CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 73/15

In the matter between:

NOMSA NKATA Applicant

and

FIRSTRAND BANK LIMITED First Respondent

SHERIFF FOR THE DISTRICT OF DURBANVILLE, WESTERN CAPE Second Respondent

KRAAIFONTEIN EIENDOMME / PROPERTIES Third Respondent

REGISTRAR OF DEEDS, WESTERN CAPE Fourth Respondent

and

SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA Amicus Curiae

Neutral citation: *Nkata v FirstRand Bank Limited and Others* [2016] ZACC 12

Coram: Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J

Judgments: Cameron J with Nugent AJ concurring (main judgment): [1] to [74]
Moseneke DCJ with Jafta J, Khampepe J, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J concurring (majority judgment): [75] to [139]
Nugent AJ with Cameron J concurring (separate concurrence to main judgment): [140] to [162]

Jafta J (separate concurrence to majority judgment): [163] to [189]

Heard on: 19 November 2015

Decided on: 21 April 2016

Summary: National Credit Act 34 of 2005 — section 129(3) — requirements for reinstatement of credit agreement — payment of credit provider's reasonable costs of enforcement — credit provider unilaterally capitalised the costs in consumer's bond account without demand of payment and taxation or agreement on reasonableness — costs not due and payable — reinstatement not precluded

---

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

(a) Leave to appeal is granted.

(b) The appeal succeeds.

(c) The order of the Supreme Court of Appeal is set aside.

(d) It is declared that—

(i) the credit agreement between FirstRand Bank Limited and Ms Nkata was lawfully reinstated;

(ii) from 8 March 2011, the default judgment entered against Ms Nkata and the subsequent warrant of execution against her home had no legal force;

(iii) the public auction of Ms Nkata's home on 24 April 2013 to the third respondent is set aside; and

(iv) the property may not be transferred to or registered in the name of the third respondent.

(e) The Bank must pay Ms Nkata's costs in the High Court, the Supreme Court of Appeal and in this Court, including where applicable the costs of two counsel.

JUDGMENT

CAMERON J (Nugent AJ concurring):

Introduction

[1] The National Credit Act[1] (NCA) permits consumers who have fallen into arrears, and face impending debt enforcement procedures, to remedy their default or, as the NCA terms it, "reinstate" the credit agreement by paying the full arrear amounts, along with the credit provider's permitted default charges and reasonable costs of enforcing the agreement.[2] The principal question is whether reinstatement of a credit agreement took place in this case.

[2] The applicant, Ms Nomsa Nkata (Ms Nkata), says Yes. So does the amicus curiae, the Socio-economic Rights Institute of South Africa (SERI). The first respondent, FirstRand Bank Limited (Bank), says No.[3] The courts below came to differing conclusions. Now this Court must, by interpreting the provisions of the NCA, provide an answer.

[1] 34 of 2005. This litigation preceded the amendments to the National Credit Act 34 of 2005 by the National Credit Amendment Act 19 of 2014 (Amendment Act), which came into operation on 13 March 2015.

[2] See section 129(3) of the NCA, the statutory provision at issue, which is set out in [20] below.

[3] No relief is sought against the second to fourth respondents, who are cited merely because of their potential interest in these proceedings.

Background

[3] Ms Nkata is a businesswoman and single mother of two. She sells hospital equipment. In March 2005, she bought a property at 35 Vin Doux Crescent, Durmonte, Durbanville, Western Cape (property). That year, and in 2006, she registered two mortgage bonds with the Bank to finance the property's acquisition. The property became her primary residence in 2007. The first mortgage bond was for R850 000 and the second for R630 000. For the first bond, Ms Nkata selected the address of the property as the *domicilium* address for the service of all notices. For the second, she selected C/04 Devonshire Hill, Rondebosch, Cape Town, 7700 (Rondebosch apartment). This was the address she temporarily lived in while her house was being built on the property. The loan or mortgage agreement, that both mortgage bonds secure, is a credit agreement to which the NCA applies, even though it was concluded before the NCA came into effect.[4]

[4] Ms Nkata was unable to meet her obligations under the credit agreement and repeatedly fell into arrears. This triggered many telephone calls and letters from the Bank, including two notices in terms of section 129(1) of the NCA.[5] On 1 June 2010, the Bank addressed the first section 129(1) notice to Ms Nkata, but it was delivered to 27 (instead of 35) Vin Doux Crescent, Durmonte, Durbanville. So Ms Nkata never

[4] For convenience and since Ms Nkata made her bond repayments in consolidated fashion under the same home loan facility, I refer to the mortgage bonds as the "credit agreement".

[5] Section 129(1) of the NCA provides:

> "If the consumer is in default under a credit agreement, the credit provider—
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—
>
> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130."

received it. The Bank said the wrong address was due to an error in the deeds office records. At that stage Ms Nkata's arrears were R30 186.19.

[5] Three days later, on 4 June 2010, the Bank addressed a second section 129(1) notice to Ms Nkata. This time it was sent to the Rondebosch apartment. But the Bank misstated the address, sending to "c/o 4 Devonshire Hill" rather than C/04 Devonshire Hill. At this stage, Ms Nkata's arrears were R42 257.01. She denied receiving either notice.

[6] On 5 July 2010, the Bank issued summons. It alleged section 129(1)(a) compliance. The address debacle continued. The second respondent (Sheriff) tried, without success, to serve the summons at the Rondebosch apartment. The Sheriff later served at the correct address – 35 Vin Doux Crescent – by affixing a copy of the summons to the outer door. Ms Nkata did not enter an appearance to defend. She maintained that the summons was never served on her.

[7] On 28 September 2010, the Registrar of the Western Cape Division of the High Court, Cape Town (Registrar) granted default judgment against Ms Nkata for the total outstanding amount owed to the Bank. This totalled R1 472 506.89, together with interest from 1 June 2010 to the date of payment. The Registrar issued a writ authorising the Sheriff to attach and take the property into execution.[6] Ms Nkata claims that she became aware of the judgment only when a representative from the Bank telephoned her to inform her that the property was to be sold in execution by public auction on 10 December 2010.

[6] See *Nkata v FirstRand Bank Ltd and Others* [2014] ZAWCHC 1; 2014 (2) SA 412 (WCC) (High Court judgment) at para 7. This occurred before this Court had delivered its judgment in *Gundwana v Steko Development CC* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) (*Gundwana*), disallowing all registrar-issued default judgments and execution writs involving debtors' homes, and requiring that the facts in each case be judicially supervised. See *Gundwana* at para 53 where this Court held that "in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes". *Gundwana* further declared rule 31(5) of the Uniform Rules of Court invalid to the extent that it authorised the Registrar (rather than the court) to declare immovable property specially executable, without judicial supervision, where it is the debtor's home – but the Court declined to make the declaration of invalidity retrospective. The judgment requires debtors against whom default judgments have been granted before 11 April 2011 to apply for rescission and to explain the reason for lateness.

[8] On 19 November 2010, Ms Nkata applied urgently to the High Court to rescind the default judgment. On 10 December 2010, before her application was heard, she and the Bank entered into a settlement agreement.[7] The Bank cancelled the sale in execution. Ms Nkata agreed to pay monthly instalments of R10 000. If she failed to do so, the Bank would be entitled to "proceed to sell the property in execution forthwith".[8] Ms Nkata also agreed to pay the costs of the cancelled sale as well as the costs of the rescission application "as taxed or agreed".[9] The agreement was never made an order of court.[10]

[9] Ms Nkata contends that after the settlement agreement, when she paid her arrears of over R87 000,[11] her credit agreement with the Bank was reinstated. She resumed monthly repayments in March 2011 when she caught up with her arrears. The Bank contends that the fact that default judgment had been granted, with the

[7] The settlement agreement provides, among other things:

> "1. The sale in execution in respect of Erf 8832 Durbanville, also known as 35 Vin Doux Street, Durmonte, Durbanville (the property) which was scheduled to take place on 10 December 2010 is cancelled.
>
> 2. [Ms Nkata] shall sign a standard FNB Quicksell Mandate (Quicksell agreement) within seven days of the granting of this [court order].
>
> 3. While the Quicksell agreement is in place [Ms Nkata] shall make payment to the [Bank] of R10 000 per month in respect of the instalments due to the [Bank].
>
> 4. Should the property not be sold in terms of the Quicksell agreement prior to its expiry/termination [Ms Nkata] shall pay the full arrears to the [Bank] within 14 days of such expiry/termination or on such terms as may be agreed between the parties.
>
> 5. Should [Ms Nkata] pay the full arrears to the [Bank] in terms of clause 4 above the [Bank] shall not sell the property in execution but [Ms Nkata] shall pay the full monthly instalments to the [Bank].
>
> 6. Should the property not be sold in terms of the Quicksell agreement and should [Ms Nkata] fail to pay the arrear amount owing to the [Bank], the [Bank] shall be entitled to proceed to sell the property in execution forthwith.
>
> 7. [Ms Nkata] shall pay the wasted costs occasioned by the cancellation of the sale in execution referred to in paragraph 1 above.
>
> 8. [Ms Nkata] shall pay the costs of this application as taxed or agreed."

[8] Id at clause 6.

[9] Id at clause 8.

[10] This occurred even though it was envisaged that the settlement agreement would be made an order of court and it was drawn up in the form of a draft order.

[11] These arrears led to the September 2010 default judgment proceedings.

notice of execution dated 28 September 2010, made reinstatement impossible under the statute.

[10] In February 2011, the Bank debited Ms Nkata's mortgage bond account with amounts titled "Legal Fees" on the account statement. The amounts were R6 498 and R8 000. The Bank describes these as being for the attorney's fees and counsel's day fee in Ms Nkata's unsuccessful rescission application, which costs were covered by the parties' settlement agreement. This was in addition to a globular amount of R9 050, debited to the mortgage bond account in October 2010, for fees that the Bank had incurred in pursuing the cancelled execution and sale.[12] Ms Nkata says these costs were not presented to her and the Bank did not invite her to pay them.

[11] After paying the full arrears on her account in March 2011, Ms Nkata again fell behind in her payments. She brought her account up to date in March 2012, and, again, in May 2012.

[12] In the meantime, Ms Nkata tried to have the default judgment rescinded. First, in March 2011, shortly after settling her arrears, she sought to make the settlement agreement an order of court. The chamber judge queried the application because the Bank had not been notified of it. It never proceeded. In April 2012, Ms Nkata asked the Bank to agree to have the default judgment rescinded as it affected her credit record. The Bank refused.

[13] Ms Nkata also tried making a distressed debt application,[13] which the Bank rejected since the matter was "under litigation".[14] She unsuccessfully asked that the Bank allow her to pay reduced instalments for five years. The Bank proposed she sell

[12] More particularly the fees were for the summons, judgment, writ, attachment and cancelled sale in execution, including VAT and disbursements for sheriff's fees.

[13] In terms of section 87(1) read with sections 79(1)(a), 86(7)(c)(ii)(aa) and (bb), and 86(8)(b) of the NCA.

[14] High Court judgment above n 6 at para 10. The Bank's records noted that although Ms Nkata's account was up to date, this was "after years in arrears"; that the Bank had a judgment; and that there was no justification for acceding to the debt application "with this lack of financial behaviour".

the property if she could not afford the instalments. By the end of 2012, Ms Nkata was in arrears of R22 058.09.

[14] In February 2013, with Ms Nkata now in arrears of R24 424.80, the Bank sent a notice of sale in execution to her by registered mail. This, she failed to collect. In March 2013, she was informed of the date of the sale in execution – 24 April 2013. Ms Nkata continued to make promises to pay. The property was sold to the third respondent by public auction. By this time, the Bank's records reflected a total debt of R1 392 028, with arrears of R33 716 (approximately three months' instalments).

[15] On 1 March 2013, the Bank debited R4 000 to Ms Nkata's mortgage bond account for fees, advertising, sheriff's charges and VAT in respect of the scheduled sale in execution.

[16] At the end of April 2013, Ms Nkata and the purchaser of the property, the third respondent, entered into a lease agreement. This allowed her to remain on the property pending its renovation and on-sale.

High Court

[17] In May 2013, Ms Nkata launched this litigation. It was her second High Court application. She once more sought rescission of the default judgment. Transfer and registration of the property to the new owner was suspended pending the outcome. The High Court (per Rogers J) heard the matter in October 2013.

[18] The High Court refused to rescind the default judgment, even though it found that Ms Nkata had a bona fide defence to the claim on which default judgment was granted. This was because the Bank failed to give her proper notice under the NCA. The Court refused rescission because Ms Nkata had no satisfactory explanation for why she delayed for nearly two and a half years after learning of the default judgment.

[19] Another reason why Ms Nkata was not entitled to rescission, the High Court found, was that she settled her dispute with the Bank when she entered into the agreement on 10 December 2010. She thereby perempted her right to set aside the judgment.

[20] So the default judgment stood. But, having rejected Ms Nkata's claim on the grounds she brought it, the High Court, of its own accord, raised a different question – reinstatement under section 129(3) of the NCA. Subject to section 129(4), which stipulates circumstances in which a consumer may not reinstate a credit agreement,[15] section 129(3) provides 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."

[21] Had Ms Nkata reinstated the credit agreement? The High Court found she had. Her March 2011 payment wiped out her arrears and reinstated her credit agreement with the Bank. The Court's reasoning had four main elements.

---

[15] Before its amendment by the Amendment Act (see n 1 above), section 129(4) read:

> "A consumer may not re-instate a credit agreement after—
>
> (a) the sale of any property pursuant to—
>
> (i) an attachment order; or
>
> (ii) surrender of property in terms of section 127;
>
> (b) the execution of any other court order enforcing that agreement; or
>
> (c) the termination thereof in accordance with section 123."

[22] First, it found that reinstatement after falling in arrears does not require payment of the full accelerated debt.[16] Here, the mortgage bonds contained acceleration clauses that allowed the Bank to claim the full debt when Ms Nkata fell into arrears. However, the High Court found that only payment of arrears is required for reinstatement. In this case, despite periodically falling behind in her payments, Ms Nkata paid all her arrears. First in March 2011 and again, in March 2012.

[23] Second, it was common cause that the Bank had not cancelled Ms Nkata's agreement, so it was eligible for reinstatement.

[24] Third, section 129(3)(a) requires the debtor to pay arrears including the "credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement". Here, the Bank had debited Ms Nkata's bond account with various charges relating to their own costs.[17] The High Court held that the Bank could not unilaterally impose these costs without their being "taxed or agreed".[18]

[25] What was more, the High Court held, by debiting these costs to Ms Nkata's account, rather than demanding separate payment, the Bank indicated to her as a consumer that it was "content to lend the corresponding amount to the consumer and to receive repayment thereof in instalments as if the debited costs were part of the capital".[19] Therefore, although Ms Nkata had not paid those costs, the High Court was satisfied that her payment of arrears sufficed to meet the requirements of section 129(3)(a).

[26] Fourth, it found that Ms Nkata did not have to intend to reinstate her credit agreement. Still less did she have to signal to the Bank any intention to do so. This

[16] High Court judgment above n 6 at paras 38-9.

[17] See [10].

[18] High Court judgment above n 6 at para 42.

[19] Id at para 44.

was because reinstatement occurs "by operation of law if the consumer as a fact makes the payments contemplated by section 129(3), unless reinstatement is precluded by virtue of section 129(4)".[20]

[27] The upshot was that, although the default judgment stood, it could no longer be enforced against Ms Nkata because before the judgment was executed her credit agreement with the Bank had been reinstated. The sale of the property was thus set aside.[21]

Supreme Court of Appeal

[28] The Supreme Court of Appeal reversed the High Court order.[22] It found for the Bank. But it did so on a basis that everyone now accepts was wrong. It found that the Bank had already executed the default judgment in terms of section 129(4) by the time Ms Nkata paid her arrears. This occurred, the Court held, when the property was sold at the sale in execution. The difficulty is that the sale in execution took place on 24 April 2013, whereas Ms Nkata paid her arrears in March 2011 – 25 months earlier. Execution, if it was to thwart reinstatement, would have to have been before 7 or 8 March 2011.[23]

[29] The Supreme Court of Appeal in addition found that reinstatement of a credit agreement implies an amendment to it. Since the NCA requires that changes or amendments to credit agreements be recorded in writing and signed, reinstatement demands a formality.[24] Since this was not followed, reinstatement was

[20] Id at para 45.

[21] Id at paras 57-9.

[22] In a judgment by Willis JA (Maya, Cachalia, Majiedt, and Saldulker JJA concurring), reported as *FirstRand Bank Ltd v Nkata* [2015] ZASCA 44; 2015 (4) SA 417 (SCA) (Supreme Court of Appeal judgment).

[23] I say before "7 or 8 March 2011" because the exact date is unclear. The parties agreed that the R87 500 lump sum that cleared Ms Nkata's arrears was paid on 8 March 2011. However, at several instances in her papers before the High Court Ms Nkata alleges that this occurred on 7 March 2011. The Bank, in its supplementary affidavit, alleged that she paid the lump sum on 8 March 2011. See further, [41] below. The High Court ultimately found that she paid this lump sum by "not later than 8 March 2011". See the High Court judgment above n 6 at para 55.

[24] Section 116 of the NCA provides:

not competent.[25]

In this Court

[30] So the principal question before us is whether the High Court was correct to hold that Ms Nkata had reinstated the credit agreement, thereby purging her default and disentitling the Bank from proceeding to sell the property. If the High Court was wrong and she did not reinstate her agreement, then no further questions arise. The order the Supreme Court of Appeal granted should be sustained, though not for the reasons that Court gave, and her application must fail. But if she fulfilled the requirements of section 129(3), then the question would arise whether section 129(4) bars her from reinstatement.

[31] Ms Nkata supported the High Court judgment. In addition, she sought to attack the validity of the sale by relying on the fact that the Bank failed to provide her with notice under section 129(1) of the NCA.

[32] The Bank contends that, though she had paid her instalment arrears in March 2011, and again in March 2012, she failed to pay its "permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement", as section 129(3) requires. In addition, it contends that a consumer must notify the credit provider when she intends to reinstate a credit agreement. Ms Nkata did not do this. In any event, the Bank urges this Court to find that reinstatement was precluded because attachment and publication of a notice of sale in terms of rule 46 of the

---

> "Any change to a document recording a credit agreement or an amended credit agreement, after it is signed by the consumer, if applicable, or delivered to the consumer, is void unless—
>
> (a) the change reduces the consumer's liabilities under the agreement;
>
> (b) after the change is made, unless the change is effected in terms of section 119(1)(c), the consumer signs or initials in the margin opposite the change;
>
> (c) the change is recorded in writing and signed by the parties; or
>
> (d) any oral change is recorded electromagnetically and subsequently reduced to writing."

[25] Supreme Court of Appeal judgment above n 22 at para 36.

Uniform Rules of Court constitute the execution of an order as contemplated by section 129(4)(b).

Leave to appeal and condonation

[33] The interpretation of the NCA raises constitutional issues.[26] Ms Nkata's case on reinstatement is arguable and has some prospects of succeeding. It is in the interests of justice that leave to appeal be granted to her. She filed the record and her submissions late. The knock-on was that the Bank filed its submissions late. Acceptable explanations were tendered and condonation should be granted.

Assessment

The section 129(1) notices

[34] We must dispose at the outset with Ms Nkata's invocation of the badly addressed notices, which she alleges never reached her. That is a dead issue. She cannot resurrect it now. The High Court dismissed her application to rescind the default judgment. It upheld her resistance to the Bank's claim on a completely different ground. Ms Nkata never obtained leave to appeal against its determination on that issue. And in this Court she did not seek leave to appeal the refusal of rescission.

[35] The result is that the default judgment stands. With it, the High Court's refusal of all remedies to Ms Nkata in respect of it is *res judicata*. The only way the bad notices can revive before us is if absence of notice under the NCA is, in the way she attempted to invoke it as a defence weapon, either an irreparable constitutional violation or a continuing wrong that vitiates everything that follows. But that contention is wrong, and she later abandoned it. The failure to obtain leave to appeal against the judgment refusing condonation and rescission means that her complaint

[26] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*) at para 36 and *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) (*Kubyana*) at para 17.

about notice is not available in determining the rights or wrongs of the sale of the property.

Did Ms Nkata reinstate under section 129(3)(a)?

[36] So we must return to the question: did Ms Nkata reinstate her credit agreement with the Bank? Section 129(3)(a) requires as a precondition to reinstatement that the consumer must pay three separate items. These are: (a) overdue amounts; (b) the credit provider's permitted default charges; and (c) the credit provider's reasonable costs of enforcing the agreement. What is at issue here is only (c).

[37] The first question is whether, on the evidence before us, Ms Nkata paid the Bank's "reasonable costs" of enforcing the agreement against her. The unchallenged evidence shows that she did not. And it was on the basis of this evidence – that those were not paid – that the High Court decided the case.

[38] Indeed, the litigation has been conducted all along on the basis that what Ms Nkata paid on 7 or 8 March 2011 were her arrear instalments under her mortgage bond, but not anything else. Her founding affidavit in the High Court, in which she sought rescission, claims only that she has paid her "arrears . . . in terms of the settlement agreement".

[39] The settlement agreement of 10 December 2010 distinguishes between three amounts Ms Nkata owes the Bank. These are: (i) arrears due in terms of the mortgage bond (clauses 3, 4, 5 and 6); (ii) the wasted costs occasioned by the cancellation of the sale in execution scheduled for that same day (clause 7); and (iii) the costs of the rescission application as taxed or agreed (clause 8). It was not disputed before us that the costs covered by clause 8 constituted "costs of enforcing the agreement" envisaged in section 129(3).

[40] In its answering affidavit, the Bank accepted that Ms Nkata had paid her arrears in terms of the settlement agreement. After the High Court raised the question of

reinstatement, the parties lodged supplementary affidavits. The Bank lodged an affidavit asserting that Ms Nkata had paid only her arrears, but not the legal costs arising from the default judgment, the rescission application and the sale in execution.

[41] To its supplementary affidavit the Bank attached a schedule setting out the bond arrears and payments made, including the payment of R87 500 on 7 or 8 March 2011. In the supplementary affidavit filed on behalf of Ms Nkata, her attorney asserted that "in accordance with the intention of the legislature and the prescripts of section 129 [Ms Nkata] paid all reasonable default charges and costs under the credit agreement on or about 7 March 2011 and 4 June 2012".

[42] But Ms Nkata did not deal with or contest the Bank's exposition and calculations in the schedule to its affidavit. In these circumstances, the High Court treated it as common cause that she had paid her bond account arrears (item (a) in section 129(3)(a)), but not any legal costs owing to the Bank (item (c)). It was on this basis that it adjudicated the application.[27] And it is on this basis that I now do.[28]

[43] In argument before us, Ms Nkata sought to contend that the account statements the Bank attached to its affidavits showed that she had, in fact, paid all items section 129(3) required her to pay to the Bank, including legal costs. Counsel's submission is wrong. Indeed, counsel made no reference to the Bank's account schedule in advancing this claim, and when challenged from the Bench on this, he appeared to have no answer.

[27] See the High Court judgment above n 6 at para 42 where Rogers J states:

> "I am prepared to assume for present purposes that [the Bank's] costs of opposing the rescission application, like the costs of obtaining default judgment, form part of the reasonable costs of enforcing the credit agreement and that they would thus have to be paid before the credit agreement was reinstated in terms of section 129(3)."

[28] In any event, as shown in [10], [39] and [40] above, default charges are not at issue simply because those were never itemised by the Bank, in the settlement agreement or in the mortgage bond account, as costs that Ms Nkata needed to pay.

[44] In addition, the Bank, the respondent in the rescission proceedings, denied that she had paid item (c). The attorney's vague claim to the contrary in the supplementary affidavit is not sufficient to constitute an effective challenge to the Bank's denial. On the accepted rules of motion court proceedings, the Bank's version must therefore stand.

Meaning of "payment"

[45] We are now in a position to consider what section 129(3) means when it says a creditor may reinstate a credit agreement that is in default "by paying" the credit provider's reasonable costs of enforcing the agreement. The High Court held that, when the Bank debited its legal fees to Ms Nkata's account, it was "content to settle" those costs "by lending her the money through a debit to her bond account". By debiting these costs to the account, rather than demanding separate payment of them, the Bank indicated to her that it was "content to lend the corresponding amount to [her]" and to receive repayment in instalments as if the debited costs were part of the capital loan.[29]

[46] The High Court's approach means that, in effect, the enforcement costs the consumer must pay to achieve reinstatement are, in its words, only "those costs of which the credit provider is at that time requiring payment".[30]

[47] This approach was not correct. It fails to give force to the clear wording of section 129(3). The High Court rightly concluded that the Bank's debit to Ms Nkata's bond account showed that it was happy to add those costs to the capital debt for her settlement. That does not mean that it accepted that she had paid those costs, or that she in fact did. By adding those costs to the capital debt, the Bank lent her money, thereby prescribing the manner in which it expected to receive payment. But the

[29] High Court judgment above n 6 at para 44.

[30] Id.

Bank's action in postponing its claim to payment did not mean that she had paid those costs. And the High Court was incorrect to conclude that it did.

[48] Differently put, the question is whether adding a debit to a debtor's total outstanding debt constitutes payment for purposes of section 129(3). The High Court held Yes. This was wrong. "Payment" has always been understood in our law to mean "the delivery of what is owed by a person competent to deliver to a person competent to receive". This is the definition of payment according to our common law authorities which Innes CJ adopted in *Harrismith Board of Executors v Odendaal*.[31]

[49] Payment means "the satisfaction or performance" of an obligation.[32] It does not mean a promise to pay later. Nor does postponing payment by adding it to an already outstanding debt constitute payment. By debiting the costs to her bond account, the Bank agreed to allow Ms Nkata to pay those costs later. It did not agree that she need not pay them, or that she had already paid them.

[50] During argument, Ms Nkata contended that reinstatement could occur once the parties, by "quasi-mutual assent", as counsel put it, agreed that payment would be effected as part of the total capital payment, followed by monthly instalments. The contention was that once the first instalment was paid – contributing in some measure, however small, to repayment of the items debited – reinstatement could occur. This approach seems to entail that the unpaid items can gradually be repaid as a function of monthly instalments against the capital amount. Hence, on this argument, no separate payment is required to effect reinstatement under section 129(3). The contention is tenuous. It would require us to conclude that, in debiting Ms Nkata's bond account, the Bank made a tacit representation that it waived its right to receive full payment.

[31] *Harrismith Board of Executors v Odendaal* 1923 AD 530 at 539.

[32] *Woudstra v Jekison* 1968 (1) SA 453 (T) at 457H.

[51] The argument cannot be sustained. Had the legislation meant that the consumer can make payment by agreeing to postpone payment, it would have said so. The provision doesn't say that. It says instead that reinstatement can be effected by "paying" the costs in issue. This requires advance, not postponed, and complete, not partial, payment. On this basis it cannot be said that Ms Nkata successfully reinstated the credit agreement since she failed to pay all the amounts section 129(3)(a) requires. This conclusion follows from the words of the statute, coupled with a consideration of its context and purposes. Narrowness doesn't come into it.

[52] SERI contended that the NCA does not prescribe how payment must be made. It contended that the parties could therefore agree on any manner of payment. This is true. But it does not assist Ms Nkata. There was never agreement between her and the Bank on payment of the costs section 129(3) requires. And no agreement can be inferred from the debit entries the Bank made.

Interpreting the NCA – balancing consumer and creditor rights

[53] I have had the benefit of reading the judgment of my colleague, Moseneke DCJ. We agree on this fundamental premise: in interpreting section 129(3), we must bear in mind the NCA's aims. The statute tells us what they are, and how they are to be achieved.[33] It aims to protect consumers by "promoting

[33] The NCA's purposes as set out in section 3 are—

> "(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
>
> (b) ensuring consistent treatment of different credit products and different credit providers;
>
> (c) promoting responsibility in the credit market by—
>
> (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
>
> (ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
>
> (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
>
> (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by—
>
> (i) providing consumers with education about credit and consumer rights;

equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers".[34] We also agree that the statute's express objectives mean that the correct interpretation of section 129 is one that strikes an appropriate balance between the competing interests of parties to a credit agreement. That is what this Court has previously held.[35] But we differ fundamentally on where that takes us. More particularly, as my colleague, Nugent AJ, in whose judgment I concur, points out, we differ on whether the Bank's legal costs were required to be paid.[36]

[54] Moseneke DCJ finds that the Bank failed to give Ms Nkata notice of the legal costs[37] and that, since the costs had not been taxed or agreed, they could not have been considered reasonable; hence they were not due and payable.[38] He finds in those circumstances that the consumer is required to do no more than pay the outstanding arrears to reinstate the credit agreement.[39] He reasons that since it is the Bank that wants to recover the costs of enforcing the credit agreement from the consumer, the Bank must be the one to take proactive steps. These include initiating taxation or

---

(ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and

(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;

(f) improving consumer credit information and reporting and regulation of credit bureaux;

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

[34] Section 3(d) of the NCA. See Moseneke DCJ's judgment at [93] to [96].

[35] *Kubyana* at para 21, citing *Sebola* at para 40 (both above n 26). The latter case is cited in Moseneke DCJ's judgment at [94].

[36] See Nugent AJ's judgment at [145].

[37] Moseneke DCJ's judgment at [79] and [121].

[38] Id at [123]. At [146] to [149] of his concurrence, my colleague, Nugent AJ, sets out the nub of why this construction is at odds with a plain reading and interpretation of the NCA.

[39] Moseneke DCJ's judgment at [80].

agreeing with the consumer on the quantification of the costs.[40] In addition, my colleague finds, the Bank must draw the costs to the consumer's attention, by way of separate demand, rather than as itemised charges appearing on a bank statement.[41]

[55] There's a glaring problem with this. The Bank didn't "want to recover the costs of enforcing the agreement from the consumer" at all.[42] It was quite content to capitalise those costs for its, and Ms Nkata's, convenience.[43] Whyever should it have been obliged to initiate the process of quantifying the unpaid additional costs, when Ms Nkata was the one seeking to rely on reinstatement?

[56] And, glaringly, the statute says the consumer, not the credit provider, must pay the outstanding sums. The statute imposes no obligation on the credit provider to take steps to recover the costs of enforcing the credit agreement. The credit provider does not have to do anything. It is the consumer who wants reinstatement – and the statute requires her to pay the sums if she seeks to attain it.

[57] The same applies to whether the costs the Bank added to Ms Nkata's statement were "reasonable". No doubt she could have objected that the sums added weren't reasonable. She never did so. She simply claimed that she was entitled to reinstate her credit agreement. But the statute doesn't say the Bank must establish that the costs are reasonable in order to ward off reinstatement. The statute says the consumer can attain reinstatement "by paying" the costs. It was for her to try to determine what was reasonable in order to achieve reinstatement. If the Bank insisted on her paying

---

[40] Id at [122] where it is held that—

> "a consumer [cannot] be expected to start taxation or agree with the credit provider on the quantification of these costs. The credit provider is required to take the appropriate steps if it wants to recover the costs for enforcing an agreement with the consumer. The Bank knows well that it is entitled to reasonable costs only. It must take steps to place its legal costs within this statutory pigeon hole."

[41] Id at [79], [120] and [122].

[42] Id at [119], where implicit endorsement is given to Ms Nkata's submission, supported by SERI, that "should the credit provider want to recover the costs of enforcing the agreement from the consumer, the credit provider must be the one to take the appropriate steps".

[43] As I mention at [25] and [47] above.

an unreasonable charge, no doubt the statute would have helped her. But it never did. It was never given the chance.

[58] Ms Nkata seeks to escape the duty the statute imposes on her of "paying" the charges in issue by saying that those charges weren't taxed or established as reasonable. To uphold this contention seems to me to forfeit the balance that our precedents on the NCA require us to maintain.

[59] Historically, creditors to whom properties were mortgaged were entitled contractually to refuse late payment of home loan instalments. Only payment of the full outstanding accelerated amounts (not just the arrears) would save a mortgagor's property. Section 129(3) has drastically changed this. Justly so. It offers a consumer in dire circumstances a lifeline. It spares consumers the harshness of that era of debtor-unfriendly laws. It protects consumers who face the sale in execution of their properties by allowing them to reverse the credit provider's election to foreclose. But it does so on conditions. The consumer must fulfil the requirements for reinstatement. Simply bringing arrear bond instalments up to date is not enough.

[60] The provision is specifically designed to counter the harsh effects of an acceleration clause. It makes good sense – and just sense – for the consumer to bear the responsibility of initiating the process and taking the necessary steps, including those required to pay the enforcement costs. There is no suggestion that the Bank was obstructive or tried deliberately to frustrate reinstatement. There is no good reason to exonerate Ms Nkata from the responsibility the statute places on her and instead impose it on the Bank.

[61] This approach does not render the statute's protection of consumers nugatory – it simply sustains the balance the statute itself imposes. So whilst I agree with

Moseneke DCJ, that the statute must be interpreted purposively and contextually,[44] a degree of caution must be exercised in doing so. That much we decided in *Kubyana*:

> "[L]egislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament."[45] (Footnotes omitted.)

[62] The purposes of the NCA are manifold. While it aims to correct imbalances by providing additional rights and protections to the consumer, it also aims to ensure that South Africa's credit market becomes and remains "competitive, sustainable, responsible [and] efficient".[46] Sections 3(c) and (g) outline the importance of "responsible borrowing", the "fulfilment of financial obligations by consumers", and "discouraging . . . contractual default by consumers". These provisions signal that the legislation must be interpreted without disregarding or minimising the interests of credit providers.[47]

[63] To borrow the words of Mhlantla AJ in *Kubyana*:

> "It deserves re-emphasis that the purpose of the [NCA] is not only to protect consumers, but also to create a 'harmonised system of debt restructuring, enforcement and judgment, *which places priority on the eventual satisfaction of all responsible*

[44] This is required by section 2(1) of the NCA which states that "the [NCA] must be interpreted in a manner that gives effect to the purposes set out in section 3". Section 3 is set out in full in n 33 above.

[45] *Kubyana* above n 26 at para 18 citing Kentridge AJ, at paras 17-8 of *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC). There he stated:

> "We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

Mhlantla AJ stated, in *Kubyana* at para 18 fn 23, that even though the above remarks referred to constitutional interpretation, "they apply even more forcefully in relation to statutory interpretation generally".

[46] Section 3 of the NCA.

[47] *Sebola* above n 26 at para 40.

> *consumer obligations under credit agreements*'."[48] (Emphasis in original and footnote omitted.)

[64] In addition—

> "[o]ne of the main aims of the [NCA] is to enable previously marginalised people to enter the credit market and access much needed credit. Credit is an invaluable tool in our economy. It must, however, be used wisely, ethically and responsibly. Just as these obligations of ethical and responsible behaviour apply to providers of credit, so too to consumers. . . . The notion of a 'reasonable consumer' implies obligations for both credit providers and consumers."[49]

[65] So Ms Nkata's circumstances, in the form of her account history, should be balanced against the increased risk and costs to credit providers and, ultimately, the increased cost to those seeking to enter the credit market. Many less affluent than she, who could not contemplate acquiring a second property as she did, might not be able to afford to acquire property at all if the cost of bond credit rose unduly. Affording her reinstatement on these facts will surely increase that cost.

[66] The view that paying her arrear settlements, but none of the other charges section 129(3) mentions, was sufficient for reinstatement may seem enticing. But I find it unwarrantably tenuous. Not only is it at odds with the provision's words, it skews the statutory balance excessively toward the consumer.

[67] The requirement that a consumer may reinstate a credit agreement only "by paying" specified items undoubtedly seeks to protect a credit provider who has taken steps after a consumer has defaulted under a credit agreement. This means that the Bank had a right to receive the payments specified in section 129(3) before Ms Nkata could reinstate her credit agreement.[50]

---

[48] *Kubyana* above n 26 at para 35.

[49] Id at para 38.

[50] Ms Nkata rightly did not seek to contend that the Bank waived its right to receive payment of the items section 129(3) specifies. Waiver is a unilateral act consisting of a renunciation of a right or legal advantage

[68] It is true that the Bank did not present the legal costs to Ms Nkata for separate payment. It simply debited them to her account under the entry "Legal Fees". But the statute does not require the Bank to demand payment of the costs section 129(3) lists. It requires the consumer to pay them in order to reinstate the credit agreement. This means that Ms Nkata had to pay those costs, or, at least, to tender payment of them.

Reasonable costs of enforcement up to reinstatement

[69] Section 129(3) provides that the costs the consumer must pay must be "reasonable". That accords with the parties' settlement agreement. This required Ms Nkata to pay the costs of the rescission application as "taxed or agreed". Had she tendered payment of the Bank's costs, the fact that they had not been agreed or taxed, as the settlement agreement required, or that there was no process through which it was established that they were "reasonable", as the statute requires, may have been in issue. Because she made no tender, the question does not arise. It is not the Bank that wanted reinstatement. It wanted to sell. It was Ms Nkata who sought to invoke reinstatement. That required her either to pay or to tender a reasonable amount to cover the Bank's costs.

[70] Differently put, the fact that the costs had not been taxed or agreed did not absolve her from the obligation to pay them, or at least to tender payment of them, in order to reinstate the credit agreement. The Bank in argument readily conceded that it could not obstruct a consumer from reinstating a credit agreement that is in default by refusing to agree what is reasonable. This is obvious. But the consumer must, at least, tender payment of what she considers to be reasonable.

(*Mutual Life Insurance Co of New York v Ingle* 1910 TPD 540 at 550, per Innes CJ), and the onus is "strictly" on the party asserting waiver to prove it (*Laws v Rutherford* 1924 AD 261 at 263, per Innes CJ). There can be no suggestion here that the Bank either expressly or by conduct incompatible with the intention to enforce its section 129(3) rights, abandoned its entitlement to payment. Debiting Ms Nkata's account did not constitute a waiver of the Bank's right to receive payment.

Conclusion

[71] From this I conclude that Ms Nkata did not reinstate the credit agreement on 7 or 8 March 2011 or at any time before the Bank sold the property in execution on 24 April 2013. This means it is not necessary to consider the Bank's argument that the point of no return in the process of execution occurred before the alleged reinstatement of the credit agreement. Nor is it necessary to consider the meaning of the terms "attachment order", "court order", "sale" or "execution" in section 129(4).

[72] The conclusion also means we do not need to consider whether section 129(3) requires the consumer to communicate her intention to reinstate to the Bank, as the Bank contended.[51]

[73] Ms Nkata owns two other properties. She is currently leasing the contested property from the purchaser. She does not face eviction in these proceedings. So the question before us is confined to the statutory interpretive issues under the NCA.

[74] I would, therefore, have granted leave to appeal and condonation for the late filing of the written submissions and record, but dismissed the appeal and ordered Ms Nkata to pay the Bank's costs, including the costs of two counsel.

MOSENEKE DCJ (Jafta J, Khampepe J, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

[51] If it is necessary to express a view, communication by the consumer does not seem to be a requirement. Reinstatement is not one of the rights section 129(1) requires the credit provider to draw the consumer's attention to in the notice it requires the credit provider to send. Since the Bank is not obliged to let the consumer know of this right, it wouldn't make sense to burden the consumer with the obligation to let the Bank know she intends to exercise it. In addition, it is not open to the Bank to accept or reject reinstatement. Instead, as the High Court found, reinstatement occurs automatically, by operation of law, upon the fulfilment of the requirements section 129(3)(a) posits. Requiring notification before reinstatement would, as SERI contended, render section 129(3) largely inoperative.

Introduction

[75] I have read the meticulously prepared judgment of my colleague, Cameron J (main judgment). Like him, I would grant leave to appeal and condonation for the late filing of the written submissions and of the record. I am grateful for his useful and accurate recital of the background facts. Cameron J concludes that the appeal against the decision of the Supreme Court of Appeal must fail with costs. I regret that I am unable to support that outcome. I have also had the benefit of reading the judgment of Nugent AJ, with which, as will appear later, I disagree. I am also grateful for the concurring judgment of Jafta J and have noted the additional reasons he relies upon.

[76] On the view I take, the appeal should be upheld with costs. Like Rogers J in the Western Cape Division of the High Court (High Court), I find that the credit agreement was reinstated; that from 8 March 2011 the default judgment entered against Ms Nkata and the subsequent warrant of execution against her home had no legal force; that the public auction of Ms Nkata's home on 24 April 2013 to the third respondent is set aside; and that the property may not be transferred to or registered in the name of the third respondent.

[77] Our difference stems from the proper interpretation of section 129(3) of the National Credit Act[52] (Act) and its implication for the present facts. The statutory provision permits a consumer at any time before the credit provider has cancelled the agreement to reinstate a credit agreement that is in default by paying to the credit provider all amounts that are overdue. The provision adds that the consumer must also pay "the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement".[53]

[52] 34 of 2005.

[53] See section 129(3) at [20].

[78] Cameron J takes the stance that the credit agreement between Ms Nkata, the applicant, and FirstRand Bank Limited (the Bank), was not reinstated in terms of section 129(3). He reasons that whilst it is so that she paid all amounts that were overdue, she did not also pay the reasonable costs of enforcing the agreement.

[79] I see matters differently. The credit agreement was indeed reinstated on 8 March 2011 when Ms Nkata settled in full her bond arrears of R87 500. Then, the Bank's legal costs were not due and payable. This is because the Bank had not given her notice of the legal costs. It had not demanded its payment properly or at all. Also, the nature and extent of the legal costs had not been agreed to by Ms Nkata and had not been assessed for reasonableness by taxation or other acceptable means. Instead, the Bank chose to be the sole arbiter of the extent of the legal costs and one-sidedly debited the costs against the bond account of Ms Nkata.

[80] Properly construed, section 129(3) does not preclude the reinstatement of a credit agreement where the consumer has paid all the amounts that are overdue, but has not been given due notice of reasonable legal costs – whether agreed or taxed – of recovering the bond arrears. This must be so because the legal costs would become due and payable only when they are reasonable, agreed or taxed and on due notice to the consumer.

[81] In order to reach the interpretive difference with the main judgment, I have to restate only those facts that may have a bearing on my approach to the applicable law. Thereafter, I will embark on the interpretive task followed by a concluding assessment.

Background facts

[82] In March 2005, Ms Nkata purchased undeveloped property, Erf 8832, Durbanville (the property). She obtained mortgage finance from the Bank against registration of a first bond in June 2005 and a second bond in May 2006. She built a home on the property and took up occupation with her two children in 2007.

[83] From 2010, she fell into the woes of an average credit consumer – arrears with her mortgage bond repayments. The Bank sent her a letter in terms of section 129(1) twice.[54] All accept now that the notice never reached her. The Bank issued summons, which after several service attempts was affixed to a door of her chosen address of service. On 28 September 2010, the Bank obtained a default judgment against her for the accelerated bond debt of R1 472 506.89 together with interest and a writ of execution against the property. Her home was scheduled to be sold in execution at a public auction on 10 December 2010.

[84] Ms Nkata approached the High Court and sought an order staying the impending public auction and setting aside the default judgment. The Bank resisted the application. It did not proceed because the parties settled the dispute. The settlement required that Ms Nkata sign a standard FirstRand Bank Quicksell agreement.[55] She was required to pay the Bank monthly instalments of R10 000. The agreement provided that if she paid the full arrears within 14 days, the Bank would not sell the property. Her attorney applied to have the settlement agreement made an order of court and sought rescission of the default judgment. The settlement agreement was never made an order of court and the rescission application was not determined. This meant that the judgment debt was never discharged and the attachment of her home remained effective.

---

[54] Section 129 of the Act reads:

> "(1) If the consumer is in default under a credit agreement, the credit provider—
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—
>
> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130."

[55] For an explanation of the Quicksell agreement, see the main judgment at n 7.

[85] Something crucial for the fate of the appeal happened on 8 March 2011. Ms Nkata paid to the Bank R87 500 representing all amounts that were then overdue. The Bank does not contest that the payment discharged all arrears on her bond account. As we will observe in a moment, its gripe was that she did not also pay the legal costs it incurred when enforcing the agreement. And for that reason in the main, the Bank says, the credit agreement was not reinstated and it was justified, in time, to auction her home to the public in order to discharge her accelerated and full indebtedness to the Bank.

[86] Given the core legal issue that arises, ordinarily this narrative would have ended here. It did not. The events that followed led to the sale of her home by public auction on 24 April 2013. The property was acquired by the third respondent, Kraaifontein Eiendomme / Properties, for R1 086 000.

[87] Here are the events that proved disastrous to Ms Nkata's quest to hold onto her home. After paying her bond arrears in full on 8 March 2011, Ms Nkata resumed her monthly repayments. She fell into arrears again on 30 April 2011. However, she brought the account up to date in March 2012. In the period between April and December 2012, Ms Nkata made several efforts to weather her financial distress. She made attempts to rescind the default judgment by consent. The Bank resisted. She also made an application for distressed debt relief with the Bank. The Bank opposed the debt relief arguing that it already had a judgment against Ms Nkata and a valid attachment of her home. The Bank preferred foreclosure. On 5 April 2013, her account's accelerated debt stood at R1 392 028 with arrears being R33 716. She came to know, on 16 March 2013, that the property was going to be sold at a public auction. The sale took place on 24 April 2013.

[88] Ms Nkata approached the High Court to rescind the default judgment of 28 September 2010. The matter was heard by Rogers J in October 2013. The Court held in favour of Ms Nkata that when the default judgment was entered she had a

bona fide defence. The Bank had not given her notice in terms of section 129(1) of the Act before issuing summons to recover the debt. However, the Court refused to set aside the default judgment because her delay in seeking a rescission was unduly long and without a satisfactory explanation. In addition, her entitlement to rescission had become perempted. Her continued intention to have her case reopened by means of rescission was inconsistent with her conduct in agreeing to the settlement. The default judgment stood.

[89] The Court, rightly in my view, invited the parties to file further affidavits and submissions on the possible application of reinstatement of the credit agreement under section 129(3) of the Act. In an appropriate case, it is open to a court to invite parties to file further affidavits and make submissions on a matter that the court draws their attention to, provided that the matter is essential to the proper determination of the dispute, none of the parties is materially prejudiced; and it is in the interests of justice to reach the matter.

[90] The Court concluded that reinstatement in terms of section 129(3) occurs by operation of law and there is no need for the consumer to be aware of the right to reinstatement or to have the intention of reinstating the agreement. On this approach, the agreement would be reinstated in terms of section 129(3) unless it was precluded by section 129(4) of the Act. The Court held that for purposes of section 129(3)(a), the costs that were debited to Ms Nkata's account lost their separate character as costs for enforcing the agreement. This interpretation, the Court found, gives better effect to the purposes of the Act which are set out in section 3.[56]

[91] The Bank was unhappy with this outcome. It appealed to the Supreme Court of Appeal. The Court upheld the appeal. Before us, both parties agreed that the Court interpreted the incorrect provision of the Act – section 129(4)(b) on execution – instead of section 129(3), which addresses reinstatement. About this, Cameron J rightly observes that the Supreme Court of Appeal decided the appeal—

[56] See section 3 below n 58.

> "on a basis that everyone now accepts was wrong. It found that the Bank had already executed the default judgment in terms of section 129(4) by the time Ms Nkata paid her arrears. This occurred, the Court held, when the property was sold at the sale in execution. The difficulty is that the sale in execution took place on 24 April 2013, whereas Ms Nkata paid her arrears in March 2011 – 25 months earlier. Execution, if it was to thwart reinstatement, would have to have been before 7 or 8 March 2011."[57]

Reinstatement of a credit agreement under section 129(3)

[92] It is now expedient to undertake the interpretive task. As I do, I acknowledge that my approach has drawn generously from the cogently reasoned judgment of the High Court. But first, I remind myself of the overarching objects of the Act and the narrower purpose of section 129(3) and what it lays down.

[93] Section 2 of the Act, somewhat redundantly, enjoins us to interpret the provisions of the Act in a way that gives effect to its purposes. The purposes are described in section 3.[58] They are optimistic but sometimes in tension. They are

---

[57] See [28].

[58] Section 3 reads in relevant part:

> "The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers by—
>
> (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
>
> . . .
>
> (d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
>
> (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by—
>
> (i) providing consumers with education about credit and consumer rights;
>
> (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
>
> (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
>
> . . .
>
> (h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

about credit markets made up of credit providers and consumers of credit. Section 3 makes the point that the legislation is meant to advance both "social and economic welfare". It hopes to find a balance between the rigour of an "efficient, effective and accessible credit market and industry", often driven by profit, and measures "to protect consumers" propelled by social good. It places a premium on "sustainable market conditions", but also helps access to credit. For now, I single out two poignant purposes—

> "(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
>
> (e) addressing and correcting imbalances in negotiating power between consumers and credit providers."[59]

[94] The Act seeks to infuse values of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate. Unlike in the past, the sheer raw financial power difference between the credit giver and its much needed but weaker counterpart, the credit consumer, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities. Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. But the human condition suggests that it is not always possible – particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes do. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise

---

> (i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."

[59] Sections 3(d) and (e) of the Act.

the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution.

[95] On what I have just expressed, I am in good company. This Court has before expressed itself on the purposes of the Act. In *Sebola*,[60] in the context of section 129(1)(a) of the Act, Cameron J observed that at the core of the Act is the objective to protect consumers.[61] This protection, however, must be balanced against the interests of credit providers and should not stifle a "competitive, sustainable, responsible, efficient [and] effective . . . credit market and industry".[62] The Act, the Court noted, replaces the apartheid era legislation that regulated the credit market,[63] and infuses constitutional considerations into the culture of borrowing and lending between consumers and credit providers.

[96] The purposes of the Act are directly attributable to the constitutional values of fairness and equality.[64] *Sebola* recognised that the Act is at pains to create a credit marketplace that agrees with our constitutional democracy both through its purpose – to promote "a fair . . . marketplace for access to consumer credit"[65] – as well as through the means that ought to be adopted to achieve these goals. The tools for achieving the Act's purposes include the promotion of "equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers",[66] and the development of "a consistent and accessible system of

[60] *Sebola* above n 26.

[61] Id at para 40.

[62] Section 3 of the Act.

[63] The preamble notes that the Act repeals the Usury Act, 1968 and the Credit Agreements Act, 1980 – the two pieces of legislation that by and large regulated the relationship between consumers and credit providers. See also *Sebola* above n 26 at para 38 where the majority of the Court highlights that the pre-apartheid design of the credit industry was "ill-suited to South Africa's post-apartheid economy and society".

[64] See fn 22 of *Sebola* above n 26, which through sections 1 and 9 of the Constitution, echoes the equality ethos of the Act.

[65] *Sebola* id at para 36. See also the aims listed in the preamble of the Act.

[66] *Sebola* id. See also section 3(d) of the Act.

consensual resolution of disputes arising from credit agreements".[67] In sum, the Act is "a clean break from the past"[68] and encourages dialogue between consumers and credit providers.

[97] *Kubyana*[69] sought to clarify the interpretation of section 129(1) that was adopted in *Sebola* and had been understood and applied in conflicting ways in other courts.[70] It relied on *Sebola* to make the point that the provision aspires "to facilitate the consensual resolution of credit agreement disputes".[71]

[98] In *Ferris*,[72] the issue was whether a credit provider could enforce, without further notice, a credit agreement once the consumer breached a debt-restructuring order in terms of section 86(7)(c)(ii) of the Act.[73] The Court recognised that *Sebola* stressed the means to be employed in order to achieve the purposes of the Act.[74] It held that the good faith negotiations required by section 86(5) in an application for debt review were aimed at the parties reaching an agreement *before* the need for a debt-restructuring order. Once the order had been granted, then the requirement for negotiations set by section 86(5) became superfluous.

[99] With these objectives in mind, I look closer at sections 129(3) and (4). These provisions bear repetition:

> "(3) Subject to subsection (4), a consumer may—
>
> (a) at any time before the credit provider has cancelled the agreement reinstate a credit agreement that is in default by paying to the credit

[67] Section 3(h) of the Act. See also *Sebola* id at para 46.

[68] *Sebola* id at para 39.

[69] *Kubyana* above n 26.

[70] Id at para 17.

[71] Id at para 22 and fn 34. See also *Sebola* above n 26 at para 46.

[72] *Ferris and Another v Firstrand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC); 2014 (3) BCLR 321 (CC) (*Ferris*).

[73] Id at paras 17-8.

[74] Id at para 7.

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 reinstatement; 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.

(4) A consumer may not reinstate a credit agreement after—

(a) the sale of any property pursuant to—

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123."

[100] Sections 129(3) and (4) have introduced a novel relief of reinstatement, which parts ways with the debt collection measures of old. The relief is available when a credit agreement is in default but has not been cancelled by the credit provider. Once the consumer makes specified overdue payments, the agreement is reinstated. What is more, she may resume possession of the property that has been repossessed by the credit provider under an attachment order. The evident purpose of section 129(3) is to urge on consumers to pay their overdue amounts, default charges and legal costs to their lenders and, in turn, consumers in good standing are rewarded with reinstatement of the credit accord and the return of their attached property.

Is the agreement reinstated by the conduct of the consumer only?

[101] The first interpretive contest between the parties was whether an agreement is reinstated by the conduct of the consumer only or in cooperation with the credit provider or simply by operation of law.

[102] Before us, the Bank contended that section 129(3) requires a consultative process for a credit agreement to be reinstated and that a consumer cannot, without more, reinstate the agreement merely by making payment of a sufficient amount of money to cover all the charges referred to in section 129(3). It stressed that payment of arrear instalments does not always mean the consumer wishes to reinstate the credit

agreement and resume possession of the property repossessed. It argued that the consumer may not be able to afford the upkeep and costs associated with possession or ownership of the property, but simply wishes to comply with her obligations under the credit agreement until the property may be sold. The Bank submits that the section provides that a consumer "*may* . . . reinstate a credit agreement . . . by paying to the credit provider all amounts that are overdue".[75] This envisages a positive act by the consumer in order to achieve a desired result.

[103] The amicus curiae, SERI, submitted that once Ms Nkata paid her arrears in terms of the settlement agreement, she reinstated her credit agreement by operation of law in terms of section 129(3) of the Act. SERI says it does not matter whether the consumer's intention to reinstate the agreement is communicated to the credit provider. Section 129(3) merely requires the consumer to perform a certain action – not communication. Requiring the consumer to give notice of her intention to reinstate the credit agreement would be at odds with the plain text of section 129(3). SERI argues that a court should be slow to read requirements into consumer-friendly provisions like section 129(3). This would have the effect of "narrowing the circumstances under which a consumer would be able to claim relief".

[104] At the outset, I observe that sections 129(3) and (4) start with what a consumer may and may not do. It is the consumer who may reinstate a credit agreement. This she may do "any time before the credit provider [cancels] the agreement".[76] So, as long as the agreement is current, she may elect to reinstate it. The clear import is that for purposes of reinstatement the consumer is the protagonist. She may disclose her design to the credit provider but she is not compelled to give notice to or seek the consent or cooperation of the credit giver.

[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

[75] Section 129(3)(a) (emphasis added).

[76] Section 129(3)(a) of the Act.

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] Reinstatement has the beneficial outcome that she may reclaim her attached property. For most consumers that would be the pressing purpose of bringing her arrears up to date. She is not compelled to have the property restored. If, for any of the reasons the Bank has advanced, she shuns restoration, she may not demand it.

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.

[109] The entitlement to reinstatement would be made useless if the amount due in terms of section 129(3)(a) were interpreted to mean the full accelerated debt as most

consumers would be unable to reinstate the agreement by paying the full debt. That construction would also fall short of the purpose of the Act to encourage consumers to fulfil their financial obligations and resolve over-indebtedness. I did not understand the Bank to contest this construction.

"Before the credit provider has cancelled the agreement"?

[110] Reinstatement may occur only before the credit provider has cancelled the agreement. The question arises whether, when the Bank invokes the acceleration clauses, it has, for that reason only, cancelled the agreement. This is a mixed question of fact and law. If the acceleration clause is resorted to while the contract subsists and the Bank demands full payment it is not the same thing as cancellation of the agreement for breach. This is so if we keep in mind that section 129(3)(a) applies to agreements in default. Here, the Bank could only have lawfully terminated the credit agreements in terms of section 130 read with section 129. At a factual level, the Bank did not comply with section 129. This meant that the credit agreements were not cancelled.

"Reasonable costs of enforcing the agreement up to the time of reinstatement"?

[111] A consumer must pay reasonable costs of enforcing the agreement up to the time of reinstatement. The costs relate to legal fees and related disbursements. The Bank contended Ms Nkata had to pay these costs to satisfy the requirements for reinstatement. She did not pay the legal costs when she discharged all other overdue amounts and thus reinstatement did not occur. The main judgment upholds the Bank's submission.

[112] A brief look at the facts is necessary. On 25 October 2010, the Bank debited legal fees amounting to R9 050 to Ms Nkata's mortgage bond account. The amounts were for summons, judgment, writ, attachment and first sale in execution including VAT, disbursements and sheriff's fees. The amounts became part of the overdue balance in Ms Nkata's bond account with the Bank. In February 2011, again the Bank

debited Ms Nkata's mortgage bond account with amounts titled "Legal Fees" on the account statement. The amounts were R6 498 and R8 000. The Bank describes these as being for the attorneys' fees and counsel's day fee in Ms Nkata's unsuccessful rescission application. This was in addition to a globular amount of R9 050, debited to the mortgage bond account in October 2010, for fees that the Bank had incurred in pursuing the cancelled execution and sale.

[113] Ms Nkata claims that these costs were not presented to her, but were debited directly to her bond account and she was not invited by the Bank to pay them. The Bank never contested in the High Court or in this Court that it had debited Ms Nkata's bond account with legal costs, nor did it aver that it had given her a separate notice of the legal costs or demanded their payment.

[114] The self-evident question is whether the costs that the Bank had debited to Ms Nkata's bond account for legal costs form part of "permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement".

[115] The High Court found on the facts that these costs were neither taxed nor quantified by agreement between the parties. The Bank did not call for a separate payment of these costs, nor did it regard Ms Nkata as being in arrears because of these costs. After she had paid the arrears in March 2011 and again in March 2012, the Bank regarded her as being "up to date" with her payments. The Court found that the Bank was satisfied with settling the costs by lending Ms Nkata the money for legal costs as they simply debited her bond account with the money and did not bring it to her attention or invite her to pay it.[77] Before us these factual findings were never impugned. If anything, they are consistent with the pleadings.

[77] The High Court took note of the decision in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation)* [1997] ZASCA 94; 1998 (1) SA 811 (SCA) that interest debited to a loan account does not lose its character as interest. However, it found that it would be untenable to expect the consumer to pay the full amount of the legal costs to effect reinstatement as a result of a rule established on the commercial practice of capitalising unpaid interest. In contrast, the Act was designed to protect consumers from exploitation.

[116] The High Court noted that the consumer could not be expected to take proactive steps to find out what the costs would be for reinstatement to be effected. Neither could a consumer be expected to start taxation or agree with the credit provider on the quantification of these costs. The credit provider is required to take the appropriate steps if it wants to recover the costs for enforcing an agreement with the consumer.

[117] The High Court observed that the Bank debited Ms Nkata's account instead of demanding separate payment of the legal costs. That indicated that the Bank was satisfied with lending the money to Ms Nkata and receiving repayment for those costs in instalments. The Bank happily "*capitalised*" the legal costs. It held that for purposes of section 129(3)(a) the costs that were debited to Ms Nkata's account lost their separate character as costs for enforcing the agreement. This interpretation, the High Court found, gives better effect to the purposes of the Act that are set out in section 3.

[118] The Bank's submissions before this Court are less than clear. They appear to amount to this. The costs were not paid to it but were capitalised in the debt owing by Ms Nkata. It submits that the High Court's finding that the capitalisation of legal fees in the bond account was payment of those amounts by Ms Nkata was incorrect. The Bank contends that the addition of those amounts to the loan account constituted a unilateral increase in the amount of the loan to Ms Nkata. And that there was no indication in any event that all costs required in terms of section 129(3) had been charged or added to the loan account, or that any increased instalments had been paid or were payable. As a result, the Bank concludes that the requirements for reinstatement in terms of section 129(3) were not met.

[119] Before us, Ms Nkata made a number of submissions. I find it necessary to restate only one. She pressed on us that should the credit provider want to recover the costs of enforcing the agreement from the consumer, the credit provider must be the one to take the appropriate steps. She submitted that only the costs that the Bank

represented to her in the Bank's statements and no other costs were due and payable. Ms Nkata also submitted that once payment had been made then the credit agreement was reinstated automatically. SERI supported this stance by submitting that the Bank had the obligation to invite Ms Nkata to agree to its bill of costs and, if she failed to do so, to tax it and demand payment only thereafter.

[120] There is indeed much to be said for the reasoning of the High Court that by debiting Ms Nkata's account instead of demanding separate payment of the legal costs, the Bank was satisfied with lending the money to Ms Nkata and receiving repayment of those costs in instalments. And that, for purposes of section 129(3)(a), the costs that were debited to Ms Nkata's account lost their separate character as costs for enforcing the agreement. However, I do not think it is necessary to reach as firm a conclusion on this point as the High Court did. In doing so, I avoid the dilatory controversy mooted by the main judgment that the Bank has not been shown to have waived its right to receive payment of legal costs under section 129(3). Even more importantly, the dispute may be resolved on another and perhaps clearer basis.

[121] On these facts, I find that the credit agreement was indeed reinstated on 8 March 2011 when Ms Nkata settled in full her bond arrears of R87 500. At that point, the Bank's legal costs were not due and payable. It is undisputed that the Bank had not given Ms Nkata notice of the nature and extent of the legal costs. It had not demanded their payment properly or at all. Also, the legal costs were not shown to be reasonable. Their nature and extent had not been agreed to by Ms Nkata and had not been assessed for reasonableness by taxation or other acceptable means. Instead, the Bank chose to be the sole arbiter of the extent of the legal costs and one-sidedly debited the costs against the bond account of Ms Nkata.

[122] In this regard, I agree with the High Court that the consumer could not be expected to take proactive steps to find out what the costs would be for reinstatement to be effected. Neither could a consumer be expected to start taxation or agree with the credit provider on the quantification of these costs. The credit provider is required

to take the appropriate steps if it wants to recover the costs for enforcing an agreement with the consumer. The Bank knows well that it is entitled to reasonable costs only. It must take steps to place its legal costs within this statutory pigeon hole.

[123] Properly understood, section 129(3) does not preclude the reinstatement of a credit agreement where the consumer has paid all the amounts that were overdue but has not been given due notice of the reasonable legal costs, whether agreed or taxed, of enforcing the credit agreement. The legal costs would become due and payable only when they are reasonable, agreed or taxed, and on due notice to the consumer.

[124] This is clear from a simple reading of section 129(3), which provides that the agreement is reinstated by the consumer 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 reinstatement".[78] The words "together" and "and" make it clear that three distinct requirements are imposed on a consumer before a credit agreement is reinstated. By requiring a credit provider to demand separately payment of the reasonable costs of enforcing the agreement, the Act imposes a more transparent practice of billing – one which is in line with the purposes of the Act. The Bank should have demanded payment of the reasonable costs of enforcing the agreement separately from Ms Nkata's arrears, and brought it to her attention.

[125] This understanding of section 129(3) is of considerable importance. It gives better effect to the clear text and purpose of the provision and the Act. If a credit provider is not obliged properly to quantify and give due notice of the legal costs to the consumer, the relief section 129(3) affords to a consumer will be frustrated and become illusory. It will always be open to the credit provider to thwart a reinstatement by simply asserting, as happened in this case, that the legal costs unilaterally debited to the bond account had not been paid. Here Ms Nkata paid R87 500 because she wanted to discharge her full arrears and save her home, which

[78] Emphasis added.

was under attachment, only to be told by the Bank that she still owed relatively small amounts labelled legal costs, which were never assessed and disclosed to her properly.

[126] All of these considerations lead to the one conclusion that the credit agreement was properly reinstated within the meaning of section 129(3).

Execution – section 129(4)

[127] I have held that Ms Nkata was entitled to have her credit agreement reinstated under section 129(3). The Bank contended before us that even so her right to reinstate has been limited by the provisions of section 129(4)(a) of the Act. Is the Bank correct?

[128] The section precludes a consumer from reviving a credit agreement after the sale of the property following on an attachment order. Section 129(4)(b) goes further to lay down that a consumer may not reinstate the agreement after the execution of any other court order enforcing that agreement.

[129] In giving meaning to section 129(4)(b), the High Court held that the bar to a reinstatement occurs only when the proceeds from a sale in execution have been realised. On the facts here, the High Court found that the default judgment of 28 September 2010 did not constitute an attachment order against the property nor did the default judgment acquire that character when the Bank obtained a writ of execution against Ms Nkata's mortgaged property.

[130] The Bank challenged this reasoning on a number of grounds. It contended that execution does not only refer to the completed act of execution, but also to the process of execution. It argued that in order to arrange a sale in execution, it had to attach the property and cause notices of sale in execution to be published and served in terms of

rule 46.[79] It insisted that the High Court should have interpreted the word "execution" in section 129(4) as including those steps that were taken to attach the property.

[131] There is no compelling reason why the meaning of "execution" in section 129(4)(b) should be given the extended meaning preferred by the Bank. The extended construction would render the section unuseful. The High Court was correct that the barrier to a revival of the credit agreement applies only when proceeds from a sale in execution have been realised. Only then would the revival be of no use to either party. I have already observed that section 129(3) had created a novel remedy to foster payment of overdue debts and to rescue attached property, provided the consumer had lawfully revived the credit agreement. The provision amounts to a statutory remedy for rendering a default judgment and attachment order ineffectual. That explains why once the credit agreement has been reinstated by paying all overdue amounts and allied administrative and legal costs, the consumer "may resume possession of any property that had been repossessed by the credit provider". This plainly means that the default judgment and subsequent attachment would be rendered without force or effect.

[132] On another tack, the Bank contended that when a judgment creditor attaches goods, the creditor obtains a real right in respect of those goods because the attachment of property in execution creates a judicial mortgage. The argument is at odds with the ordinary, contextual and purposive meaning of sections 129(3)(a) and (b). The common law judicial mortgage the Bank has in mind, in this context, has been superseded by the design of section 129(3).

[133] The Bank accepted that, in its words, "[i]n the event that the arrears are now paid, the Bank cancels the sale in execution, the agreement continues and the defendants retain their immovable property". However, the Bank steadfastly maintained that "[i]f the defendants again [fell] into arrears, the Bank, as it is entitled to, [may instruct] its attorneys to reschedule a sale in execution". The Bank fell back

[79] Uniform Rules of Court.

on the facts here to buttress its stance. The argument ran thus: here reinstatement would still be precluded as the settlement agreement reached between the parties on 10 December 2010 – long before the payment of any arrears in 2011 and 2012 – reserved the Bank's right to sell the property.

[134] This argument too must falter. Clause 5 of the settlement agreement states that "[s]hould [Ms Nkata] pay the full arrears . . . the [Bank] shall not sell the property in execution but [Ms Nkata] shall pay the full monthly instalments to the [Bank]". Not even the terms of the settlement agreement entitled the Bank to seek to sell the property without more.

[135] There is another decisive reason why the High Court was right. Had the property been sold in execution following an attachment order, the execution would not have stopped the reinstatement because the sale in execution took place in April 2013 – just over two years after Ms Nkata had cleared her arrears for the first time in 2011.

[136] Although there had been an attachment of the bonded property, no sale in execution of the property occurred and no proceeds of the sale were realised at any time before Ms Nkata had cleared her arrears in March 2011. She was well within her entitlement to revive the credit agreement that the credit provider had not cancelled. That she did by purging her default in full. She paid the credit provider all amounts that were then overdue together with default charges. For these reasons, the High Court correctly ordered that the default judgment and the writ of execution ceased by operation of law to have any force or effect as from 8 March 2011.

[137] It follows without more that the appeal must succeed. Ms Nkata is entitled to an order declaring that: the credit agreement was lawfully reinstated; from 8 March 2011, the default judgment entered against Ms Nkata and the subsequent warrant of execution against her home had no legal force; the public auction of

Ms Nkata's home on 24 April 2013 to the third respondent is set aside and the property may not be transferred to or registered in the name of the third respondent.

Costs

[138] There is no reason why costs should not follow the event. The Bank should pay Ms Nkata's costs in the High Court, Supreme Court of Appeal and in this Court.

Order

[139] The following order is made:

(a) Leave to appeal is granted.

(b) The appeal succeeds.

(c) The order of the Supreme Court of Appeal is set aside.

(d) It is declared that—

(i) the credit agreement between FirstRand Bank Limited and Ms Nkata was lawfully reinstated;

(ii) from 8 March 2011, the default judgment entered against Ms Nkata and the subsequent warrant of execution against her home had no legal force;

(iii) the public auction of Ms Nkata's home on 24 April 2013 to the third respondent is set aside; and

(iv) the property may not be transferred to or registered in the name of the third respondent.

(e) The Bank must pay Ms Nkata's costs in the High Court, the Supreme Court of Appeal and in this Court, including where applicable the costs of two counsel.

NUGENT AJ

[140] I have read with considerable interest the conflicting judgments of my colleagues Moseneke DCJ (majority judgment) and Cameron J (main judgment). I regret I cannot agree with Moseneke DCJ. I agree with Cameron J that the appeal must fail, and the order of the Supreme Court of Appeal left undisturbed, for the reasons he gives, to which I add brief reasons of my own.

[141] When home loans are made against the security of a mortgage bond, the agreement generally requires the borrower to repay the loan, with compounded interest, in monthly instalments. If the borrower fails to pay an instalment the full amount then outstanding becomes repayable to the bank. Unless new arrangements are made with the bank it can be expected that the borrower will not be able to repay the debt and the process for recovery will be set in motion. Demand will be made, summons will be issued, judgment will be taken, a writ of execution will be issued, the property will be attached, and ultimately it will be sold. At each point in that process the bank will incur costs of various kinds. That was the form of the agreement in this case and those were the consequences that followed upon default.

[142] For good reasons eloquently expounded by my colleagues, section 129(3) of the Act makes inroads upon the ordinary right of the bank to recover the loan upon default. The borrower may at any time – from the time the default occurs right until the eve of the sale – interrupt the process and restore the earlier position. To do so he or she must fulfil three conditions: (i) all amounts overdue (the instalments required to have been paid by that time) must be paid; (ii) the bank's permitted default charges (if any) must be paid; and (iii) the reasonable costs incurred by the bank until then in enforcing the agreement (if any) must be paid.

[143] I agree with my colleagues that fulfilment of the conditions need not be communicated to the bank. All that is required is that they must be fulfilled, whereupon the agreement is automatically reinstated by operation of law, by which is meant the position before default is restored.

[144] The section affords powerful protection to borrowers who fall into temporary distress (or carelessness) at any time until the loan is repaid. But it requires the borrower to comply with its conditions if he or she is to have that protection. The language in which the conditions have been expressed is straightforward, and I see nothing, in the context or its purpose, not to construe it for what it says.

[145] In this case it is not controversial that the overdue amounts were paid. It is also not controversial that the Bank incurred costs in enforcing the agreement. It is also not controversial that the costs were not paid. The difference, as I see it, between my colleagues is that the majority judgment contends the costs were not required to be paid because they were not due.

[146] The majority judgment construes the section as requiring payment by the borrower only if the bank has itself met certain conditions at the time the borrower seeks to invoke the section. It finds the borrower is required to pay the costs only if by then they have been taxed and demanded by the bank. Absent that, the borrower may reinstate the agreement by paying only the overdue amounts.[80]

[147] The language of the section is against that construction. In its terms it requires the borrower to pay. Nothing in the language of section 129(3) of the Act suggests that sometimes the borrower need not pay. The majority judgment does not suggest that demand by the bank is a pre-condition for payment of the overdue amounts. I fail then to see how it becomes a pre-condition for payment of the costs when the same language is used for both.

[148] I also do not find it supported by the context within which the section appears. Perhaps greater transparency in bank billing is desirable, though the Bank's account in this case seems clear enough to me, but that is then a matter for the Legislature to correct. My colleague points to nothing in the Act indicating the Legislature has

[80] It is not clear to me what the position is to be concerning the permitted default costs but that is not important for present purposes.

chosen to achieve billing transparency through enacting section 129(3). Had that been its object, I have no doubt credit providers would have been directed expressly on what is required, as they are directed in other parts of the Act.

[149] Nor do I find support for that construction in the purpose of the section. Its purpose is to throw a lifeline to a borrower who has defaulted. It was not enacted to provide a remedy for banks to recover their costs. No doubt the Bank in this case would have been perfectly content to recover its costs in the ordinary way. To construe it as attaching conditions if banks want to recover their costs does not give effect to its purpose but inverts it instead.

[150] Since we agree that the borrower is not required to notify the bank that he or she intends invoking the section, the bank is not to know whether a borrower will invoke the section, and if it is invoked, when that will occur.

[151] I observed earlier that costs are incurred by a bank at various stages of the process of enforcement. They are incurred when a letter of demand is issued, and again when a summons is issued, and again when judgment is taken, and again at various stages of the process of execution. On the construction proposed by my colleague, Moseneke DCJ, the bank would need immediately to tax and then demand its costs each time they are incurred, just in case the borrower were at some time to invoke the section, if it is to preserve its right to have them paid when reinstatement occurs. To expect a bank to tax and demand costs each time they are incurred seems to me to be unrealistic, and I cannot accept it is what the provision means.

[152] The majority judgment reaches this conclusion on the basis that the costs incurred by the bank are not reasonable until agreed with the borrower or assessed for reasonableness by taxation or other acceptable means, and then are not payable until they have been demanded.

[153] Costs are either reasonable or they are not reasonable as a fact. It is true that what is reasonable is not exact and falls within a band. But they either fall within that band or they do not. Costs that are not reasonable do not become reasonable by agreement between the parties. They merely become agreed. They are also not converted from one to the other by taxation. On taxation a taxing official merely certifies that in his or her opinion the costs are reasonable. If they are reasonable in fact, and are then certified as such by a taxing official, they were reasonable from the start. And if they were unreasonable at the start, and were then reduced by the taxing official to what is reasonable, the reduced amount becomes reasonable because the amount was reduced, not because it was the opinion of the taxing official that the reduced amount was reasonable. If an approved tariff allows a charge of R100 it can hardly be said a charge of R50 is not reasonable only because a taxing official has not expressed an opinion to that effect. I am not sure what other acceptable processes of assessment the majority judgment has in mind but whatever they are the position remains the same. Whether costs are reasonable as a fact is not dependent upon the opinion of a costs assessor.

[154] That does not leave the bank at large to determine the extent of the costs, as contended for by my colleague. The section requires the borrower to pay only reasonable costs, and it is only reasonable costs the borrower must pay. If the borrower wants the opinion of a taxing official on whether they are reasonable the borrower may ask for them to be taxed, and it would be a naive bank that sought to require payment of more than the amount considered by the taxing official to be reasonable. Even then the borrower is not required to pay the amount in which the costs have been taxed. The section does not require a borrower to pay what a taxing officer believes to be reasonable. The borrower is required to pay what is reasonable as a fact. Ultimately it will be for a court to determine whether the costs are reasonable should it be disputed in legal proceedings like the present.

[155] Demand might or might not be a prerequisite for a debt to become payable depending upon the particular facts. In this case, Ms Nkata was obliged by

clause 11.1.3 of the agreement to "pay all costs including attorney and client costs and collection commission incurred by the Bank . . . in demanding or obtaining payment of all or any sums due by the [borrower] . . . to the Bank and in suing for the recovery thereof" without any precondition of demand.

[156] But I do not reach my conclusion on the basis of the agreement. Section 129(3) does not require payment of costs only if they have become payable at the time the section is invoked. The section itself makes them payable as a condition for reinstatement if they have been incurred. To construe "incurred" as meaning "then payable" does violence to the language of the section. There is no dispute that the costs now in issue had indeed been incurred by the Bank, provided they were reasonable, and there has been no suggestion that they were not. But if Ms Nkata had wanted them taxed, then it was for her to ask for it, and pay them once they were taxed. They could not simply be ignored.

[157] The majority judgment expresses the view that the borrower cannot be expected to take proactive steps to find out what the costs would be for reinstatement to be effected. I do not see why that should be so. That judgment accepts the borrower must pay what is overdue, and I can imagine few borrowers having records that are so meticulous, and whose calculations of compound interest are so exact, as to be capable of knowing what is overdue without asking the bank. It is not unduly oppressive to expect a borrower to ask at the same time what costs have been incurred. It is the bank, instead, that cannot be expected to know whether, and if so when, the borrower will invoke the provision, and so be obliged to tax and demand its costs in case that should occur.

[158] I have also read the judgment of my colleague Jafta J, which takes us down untrodden paths. He finds the High Court judgment taken by default was null and void. From there he goes on to find, first, that the costs incurred in enforcing the agreement were not recoverable, and second, that the sale in execution was invalid. He finds also that the parties' settlement agreement in itself reinstated the agreement.

And he finds the portion of the costs Ms Nkata undertook to pay were required to be agreed upon or taxed, in the absence of which she was not required to pay them as a condition for reinstatement.

[159] The last finding echoes that of the majority judgment, which I dealt with earlier. Section 129(3) does not require the costs to have become payable in the ordinary course when the section is invoked. If they have been incurred the section makes them payable as a condition for reinstatement. No doubt, Ms Nkata was entitled to have the costs she undertook to pay taxed but, having been incurred, she was required to pay them for reinstatement to occur. Again they could not simply be ignored.

[160] As for the remaining findings – save for saying I see strong arguments against each of them – I am not willing to decide them, in either direction, without the Bank first having been heard. It is a salutary practice before any decision is made that a person affected by the decision should have the opportunity to be heard before the decision is made, and I think it can be taken as well established that that applies especially when rights are decided by courts. It is not uncommon for points that at first seem attractive to vaporise when subjected to critical examination and debate. There is powerful authority for the proposition that new points will not be considered on appeal unless they have been exhaustively covered by the pleadings and the evidence, and it is not unfair to the parties to require this.[81] That is certainly not the case where an affected party has not had the opportunity to deal with them in any court at all – not in the High Court, not in the Supreme Court of Appeal, nor even in this Court. That is the present case.

[81] See for example *Cole v Government of the Union of South Africa* 1910 AD 263 at 272; *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality (1)* 1971 (4) SA 522 (C) at 529B-D; and *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 288J, 289A-B and 290D-I.

[161] But on one thing I do not think it would be improper to express myself. What was said by Ponnan JA in *Motala*[82] is not authority for the findings made by my colleague Jafta J. In that case the learned judge found, on good authority, no more than that a person is not compelled to obey an order made by a court that had no jurisdiction to make it, and for that reason he or she is not in contempt for failing to do so.[83] It is not authority for the proposition that if the order has indeed been given effect, the consequences are to be treated as if they had not occurred. Nor is it authority for the proposition that the order may be ignored if a court has authoritatively ordered it should stand, which are the facts in the present case. Perhaps my colleague is right, and perhaps my colleague is wrong, but should he be right that would not be on the authority of *Motala*.

[162] In conclusion I agree with Cameron J that the payment that was made by Ms Nkata did not bring her within the protection of section 129(3) and thus that the order of the Supreme Court of Appeal was correct.

JAFTA J

[163] I have had the benefit of reading judgments prepared by Moseneke DCJ, Cameron J and Nugent AJ. Unlike Cameron J and Nugent AJ, I would not dismiss the appeal. Like Moseneke DCJ, I would uphold the appeal and set aside the order of the Supreme Court of Appeal for mainly the reasons advanced by him in his judgment and to which I add mine. In the additional reasons I also hold that legal costs claimed by the Bank were not due but for reasons that differ from his. In my view the litigation instituted by the Bank was irregular as it was commenced in circumstances where there was no compliance with section 129(1) of the Act.

[82] *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) (*Motala*).

[83] Id at para 12.

[164] Payment of legal costs sits at the heart of the divergent views expressed by my colleagues Cameron J and Nugent AJ, on the one hand, and Moseneke DCJ, on the other. The disagreement lies in the question whether, on the proper interpretation of section 129(3), when Ms Nkata paid the full amount of the arrears on 8 March 2011, by that alone she reinstated the credit agreement as envisaged in that section. All judgments accept that section 129(3) means that the credit agreement is reinstated by operation of law, once the consumer pays "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 reinstatement".

[165] The disagreement is somewhat narrower and it revolves around the question whether Ms Nkata had paid reasonable legal costs. It is common cause that the Bank debited legal fees in the sum of R9 050 to Ms Nkata's mortgage bond account. This amount was for issuing summons, obtaining a default judgment, issuing a writ, attaching Ms Nkata's home, advertising the first sale in execution, including the sheriff's fees. Later amounts of R6 498 and R8 000 were also added to her bond. These sums were described as the attorney's and counsel's day fees charged in connection with the unsuccessful rescission application.

[166] Both Cameron J and Nugent AJ hold that Ms Nkata failed to pay reasonable costs of enforcing the credit agreement. While I agree that those costs existed in fact, I do not agree that they constituted reasonable costs of enforcing the credit agreement. In my view, as a matter of law, no legal fees were due because the institution of the legal action without compliance with section 129(1) was irregular and the default judgment was a nullity because the registrar had no power to grant it.[84] For one to conclude that section 129(3) was not met for purposes of reinstating the agreement, one must be satisfied that costs which Ms Nkata failed to pay were those envisaged in the section. This is so because the action does not require payment of costs incurred in irregular proceedings or as a result of invalid judgments. On the authority of

[84] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* [2012] ZASCA 116; 2012 (6) SA 294 (SCA) (*Changing Tides*) and *Motala* above n 82.

Motala and *Changing Tides*, the default judgment granted by the registrar was a nullity.

[167] Here the Bank commenced the legal action at a time when it was not permitted to do so. Section 130(1)[85] prohibits the commencement of legal proceedings before the expiry of 10 business days from the date of delivery of notice in terms of section 129(1). The High Court held that the Bank failed to deliver the requisite notice and the correctness of this finding was not challenged in this Court.

[168] It is compulsory for any credit provider to comply with section 129(1) before instituting legal proceedings. In *Sebola*, Cameron J said:

> "Section 129(1)(a) requires a credit provider, before commencing any legal proceedings to enforce a credit agreement, to draw the default to the notice of the consumer in writing. It has been described as a 'gateway' provision, or a 'new pre-litigation layer to the enforcement process'. Although section 129(1)(a) says the credit provider 'may' draw the consumer's default to his or her notice, *section 129(1)(b)(i) precludes the commencement of legal proceedings unless notice is first given.* So, in effect, the notice is compulsory."[86] (Footnotes omitted and emphasis added.)

[85] Section 130(1) as read at the relevant time provided:

> "Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and—
>
> (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;
>
> (b) in the case of a notice contemplated in section 129(1), the consumer has—
>
> (i) not responded to that notice; or
>
> (ii) responded to the notice by rejecting the credit provider's proposals; and
>
> (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127."

[86] *Sebola* above n 26 at para 45.

[169] Parliament has considered compliance with section 129(1) to be so important that it deemed it necessary to preclude a court from adjudicating the dispute until the court itself is satisfied that there was compliance.[87] Notably, it is the court that must be satisfied and nobody else. This signifies that legal proceedings to which the Act applies must be determined by the court only.

[170] Furthermore, section 130(3) precludes a court from deciding the case unless it is satisfied that the notice requirements in section 129 have been complied with. Section 130(3) provides:

> "Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the *court may determine the matter only if the court is satisfied* that—
>
> (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with." (Emphasis added.)

[171] If it appears to the court that the credit provider has not complied with section 130(3)(a) or that it is not positively satisfied that there was compliance, the court must—

(a) adjourn the matter before it; and

(b) make an appropriate order setting out steps the credit provider must complete before the matter may be resumed.[88]

---

[87] Id at para 163.

[88] Section 130(4) provides:

> "In any proceedings contemplated in this section, if the court determines that—
>
> (a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;
>
> (b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a), or has approached the court in circumstances contemplated in subsection (3)(c) the court must—
>
> (i) adjourn the matter before it; and

[172] Later in *Kubyana*, we reaffirmed the principle that the Court is precluded from deciding a matter unless it is satisfied that the procedures stipulated in sections 129 and 130 are met. We said:

> "The text of this section reveals that in the event of the consumer being in default of her repayments of the loan, the credit provider is obliged to draw the default to the attention of the consumer. The section prescribes that the notice given to the consumer must be in writing. It further stipulates what the notice must contain. The notice must propose the options available to the consumer who is in financial distress and unable to purge the default. It must point out that, at the election of the consumer, the credit agreement may be referred to a debt counsellor, dispute resolution agent, consumer court or ombud. The purpose of the referral must also be stated in the notice.
>
> The purpose of the referral is to resolve whatever disputes may have arisen from the credit agreement and also to agree on a plan to cure the default and bring the payments up to date. Furthermore, the section makes reference to section 130 which governs the institution of litigation for enforcing credit agreements. Section 129(1) lays down two conditions which must be met before the credit provider may institute litigation. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before—
>
> (a) first providing notice to the consumer; and
>
> (b) meeting further requirements set out in section 130."[89]

[173] Here the legal fees claimed by the Bank arose in circumstances where the Bank had acted in breach of the Act in a number of respects. First, it failed to give notice as required by section 129(1) read with section 130(1). Second, it sought and obtained a default judgment from the registrar of the High Court, something that is incompatible with section 130(3) which requires such matters to be determined by the court. Third, the Bank sought and obtained the default judgment without satisfying the Court on

---

> (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed."

[89] *Kubyana* above n 26 at paras 67-8.

compliance with section 129. Fourth, the Bank caused a writ to be issued, an attachment to be effected and Ms Nkata's home to be advertised for sale in execution on account of an invalid judgment. Fifth, the Bank opposed Ms Nkata's application for the rescission of that judgment.

[174] The High Court declared:

> "The non-compliance with section 129(1) also leads to the conclusion, in my opinion, that default judgment was 'erroneously' sought and granted within the meaning of rule 42(1)(a) (see *Buys v Changing Tides 17 Pty Ltd NO & Others* [2013] ZAWCHC 150). *Compliance with section 129(1) is a substantive legal prerequisite for the valid institution of legal proceedings on a credit transaction to which the Act applies*. The notice annexed to the summons (the notice addressed to 'c/o 4 Devonshire Hill, Rondebosch') did not *ex facie* the summons, constitute a valid notice in respect of the first mortgage loan agreement and bond on which [the Bank] was suing. (The summons alleged that [Ms] Nkata's chosen domicilium was 35 Vin Doux Street, and this was also the chosen address appearing in the first mortgage bond annexed to the summons. The summons contained no allegation that [Ms] Nkata had selected the Rondebosch address for purposes of receiving all notices under the Act.)"[90] (Emphasis added.)

[175] Thus the High Court notably points out that on the face of it, the notice in terms of section 129(1) was served at the wrong address. It is apparent from the High Court's statement that had the request for the default judgment been placed before a court, that court could not have been satisfied that there was compliance with section 129(1) read with section 130(1). In that event, the Court could not have granted the default judgment because it would not have been competent for it to do so, in light of the peremptory language of section 130(3). That section proclaims that a court may determine a matter to which the Act applies *only if the court is satisfied that there was compliance* with section 129. Thus the exercise of the court's competence or jurisdiction is deferred until compliance is achieved.

[90] High Court judgment above n 6 at para 21.

[176] This is the backdrop against which the reasonableness of the legal fees claimed by the Bank must be assessed. In my view, it cannot be said that costs incurred when the Bank acted in breach of the Act were reasonable costs contemplated in section 129(3). This section envisions costs incurred in legitimate proceedings. If the High Court had set aside the default judgment during the first application for rescission, the legal fees in question would have fallen away. This application was made in November 2010 but was settled by the parties on 10 December 2010.

[177] In terms of the settlement agreement, Ms Nkata was to pay the costs of the rescission application as taxed or agreed. Notably, the agreement on payment of costs was limited to the rescission application only.[91] The other costs would have been payable in terms of section 129(3), if they were reasonable. In view of the fact that the Bank was not entitled to issue the summons, those costs were not reasonable. This is because the entire process, from the stage the summons was issued up to the attachment and advertising the sale, was tainted by non-compliance with various provisions of the Act.

---

[91] The settlement agreement provides, among other things:

> "1. The sale in execution in respect of Erf 8832 Durbanville, also known as 35 Vin Doux Street, Durmonte, Durbanville ("the property") which was scheduled to take place on 10 December 2010 is cancelled.
>
> 2. [Ms Nkata] shall sign a standard FNB Quicksale Mandate ("Quicksell agreement") within seven days of the granting of this [court order].
>
> 3. While the Quicksell agreement is in place [Ms Nkata] shall make payment to the [Bank] of R10 000 per month in respect of the instalment due to the [Bank].
>
> 4. Should the property not be sold in terms of the Quicksell agreement prior to its expiry/termination [Ms Nkata] shall pay the full arrears to the [Bank] within 14 days of such expiry/termination or on such terms as may be agreed between the parties.
>
> 5. Should [Ms Nkata] pay the full arrears to the [Bank] in terms of clause 4 above the [Bank] shall not sell the property in execution but [Ms Nkata] shall pay the full monthly instalments to [the Bank].
>
> 6. Should the property not be sold in terms of the Quicksell agreement and should [Ms Nkata] fail to pay the arrear amount owing to the [Bank] the [Bank] shall be entitled to proceed to sell the property in execution forthwith.
>
> 7. [Ms Nkata] shall pay the wasted costs occasioned by the cancellation of the sale in execution referred to in paragraph 1 above.
>
> 8. [Ms Nkata] shall pay the costs of this application as taxed or agreed."

[178] But this does not include the costs that Ms Nkata agreed to pay in terms of the settlement agreement. However, in terms of that agreement payment of those costs depended on being taxed or agreed. The question that arises is whether where, as here, the parties agree on conditions for payment of costs, the activation of reinstatement of the credit agreement is delayed until those costs are paid. I think not.

[179] It will be recalled that were it not for the parties' settlement agreement, those costs would be tainted too. Payment of those costs was regulated by the agreement and not section 129(3). In any event, in the settlement agreement the parties agreed to reinstate the credit agreement. If the settlement agreement was enforceable against Ms Nkata in respect of the payment of costs, it must equally have been binding on the Bank with regard to the reinstatement of the credit agreement.

[180] Therefore, whether one approaches the matter on the footing of the settlement agreement, or section 129(3), it appears that the credit agreement was reinstated. It makes no difference whether reinstatement occurred in December 2010 or in March 2012 when the arrears were cleared.

[181] Ms Nkata's home was sold to a third party in April 2013 on the strength of a default judgment that amounted to a nullity. The effect of dismissing the appeal is to endorse that absurd outcome. Since the default judgment was a nullity, it did not have the legal consequence of authorising the sale in execution. As Ponnan JA observed in *Motala*:

> "It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect. . . . Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing."[92]

[92] *Motala* above n 82 at para 14.

[182] Nugent AJ holds that he would not determine whether the default judgment was invalid and that the costs incurred in the legal proceedings enforcing the agreement were not recoverable without hearing the Bank. He finds that the Bank as the affected party has not had the opportunity to deal with the argument relating to the regularity of the legal proceedings instituted by it. This is not correct.

[183] In her written argument Ms Nkata, having cited *Sebola* and *Kubyana*, submitted that the bank was precluded from instituting the legal proceedings without first complying with section 129(1). With reference to section 130(3) Ms Nkata proceeded to submit that in terms of that section "the court may determine the matter *only* if the court is satisfied that the procedures required . . . by section 129 have been complied with". She concluded by contending that section 130(4) obliges the court to adjourn the matter where there is non-compliance and direct that specified steps be completed before the matter may be resumed.

[184] The Bank countered Ms Nkata's argument by contending that the High Court was correct in withholding rescission, owing to Ms Nkata's delay and the fact that she settled the rescission application. The Bank argued that by settling the rescission application Ms Nkata had accepted that the default judgment was correctly granted and that the sale in execution was validly concluded. The Bank submitted that to set aside the default judgment after all this would be grossly unfair to it. Therefore, the Bank was heard. What remains for consideration is whether its argument should be upheld. I think it should not.

[185] In my view, none of the submissions advanced by the Bank to counter invalidity of the legal proceedings has merit. On the authority of this Court in *Sebola* and *Kubyana*, the Bank was prohibited from instituting the legal proceedings. Not only were the proceedings prohibited, but section 130(3) made the Court's competence to adjudicate the matter dependent on the Court being first satisfied that there was compliance with section 129(1). On the papers non-compliance was

apparent. The notice in terms of the section was served at an address different from the one appearing on the summons and the mortgage bond.

[186] What is more is that the default judgment was granted in violation of the peremptory terms of section 130(3) by someone other than the Court and who had no power at all to decide a matter to which the Act applies. The result was that what was done by the registrar contrary to a direct prohibition of section 130(3) was a nullity and had no force in law. The fact that Ms Nkata believed otherwise did not change the legal position simply because she had no authority to overrule the Act. A common but mistaken application of the law by the parties does not bind the court. If that were to be true, decisions based on incorrect application of the law would be made. And in the present context a nullity would be given legal force contrary to the principle of legality.[93]

[187] Unlike my colleague I do not read *Motala* as laying down the limited principle that a person is not compelled to obey an order made by a court that had no jurisdiction to make it. With reference to *Schierhout*, the Supreme Court of Appeal expressed a general principle that what is done contrary to a direct prohibition amounts to a nullity.[94] The Court went further to say that as a nullity, it is not even necessary for it to be declared invalid. Clearly this has nothing to do with being compelled to obey an order. Nowhere in paragraph 14, does the Supreme Court of Appeal refer to compulsion to obey an order. The entire paragraph is devoted to showing that the High Court there usurped for itself the power expressly left to the Master by the relevant Act. Here too the registrar usurped for himself a power expressly left to a court by section 130(3) of the Act.

[188] It will be recalled that the appeal to this Court lay against the order of the Supreme Court of Appeal and not the order of the High Court. The High Court

[93] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68.

[94] *Schierhout v Minister of Justice* 1926 AD 99 at 109.

granted an order in favour of Ms Nkata. It declared that the credit agreement had been reinstated and that the default judgment ceased by operation of law to have force and effect from the moment of reinstatement. The sale in execution was also declared invalid and set aside.[95] Therefore, here there is no suggestion that the Court has authoritatively ordered the default judgment and what was done purportedly on its authority to stand.

[189] All judgments here having accepted that the Supreme Court of Appeal was wrong, reach the High Court order not on the basis that there was an appeal against it to this Court. But they do so in the process of determining whether the Supreme Court of Appeal granted the correct order, albeit for wrong reasons. That enquiry involves the question whether the High Court came to the correct conclusion. If it had, then the Supreme Court of Appeal should have dismissed the appeal. In other words, this enquiry enabled this Court to determine what order the Supreme Court of Appeal ought to have granted in this case.

[95] High Court judgment above n 6 at para 59.

For the Applicant:	M Donen SC and L Dzai Instructed by Nolundi Nyati Attorneys
For the First Respondent:	M A Chohan SC, D Van Reenen and N Van Zyl Instructed by Cohen Shevel & Fourie Attorneys
For the Amicus Curiae:	S Wilson, I De Vos and K Thobakgale Instructed by Socio-economic Rights Institute Law Clinic