



national consumer tribunal

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27 January 2012

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Dear Mrs. McKeen

**RE: JUDGMENT ON APPLICATION IN TERMS OF SECTION 149(1) IN THE MATTER  
BETWEEN SANDRA MCKEEN AND FIRST NATIONAL BANK, A DIVISION OF FIRST RAND  
BANK LTD**

**CASE NUMBER: NCT/943/2010/149(1)(P)**

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Kindly be advised that the Tribunal issued a judgment in the above matter.

The judgment is attached hereto.

Yours Sincerely

 27/01/2012

**Mrs L. Koen**  
Senior Case Analyst  
Office of the Registrar  
National Consumer Tribunal

**Cc: Respondent**  
**First National Bank, A division of First Rand Bank Ltd**  
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**IN THE NATIONAL CONSUMER TRIBUNAL  
HELD IN CENTURION**

**CASE No: NCT/943/2010/149(1) (P)**

**In the matter between**

**Sandra McKeen**

**Applicant**

**and**

**First National Bank**  
A division of First Rand Bank Limited

**Respondent**

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**JUDGMENT**

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**INTRODUCTION**

1. The Applicant in this matter is Mrs Sandra McKeen and the Respondent is First National Bank, a division of First Rand Bank Limited.
2. This is an application for interim relief in terms of section 149(1) of the National Credit Act, Act 34 of 2005 (hereinafter the Act).

**BACKGROUND**

3. The application relates to the sale of Applicant's property by public auction on 7 September 2010. The Respondent was the mortgage bondholder. The Applicant and her husband obtained a home loan from the Respondent in March 2006. The Applicant's account went into arrears and this eventually led to the home being sold in execution on 7 September 2010. The house was sold to RynCorp Projects.

4. The Applicant approached the Tribunal for urgent relief pending the hearing of a complaint. However, from the documents handed in to the Tribunal the NCR concluded that it could not take the matter any further because the Applicant was requesting that the NCR set aside a High Court judgment, something which it is not empowered to do. The NCR recommended that the Applicant pursue the matter in another forum such as the courts.

#### **ORDER SOUGHT**

5. The order sought from the Tribunal and the grounds for the application as set out in the form T.1 149 (1) submitted by the Applicant read as follows:

*I/we having initiated a complaint before the Regulator under section 136, hereby apply for an interim order providing relief in the following terms:*

1. *Stop Ryncorp threatening me*
2. *Have the sale in execution rescinded.*

#### **THE ADJUDICATION INTO THE APPLICATION FOR INTERIM RELIEF**

6. The matter was set down for hearing on 15 July 2011. Unfortunately the Applicant was not informed of the date of the hearing until 14 July 2011 and so she was unable to attend. The Tribunal decided to continue with the matter in order to establish whether or not certain preliminary matters could be resolved.

These issues were the following:

1. The Respondent had made an application for condonation because it had failed to file its replying affidavit within the time limits set by the rules;
2. The Tribunal, once it had perused the application submitted by the Applicant and the replying affidavit submitted by the Respondent, had

called for certain documents from the Respondent which were submitted by the Respondent on 15 July 2011.

7. After considering the Respondent's application for condonation the Tribunal decided to grant the application although not on the grounds sought by the Respondent. The Tribunal granted the application for the following reasons:
  1. The Tribunal conducts its proceedings in an inquisitorial manner and as informally as possible in terms of the requirements of section 142 (1)(a) and (c); and
  2. The Tribunal is of the view that it is important that all the issues between the parties should be thoroughly ventilated.
8. As stated above, after perusing the application by the Applicant and the replying affidavit by the Respondent, the Tribunal requested that the Respondent supply certain documents to the Tribunal. These documents, which included the following, were handed to the Tribunal at the hearing:
  1. A copy of the summons relating to the outstanding debt which was owed by the Applicant to the Respondent.
  2. A copy of the order granted in terms of the application for summary judgment.
  3. A copy of the warrant of execution.
  4. A copy of the signed conditions of sale in execution of immovable property.
9. After considering these documents and being satisfied that the house was sold in execution in September 2010 to a third party (which was named in the application by the Applicant but which was not a party before the Tribunal) the Tribunal decided that certain issues must be dealt with before it could consider the application for interim relief and then, if appropriate, grant the order as requested by the Applicant. The Tribunal therefore issued a directive to the Applicant. In this directive it requested the Applicant to consider the issues set out below and to provide the Tribunal with her written submissions relating to the issues raised.

10. The issues, which the Applicant was requested to deal with, were as follows:
  1. The Applicant is requesting the Tribunal to grant an order against RynCorp which is a third party and is not a party before the Tribunal. On what basis is the Applicant of the view that the Tribunal has the power to grant an order against such a third party?
  2. The property which is the subject of this application has been sold in accordance with a warrant of execution granted by the High Court. On what basis is the Applicant of the view that the Tribunal has the power to set aside an order which has been granted by the High Court?

### **APPLICANT'S RESPONSE TO THE DIRECTIVE**

11. In her response to the directive, the Applicant stated that certain facts which the Respondent had provided to the Tribunal were in fact incorrect. The Applicant argued that the Tribunal should also consider certain facts which the Tribunal had found were not relevant to the application. These facts which were in dispute related to the process which the Respondent had followed before the Applicant's property was sold in accordance with a warrant of execution granted by the High Court. However in her response the Applicant confirmed that her property had been sold at a public auction on 7 September 2010. The Applicant did not deal with the first issue raised in the directive and as far as the second issue is concerned, the Applicant referred to section 128 and 130 of the Act.

### **ASSESSMENT**

12. Interim relief is granted in terms of section 149 of the Act. This section reads as follows:

*At any time, whether or not a hearing has commenced into a complaint, a complainant may apply to the Tribunal for an interim order in respect of the complaint, and the Tribunal may grant such an order if –*

- (a) *there is evidence that the allegations may be true; and*

- (b) *an interim order is reasonably necessary to –*
    - (i) *prevent serious, irreparable damage to that person; or*
    - (ii) *prevent the purposes of this Act from being frustrated;*
  - (c) *the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings, and*
  - (d) *the balance of convenience favours the granting of this order.*
13. Only complainants as defined in the NCA can apply for interim relief in terms of the NCA. Complainant is defined in section 1 of the NCA as “*a person who has filed a complaint in terms of section 136(1)*”. Section 136(1) refers to “*any person may submit a complaint concerning an alleged contravention of the Act to the National Credit Regulator in the prescribed manner and form*”.
14. The applicant is a complainant as defined as she has filed a complaint with the National Credit Regulator (NCR) in terms of section 136 of the National Credit Act, 2005 (the Act) on 27 August 2010. On 12 May 2011 the NCR informed Applicant “*Upon receipt of your complaint our office investigated it ... and came to the conclusion that there was nothing more we could do. You were advised to seek remedies in alternative forums e.g. courts...*”
15. At the time when the section 149(1) application for interim relief was lodged at the Tribunal there was no pending investigation before the NCR for potential referral of the matter to be heard by the NCT. At the point of adjudication there is no indication if and when this matter will come before the Tribunal for hearing in the future perhaps by way of a direct referral by the Applicant upon non-referral by the Regulator in terms of section 141(1)(b) of the NCA. This factor weighs heavily against the Tribunal granting the interim relief order. Interim relief orders is temporary by nature and generally should not extend beyond six months, except on good cause shown.
16. The relief sought by the Applicant is for the Tribunal to “*Stop Ryncorp threatening me; and to have the sale in execution rescinded.*”



17. It is common cause that the property was sold at a public auction on 7 September 2010 in accordance with a warrant of execution granted by the High Court.
18. *Section 149(1)(b) provides that the Tribunal may grant an interim order to –*
  - (i) *prevent serious, irreparable damage to that person; or*
  - (ii) *prevent the purposes of this Act from being frustrated;*
19. It is apparent that the property was sold before the Applicant approached the Tribunal for interim relief. At that stage the harm complained of which the Applicant seeks from the Tribunal to prevent, which appears to be the sale in execution, already eventuated. The Tribunal cannot in these circumstances “... *grant an interim order to – (i) prevent serious, irreparable damage to that person*”
20. Furthermore the second part of the order sought namely “...*to have the sale in execution rescinded*” in effect requires of the Tribunal to overturn a High Court order. The question then is: does the Act empower the Tribunal to do this?
21. The Applicant dealt with this question in her response to the directive by referring the Tribunal to sections 128 and 130 of the Act.
22. Section 128 provides that a consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of section 27 may apply to the Tribunal to review the sale. This section empowers the Tribunal to review the sale conducted by the credit provider and if it is not satisfied with the sale, the Tribunal may order the credit provider to pay an additional sum of money to the consumer. The section does not empower the Tribunal to set aside the sale, only to order the credit provider to credit the consumer with a sum of money. It is also important to note that this section relates to goods which have been sold in terms of section 127. It is therefore necessary to consider section 127.

23. Section 127 provides for the surrender of goods under an instalment agreement, secured loan or lease. Both an instalment agreement and a lease (as defined in the definition section) refer to the sale or lease of moveable property. A secured loan is defined as an agreement in terms of which a person advances money or grants credit to another and retains or receives a pledge or cession of the title of any moveable property or other thing of value as security for all amounts due under that agreement. Under this section a consumer may elect to surrender moveable property to a credit provider which must then sell the moveable property in order to satisfy the debt which is owed by the consumer to the credit provider under a credit agreement.
24. The types of agreements referred to in section 127 were dealt with by the Supreme Court of Appeal in *Roussouw v First Rand Bank* 2010 (6) SA 439 (SCA). The court held that these agreements, namely an instalment sale agreement, a secured loan and a lease as defined in section 1 of the Act all relate to moveable property. Therefore this section does not apply to the sale of immovable property. (Although the SCA was dealing specifically with section 130 (2), both section 130 (2) and section 127 refer to the same types of agreements. As the SCA found that section 130 (2) does not apply to immovable property, likewise, section 127 does not apply to immovable property as the same types of agreements are specified in the sections).
25. In this particular matter, the Applicant did not "surrender" her property to the Respondent. Therefore section 127 is not applicable. For the sake of completeness the Tribunal will also deal with section 131 which deals with the situation where goods are sold following the granting of an attachment order by a court.
26. Section 131 provides that "*If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127 (2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order.*"



27. The important point to note about section 131 is that it does not appear to be limited to instalment agreements, secured loans or leases as is done specifically in section 127.
28. The question to be decided therefore is whether section 131 applies when immovable property is attached by the court in order that it may be sold to satisfy a judgment debt, as occurred in the circumstances of this matter.
29. Section 131 states that where the court makes an attachment order with respect to property that is the subject of a credit agreement, section 127 (2) to (9) and section 128 apply subject to changes which are required by the context.
30. Sections 127(2) to (9) deal with the processes which a credit provider must follow when property which has been sold to a consumer is returned to the credit provider because the consumer is unable to meet its obligations under the credit agreement.
31. This property is returned to the credit provider either because the consumer surrenders the goods (under section 127) or because a court has issued a writ of attachment (under section 131).
32. Section 131 is discussed in the case of *Absa Bank Ltd v De Villiers* 2009 (5) SA 40 (C). The court explains that when a consumer is in default, the credit provider may apply for a court order to attach the goods which were the subject of the credit agreement. (It must be noted that where a consumer does not voluntarily hand back the goods to the credit provider, the credit provider can only regain possession of the goods with a court order even in circumstances where the credit provider is the owner of the goods). The *De Villiers* case involved the attachment of a motor vehicle which was the subject of an instalment sale agreement. In terms of the agreement, ownership of the vehicle was ceded and transferred to the credit provider. The consumer failed to pay the required instalments and so the credit provider brought an

application in terms of s130 (1) for an order authorising the sheriff to attach the motor vehicle and to hand the vehicle over to the credit provider for safe keeping. Because a court attachment was involved rather than a voluntary surrender the matter was governed by section 131. In terms of section 131 the credit provider must then follow the process set out in section 127 (2) – (9) in order to realise the value of the goods. Once the goods have been sold, this amount is credited to the consumer's outstanding account. If the amount is less than the settlement value, the credit provider may demand payment from the consumer of this outstanding balance. If the consumer fails to pay this outstanding amount within 10 days after receiving the required notice, the credit provider may apply for judgment in terms of the Magistrate's Court Act for the recovery of the remaining settlement value. If however, the consumer pays the amount demanded after receiving the demand notice, judgement against him or her will be prevented. (See section 127 (8) (a) and (b) and De Villiers judgment at 49E – 50E).

33. A different process is followed when a creditor seeks to enforce a judgment debt. In order to enforce a judgment debt, one may issue a writ of execution (in the High Court) or a warrant of execution (in the Magistrate's Court). In both these scenarios, the effect of the writ or warrant is to instruct the sheriff of the court to attach the property of the judgment debtor so that if the judgment remains unpaid after the attachment, the attached property can be sold at a public auction and the proceeds used to pay the money owed to the judgement creditor (see Pete Hulme Du Plessis and Palmer *Civil Procedure: A practical guide* 359).
34. In this particular matter, the Respondent granted the Applicant a loan of money and against this loan of money, the Applicant granted the Respondent a mortgage bond over her property in order to secure this loan. When the Applicant defaulted on her mortgage loan repayments, the full amount of the loan became due and payable and judgment was taken against her for this full amount. The property which was security for the loan rather than "the subject of the loan agreement" was attached so that the sale proceeds could be used

to pay off the judgement debt (or at least a portion of the outstanding judgment debt). The Respondent never at any time had possession of the immovable property. Neither, did the Respondent repossess the property. The property was attached by the sheriff of the court pursuant to a writ of attachment issued by the High Court.

35. Section 131 is not intended to govern the process in the circumstances of this case. The process is governed instead by the High Court Rule 46 which deals with execution against immovable property when property is sold to satisfy a judgment debt. Sections 127 - 131 are intended to deal with the situation where the credit provider initially had possession of the property (either actual physical possession or ownership was transferred to it), the property was then given to the consumer under a credit agreement and then the property was finally returned to the credit provider (which must assume responsibility for disposing of the property) because the consumer was unable to meet his obligations under the credit agreement. (It must be noted that the heading of section 131 refers to the repossession of goods. Repossession is defined as the retaking of possession when a buyer defaults on payments. In this instance the Respondent has never been in possession of the immovable property and was merely the grantor of a loan which was secured by way of a mortgage bond.) If the property is sold and this covers the full amount of the debt, or the consumer is able to pay off the outstanding amount after the sale, there will be no judgment debt.

36. From the above we conclude as follows:

- (1) One of the parties, namely Ryncorp, against whom the Applicant is requiring an order against, is not a party before the Tribunal.
- (2) The Applicant's property was sold before she approached the Tribunal. As a result there is no order the Tribunal can issue to prevent irreparable harm to the Applicant.

- (3) There is no section in the Act that empowers the Tribunal to set aside an order of the High Court for it to rescind the sale in execution and accordingly issue an order to prevent the purposes of the Act from being frustrated.
- (a) Section 128 in particular only empowers the Tribunal to review a sale, not set it aside.
- (b) The reference to the Tribunal in section 130 refers to the situation where there is a matter pending before the Tribunal. A court may adjourn the matter pending adjudication by the Tribunal. This is not the situation in this case as the matter was finalised in court before it was referred to the Tribunal

#### **ORDER OF THE TRIBUNAL**

The application for interim relief is refused. No order is made as to costs.

Dated this 26 day of January 2012.

[signed]

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T Woker  
Presiding Member

Ms D Terblanche and Mr X May concur in the judgment.