

**IN THE NATIONAL CONSUMER TRIBUNAL**

**HELD AT CENTURION**

**CASE NO: NCT/3032/2011/128(1)(P)**

In the matter between:

**REGINALD SETHOLE LEGOABE**

**Applicant**

And

**MEEG BANK (ABSA BANK)**

**Respondent**

**CORAM:**

Adv. Fati K. Manamela	(Presiding Member)
Mr. Xolela May	(Panel Member)
Prof. Joseph M. Maseko	(Panel Member)

<i>Date of the Hearing:</i>	<i>6 March 2012</i>
<i>Date handed down:</i>	<i>30 March 2012</i>

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**JUDGMENT AND REASONS**

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**INTRODUCTION**

1. This is an application for the Tribunal to review the sale of goods in terms of section 128 of the National Credit Act, (No. 34) 2007 ("NCA"). The goods in question involved immovable property which had been owned by the Applicant and which was sold at a public auction on 6 May 2011.

2. The Applicant in this matter is Mr. Reginald Sethole Legoabe. At the hearing the Applicant appeared in person and was not represented. And for purposes of this matter, the applicant is a “consumer” as defined in terms of section 1 of the NCA.
3. The Respondent in this matter is Meeg Bank Limited hereinafter also referred to as Absa Bank, a member of the Barclays Group. The Respondent did not attend the hearing and did not file any documents with the Applicant or the Tribunal, in order to answer allegations leveled against it.
4. The Applicant acknowledged that he had at some point experienced difficulty in meeting his payment obligations arising from a mortgage agreement he had signed with the respondent. He further conceded that he had been making irregular payments to his mortgage bond account. As a result of the default, the Respondent instituted legal proceedings for the recovery of the full outstanding balance in terms of the mortgage bond agreement by; *inter alia*, obtaining an Order of the High Court declaring executable, the mortgaged property.
5. At the hearing held on 6 March 2012 the Tribunal was appraised only of the version of the Applicant’s account of events leading to the application. The basis for the Applicant’s approach to the Tribunal is that the Respondent did not sell the goods at the best reasonable price available. According to the Applicant:
  - (a) On 29 April 2011, noting the looming public auction of his house, he managed to secure a potential buyer for his house. Subsequently, he signed an offer to purchase with a certain Mr. Vilakazi for the amount of R400 000.00 (four hundred thousand rand). The signed offer was presented to the Tribunal.
  - (b) On 5 May 2011 and just before the auction took place, Mr Vilakazi’s attorneys made a written offer to the Respondent pursuing the implementation of the sale agreement which had already been submitted to the Respondent. Notwithstanding the signed agreement, the Respondent sold the house for R380 000.00.

## **WHAT SEEMS APPARENT**

6. The Applicant purchased certain immovable property held by deed of transfer no: T158559/ 2006. In order to finance this purchase the Applicant passed a mortgage bond in the Respondent's favour as security for a loan of R340 000.00.
7. The Applicant breached the terms of the mortgage bond agreement by failing to pay certain installments. In terms of the mortgage bond agreement the full balance of the bond became due, owing and payable. The total balance owing and payable to the Respondent according to the Notice of Attachment served by the Sheriff, dated 31 March 2010 was R366 980.89. Interest on this amount was calculated daily at the rate of 16.00% per annum and compounded monthly from 6 March 2009 to date of final payment.
8. Applicant secured a potential buyer and concluded a sale agreement in the amount of R400 000.00. The property, for all intents and purposes had already been declared executable under the Sheriff's warrant and subsequently sold for R380 000.00.
9. The Applicant was not satisfied with the price which was obtained for the property on public auction and approached the Tribunal to review the sale.

## **BASIS FOR THE APPLICATION**

10. The Applicant based his application for the review of sale on sections 127 and 128 of the Act. These sections deal with the situation where a consumer under an installment agreement, secured loan or lease surrenders goods to the credit provider. The credit provider is then required to follow a specific procedure as set out in the Act before the goods are sold. Once the goods are sold, the consumer may approach the Tribunal to review the sale of goods. If the Tribunal is not satisfied that the credit provider sold the goods as soon as reasonably practicable or for the best price

reasonably obtainable, the Tribunal may order the credit provider to credit and pay to the consumer an additional amount exceeding the net proceeds of the sale.

11. The Applicant argued that these provisions applied to the sale of his mortgaged property because he had entered into an agreement with the Respondent in terms of which the Applicant would attempt to have the property sold quickly and for the best price obtainable. The Applicant argued that by securing a potential buyer for his property he was preventing the property from being auctioned and undersold, thereby expediting the sale. For this reason, the Applicant submits without specific mention or reference to applicable sections in the National Credit Act, that sections 127 and 128 applied to the sale of his property. The Tribunal acknowledges the fact that the Applicant was unrepresented and may not have researched areas of the law relevant to his case.

#### **ISSUE TO BE DECIDED**

12. The issue the Tribunal must determine is whether sections 127 and 128 apply to the Applicant's case. Pertinently, the Tribunal must determine whether the sale of the Applicant's immovable property at a public auction by the sheriff of the court subsequent to an order of the High Court, rendering the property specially executable can be reviewed in terms of section 128 of the Act. Further the Tribunal must decide whether section 131 extends the application of section 127 to the Applicant's case before the Tribunal.

#### **APPLICATION OF THE LAW**

13. Section 131 reads as follows:

*'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.'*

Section 131 deals with an attachment order with respect to property that is the subject of a credit agreement. It provides that if a court grants an attachment order with respect to property which is the subject of a credit agreement (as opposed to being surrendered to the credit provider by the consumer) the credit provider is required to follow the procedure set out in sections 127 (2) to (9) and section 128 read with the changes required by the context. The effect of the section is therefore to extend the application of the provisions of sections 127(2) to (9) to the applicable situations provided for in section 131.

14. The question to be decided 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. This section deals with the repossession of goods in terms of credit agreements. What needs to be determined is: whether the transaction the Applicant entered into with the Respondent constitutes a credit agreement. At first glance it may appear that sections 127 and 128 read with section 131 apply to this case, and in particular the agreement concluded by both parties where the credit provider advanced monies (loan) to the consumer, the Applicant in this matter. A mortgage bond was then registered in favour of the Respondent as a security for the loan. The Respondent never owned or possessed the immovable property, but was only the loan-grantor whose loan was burdened with a mortgage bond to secure it. For all intents and purposes the Applicant was in ownership and possession of the immovable property. The immovable property which is the mortgaged property was not the subject of a credit agreement and is therefore not capable of being repossessed.
15. In this case the Applicant entered into a mortgage agreement with the Respondent. Section 1 of the Act defines a mortgage agreement as a credit agreement that is secured by a pledge of immovable property. This throws out the applicability of section 127 as the latter only applies to installment agreements; secured loans and leases. A secured loan is defined in section 1 of the Act and refers only to a pledge or cession of title in respect of movable property. An installment agreement is also defined as the sale of movable property. The Supreme Court of Appeal, in the matter of *Rossouw and Another vs FirstRand Bank Limited* [2010] ZASCA 130, confirmed the assertion that a mortgage agreement does not fall within the definition of an installment agreement,

secured loan or a lease. Section 127 is thus only applicable to agreements involving movable property.

16. In the matter 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. This case involved the attachment of a motor vehicle which was the subject of an installment 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 installments and the credit provider brought an application in terms of s130 (1) for an order authorizing 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 realize 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 of this outstanding balance from the consumer. Should the consumer default in paying the 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, judgment against him or her will be prevented. (see section 127 (8) (a) and (b). See also judgment at 49E – 50E).

17. A different process obtains 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 judgment creditor (see Pete Hulme Du Plessis and Palmer *Civil Procedure: A practical guide* 359).

18. When the Applicant defaulted on his mortgage loan repayments, the full amount of the loan became due and payable and judgment was taken against him 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 judgment debt. It is clear from the facts, as set out above, that 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.

## ASSESSMENT

19. 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. If the Tribunal is not satisfied that the credit provider sold the goods as soon as reasonably possible, or for the best price reasonably obtainable, the Tribunal may order the credit provider to credit and pay to the consumer an additional amount exceeding the net proceeds of 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.
20. 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. And the signed offer to purchase and sell the property to Mr. Vilakazi was of no consequence, as after the property had been attached, by the sheriff, it was no longer in the hands of the Applicant to sell. A person cannot pass ownership that they do not have. Nobody transfers more rights than he himself has<sup>1</sup>.

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<sup>1</sup> “Nemo plus iuris ad alium transferre potest quam ipse habet”

21. The Uniform Rules of the High Court apply to execution sales of immovable property. Rule 46(8) provides for the condition of sale and application of conditions stipulated by the sheriff before the sale. The conditions cannot be altered orally. In the matter at hand, the Applicant contends that he had secured a potential buyer with whom he had concluded a sale agreement on a determinable reserve price. The sale is without reserve and the sheriff is obliged in terms of Rule 46(12) to sell to the highest bidder. Accordingly a sale by public auction without reserve is completed at the fall of the hammer and is over when the final bid is accepted by the sheriff. A sheriff has no power under Rule 46 to undo a sale.
22. 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
  - the property was finally returned to the credit provider (who must assume responsibility for disposing of the property) because the consumer was unable to meet his obligations under the credit agreement.
23. All of the above situations did not obtain in the application presented to this Tribunal. By reason of the afore-going the Tribunal has no authority under the Act that creates it to pronounce on the matter. The question whether the Tribunal should adjudicate the issue relating to the review of the sale of goods, becomes an academic exercise.

Case law that has been cited in this judgment also attests to this finding. Therefore, this application must fail.



**ORDER**

24. Having regard to all the information at its disposal, the Tribunal finds that sections 127 and 128 only apply to the sale of moveable property. The Tribunal further finds that section 131 does not apply in the circumstances of this case. The application for the review of the sale of goods is hereby dismissed.

**Dated this 30th day of March 2012**

[SIGNED]

A handwritten signature in black ink, appearing to be 'Adv. FK Manamela', written in a cursive style.

**ADV. FK MANAMELA**

**PRESIDING MEMBER**

**PROF. J MASEKO (MEMBER) AND MR X MAY (MEMBER) CONCURRING**