IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Reportable

Case No.: 3325/2023

Matters heard on: 16 October 2024

Judgement delivered on: 19 November 2024

In the matter between:

THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA **Applicant**

And

SANDILE CHISTOPHER NTSEKWA **1ST Respondent**

BABALWA NTSEKWA **2nd Respondent**

JUDGMENT

Zono AJ

Introduction

1. The applicant approached this court by way of a notice of motion supported by an affidavit[1]. The applicant seeks the following exact relief in the notice of motion:

"*1.1 That the judgment be entered against the first and second respondents ("respondents") jointly and severally, the one to pay the other to be absolved for:*

1.1.1 Payment in an amount of R2172 043.03 (Two Million One Hundred and Seventy-Two Rand and three cents) together with interest at the rate of 10.25% per annum calculated from 27th March 2021 to date of full and final payment, both days inclusive;

1.2 That the immovable property better known as:

1.2.1 Farm Nr 440 division of Sutterheim Eastern Cape (measuring 179872) ha

1.2.2 Portion 13 of the farm Kabuse Nr 411 Division of Stutterheim, Eastern Cape (measuring 42,4584) ha

1.2.3 Farm 443 division of Stutterheim, Eastern Cape (measuring 13, 4733) ha

1.2.4 Farm cotoneaster Nr 424 Division of Stutterheim, Eastern Cape (Measuring 77.4809) be declared specially executable in favour of the applicant;

[1] Rule 6 (1) of the Uniform Rules

1.3 The respondent's attention is drawn to Section 26 (1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the respondents claim that the order for execution will infringe with that right, it is incumbent on the respondents to place information supporting that claim before the court.

1.4 That above mentioned properties be sold by the applicant or its appointed agent in conjunction with the sheriff of the court by public auction or private treaty;

1.5 That the respondents pay the costs hereof jointly and severally on a scale as between attorney and client.

1.6 Further and alternative relief".

2. In support of the aforesaid relief the applicant avers that; the respondents are married in community of property. They would be jointly and severally liable for the indebtedness towards the applicant. On or about 13th August 2013 the parties entered into a loan agreement in terms of which the applicant lent and advanced, alternatively made available a credit facility to the respondents in the amount of R1 620 000 (one million six hundred and twenty thousand rand). It was a material term of agreement that the respondents would repay the term loan in 16(sixteen) annual installments of which the first payment would be the sum of R101250.00 payable on the same day.

3. Should the respondents be in default, the full amount of the term loan would be payable and the full outstanding balance would immediately become due and payable without any further notice to the respondents. The applicant would be entitled to call up all or any security granted to the applicant, including to launch court proceedings in terms of which the immovable properties over which covering mortgage bonds that were registered in its favour be declared

executable. In the event of breach, the applicant would be entitled to cancel the agreement and terminate any services available to the respondents whilst the respondents remain in breach of the terms of the loan agreement.

4. The parties appointed their respective *domicillium citandi et executandi* where all notices and proceedings would be served in terms of the agreement. Clause 13.4 of the loan agreement contemplates that a written notice of default must be given to the borrower. The purpose of the clause is exactly the same purpose contemplated in Section 129 of the National Credit Act 34 of 2005.

5. Clause 13.4 Provides:

"13.4 provided, however that:

13.4.1 Land bank has given the borrower written notice of such default and has proposed that the borrower refer the credit agreement to a debt Counselor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under this credit agreement or develop and agree on a plan to bring repayments up to date or has given the borrower notice to terminate any debt review process under Section 86 of the National Credit Act which may then be underway in respect of this credit agreement, and

13.4.2 The borrower is, and has been in default under this credit agreement for at least twenty (20) business days;

13.4.3 at least ten (10) business days have elapsed since Land Bank delivered the notice contemplated in clause 13.4.1; and

13.4.4 in the case of a notice in terms of clause 13.4.1 above, the borrower:

13..4.1 has not respond to that notice; or

13.4.4.2 respond to the notice by rejecting Land Bank's proposal".

6. For all intents and purposes, not only the text that suggests that the provisions of the National Credit Act are applicable in this contract,[2] but also reference to the provisions the National Credit Act in the whole contract and the provisions. In any event this agreement is a credit agreement as defined in Section 8 (1) of the National Credit Act and a credit facility that conforms with the definition in terms of the provisions of Section 8(3) of the National Credit Act [3]. The applicant in its founding affidavit states that it complied with the provisions of Section 129 read together with Section 130 of National Credit Act 34 of 2005 and the respondents have failed to address their inability to pay and react to the Section 129 notice.

7. The first respondent, as a result of the agreement became a registered owner of the seven (7) properties. The respondents live in one of the properties that are subject matter of this matter. However, the applicant is primary and secondary bondholder over the properties.

8. The respondents fell in arrears and are consequently indebted to the applicant in the amount of R 2 253 235.03 excluding interests and legal costs as at 31 May 2023. The respondents made monthly payments up to and until 27th March 2021 and has failed to make any further payments in respect of their indebtedness towards applicant. The applicant concludes that the respondents are unable to make payments to liquidate their indebtedness towards the applicant and alleges that the respondents have admitted that unequivocally. That conduct is in breach of the contract or agreement.

[2] Section 129 of the National Credit Act 34 of 2005
[3] A credit provider undertakes to pay an amount or amounts, as determined by the consumer from time to time to the consumer or on behalf of, or at the direction of the consumer.

9. The applicant, in full realization that the respondents were in default, dispatched a notice in terms of Section 129 referred to above. The notice dated 16th January 2023 was served through the services of the sheriff. The respondents have failed to engage with the applicant despite due and proper notice.

10. This application is opposed by the respondents. In so doing the respondents have delivered their notice to oppose and their answering affidavit. Notice to oppose was served on 04th October 2023.

11. The respondents essentially state they paid off their arrear instalment in full. Before filing answering affidavit, the respondents furnished the applicant with proofs of payment respectively dated 28th September 2023 and 19th October 2023. Amounts of R 200 000.00 and R300 000.00 were respectively paid with a view to remedy their default and to bring their payment up to date. The respondent expressed their wish not to incur further legal costs and requested that the matter to be kept in abeyance for two months namely, from October 2023 to December 2023. Receipt of both payments was confirmed by the applicant's attorneys in their letter of 09th October 2023.

12. On 19th October 2023 the respondents caused a letter enclosing proof of R300 000.00 to be delivered on the applicant's attorneys. In their letter they referred to their letter of 06th October 2023 enclosing proof of payment of R200 000.00. In two paragraphs the respondents' letter is worded as follows:

"*Our clients instruct us that he has since settled the arrears and we attach hereto proof of payment in the amount of R 300 000.00.*

In the circumstances, kindly confirm that the matter will be withdrawn and our client tenders' payment of legal costs todate."

13. Relying on the certificates of balance signed respectively on 08th May 2023 and 10th May 2023 and Ad Hoc account transaction list evincing respondents' payments and indebtedness, the applicant refused to withdraw the application. The applicant expressly indicated that the matter can only be withdrawn upon payment of the full capital balance with interest and legal costs. The applicant invited the respondents to furnish formal settlement proposals for approval. The proposals would be approved subject to respondents' disclosure of their full financial position. No further correspondence appears to have passed. Answering affidavit was filed of record.

14. The respondents accept the terms of agreement as foreshadowed above. They contend that they continued to pay the annual installments until around March 2021. They did not pay the annual installments thereafter including the year 2022 because of the negative effects of Covid 19 pandemic and the applicant was advised of respondents' financial situation.

15. The respondents fundamentally state in their answering affidavit that:

"*9. I had prior to the launching of this application missed two annual installments. I was accordingly in arrears to the applicant for an amount estimated around R200 000.00. I cannot be certain of the amount I was in arrears with because the applicant did not inform me through a breach letter nor the National Credit Act Section 129 Notice of the amount I was in arrears in".* The issue of the two annual installments does not seem to be in dispute. The dispute is only in respect of Section 129 notice[4].

16. For context on this subject or related subject, in the founding affidavit the applicant makes the following contention:

[4] Expressio est exclusio alterius – express mention of the section 129 notice is an exclusion of installment amounts.

"6.3.1 The respondents were obliged to repay the term loan in sixteen (16) annual installments of which the first payment in the sum of R 101 250.00 was due, owing and payable on 13th August 2014." This allegation is expressely confirmed by the respondents.

17. Respondents further confirms that on 28th September 2024 and 13th October 2024 they paid respective amount of R 200 000.00 and R 300 000.00 which amounts come to a total of R 500 000.00. It is a common cause that this amount of money was paid. According to the respondent the credit agreement was "*ipso facto*" reinstated in terms of the provisions of Section 129 (3) of National Credit Act.

18. With regard to the fact that the applicant seeks an order declaring the respondent's properties executable, the respondents state that it is inappropriate and premature to seek an order of executability before or at the same time with the monetary judgment. There must first be a monetary judgment that will be executed against movable assets. Only in the event of a *nulla bona* return of service against movable assets that an order of executability may be sought.

19. Whilst it is common cause that parties entered into a loan agreement on 13th August 2023, they also agree on the terms of the contract or agreement. The respondents admit that they missed two annual installments. They defaulted. According to the respondents, the two annual installments with which the respondents were in arrears were approximately R 200 000.00. That estimate is not gainsaid. However, the respondents paid to the applicant a total amount of R500 000.00 during the months of September 2023 and October 2023 to liquidate their arears. These crisp facts are determinative of this matter.

20. It appears to be in dispute that the applicant did dispatch the requisite notice in terms of Section 129 read with section 130 of the NCA. I set out to deal with this aspect during the course of my judgment.

Discussion and analysis

21. It is not pleaded by the applicant that when the respective payments of R 200 000.00 and R 300 000.00 amounting to a total sum of R 500 000.00 were paid by the respondents the credit agreement had been cancelled. It is therefore implied that the credit agreement was extant when those payments were made. The issue therefore that arises for determination is whether those payments remedied respondents' default. This drives me now to the provisions of Section 129 (3) of the NCA.

22. *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 a credit agreement by paying to the credit provider all amounts, 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"

23. For context it worths a while to similarly quote the provisions of Section 129 (4) of National Credit as the provisions of Section 129 (3) of NCA are subject thereto. They provide as follows:

"4) A credit provider any not reinstate or revive a credit agreement after-

(a) the sale of nay 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."

24. The two provisions set out instances where credit agreement may be revived, reinstated and or remedied. However, they deal and provide for different circumstances and different stages of default. Section 129 (3) of NCA is applicable and can suitably be invoked before cancellation of credit agreement, while Section 129 (4) of NCA applies when there is termination, surrender of goods and execution of court orders arising from enforcement of credit agreement.

25. In **Cools Ideas** [5] the Constitutional Court held:

"28. A fundamental *tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)"[6].

[5] Cools Ideas 1186 CC v Hubbard and another 2014 (4) SA 474 (CC) Para 28

[6] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Developmnet Company and Others 2014 (3) BCLR 265 (CC) Para 84- 86; North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd 2013 (5) SA 1 (SCA) Para 24

26. According to Section 129 (3) of the National Credit Act a default may be remedied before the credit provider cancels the credit agreement. The operative word for purposes of this judgment is the verb "*remedy*": Oxford dictionary offers the following definition for the verb "*remedy*."

"*Set right (an undesirable situation); put right*."

27. In the context of the empowering provision[7] a consumer may only set or put right his default before the cancellation of the credit agreement by the credit provider. The only way to remedy a default is by paying all the amounts overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time of default.

28. Upon paying and or pursuant to the payment of R500 000.00, the respondents sought the applicant to withdraw this application as they believed that the arrears and the related costs or charges that were overdue were settled; penned a letter dated 19th October 2023 in terms of which the respondent requested applicant to withdraw the application with the respondent tendering all legal costs up to the date of the letter.

29. The request to withdraw these proceedings was turned down in terms of applicant's letter dated 09th October 202 (which I assume is an incorrect date). The applicant asserts in his letter as follows:

"*8. The matter can only be withdrawn upon payment of the full capital balance together with interest and legal costs in full.*

9.We accordingly await your client's formal proposal if it wishes to settle the matter amicably such a proposal will accordingly be reduced to a settlement agreement which is to be made an order of court".

[7] Natal Joint Municipality Pension Fund v Endumeni Municipality 2012(4) SA 593 at 603 Para 18

30. The applicant's inability to withdraw this application stems from its firm belief that it is entitled to the full capital balance. I do not agree. Only the overdue arrear amount and related costs or charges that is required to be paid to remedy the consumers default. The respondents paid more than or approximately double the arrear amount that was overdue. I accordingly come to a conclusion that the default was effectively remedied by the respondents. The payment of arrear amount was at a time when the credit agreement was still extinct. This is an important prerequisite for a consumer to successfully remedy the default in the credit agreement.

31. The applicant, in the whole tenor of his papers does not suggest that the overdue arrears or amounts were not paid. Instead the applicant acknowledges that an amount of R 500 000.00 was paid by the respondents during the months of September 2023 and October 2023, when the amount that was overdue was far lesser than that. It is not applicant's case that money, costs and charges referred to Section 129 (3) of the NCA were still not paid. The credit agreement between the parties was still not cancelled at the time the respondent paid the amount of R 500 000.00 to remedy the default.

32. If then the default was remedied, why is it necessary that we have this matter serving before this court? My view is that there was simple no virtue of having this application until the stage of argument, as the credit agreement was only reinstated in terms of Section 129 (3) of NCA when the payment of R 500 000.00 was made. The resistance by the applicant when it was timeously asked to withdraw the application is borne out by the fact that it insists on the payment of the whole capital balance. That view lacks the support of the law.

33. In Nkata[8] the Constitutional Court authoritatively settled the legal position in the following dictum:

[8] Nkata v First Rand Bank Limited and others 2016 (4) SA 257 (CC) para 108-109

"[108] This prompts the question whether the right of reinstatement in terms of Section 129 (3) (a) requires the debtor to pay back the full accelerated debt or only the arrear instalments. I readily embrace the conclusion of the High Court that only the arrear instalments, and not the full accelerated debt, needed to be paid in order to effect reinstatement. This flows without more from the wording and purpose of the provision. Reinstatement is predicated on "a credit agreement that is in default". It is a rescue mechanism that is available to the consumer precisely when she has fallen into arrears and may be liable to pay the full accelerated outstanding debt.

[109] The entitlement to reinstatement would be made useless if the amount due in terms of Section 129 (3) (a) were interpreted to mean the full accelerated debt as most consumers would be unable to reinstate the agreement by paying the full debt. That construction would also fall short of the purpose of the Act to encourage consumers to fulfil their financial obligations and resolve over-indebtedness".

34. Once all the amounts that are overdue, together with the credit providers prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied are paid and before cancellation of the agreement, the default is remedied and the credit agreement is *ipso facto* reinstated. It is reinstated by the operation of the law. [9] The respondents in their letter dated 09th October 2023 tendered the legal costs. The respondents in their answering affidavit did not withdraw their tender of costs. No legal costs yet have been quantified for payment. The applicant did not call for a separate payment of costs. The nature and extent of the legal costs has not been given to the respondents. Accordingly, applicant's legal costs were not due and payable when the default was remedied by payment of R 500 000.00. The respondents cannot reasonably be expected to take a proactive step to quantify

[9] Nkata (Supara) Para 100 and 105

the costs. Only the applicant as the credit provider can do that. On this the Constitutional Court [10] held:

"[123] Properly understood, Section 129 (3) does not preclude the reinstatement of a credit agreement where the consumer has paid all the amounts that were overdue but has not been given due notice of the reasonable legal costs, whether agreed or taxed, of enforcing the credit agreement".

35. In addition to the above, the applicant has not accounted for the amount of R 500 000.00 that was admittedly paid to it when in actual fact it was owed for two annual arrear instalments. It might be that the amount in excess of two annual arrear instalments may cover also the legal costs of enforcement up to the date when the default was remedied. I accordingly reiterate my finding that the default was duly remedied and the credit agreement was duly reinstated.

36. In the light of the fact that Section 129 (3) is subject to Section 129 (4) of NCA, it behoves one to deal with the provisions of subsection 4 with a view to clarify that the credit agreement was duly reinstated and default was remedied only by the fact of payment of R500 000.00. Subsection 4 creates a bar to the reinstatement revival of the credit agreement. The circumstances under which a credit agreement cannot be reinstated or revived are statutorily prescribed[11]. They are the exception or a bar to the principles governing reinstatement or revival of the credit agreement. A credit agreement may not be reinstated or revived after a sale of the property pursuant to an attachment order or surrender of property in terms of Section 127; after the execution of any other order enforcing that agreement; or after the termination thereof in accordance with Section 123.

37. All of the factors or circumstances that preclude or bar the reinstatement or revival of the credit agreement do not arise in this matter. On application of the

[10] Nkata (Supra) Para 123
[11] Section 129(4) of National Credit Act 34 of 2005

interpretation maxim: *Inclusio unius est exclusion alterius*[12]*"*, specific mention of these factors or circumstances under which a credit agreement may not be revived or reinstated is an exclusion of any other factor or circumstance not specifically mention in Section 129 (3) and (4) of the NCA. Having found that the credit agreement was duly reinstated at the time when a sum of R500 000.00 was paid and accepted by the applicant, I next deal with whether or not the institution of these proceedings was justified.

Were the instant proceedings justified?

38. Section 129 (1) of the NCA provides:

"1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to Section 130 (2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in Section 86 (10), as the case may be; and

(ii) meeting any further requirements set out in Section 130".

39. In broad general terms, legal proceedings may not be commenced unless a notice in terms of Section 129 (1) of NCA has been given to the consumer. The

[12] Express mention of one thing is an exclusion of the other

notice must either be brought to the attention of the consumer or reached the consumer. Averments must be made by the credit provider that the notice probably reached the consumer[13].

40. Firstly there are no express allegations in the applicant's founding affidavit that the notice, on balance of probabilities reached the consumer. Secondly there is no indication at all that a notice was ever addressed and sent to the second respondent[14]. No allegation in the founding affidavit that the requisite notice was specifically addressed to the second respondent or was sent for her attention. The notices dated 16th January 2023 was ostensibly intended to be received only by the first applicant. It was addressed as follows:

"*Sandile Christopher Ntsekwa*
5[...] D[...]
King Williams Town
5600
(By Sheriff)"

41. Failure to send or even attempt to send a Section 129 (1) notice to the second respondent vitiates these proceedings. It is so because both respondents are sued as consumers or as persons who applied for and granted term loan by the applicant. The following averments in the founding affidavit are apposite to underscore the point:

"***The respondents' indebtedness***

6.1 During or about 13th August 2013 the respondents duly applied for an was granted a term loan subject to the terms and conditions, which were accepted by the respondents, to which such loans are granted by the applicant….

[13] Sebola and Another v Standard Bank of South Africa and another 2012 (5) SA 142 (cc) para 74, 75, 76, 77, 83, 85, 86 and 87
[14] Section 7 of Interpretation Act 33 of 1957

63.1The respondents were obliged to repay the term loan in sixteen (16) annual installments, of which the first payment in the sum of R 101 250 .00 was due owing and payable on 13th August 2014…"

42. There are other instances in the founding affidavit where reference to respondents is not only in the plural form, but also specifically to both first and second respondents. I am therefore fortified by the pleadings that both respondents are dealt with and sued as consumers under credit agreement. Accordingly, on the assessment I have made above, I come to a conclusion that these proceedings were prematurely instituted against the second respondent. The second respondent is entitled to the same rights the first respondent and any other consumer is entitled to under Section 129 (1) of NCA. There is no justification for unequal treatment of the consumers and uneven application of the provisions of Section 129 (1) of NCA[15]. I am fortified in this proposition by the provisions of Section 9 (1) of the Constitution which provides:

"*Everyone is equal before the law and has the right to equal protection and benefit of the law."*

The second respondent was accordingly entitled to an individual notice addressed to her or brought to her attention, containing the same rights afforded by Section 129 (1) of NCA.

43. About the first respondent it is averred that services of the sheriff were solicited. In his return of service, the sheriff makes the following remarks and record:

"*On this 20th Day of February 2023 at 15:02 after a diligent search at 5[...] D[...], Zwelitsha as a result I was neither able to find Ntsekwa Sandile Christopher or some person apparently not less than 16 years of age and apparently residing or*

[15] Section 9 of the Constitution

employed there, I served this notice in terms of Section 129 on Ntsekwa Sandile Christopher at his/ her chosen domicillium citandi et executandi at 5[...] D[...], Zwelitsha by leaving a copy of the notice in terms of Section 129 at such domicillium.

Rule 4 (1) (a) (iv).

Premises found locked, affixed to security gate.

Address confirmed with (sic) neighbours at House No 5[...]….."

44. The first respondent contend in his answering affidavit as follows:

"*9. I had prior to the launching of this application missed two annual installments. I was accordingly in arrears to the applicant for an amount estimated at around R202 000.00. I cannot be certain of the amount I was in arrears with because the applicant did not inform me through a breach letter nor the NCA S129 notice of the amount I was in arrears in…"*

45. Paragraph 45-16 of the replying affidavit is dealing with paragraph 9 of the answering affidavit as follows:

"15. The contents of this paragraph is denied. The honourable court's attention is specifically drawn to what has been stated in paragraph 9.13, 9.14 and 9.15 of the applicant's founding affidavit. I reiterate that a notice in terms of Section 129 of the National Credit Act 34 of 2005 has been served by sheriff at respondents' chosen domicillium citandi at executandi and that the sheriff of this court confirmed the respondents are indeed resident at the address of service.

16. The applicant thus contends that there has been proper compliance with Section 129 of the National Credit Act 34 of 2005".

46. There is no direct allegation by or on behalf of the applicant that the first respondent on a balance of probabilities[16] received the notice. Accordingly, there are no averments that satisfy the court that the notice probably reached the first respondent as a consumer[17].

47. In **Balkind**[18] **Alkema J** interpreting Sebola Judgment made the following observations:

"37. The finding that s.129 requires that the notice reached the consumer, is expressed in various terms in the judgment. In paras 72 and 83 the judgment states that the section requires that the notice must be "provided" to the consumer; in paras 75 and 85 it states the notice must "come to the attention" of the consumer; in paras 86 and 87 it suggests that the notice must be "delivered" to the consumer; and in paras 74 and 77 it requires that the notice "reached" the consumer. The various expressions, coupled with the absence of any requirement in the Act of proof of actual receipt of the notice by the consumer, is in my respectful view indicative of a broad requirement that the consumer must be made aware of the notice, or that it came to his or her attention. (See para 77).

40. The caveat to the requirement of allegations to establish registered post and delivery to the correct post office, is therefore that if, notwithstanding these allegations, the notice did not come to the attention of the consumer, then the credit agreement may not be enforced due to non-compliance with s. 129…"

48. The applicant has not established that the notice has come to the attention of the first respondent as the consumer, therefore the credit agreement cannot be

[16] Sebola v Standard Bank of South Africa Ltd and another 2012 (5) SA 142 (CC) Para 74 and 75
[17] Balkind v ABSA Bank, *In re* ABSA Bank Ltd v Ilifu Trading 172 (CC) and Others 2013 (2) SA 486 (ECG) Para 34-40
[18] Balkind v Absa Bank (Supra) Para 37 and 40

enforced in those circumstances. Even if I am wrong on the finding I have made above, I still find that there are massive disputes of fact around the issue of Section 129 notice purportedly addressed to the first respondent. The first respondent refutes that notice in terms of Section 129 came to his attention[19].

49. In Zuma[20] the Supreme Court of Appeal observed as follows:

"26. *Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order…"*

50. On the conspectus of all the facts of this matter the applicant has not complied with the provisions of Section 129(1) of NCA. Section 129 (1) notice is a necessary notice to complete the cause of action of the credit provider. It is a condition precedent to the institution of the legal proceedings. A cause of action can only be complete and perfect once a requisite notice is issued prior to the commencement of proceedings[21].

51. This proposition necessarily supports a view that the applicant prematurely commenced or instituted the instant proceedings. There was no reason at all for the applicant to refuse to withdraw the application when it was asked to do so, especially after the default had been remedied. They should not have been instituted without Section 129 notice preceding their commencement.

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[19] Plascon- Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd 1984 (3) SA 623 (A) 634-5
[20] National Director of Public Prosecutions v Zuma 2009(2) SA 277 (SCA) 28 Para 26
[21] Herbstein and Van Winsen: The Civil Practice of the High Court of South Africa, 5th Edition, Volume 1 Pages 247, 249, 250, and 255

52. With regard to executability of immovable properties, Rule 46 provides as follows:

"(a) Subject to the provisions of Rule 46A, no writ of execution against the immovable property of any judgment of debtor shall be issued unless –

(i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or

(ii) such immovable property has been declared to be specially executable by the court or whose judgment is granted by the registrar under Rule 31 (5)"

53. The rule suggests that there must first be a judgment debtor, against whom monetary judgment has been granted; and that there must be a "*nulla bona*" return rendered to show that the judgment debtor has insufficient movable property before an order granting an immovable property executable is granted. Accordingly, judgment on executability of immovable property cannot be granted simultaneously with the monetary judgment.[22] It cannot even precede the granting of monetary judgment.

54. The prerequisite for a "*nulla bona*" return is a clear indication of how important right to housing is in our legal system.[23] Rule 46 and 46A of the Uniform Rules must be interpreted consistently with the purpose of Section 26 of the Constitution. They must be interpreted restrictively with a view to protect people's right to adequate housing. In those circumstances respondents' immovable properties cannot be declared executable.

[22] Changing Tides 17 (Pty) Limited N.O. v Tyler and Another (2757/2020) [2024] ZAECQBHC6 (30 January 2024) para 9-10.
[23] Section 26 of the Constitution

Conclusion

55. I have concluded that the default was remedied by the respondents when the payment of R 500 000.00 was paid to the applicant. The proceedings should have been withdrawn by the applicant at that stage when asked to do so by the respondents.

56. Section 129 (1)(b) of NCA prohibits the institution of legal proceedings to enforce the credit agreement before first providing notice to the consumer as contemplated in paragraph (a). I have found that at the time when the instant legal proceedings were commenced with the requisite notice had not been provided to the respondents. The current proceedings were prematurely and improperly instituted.

57. In the amalgam of the whole case applicant's application cannot succeed. I see no reason why a general rule that costs should follow the result cannot be applied.

ORDER

58. In the result I make the following order:

58.1 The application is dismissed with costs.

Zono AJ

Acting Judge of the High Court

APPEARANCES:

For the Applicant : Adv. Fourie

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Ref: O. Huxtable/cl/02V046001

For the Respondent: Adv. Somandi

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