# THE SUPREME COURT OF APPEAL
**REPUBLIC OF SOUTH AFRICA**

**MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

***FirstRand Bank Limited t/a Wesbank v Davel* (1229/2018) [2019] ZASCA 168 (29 November 2019)**

**From**: The Registrar, Supreme Court of Appeal

**Date:** 29 November 2019

**Status:** Immediate

***Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.***

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Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against a decision of Legodi JP sitting in the Gauteng Division of the High Court, Pretoria. The appeal was upheld to the extent reflected in the substitution order granted, and there was no order as to costs.

The matter concerned so-called instalment sale agreements in terms of the National Credit Act 34 of 2005 (the NCA). On 27 June 2011 the appellant, FirstRand Bank Limited t/a Wesbank (Wesbank) concluded a written instalment sale agreement with the respondent, Mr Nicolaas Johannes Davel, in terms of which he purchased a 2010 Volkswagen Polo 1.6 Comfortline SE (the vehicle) for an amount of R195 863,45. Mr Davel was obliged to pay 69 consecutive monthly instalments of R3 592,79 and a final balloon payment of R68 796 on 25 July 2016. The agreement made provision for the payment of interest by Mr Davel, at a fixed rate of 11,5 per cent per annum. It also contained the typical reservation of ownership clause, in terms of which ownership would remain vested in the seller until the buyer had paid the purchase price in full. Mr Davel fell behind on the payment of his instalments and, as at 26 May 2017, was in arrears in an amount of R75 415,92.

Wesbank proceeded to deliver a notice to Mr Davel in terms of s 129(1)(*a*) of the NCA, drawing the default to his attention and informing him of the options available to him in terms of the Act. The notice also warned Mr Davel that, in the event of him not electing any one of those options, legal proceedings would be instituted against him for the cancellation of the agreement and the return of the vehicle. Mr Davel did not respond to the notice and Wesbank accordingly instituted summons claiming the relief foreshadowed in the notice. It thereafter made application for summary judgment, in terms of which it claimed the cancellation of the agreement, the return of the motor vehicle and that the entire damages component of its claim be postponed *sine die*. It further sought forfeiture of all monies paid by Mr Davel.

The application came before the court below along with two applications for default judgment by Standard Bank, on similar grounds and claiming similar relief. None of these applications were opposed. Legodi JP accepted that, in the circumstances, both banks were entitled to cancel the respective agreements and obtain return of the motor vehicles. However, the court was concerned about the price

at which the vehicles would later be resold by the banks. Accordingly, after confirming the cancellation of the instalment sale agreement and ordering the return of the motor vehicle purchased in terms thereof, Legodi JP made an additional order (para 20.4) to the effect that the credit provider shall, within ten business days after receiving the vehicle, provide the consumer with a written notice in which it sets out the estimated value of the vehicle, and informs the consumer that the vehicle concerned will not be sold at a price less than such an estimated value unless so sanctioned by the court, and then after a notice has been provided to the consumer.

Wesbank's application for leave to appeal this order was dismissed with costs by the court below. It then applied, successfully, for leave to appeal to the SCA. Standard Bank did not appeal the order of the court below.

The SCA held that although the concerns of the court below were legitimate, para 20.4 was made without a proper appreciation of the architecture of the NCA and was not in accordance with its provisions. Both Wesbank and the University of the Free State Law Clinic (the Clinic), who was admitted as *amicus* due to its interest in matters affecting the rights of consumers, agreed that the order would need to be re-crafted if it were protect the rights of both credit providers and consumers and provide practical guidance, especially in relation to the price to be realised upon resale of the motor vehicle. The SCA stated that while the procedures prescribed by the NCA are no doubt to be complied with, in terms of the agreements as well as the NCA sellers in instalment sale agreements are entitled, in the normal course, upon default by purchasers, to claim from the latter the amount they would have received had the purchasers fulfilled their contractual obligations. The proceeds of the sale of the motor vehicles concerned would ultimately have to be brought into account in determining how much is still owing or, depending on the amount recovered, the surplus amount that accrued to the purchaser.

The SCA then dealt with the relevant provisions of the NCA, which was promulgated to promote a fair and non-discriminatory marketplace, to regulate consumer credit and to improve standards of consumer information. Section 3 sets out the purposes of the Act, which includes promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers, and addressing and preventing over-indebtedness of consumers. Section 122(2)(*a*) of the Act makes provision for a consumer to terminate an instalment sale agreement by surrendering the goods in accordance with s 127, which in turn enables a consumer to terminate such an agreement by giving written notice to the credit provider. Section 123(2) allows a credit provider to terminate the agreement if the consumer is in default, by taking the steps in terms of ss 129, 130 and 131. Section 127 deals with the surrendering of goods by the consumer and s 128 provides consumers with an added avenue of dispute resolution. Section 129, under which the notice was sent by the appellant to Mr Davel, sets out the procedures to be followed by a credit provider before debt enforcement can be resorted to, and s 130 has to do with certain time bars and procedures in court.

After an explanatory note on each of the relevant NCA provisions, the SCA found it to be clear that the legislature was intent on ensuring that consumers are protected post cancellation of a credit agreement to which they had been a party. It held that there were proper mechanisms in place for consumers to challenge estimated values and prices realised upon a sale of goods, for example. However, the NCA also provides for the enforcement of the rights of a credit provider, its purpose being directed at ensuring an equality of arms as far as is practically possible.

The SCA held that the court below erred in not having sufficient regard to s 128 of the NCA, which allows for contestation in relation to a disputed sale of goods, and thus not appreciating fully the architecture of the Act. In the result, it upheld the appeal to the extent reflected in its substitution order, which is somewhat extensive and includes all the steps that credit providers are obliged to follow.

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