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IN THE NATIONAL CONSUMER TRIBUNAL
HELD IN CENTURION

CASE No: NCT/81971/2017/128 (1)

In the matter between:

MUDWA KHUMALO

APPLICANT

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED

RESPONDENT

JUDGMENT AND REASONS

INTRODUCTION

1. The Applicant in this matter is Mr Mudwa Khumalo. At the hearing, held on 31 August 2017, Mr Khumalo represented himself.
2. The Respondent in this matter is The Standard Bank of South Africa Limited. The Respondent was represented by Mr Daniel Raath from Van Hulsteyns Attorneys.
3. This is an application for the Tribunal to review the sale of goods as provided for in section 128 (2) of the National Credit Act, 2007. The goods in question involved immovable property (a house) described as Erf [...] C. Extension 27, Registration Division JR, Gauteng (the property). The property was previously owned by the Applicant and was sold at a sale in execution in 2009 for R288 000.00

BACKGROUND

4. The Applicant purchased the property for R85 000 in 2007. The exact details regarding this purchase are not clear but it seems that the Applicant purchased the property in a development.
5. The Applicant and the Respondent concluded a written home loan agreement on 8 August 2007.¹
6. In terms of this agreement, the Respondent agreed to lend the Applicant the sum of R491 204.38. As security for this debt, the Applicant was required to register a mortgage bond over the property in favour of the Respondent for an amount of R488.646.00.²
7. The Applicant failed to effect payment of the monthly instalments due in terms of the mortgage bond agreement. It is noted by the Tribunal that the Applicant disputes the exact details regarding the registration of the mortgage bond and he disputes that any money was actually paid to him. Regardless of these factual disputes however, the fact remains that the Respondent obtained a default judgment in the Gauteng Division of the High Court Pretoria on 15 September 2009 for the purposes of recovering the debt due to it under the loan agreement. The amount owing to the Respondent at the time was R528 765.65.
8. The property was sold by the sheriff of the High Court at a public auction on 9 June 2010. The sale of the property realised the sum of R288 000.00.
9. The Applicant instituted an application for a rescission of the default judgment in 2011 but his application was unsuccessful. He has not appealed against the dismissal of the rescission application.

BASIS FOR THE APPLICATION

10. The Applicant based his application for the review of the sale on section 128 of the Act. This section permits a consumer to approach the Tribunal directly when he has a dispute regarding the sale of goods. If the Tribunal is not satisfied that a credit provider, who has sold goods in accordance with section 127, sold the goods as soon as reasonably practicable or for the best

¹ See Annexure SB3 to the Answering affidavit.

² See Annexure SB\$ of the Answering affidavit for a copy of the mortgage bond.

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.

ISSUE TO BE DECIDED

11. The issue the Tribunal must determine is whether section 128 applies 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.
12. In order to fully appreciate the import of section 128 it is also necessary to consider section 127 because section 128 provides a method of review for the sale of goods that took place in accordance with section 127 of the Act. In other words, the Tribunal only has jurisdiction to review the sale of goods if the sale took place in accordance with section 127 of the Act.

ASSESSMENT

13. 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 of the NCA, refer to the sale or lease of **moveable property** (our emphasis). 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 surrender **moveable property** (our emphasis) 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.
14. Section 128 provides that a consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of section 127 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 a sale that took place in accordance with section 127. If the Tribunal is

not satisfied with the sale, the Tribunal may order the credit provider to pay an additional sum of money to the consumer.

15. The Tribunal has considered section 127 and 128 in a number of judgments where the Tribunal has held that sections 127-131 of the Act do not apply to the review of the sale of immoveable property.³ Although section 131 was not referred to in this matter, the Tribunal, for the sake of completeness deems it necessary to explain why section 131 which deals with “the Repossession of Goods pursuant to an attachment order” is not relevant when it comes to the sale of immoveable property.

16. 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.”

17. 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.

18. The question to be decided therefore is whether section 131 applies when immoveable property is attached by the court in order that it may be sold to satisfy a judgment debt.

19. 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.

20. Section 127(2) to (9) deals with the processes that a credit provider must follow when property that has been sold to a consumer is returned to the credit provider because the consumer is unable to meet his or her obligations under the credit agreement.

21. 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

³ See *Sikosana v First Rand Bank Limited* (NCT/2800/2011/128(1) (NCA) [2014] ZANCT (15 March 2014); *Opperman v Firstrand Bank Ltd* (NCT2263/2011/128 (1) (p) [2012] ZANCT (8 May 2012)

131).

22. 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 that 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). See also judgment at 49E – 50E*).

23. 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).

24. 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 judgement debt (or at least a portion of the outstanding 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.
25. 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 or her obligations under the credit agreement. If the property is sold and this governs 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.

ORDER OF THE TRIBUNAL

26. In summary therefore, the Tribunal finds that section 128 applies to the sale of moveable property only and that the Tribunal has no jurisdiction to review the sale of immovable property.
27. The application for the review of the sale is dismissed.

Handed done in Centurion this 1st day of September 2017.

[Signed]

Prof T Woker

Ms H Devraj and Adv F Manamela concur in the judgment.