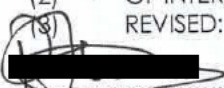


REPUBLIC OF SOUTH AFRICA



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

CASE NO:13651/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	<u>12 November 2025</u>
SIGNATURE	DATE

In the matter between:

GQABANSTHI SYDNWELL LUVUYO

First Applicant

GQABANSTHI NOKWANDA

Second Applicant

and

FIRST NATIONAL BANK

First Respondent

SHERIFF ROODEPOORT SOUTH

Second Respondent

REGISTRAR OF THE DEEDS

Third Respondent

THOMAS MOKWENA

Fourth Respondent

LINDI AMELIA MOKWENA

Fifth Respondent

LEBLED INVESTMENTS CC

Sixth Respondent

MACHAKA MALEKA MACKAY

Seventh Respondent

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10h00 on 12 November 2025.

MALUNGANA AJ

INTRODUCTION

- [1] This is an application on notice of motion whereby the first and second applicants, whom I shall collectively refer to as “the applicants”, seek *inter alia*; a declaratory order that the actions of the first respondent (hereinafter called “the Bank”) in cancelling the written mortgage bond agreement concluded on 23 February 2011, were premature and unlawful. The terms of the mortgage loan agreement are essentially common cause.
- [2] The applicants further seek a declaratory to the effect that the Registrar of Deeds, the second respondent, re-register the immovable property into their names. According to the applicants, there was no factual nor legal basis for the Bank to cancel the instalment sale agreement, as they purportedly purged their default in terms of the provisions of section of section 129 of the National Credit Act. Moreover, the alleged liability was already compromised following the agreement with the bank. In essence the applicants’ contention is that the cancellation of the instalment sale

agreement, and the subsequent sale of their immovable property ("the property") on auction was premature and unlawful.

- [3] The Bank has opposed the application on various grounds, *inter alia* that the applicants breached the terms of the mortgage bond agreement including the repayment plan concluded through the applicants' erstwhile legal representatives. Following this, the Bank obtained the order declaring the property specially executable and thereafter placed the property on auction for sale, as it was entitled to do so. The Bank also raised a point in *limine* to the effect that the order sought by the applicants is not competent absent the rescission of the order which led to the property being sold on auction.
- [4] In my view there are three issues which fall for determination: (a) whether the applicants are in breach of their payment obligations appertaining to the instalments sale agreement, and the subsequent payment arrangement; (b) whether the applicants have purged their default under the provisions of section 129; and (c) whether it is competent for this Court to grant the relief sought by the applicants in circumstances where there is no rescission sought against the orders which led to the cancellation of the instalment agreement and the executability order, and lastly whether the instalment sale had been compromised.

BACKGROUND

- [5] A good starting point in dealing with this matter is the background facts: In their founding papers the gravamen of the case made out by the applicants is the following:
- (a) On 23rd of February 2011 the applicants and the bank concluded a home loan agreement in terms applicants were loaned an amount of R750 376,80 repayable in monthly instalments of R3 125.57. The loan would be secured by a mortgage bond registered over their immovable property in favour of the Bank.
- (b) In 2016 the first applicant was retrenched, and subsequently fell into arrears with their bond repayments. As a result he approached the Bank to make repayment

arrangement, and was told to make payment of whatever he could in order to demonstrate his commitment.

- (c) Despite the above arrangement the bank issued summons against the applicants in 2016. After receipt of the retrenchment package, the applicant proceeded to make payment. The applicants then defaulted again.
- (d) In March 2017, the Bank issued another summons which, unfortunately the applicants did not receive.
- (e) The Bank subsequently obtained a default judgment against the applicants in the sum of R317 048.70 on 7 July 2017. At the time, the arrears in respect of the bond repayments were about R13 469.11, which according to them was equivalent to 3 months arrears.
- (f) The application to have the property declared specially executable was set down for the 29 September 2017.
- (g) In 2020, the first applicant was again laid off work after the country was hit by COVID19 pandemic, and the country had to go on a lockdown. He then applied for UIF-COVID-19 Temporary Employee/Employer Relief fund (TERS).
- (h) In November 2020 he received a call from the Bank informing him that he was arrears in the sum of R90 000,00, and had to pay 50% of the arrears to prevent the sale of the house on auction. He was further advised to pay the sum of R4000.00 towards the bond in December 2020. Subsequently he would pay the sum of R1500,00 towards the arrears plus R4000,00 towards the bond repayments commencing in January 2021.
- (i) After he made payment of R45 000.00 into the loan account, he made other payments commencing in January 2021=R4000 +R1500; February=R4000 +R1300; March R4000 + R1300; April R4000; May R4000;and R2600,00.

- (j) He further avers that he failed to make a payments in April and May 2021, hence he paid R2600 on 1 June 2021 to cover the shortfall on arrear payment. Despite making these payments property agents were hounding him wanting to buy his property. This did not bother him because he believed he his settlement agreement with the Bank was intact.
- (k) On 1 June 2021, the applicant received a text message on his old phone advising him that the property was going on auction. He has no access to the text message because his old phone stopped functioning. In the same month, Mr Leboa on behalf of the sixth respondent called in his house and informed him that he purchased the house on auction. He further informed there to check with Hammond Pole Majole Inc to verify the fact that the house was indeed sold at auction.
- (l) Upon visiting the lawyers' office they were informed that the sale of the house arose out of the default judgment. They were surprised because they were not served with the papers.
- (m) In October 2021 Mr Leboa attended to the premises and showed them the title deed.
- (n) In December 2020, the received eviction papers which notified them that the matter was set down for the 4th of February 2022.
- (o) After their attorneys of record uplifted the contents of the file, it was discovered that the auction took place on the 4th of June 2021.
- (p) In brief: The applicants further state that they were not aware of the default judgment against them on 7 July 2017. The arrears on 7 July 2017 were paid up, and therefore the loan agreement was reinstated. The first respondent ought to have instituted fresh proceedings for the new R90 000.00. The applicants complied with the terms of the settlement agreement. There was no valid court order to make an application to have the property executable. The applicants, however, do not have knowledge of how much they have paid, and request that

the Bank discloses same in Court. Consequently, the entire process leading to the sale of the property was irregular and unlawful.

[6] The Bank avers in its answering affidavit as follows:

- (a) Point in *limine*: the relief sought by the applicants to declare the sale of the immovable property in question is not competent in law, in that they do not seek the rescission of the monetary judgment of R317 048,70 and the order declaring the property specially executable.
- (b) The Bank further avers that the breach of the credit gave rise to the enforcement of the provisions of the loan agreement, which culminated in the monetary and executability judgements.
- (c) The executability judgment was granted on the 17th of November 2017, and had not been challenged.
- (d) It also contended that on 10 November 2020, the applicants erstwhile attorneys corresponded with the Bank regarding the applicants indebtedness to the Bank, which resulted in the following agreement:
 - (i) The applicant agreed to make immediate payment of R37,500, 00 towards the arrears;
 - (ii) The balance of R53,100,00 would be paid monthly in instalments of R1500,00 each; and
 - (iii) The applicants would make a payment of R5500,00 monthly, which amount included the contractual agreed upon instalment and the monthly repayments agreed of the arrear amount.
- (e) In January 2021, the payment proposal was amended to the effect that the applicants would make a monthly payment of R1300,00 in settlement of the arrear amount.

- (f) Subsequently, the applicants made payments of R2800,00 on 01 June 2021 for the month of April and May 2021. In this regard, the Bank avers that the applicants failed to comply with the repayment plan.
- (g) According to the Bank the amount of R45 000,00 was made in compliance with the repayment plan concluded in November 2020. The applicants often made late payments, and the payments made of R2800,00 on 1 June 2021 did not cure the applicants breach of the payment proposal.
- (h) The Bank further submits that the applicants were aware of the sale that took place on the 4th of June 2021 and were also given an opportunity to settle the arrears in order to avoid the property from being sold in execution.

- [7] In reply to the Bank's answering affidavit, the applicants contend that the point in *limine* raised by the Bank is intended to waste the court's time. Furthermore the applicants contend that the application for rescission and the application to set aside the sale of the immovable property are mutually exclusive. The applicants persist with their contention that they have paid off the arrear amounts of R13 489.11, and as a result the judgment order and the writ of execution seized to be operational at that point. The applicants are asking the court to reverse the illegal sale on auction of their home and restore same to them.
- [8] Additionally, the applicants state that the success of their application does not rest on the judgment order being rescinded. Consequently, the Bank's point in *limine* is bad in law.
- [9] In argument, the applicants contend that when the Bank obtained the order in November 2017, the arrears were about R13 469.11. The applicants further argued that the order for the executability was issued by the Registrar in contravention of rule 31(5)(b), which enjoins the registrar to refer all applications declaring the property specially executable to the open court.

- [10] Miss Morwasehla also referred this Court to the provisions of sections 129(3) and 129(4) of the National Credit Act, and submitted that the NCA permits consumers, as in *Nkata v FirstRand Bank Limited and Others*¹, to remedy their default by paying the full arrear amounts along with the credit provider's permitted default charges and reasonable costs of enforcing the agreement. I am in agreement with this submission insofar as it relates to the reinstatement of the credit agreements.
- [11] The applicants further contend that the first default has lapsed after the arrears were settled, and the loan agreement was reinstated. This contention misses the point the point that the arrears have been accumulating since the judgment was obtained against the applicants.
- [12] The Bank has filed a supplementary answering affidavit to address the issues appertaining to the application of section 129(3) of the NCA, as well as the Constitutional Court judgment of *Nkata, supra*. It submits that in order to determine whether the credit agreement has been reinstated in terms of section 129(3), this Court has to have regard to the history of payments made.
- [13] The Bank further submits that despite the order of executability which it obtained against the applicants, it entered into payment arrangements with the latter in November 2020. In paragraphs 11 of the supplementary affidavit the Bank states instances in which the respondents failed to comply with the payment proposal.
- [14] Importantly, the Bank states in paragraph 11.7.23, that the arrears as at 12 June 2021 amounted to R42 456.54 as shown in annexure "S6." According to the Bank, based on these information the credit agreement could not have been reinstated as contemplated by section 129(3) of the NCA read together with *Nkate* judgment. Given that the supplementary answering affidavit was filed as a matter of courtesy to the Court in order to address the pertinent issues and for proper ventilation, I accepted the affidavit in evidence.

¹ *Nkata v FirstRand Bank Limited and Others* [2016] ZACC 12, para 1

RELEVANT LEGAL PRINCIPLES

[15] Section 123 of the National Credit Act 34 of 2005 ("the NCA") provides:

- "(1) A credit provider may terminate a credit agreement before the time provided in that agreement only in accordance with this section.
- (2) If a consumer is in default under a credit agreement, the credit provider may take the steps set out in Part C of Chapter 6 to enforce and terminate that agreement."

[16] Section 129(3) of the NCA provides:

- "(3) Subject to subsection (4), a consumer may-
- (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default 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."

[17] On the other hand, section 129(4)(c) provides as follows:

- "(4) A consumer may not-re-instate 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."

[18] In *Nkata v FNB* the majority held that the credit agreement between FNB and Ms Nkata was legally reinstated when she settled all her arrears. In effect the default judgment together with the writ issued against her property were of no consequences.

[19] Moseneke J, in *Nkata* emphasised the import of the NCA in paragraph 105 as follows:

“The clear import is that for purposes of reinstatement, the consumer is the protagonist. She may disclose her design to the credit provider but she is not compelled to give notice to or seek the consent or cooperation of the credit giver.”

[20] On the settlement of legal costs, the Court found that the legal costs were not due in that the bank had not at that point given Ms Nkata their taxed legal costs. I now revert to the facts of the present matter.

WHETHER THE CREDIT AGREEMENT WAS RESINSTATED

[21] To properly answer the above question, one has to examine the status of the applicants' bond account as at time of the issuance of the writ of execution, and the subsequent sale of the property in execution pursuant thereto.

[22] According to the bank statement dated 12 June 2021, attached to the Bank's supplementary affidavit as annexure “S6” there was an overdue amount of R42 458.54 payable by the applicants. It is contended by the Bank that on 04 June 2021, the property was sold to the seventh respondent at the sale in execution, and registered on 29 October 2021.

[23] The Bank further asserts that in order for the agreement to have been reinstated in terms of section 129(3) of the NCA, the applicants must have paid all the overdue amounts due to the Bank as well as other prescribed default administrative charges at a point in time. Unfortunately the applicants

did not pay these amounts. Absent these payments the agreement could not have been reinstated as contended by the applicants.

- [24] I am in agreement with the Bank's contention, that the applicants have not tendered evidence to prove that they are entitled to reinstatement of the credit agreement within the context of section 129(3) of the NCA, read with the *Nkata* judgment. There is, however, evidence to the effect that when the property was sold in execution, the applicants were in arrears with their bond repayments as reflected in the June 2021 statement.
- [25] The next point for consideration is whether the credit agreement was compromised. Ms Morwasehla sought to make a point that because of the payment arrangements which the Bank had made with her clients, the bank had compromised the credit agreement. This contention cannot stand, for it is apparent on the facts before me, that the bank was merely exercising a consideration based on the applicants' financial circumstances at the time. The repayment arrangement reached with the applicants' former attorney, and subsequent thereto did not vary or add any term to the parties credit agreement.

CONCLUSION

- [26] In the context of *Nkata* judgment, read with section 129(3) and (4) of the NCA, the applicants in *casu* have not adduced any evidence to suggest that their overdue amounts, default charges and legal costs to the Bank have been paid. This would have triggered the reinstatement of their credit agreement with the Bank. Additionally, there is evidence to the effect that the applicants defaulted on the subsequent payment arrangements concluded with the Bank which led to the sale of the property in execution.
- [27] I accordingly conclude that the applicants have not made out a case for the relief sought, and that the application falls to be dismissed.

[28] Given the conclusion that I have reached above, it is unnecessary for me to consider the merits or otherwise of the point *in limine* raised by the Bank.

[29] I shall therefore make the following order:

1. The application is dismissed with costs, on Scale A.



MALUNGANA PH
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

REPRESENTATION

Date of Hearing: 11 August 2025

Date of Judgment: 12 November 2025

Applicant's Counsel: Ms N Morwasehla

Instructed by: Morwasehla Attorneys

Respondent's Counsel: D Van Niekerk (Adv)

Instructed by: Hammond Pole Majola Attorneys