REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1)	**NOT REPORTABLE**
(2)	**NOT OF INTEREST TO OTHER JUDGES**

CASE NO: 2018-12442

DATE: 2nd OCTOBER 2024

In the matter between:

PHILLIP MAITLAND LE FEUVRE	Applicant
and	
STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent
SHERIFF OF THE HIGH COURT, JOHANNESBURG NORTH	Second Respondent
FARHANA CAJEE	Third Respondent
THE REGISTRAR OF DEEDS, JOHANNESBURG	Fourth Respondent

Coram: Adams J

Heard: 2 September 2024

Delivered: 2 October 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 2 October 2024.

Summary: Credit agreement – consumer credit agreement – reinstatement of agreement in default – occurring by operation of law – National Credit Act 34 of

2005 – s 129(3)(a) – payment of 'all amounts that are overdue' – whether ‘all amounts that are overdue’ have been paid a factual enquiry – *Plascon Evans* finds application – payment of ‘all amounts that are overdue’ entails extinguishing all arrears owing and settling all amounts due as and at the time of the intended reinstatement of the loan agreement – to include the sums by which the arrears had increased and the subsequent instalments which fell due between the date of the s 129(1) notice and/or the issue of the summons and the date of the intended reinstatement – arrears and ‘all amounts that are overdue’ cannot possibly remain the same – the actual or accrued amount of the arrears at the time of the intended reinstatement being the relevant consideration –

The Creditor Provider relying on the judgment granted in its favour – bound by the terms of the said judgment when executing same – no need for the Bank to start the legal process afresh – only entitled to recover the interest provided for in the court order – other charges in terms of the loan agreement not recoverable by the bank as not being post-judgment charges – Consumer entitled to recover such charges if included as part of the post-judgment charges –

Main application dismissed – alternative application succeeds in part –

ORDER

(1) The applicant's main application is dismissed.

(2) In the applicant's alternative application, judgment is granted in favour of the applicant against the first respondent for: -

  (a) Payment of the sum of R316 958.52.

  (b) Payment of *a tempore morae* interest on R316 958.52 at the rate of 10.5% per annum from 26 June 2016 to date of final payment.

(3) Each party shall bear his / its own costs.

JUDGMENT

Adams J:

[1]. On 7 May 2010 default judgment was granted by this Court in favour of the first respondent ('Standard Bank') against the applicant for payment of the sum of R1 972 697.64, together with interest thereon at the rate of 10.5% per annum from 4 February 2010 to date of final payment and costs of suit on the attorney and client scale. The applicant's immovable property, being Erf 239, Saxonwold Township in Gauteng ('applicant's immovable property'), was simultaneously declared to be specially executable. The default judgment and Standard Bank's underlying cause of action were based on a home loan agreement which was concluded between the applicant and Standard Bank during 2004, and the amount of the loan was secured by a continuing covering mortgage bond ('mortgage bond') in favour of the bank over the applicant's property.

[2]. Pursuant to the aforesaid judgment a warrant of attachment of the applicant's property was issued on 9 November 2010 with a view to having same sold in execution at a public auction. The sale in execution was ultimately held

only some six years later on 25 February 2016. On that date the property was sold by the second respondent ('Sheriff') at the public auction for an amount of R3 860 000 to the third respondent.

[3]. The applicant is aggrieved by the sale in execution of his property and therefore launched this opposed application on 27 March 2018, claiming declaratory relief the effect of which will be to have the said sale reviewed and set aside. The applicant claims that the sale in execution was unlawful and invalid, and therefore stands to be set aside, on the basis that he had allegedly reinstated the credit agreement in accordance with section 129(3)(a) of the National Credit Act ('NCA')[1] prior to the sale in execution. In the alternative, the applicant claims a monetary judgment for damages allegedly suffered by him on the basis of unjust enrichment. It may be apposite to cite here the applicant's notice of motion, which, in the relevant part, reads as follows: -

'Take notice that the applicant intends making application to the above Honourable Court … for an order in the following terms: -

(1) Declaring the sale in execution by the second respondent [Sheriff] of the immovable property, Erf Number 239 Saxonwold Township, Gauteng Province ("the Property") on 25 February 2016 and the subsequent transfer and registration of the property in the name of the third respondent, to be unlawful and invalid due to the applicant having reinstated the credit agreement in accordance with section 129(3)(a) of the National Credit Act 34 of 2005 prior to the said sale in execution.

(2) Directing and ordering the fourth respondent [Registrar of Deeds] to forthwith remove and/or cancel the deeds of transfer issued in favour of or in the names of the third respondent from the register of deeds and restore the applicant as the registered owner of the property.

(3) Directing and ordering the first respondent to pay the costs of this application. … … ...

(4) … … …

Alternative Application

In the event of the above Honourable Court dismissing the main application, and only in such event, applicant prays for an order against the second respondent, in the following terms:

[1] National Credit Act 34 of 2005.

(1) Declaring the balance of the judgment debt at 25 June 2016 to have been the amount of R2 200 427.97.

(2) Declaring that the second respondent was lawfully authorised to deduct from the proceeds of the sale in execution of the property only the amount of R2 200 427.97.

(3) Directing the second respondent to pay to the applicant the balance of R707 658, together with interest thereon at the rate of 9% per annum, from 26 June 2016 to date of payment.

(4) Costs of suit.

(5) Further and/or alternative relief.'

[4]. Standard Bank opposes the application on the basis that the credit agreement was not reinstated as alleged and furthermore that the relief sought by the applicant is not competent.

[5]. The issue to be decided in this application is therefore whether factually the credit agreement had been reinstated as contemplated by s 129(3)(a) of the NCA. Put another way, the question to be considered by me is whether the applicant has proven that the requirements of s 129(3)(a) had been met and that *ipse iure* the credit agreement had been reinstated.

[6]. Those issues are to be decided against the factual backdrop and the facts in the matter as analysed later in the judgment. The facts are to be applied to the law and the applicable legal principles. In that regard, a convenient starting point is s 129(3) of the NCA and its interpretation. The said section presently provides as follows: -

'129 **Required procedures before debt enforcement**

… … …

(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.'

[7]. Previously, before being amended, s 129(3) provided that –

'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 permitted default charges and reasonable costs of enforcing the agreement up to the time of re-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.'

[8]. The latter reading of the said section is the one applicable during the relevant period in this matter. The purpose and objective of the subsection, however, remain the same.

[9]. *Nkata v FirstRand Bank Limited* 2016 (4) SA 257 (CC) is the leading authority in relation to the interpretation and the application of the said section. In that matter, the Constitutional Court (per Moseneke DCJ) 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 to the credit provider all arrears that are due, permissible default charges and legal costs. Reading in a requirement of prior notice to the credit 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 if the consumer were saddled with procedural requirements most consumers are likely to falter on.

[106] … ... ….

What are "all amounts that are overdue"?

[107] Section 129(3)(a) requires the consumer to pay "all amounts that are overdue" before the credit agreement is reinstated. On the facts here, the mortgage bonds contained acceleration clauses that the bank invoked, particularly in 2010, as soon as Ms Nkata fell into arrears. Once the acceleration clauses were invoked, the full extent of the mortgage debt was made due and payable and not just the arrear instalments.

[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.' (Emphasis added)

[10]. The simple point about this extract from *Nkata* is that a credit agreement can and will be reinstated only in the event of a debtor having, as and at the time of the reinstatement, paid 'all amounts that are overdue', which would include 'permissible default charges and legal costs'. Moreover, as explained by the Court in *Pule v Nedbank Limited and Others*[2], the amount of the arrears demanded in the applicable s 129(1) notice and the subsequent legal action cannot possibly remain the same for purposes of reinstatement of the credit agreement as contemplated in s 129(3)(a) of the NCA. '[A]ll amounts that are overdue' clearly refers to accrued overdue amounts as and at the date of reinstatement and may include in the calculation the original arrear amounts demanded.

[11]. It bears emphasising that payment of 'all amounts that are overdue', as envisaged by s 129(3)(a), entails extinguishing all arrears owing to a creditor and settling all amounts due as and at the time of the intended reinstatement of the loan agreement. The amounts overdue would include the sums by which the arrears had increased and the subsequent instalments which fell due between the date of the s 129(1) notice and/or the issue of the summons and the date of the intended reinstatement. The point is that the arrears stated in the s 129(1) notice cannot possibly remain the same – the actual or accrued amount of the arrears at the time of the intended reinstatement being the relevant consideration.

[12]. In the present matter it is common cause between the parties that during 2009 the applicant defaulted on the agreement. On 29 January 2010 Standard Bank caused a section 129(1) notice to be dispatched to the applicant and on 2 March 2010 the summons was issued by the bank against the applicant, who failed to enter an appearance to defend. At the time of the issue of the summons, the amount by which the applicant was in arrears with his bond account was the sum of R232 895.43. Consequently, on 7 May 2010 default judgment was

[2] *Pule v Nedbank Limited and Others* 2022 JDR 0844 (GP).

granted against the applicant. On 9 November 2010, a Warrant of execution was issued against the applicant's immovable property.

[13]. The applicant alleges that by June 2012, he had 'made good the arrears' and he explains, with reference to a schedule of payment, that between the date of the issue of the summons and June 2012 he had paid in total an amount of R247 542. This then means, so the applicant contends, that the account had been brought up to date and that the credit agreement had been reinstated.

[14]. This is denied by Standard Bank, who maintains that the account remained in arrears throughout the period from date of issue of summons to the date of sale in execution of the applicant's property. I do not accept the applicant's version on this aspect of the matter for the simple reason that, applying *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd*[3], I am obliged to accept the version of Standard Bank, who explains, with reference to a schedule based on their records that by June 2012, the account was still in arrears to the tune of R812.11. This explanation, in my view, accords with the facts in the matter especially if one has regard to the fact that monthly instalments due at that time was in the region of about R15 000 per month. This then means that between November 2010 and June 2012, the applicant, in order to bring the account up to date, would have had to pay, in addition to the arrears, a total amount of about R270 000 in monthly instalments, which, as indicated above, amounted to over R232 000 at the time of the issue of the summons. The simple point of this rudimentary arithmetical exercise is that there is merit in the claim by Standard Bank that the account was never brought up to date.

[15]. The applicant also contends that there was a fundamental error in relation to the calculation by Standard Bank, as per the schedule referred to above, of the arrears as and at June 2012. He argues that the arrears amounting to R232 895.43 (claimed in the s 129(1) notice dated 29 January 2010) as at

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[3] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620.

31 December 2009 cannot possibly be accurate because the aforesaid arrears had increased from R86 062.90 at 30 September 2009 – over a period of about three months – by approximately R147 000, when the monthly instalments at that time was in the region of R16 000. The arrears at 31 December 2009, so the contention on behalf of the applicant goes, was therefore overstated by about R81 000. This means, so the argument is concluded, that the agreement, on the version of Standard Bank, had in fact been reinstated earlier than 12 June 2012 if regard is had to this alleged overstatement of the arrears. Moreover, at that date the applicant alleges that he was in fact in advance by about R80 000 and not in arrears in the amount of R812.11. The applicant contends that the aforegoing is also an indication of the unreliability of the bank's calculation of the arrears at any given point in time and he urges me to reject out of hand the bank's calculations.

[16]. At first blush there appears to be merit in these submissions. However, the fallacy in the argument becomes apparent from a basic interrogation of the numbers. At the commencement of the home loan period during July 2004 the minimum monthly instalment was the sum of about R15 000, which means that at December 2009 the total amount of the instalments that ought to have been paid by then should have amounted to R15 000 X 65 months (5 years and 5 months) = R975 000. The actual total of the instalments received by the bank from the applicant during that period, according to the common cause payment history, is the sum of R749 065,94, which suggests that the R232 895.43 arrears as per the schedule is almost spot on.

[17]. It is also probable, again based on common sense and basic logical reasoning, that the R812 arrears as and at June 2012 was calculated on the basis of restructured / compromised repayment plan.

[18]. All the same, the applicant confirms that after 2012 he again fell into arrears, and he became aware that the bank intended selling his property during November 2015. By all accounts the applicant's account was at that stage hopelessly in arrears. According to the bank, the total arrears at that stage

amounted to R275 000. There can, in my view, be no dispute about the aforegoing. I also reject out of hand the applicant's contention that he brought the account up to date by payment of the total amount of R155 000. That averment flies in the face of the objective documentary evidence in the form of an email to the applicant from the bank, confirming that the said payment would be in settlement of about 50% of the arrears.

[19]. Therefore, by the time of the sale in execution during February 2016 the applicant's bond account with Standard Bank was in arrears and had been in arrears since summons had been issued during 2010. Standard Bank was accordingly fully within their rights to proceed with the sale in execution on the basis of the proceedings commenced during 2010. There never was a reinstatement of the credit agreement as alleged by the applicant – at no stage did the applicant pay to Standard Bank 'all amounts that are overdue'. Section 129(3)(a) accordingly never came into effect.

[20]. It is so, as averred by the bank, that the only period in which the applicant's account was not in any arrears was during the period 31 March 2009 to 3 June 2009. I accept as a fact that the arrears were not settled or paid in full either during 2012 or during 2015. The evidence does not support the applicant's case in that regard.

[21]. For all of these reasons, the applicant's main claim to have the sale in execution and the consequent transfer declared unlawful and invalid, should fail.

[22]. As regards the alternative application, as alluded to *supra*, the applicant applies against the Sherif of this Court for a declaratory order, declaring that the balance of the judgment debt as and at 25 June 2016 to have been the amount of R2 200 427.97 and that the Sheriff was lawfully authorised and entitled only to deduct from the proceeds of the sale in execution of the property only the said amount of R2 200 427.97. The applicant accordingly applies for judgment against the Sheriff for payment of the sum of R707 658, together with interest thereon.

[23]. The case of the applicant is that the Sheriff was required to ensure that he acted within the four corners of the warrant of execution against property. The Sheriff, so the argument on behalf of the applicant goes, should have ensured that he was distributing the correct amounts to the beneficiaries, by calculating the amounts due in terms of the Judgment. Instead, he relied on a Certificate of Balance issued by Standard Bank, who unjustly benefitted from incorrect calculations and an unlawful distribution of the proceeds of the sale in execution.

[24]. I find myself in agreement with these submissions by the applicant. The simple point is that the bank, in relying on the judgment granted in its favour during 2010, when executing the judgment, was bound by the terms of the said judgment. It was entitled do so because, as I have already found, the loan agreement had not been reinstated by the applicant bringing the loan account up to date. The original judgment and the cause of action on which it was founded therefore stand and there was no need for Standard Bank to start the legal process afresh. However, the flipside of the coin is that the bank was only entitled to recover the interest provided for in the order which was to the effect that interest would be levied on the amount of R1 972 697.64 at the rate of 10.5% per annum from 4 February 2010 to date of final payment, that being 23 June 2016 (both days inclusive), which is the date on which Standard Bank received payment from the Sheriff. It is trite that interest granted in favour of a judgment creditor is simple interest unless the judgment or order provides otherwise. According to my calculations, interest was payable on R1 972 697.64 at 10.5% per annum for a period of six years and 140 days = R1 322 247.88.

[25]. I find support for the aforegoing approach in *Bayport Securitisation Ltd and Another v University of Stellenbosch Law Clinic and Others*[4], in which the court held as follows: -

'[26] However, in *Nedbank* the court was not called upon to consider whether the statutory limit in s 103(5) continued to apply to the costs of credit referred to in s 101(1)(b) – (g) after judgment had been granted. A fundamental difference between the facts in that case and in this

[4] *Bayport Securitisation Ltd and Another v University of Stellenbosch Law Clinic and Others* 2022 (2) SA 343 (SCA).

is that after a judgment has been granted against a consumer, usually, save for necessary disbursements and charges allowed in terms of the relevant tariff, only interest accrues on the judgment debt. The remaining charges contemplated in s 101(1)(b) – (g) are thus not post-judgment charges. The judgment entered is thus for the capital sum fixed at a particular date together with interest. It follows that, even had it been correctly found that s 103(5) found application, it did not apply post-judgment.'

[26]. The applicant has calculated the interest payable in terms of the 2010 judgment at R1 061 931.08. The difference between this calculation and mine is explained by the fact the applicant adjusted the interest payable as and when the capital sum was supposedly reduced. However, that approach is misguided for the simple reason that it is trite that simple interest is to be calculated at a set rate from the day it starts running to the last date on which it is payable. In this case, I have calculated the daily interest rate at R567.49 per day.

[27]. The question is, therefore, whether the interest charged by Standard Bank and deducted from the proceeds of the sale in execution was correctly calculated. It would be if it accords with the aforesaid sum of R1 322 247.88. Nowhere in their papers do any of the parties give any indication of the actual amount of the interest charged by Standard Bank and deducted from the proceeds of the sale in execution. The bank did however attach to its answering affidavit what appears to be a complete transaction history in relation to the applicant's home loan account from inception (28 July 2004) all the way through to 27 June 2016, when the account was closed after receipt of payment by Standard Bank from the Sheriff of the amount of the net proceeds of the sale in execution. This transaction history appears to be common cause between the parties and from it the total interest charges and debited to the applicant's account for the period from 4 February 2010 to date of final payment, being 23 June 2016, was the total sum of R1 311 598.17, which is in fact R10 649.71 less than what the bank was entitled to receive in terms of the 2010 court order.

[28]. There is therefore no merit in the applicant's cause of action in relation to the interest supposedly overcharged by Standard Bank.

[29]. The aforegoing furthermore illustrates a fatal defect in the applicant's case in that he fails to give exact details of the alleged unlawful and unjustified deductions from the proceeds of the sale in execution. He failed to give details and an exact calculation of the debits and the totals thereof which should not have been deducted from the proceeds. And for this reason alone, most of his claim for a refund of further sums based on unjust enrichment should fail. He, for example, does not give a total in respect of the untaxed legal costs or a sum total for the insurance premiums, which, according to him, should be refunded to him.

[30]. There is however one amount which the applicant is entitled to recover in that it is undisputed that he was not liable to pay same and yet the bank debited his loan account with same. And that amount is the R316 958.52 in respect of outstanding municipal rates and taxes, which obviously needed to be paid before the transfer of the property could be effected pursuant to the sale in execution. The simple and undisputed fact of the matter is that the conditions of the sale in execution provided that the purchaser – the third respondent herein – was liable for such charges. The bank was not entitled to claim that amount from the applicant – this is not denied by the bank. Accordingly, the applicant is entitled to a refund of the said amount.

[31]. Although the applicant applied for an order directing the Sheriff to repay any amounts due to him, it is clear that Standard Bank was in fact the company which benefitted from the incorrect payment. It is common cause between the parties that Standard Bank in fact received from the proceeds of the sale in execution the said amount of R316 958,52. It would therefore be just and fair that the bank, and not the Sheriff, should be ordered to repay to the applicant the said sum.

[32]. I am therefore of the view that judgment in favour of the applicant against Standard Bank for payment of that amount, together with interest thereon, should be granted.

Costs

[33]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[5].

[34]. In this matter the applicant has been successful in that judgment is granted in its favour on his alternative claim for a portion of the amount claimed. Conversely, Standard Bank has had a measure of success in that it successfully resisted the applicant's main claim. These two parties, in my view, have had equal measure of success and it would be just to apply the aforegoing general rule and to order each party to bear his / its own costs.

Order

[35]. In the result, the order which I grant is as follows: -

(1) The applicant's main application is dismissed.

(2) In the applicant's alternative application, judgment is granted in favour of the applicant against the first respondent for: -

   (a) Payment of the sum of R316 958.52.

   (b) Payment of *a tempore morae* interest on R316 958.52 at the rate of 10.5% per annum from 26 June 2016 to date of final payment.

(3) Each party shall bear his / its own costs.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

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[5] *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

HEARD ON:	2nd September 2024
JUDGMENT DATE:	2nd October 2024
FOR THE APPLICANT:	M R Webbstock
INSTRUCTED BY:	Matthew Webbstock Attorney, Sandringham, Johannesburg
FOR THE FIRST RESPONDENT:	W Isaaks
INSTRUCTED BY:	Van Hulsteyns Attorneys, Sandown, Sandton
FOR THE SECOND AND FOURTH RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance
FOR THE THIRD RESPONDENT:	No appearance
INSTRUCTED BY:	S Suleman Attorneys, Roshnee, Vereeniging