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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2793/2022

1. REPORTABLE: ~~YES~~/ NO
2. OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
3. REVISED: YES / ~~NO~~

DATE: 06/05/2025

SIGNATURE OF JUDGE:

In the matter between:

MANUEL HEUNES

APPLICANT

and

**ABSA HOME LOANS GUARANTEE COMPANY (RF)
PROPRIETARY LIMITED**

FIRST RESPONDENT

ABSA BANK LIMITED

SECOND RESPONDENT

SHERIFF OF THE HIGH COURT

PRETORIA

THIRD RESPONDENT

**REGISTRAR OF DEEDS,
PRETORIA**

FOURTH RESPONDENT

JUDGMENT

HERSHENSOHN AJ

INTRODUCTION

[1] The current matter before me has its genesis as an urgent application which was set down on 5 November 2024. In this regard the matter was heard by my sister, the honourable Justice Mncube AJ on 5 November 2024 and was accordingly struck from the roll for a lack of urgency with the applicant to pay the costs on a party and party scale.

[2] The matter now comes before me as an opposed motion and was set down to be heard during the week of 22 April 2025.

[3] The applicant, at this stage represented himself and the respondents were represented by Advocate Kollapen.

[4] In the application before me the applicant seeks the following relief:

- (a) pending the outcome of the application that the execution of the judgment granted against the applicant on 4 October 2023 be suspended in terms of Rule 45A of the Uniform Rules of Court;
- (b) that the respondents are prevented from selling or transferring the units comprised of sections 1 and 2, together with the undivided shares of

the common property in Waterkloof Park (“the properties”) to any executioner purchaser or their successors in title pending the final determination of Part B of the application;

- (c) that the second respondent be directed to deliver to the applicant within five (5) days of such other period determined by the court certain information and relating more particularly to the interest rate change notices on the respective account number 8[...] for several dates set out from as far back as 2018 and up until the end of 2024;
- (d) a statement reflecting the calculation of the amounts in arrears in respect of the loan agreement since commencement of the loan agreement and to date of the statement;
- (e) a statement reflecting the current outstanding balance of the amount due in terms of the judgment, together with the calculation of said outstanding balance;
- (f) an order declaring that the applicant is entitled to remedy his default under the relevant civil agreement, being the home loan agreement, by satisfying the requirements of section 129(3) of the National Credit Act, 34 of 2005 (“the National Credit Act”) at any stage up to the realisation of the proceeds of a sale in execution pursuant to the judgment.

[5] That leave be granted to supplement his application in any way that may be necessary.

CHRONOLOGY

[6] Prior to dealing with the merits of this application it is possibly apposite to set out the following key events:

- (a) on 27 May 2022 Absa issued summons against the applicant for a default of his loan agreements and more particularly his home loan;
- (b) on 4 October 2023 summary judgment was granted by consent and such summary judgment was suspended for a period of three months on proviso that the applicant pay the current monthly instalment in the amount of R73,295.24 together with an additional amount of R40,000.00 towards the current arrears in the home loan account effective from 10 October 2023 until the arrears were settled in full, payment to be made directly into the applicant's home loan account with account number 8[...]. The suspension of the summary judgment order was further subject to the condition that:
 - (i) once the arrears of the home loan account had been settled in full then the applicant was to pay his normal monthly instalment on or before the due date;
 - (ii) in the event that the applicant failed to make payment as directed (then both the payment of the monthly instalment as well as the contribution towards the current arrears) then the respondents would be entitled to proceed with execution of the order;
 - (iii) the applicant was to pay the respondents' costs in respect of the application on a scale as between attorney and client, such costs to be debited to his own account and with the respondents;
- (c) on 10 October 2023 and despite the clear wording of the order setting out the terms upon which the summary judgment order was suspended, the applicant failed to make payment of the amounts agreed to. This appeared during argument to be common cause;

- (d) on 29 November 2023 the applicant paid the sum of R1,440,000.00 (this amount seems to differ slightly in the affidavits, in some cases recorded as being R1,446,000.00 or R1,448,000.00) believing it to have settled the outstanding arrears;
- (e) on 6 August 2024 the respondents notified the applicant of the fact that at that stage he was in arrears to the tune of some R511,735.82 and that they intended to proceed with the sale in execution;
- (f) on 10 September 2024 the respondents e-mailed the applicant and notified him of the sale scheduled for 31 October 2024;
- (g) on 7 October 2024 the applicant's attorneys requests a sale postponement to explore the Help You Sell option for the immovable property;
- (h) on 29 October 2024 the applicant filed the current urgent application to suspend the sale;
- (i) on 31 October 2024 the sale in execution proceeded and the property was sold to a third party for the sum of R1,1 million which sale is subject to the ratification of this court.

THE FACTS

[7] It is common cause that subsequent to the launching of the application and subsequent to its striking from the urgent roll, that sale in execution took place and the property was sold for the sum of R1,1 million as I have alluded to above. At this stage the sale is the subject of ratification by the court and, transfer has not taken place.

[8] It is also common cause that as matters currently stand, the summary judgment order as was granted by agreement and stands, and has of yet not been set aside. In my view this is an important aspect, as when one considers certain

portions of the relief and more particularly the relief sought in paragraph 4 thereof, this relates to issues which predate the summary judgment order, an order which has already been granted by this court and which order stands until such time as it is set aside.

[9] It is also common cause between the parties that to date the applicant has not launched a rescission application seeking to set aside the summary judgment order which was granted by agreement and further the applicant conceded that the current application before me was not an attempt to rescind the summary judgment order.

[10] From the above it appears that the only relief remaining in the notice of motion of any substance (if one were to assume that the relief sought in paragraphs 2 and 3 would concomitantly follow if the applicant were successful in the relief sought in paragraph 5) is the relief set out in paragraph 5 and more particularly that an order is sought declaring that the applicant is entitled to remedy his default under the relevant credit agreements being the home loan agreement by satisfying the requirements of section 129(3) of the National Credit Act at any stage up until realisation of the proceeds of a sale in execution and pursuant to the summary judgment.

[11] In this regard it appears that this is the crux of the matter before me. As currently worded paragraph 5 of the notice of motion as it stands and insofar as it concerns a creditor's right appear trite insofar as a creditor is entitled, within the ambit of section 129(3) of the National Credit Act, to remedy his default and to seek reinstatement of the credit agreement upon the grounds and the terms as set out in the said section of Act. This relief is axiomatic if one considers the provisions of the Act.

[12] However, I am alive to the fact that Mr Heunes is a layperson who drafted this application on his own and who similarly appeared in person and on his own may not legally minded. From what can be gleaned from the heads of argument and from his argument in court, is that in actual fact the relief ought to have been styled slightly differently and more particularly that, by virtue of his payment of the sum of

R1,440,000.00 made on 29 November 2023 he had paid the arrears and was as such entitled to reinstatement of the credit agreement.

[13] The abovementioned find credence in the founding affidavit from paragraph 12 to 14 of the founding affidavit. The applicant goes further in the founding affidavit to contend that it is important to note that the respondents record very clearly that up until the applicant took advice (ostensibly during the course of October 2024) he was not familiar with the concept of reinstatement of the agreements. He also conceded that he was advised to establish how much he would need to pay to reinstate the agreement should his payment of R1,440,000.00 not have done so.

[14] In this regard the founding affidavit records particularly as follows:

“16. Accordingly, on 16 October 2024 I sent an email to the first and second respondents’ attorneys of record, Haasbroek & Boezaart (“HB”) wherein I requested a comprehensive breakdown of the arrears of the home loan agreement from time to time. I did not tell them that I needed the breakdown to establish whether I had at any stage reinstated the home loan agreement.

17. In the event that I had not reinstated the said agreement, I also requested the current balance of the arrears together with the total of taxed costs and default charges to enable me to consider reinstatement of the home loan agreement. I attach a copy of the said email as annexure “MH3” hereto.”

[15] As I have already stated above the right of a creditor in terms of section 129(3) of the National Credit Act is axiomatic. However the question before me, as I understand the argument of the applicant, is whether the payment of the sum of R1,440,000.00 was in fact sufficient to reinstate the agreement.

[16] In this regard this requires a careful analysis of the provisions of section 129(3) of the National Credit Act. Section 129(3) of the National Credit Act provides as follows:

“(3) Subject to subsection (4) a consumer may–

- (a) at any time before the credit provider has cancelled the agreement re-dash instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider is permitted default charges and reasonable costs of enforcing the agreement up to the time of re-dash instatement; and*
- (b) After complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.*

(4) A consumer may not re-instate 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.”*

[17] Secondly, and as I was referred to in the heads of argument provided by the applicant and ostensibly upon which reliance is made was reference to a judgment in the Constitutional Court and more particular **Nkata v Firstrand Bank Ltd and others (Socio-Economic Rights Institute of South Africa as *amicus curiae*)** 2016 (6) BCLR 794 (CC). In this matter which is discussed by the Constitutional Court in much detail the applicant borrowed money from Firstrand Bank to finance the purchase of a residence. The home loan was a credit agreement in terms of the

National Credit Act and the applicant later fell into arrears on the repayments. The bank attempted to give notice to the applicant in terms of section 129(1) of the National Credit Act but sent its notice to an incorrect address. The bank applied for default judgment and on 28 September 2010 the registrar granted default judgment and authorised the sheriff to attach and sell the house to recover the outstanding debt. The applicant and the bank reached a settlement agreement that stayed the sale of the property. In this regard the applicant brought her payments up to date by March 2011 and then brought an urgent application to rescind the default judgment against her. The High Court dismissed the application. The applicant again fell into arrears and various attempts at debt review failed. The bank then sold the property to a third party purchaser and the applicant again approached the High Court contending that by paying the outstanding debt in March 2011 she had reinstated the credit agreement. In January 2014 the High Court found in her favour and ruled that the original credit agreements between the applicant and the bank had indeed been reinstated in March 2011 which precluded the bank from selling the property. The sale failed to be set aside.

[18] The bank appealed to the Supreme Court of Appeal against the decision and in March 2015 the Supreme Court of Appeal reversed the High Court order and held that the applicant could not have reinstated the agreement because the property had already been sold in execution. By a majority of the Constitutional Court, the appeal was upheld against the decision of the Supreme Court of Appeal and the Constitutional Court observed that because the constitutional values of fairness and equality inform the purposes of the Act, an interpretation of the Act should strike the appropriate balance between the competing rights of the consumer and the credit provider. The purpose of section 129(3) was to encourage consumers to pay their overdue debts, default charges and legal costs. Consumers with good standing were then rewarded with reinstatement of the credit agreements on the return of the attached property. The majority of the court found that the applicant had reinstated the credit agreement when she settled the arrears in full in March 2011. The consumer was not compelled to give notice to or seek the consent or cooperation of the credit provider. The consumer could not be expected to take creative steps to find out what legal costs needed to be paid in order for the reinstatement to occur nor could a consumer in the applicant's position be expected to initiate taxation of

the legal costs or seek agreement with the credit provider on the quantification of those costs. The credit provider had to take the necessary steps to recover the legal costs. These costs became due and payable only when they were reasonable, agreed or taxed and on due notice to the consumer.

[19] The bank had contended that the applicant's right to reinstate the credit agreement was limited by the provisions of section 129(4) of the National Credit Act. Section 129(4) precluded a consumer from reinstating a credit agreement after the property had been sold pursuant to an attachment order. It also prevents a consumer from reinstating the credit agreement after the extension of any other court order enforcing that agreement or after cancellation of the credit agreement. The majority of the Constitutional Court held that the sale in execution *in casu* would not have prevented reinstatement because it took place in April 2013, just over two years after the applicant had cleared her arrears for the first time. Although the bonded property had been attached no sale in execution occurred and no proceeds of the sale were realised at any time before she cleared her arrears in 2011. The applicant was accordingly within her rights to reinstate the credit agreement.

[20] In the matter before me there are several striking similarities but there are also certain differences.

[21] As was pointed out by myself above, the notice of motion with regards to this aspect seeks simply a declaration of rights which are, as I have already stated, self-evident. Insofar as I understand the applicant correctly, arguing the matter in person and from considering the founding affidavit in support of the relief he seeks, it appears that this is in fact the relief that the applicant seeks.

[22] I must immediately interject to mention that during the course of argument the applicant handed up a draft order to myself of revised relief he sought. In terms of the draft order, the relief sought in terms of the provisions of section 129(3) of the National Credit Act was effectively excluded. Counsel for the respondents argue that this amounted to an abandonment of the relief sought, however, considering that the applicant represented himself in the proceedings and *ex abundante cautella*, I believe

it is important to nonetheless consider this argument and as premised upon the facts.

[23] From my understanding of the **Nkata** judgment and more particularly the majority judgment, whether or not judgment had been granted is irrelevant. As such, whether or not summary judgment had been granted and whether or not had been complied with, is a fact, which when considering the provisions of section 129(3) of the National Credit Act is an aspect which may be considered, but more important facts which the court will consider is whether or not the overdue amounts together with the credit provider's permitted default charges and reasonable costs enforcing the agreement up to the time of reinstatement have been paid.

[24] Furthermore and returning to the facts of the matter before me and more particularly what is recorded in the founding affidavit it appears that reinstatement was not foremost in his mind when the applicant made the payment of R1,440,000.00. In fact in the following two or three paragraphs in his founding affidavit he concedes that the amount may not have been for the full amount of arrears and may not have included the default charges and the costs and that this aspect was an aspect which he still needed to determine from the attorneys and hence the dispatching of certain correspondence.

[25] Albeit that this is the applicant's contention, the fact of the matter remains that the reinstatement occurs by operation of law. In this regard and with reference to the **Nkata** judgment above, the Constitutional Court held as follows:

"[105] The reinstatement occurs by operation of law. This is so because the wording of the provision is clear that the consumer's payment in the prescribed manner is sufficient to trigger reinstatement. She may reinstate by paying the creditor provider arrears that are due, permissible default charges and legal costs. Reading in a requirement of prior notice to the creditor provider as well as a reinstatement that does not occur automatically against due payment, would unduly limit the value to the consumer of the remedy of reinstatement. It would unduly diminish the usefulness of the relief

of reinstatement of the consumer where saddled with the procedural requirements most consumers are likely to fault her on.”

[26] This then begs the question “*was there payment of R1,440,000.00 sufficient to pay all the arrears and sufficient enough to trigger the reinstatement by operation of law*”.

[27] Unfortunately the founding affidavit is not very helpful in this regard.

[28] In his replying affidavit the applicant appears to change tac, this time insisting that the R1,440,000.00 was paid not only to settle the arrears but also advance payments due and now contends that the first respondent refused to give him the information to determine whether or not he had reinstated the agreements, even after he was forced to bring the urgent application. (Paragraph 9 of the replying affidavit.)

[29] In support of these contentions the applicant relies on the statement of his bond accounts for the period 1 March 2023 to 29 February 2024.

[30] This in itself is also not of assistance in that although it indicates receipt of payments for that year in the sum of R1,448,000.00 and two further payments of R20,000.00 on 18 January 2024 and again on 6 February 2024, the statement still indicates an arrears at the end of the term in the sum of R224,849.12.

[31] During argument, counsel acting on behalf of the respondents referred me to a letter annexed to the respondents’ answering affidavit as annexure “TMP6” in terms of which it is made very clear that the applicant had failed to settle the arrears as per the agreement and the endorsed court order (the order granted in the summary judgment proceedings) and that the home loan account had fallen to further arrears effectively as of 6 August 2020 in the sum of R511,735.82.

CONCLUSION

[32] Considering the totality of the evidence before me, I cannot find any evidence that demonstrates that the arrears or overdue amounts as at 29 November 2023, when the payment was made, were settled. In fact when one considers the bank statement of the bond accounts for the particular period and furthermore the abovementioned correspondence it appears that on the papers that the payment of the sum of R1,440,000.00 was in fact insufficient to settle the overdue or arrear amounts. This is also supported by the applicats own version where he postulates as to whether or not he has settled the overdue amount.

[33] This being the case and on the papers before and assuming for the moment that the applicant's case was in fact for the reinstatement of the agreement, this, on the papers before me must fail.

[34] Accordingly and considering the above I do not believe that on the papers before me the applicant has made out a proper case justifying the relief that he seeks. He is obviously not without remedy and is entitled in terms of the provisions of section 129(3) of the National Credit Act entitled at this stage still to approach the respondents with a view to settling amounts outstanding and to seek reinstatement of the credit agreement. During the course of argument counsel for the respondents, Adv. Kollapen, advised me that her instructions were that as at the time of the hearing of this matter that the arrears on the bond amounted to just over R1 million. If the applicant is genuine about settling his arrears and reinstating the credit agreement, he has ample opportunity to approach the respondents with a view to settling this amount and dealing with it accordingly.

[35] However, in terms of the current application before me, I find no grounds to justify granting the relief sought and accordingly I must dismiss the application with costs. Insofar at the costs in this matter are concerned I do not find any malice in the application brought by the applicant and considering that he brought it in person and is not legally skilled I do not believe that these proceedings warrant an order of costs on a punitive scale and accordingly I make the following order:

ORDER

- (1) The application is dismissed with costs, such costs to be paid on a party and party scale in terms of scale B.

HERSHENSOHN AJ
ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 6 May 2025.

Appearances

Counsel for the Applicant: None
instructed by n/a

Counsel for the Respondents: Adv K Kollapen
Instructed by Hasbroek Boezaart
Date of Hearing: 22 April 2025
Date of Judgment: 6 May 2025