment sought to be appealed by the respondents lacked any of the attributes in the *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (AD); [1993] 1 All SA 365 (A), (536B-D) where the court ruled against the appealability of the interim order made by the court of first instance. It held that the interim order should be tested against (i) the finality of the order; (ii) the definitive rights of the parties; and (iii) the effect of disposing of a substantial portion of the relief claimed. Therefore, the reliance by the court a quo in *Slabbert v MEC for Health and Social Development, Gauteng* [2016] ZASCA 153, was misplaced. The door is still open to the respondents to approach the magistrate's court for a determination of a new debt review order.

[23] I turn to the costs of the appeal. The respondents counsel submitted that, in the event that the appeal is upheld, this Court should make no order as to costs as the prosecution of the appeal was in the public interest. This could not be the case as the matter rested on the interpretation of the provisions of the NCA. The

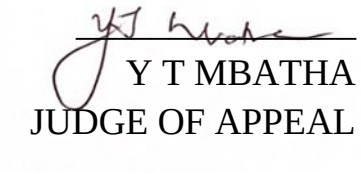
respondents could have withdrawn their opposition to the appeal to minimise costs, but pursued the appeal to the date of the hearing. The respondents could have abided by the decision of this Court, if they felt that it was in the public interest, but failed to do so. For these reasons, the respondents should be ordered to pay the appellant's costs, including the costs of two counsel.

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

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following order:

'The appeal is dismissed with costs.'



Y T MBATHA
JUDGE OF APPEAL

Appearances

For appellant:	A Gautschi SC (with him B Stevens and J Chanza)
Instructed by:	CF Van Coller Attorneys, Germiston
	Symington & De Kok, Bloemfontein
For respondents:	J C Viljoen
Instructed by:	Morgan Attorneys, Johannesburg
	Du Toit Lamprecht Incorporated, Bloemfontein.