THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 213/2014

REPORTABLE

In the matter between:

FIRSTRAND BANK LIMITED **APPELLANT**

and

NOMSA NKATA **RESPONDENT**

Neutral citation: *Firstrand Bank Ltd v Nkata* (213/14) [2015] ZASCA 44 (26 March 2015)

Coram: Maya, Cachalia, Majiedt, Willis and Saldulker JJA

Heard: **6 March 2015**

Delivered: **26 March 2015**

Summary: National Credit Act 34 of 2005 – interpretation of s 129 (4) – the rescheduling or restructuring of debt does not ipso facto nullify a previously obtained writ of execution in relation to the credit agreement in question – execution means sale in execution - appeal upheld.

ORDER

On appeal from: Western Cape High Court, Cape Town (Rogers J sitting as the court of first instance)

1 The appeal is upheld with costs, including the costs of two counsel.

2 The following is substituted for the order of the high court:

'The application is dismissed with costs.'

JUDGMENT

Willis JA (Maya, Cachalia, Majiedt, and Saldulker JJA concurring):

[1] The appellant appeals, with the leave of the Western Cape High Court (Rogers J), against the judgment and order which it delivered on 16 January 2014. The respondent, Ms Nomsa Nkata (the debtor) had brought an application for the rescission of a default judgment which the appellant, Firstrand Bank Ltd, trading as First National Bank (the bank) had obtained against her, together with an application for the cancellation of the sale in execution of an immovable property ('the property'). It was erf 8832 Durbanville, situated at 35 Vin Doux Street, Durmante, Durbanville, Western Cape under deed of transfer no. T42327/2005. A first mortgage bond had been registered over the property in order to secure a loan that the bank had given the debtor to assist her to buy it. The loan is subject to the provisions of National Credit Act 34 of 2005 (the NCA). Although the high court dismissed the application for rescission of the default judgment it, mero motu, reinstated the credit agreement, purportedly in terms of s 129(3) of the NCA. Not only the bank but also the debtor

applied for leave to appeal. Although the bank was given leave to appeal, the debtor was not.

[2] The rescission application was the second that the debtor had brought in respect of the property. The first had been brought in November 2010. Arising from the first application, the parties settled the matter in terms of which a previously scheduled sale in execution of the property was cancelled, the debtor agreed to pay her arrears and that, in the event that the debtor failed to make good her arrears, the bank would be able to proceed forthwith to sell the property in execution. The settlement was reflected in a draft order of court. The debtor herself applied for the draft to be made an order of court but the judge on duty at the time declined to do so as there had not been notice given to the bank. Neither the debtor nor the bank took any further steps in this regard. Nevertheless, in that draft, the debtor clearly agreed that the property could subsequently be sold in execution should she once again default in respect of the payments that were due.

[3] The property was undeveloped at the time when the debtor bought it in 2005. The debtor, who describes herself as a 'businesswoman', built a house on the property, taking occupation with her two daughters during 2007. She is a supplier of hospital equipment. She obtained financial assistance from the bank, which was secured by a first mortgage bond registered over the property in May 2006 and a second in 2007. The property is what is colloquially known as 'up market'. From the time when the debtor bought the property in 2005 until she took occupation in 2007, she had been living in a block of flats in Rondebosch, known as Devonshire Hill. It was the address at this flat which she had chosen as her domicilium citandi et executandi.

[4] Between March and November 2010, the debtor received numerous calls from the bank concerning her arrears. Two letters were addressed by its attorneys to the debtor in terms of s 129(1): the first on 1 June 2010 and the second on 4 June 2010. The debtor claims not to have received these notices and the summons in respect of which the default judgment was obtained. Be this as it may, the debtor approached a debt counsellor on 4 August 2010 and applied for debt review on 20 August 2010. The debtor acknowledges that she had learned of the default

judgment and the first pending sale in execution during the first half of October 2010. This lead to her issuing the first application for rescission on 19 November 2010. That application was opposed by the bank but, as has already been mentioned, the matter was settled as reflected in the draft order of court.

[5] The bank debited the debtor's account with costs related to the recovery of the debt. These were R9 050 on 25 October 2010, R14 498 on 21 February 2011 and R4 000 on 1 March 2013. The total was therefore about R28 000 – less than the sum of approximately R33 000 which the debtor owed in respect of arrears at the time of the sale in execution.

[6] The summons was issued on 27 July 2010. Default judgment was granted, in terms of rule 31(5) of the Uniform Rules of the High Court, by the registrar on 28 September 2010, the property being declared executable. The writ of attachment was issued on the same day.

[7] In May 2012, the debtor informed the bank that she was experiencing difficulties meeting her monthly instalments. She had several meetings with the bank concerning the issue but no agreements were concluded as a result thereof. In October 2012, she approached another debt counsellor. The debtor managed to continue with her instalments until February 2013. According to the bank, it attempted, on numerous occasions between February and April 2013, to resolve the matter, but to no avail. On the debtor's own version of events, she was informed by the bank of the impending sale in execution in March 2013. The property was sold in execution on 24 April 2013.

[8] At that stage the debtor's arrears were R33 716.89. As at 2 July 2013, the debtor's arrears were R66 918.19. The purchaser at the sale in execution was Kraaifontein Properties and was the third respondent in the motion court. The second respondent was the sheriff. Kraaifontein Properties renovated the property and then sold it 'on'. By agreement between the purchaser at the sale in execution and the new buyer, registration of the transfer has been suspended, pending the outcome of this matter. A deeds registry search conducted on 2 July 2013 revealed that the debtor was the co-owner of two other properties. One of these properties is

in Parklands, which she owns with her attorney. The other property is in Hunters' Retreat, which she owns with one Ms Thembile Maxwell Nkata.

[9] Relying on the provisions of s 129(3)*(a)* of the NCA, the high court declared that the loan agreements had been reinstated because the debtor made good her arrears in both March 2011 and March 2012 and that, accordingly, the default judgment and the writ in execution ceased, by operation of the law, to have any force and effect. The order also interdicted the transfer of the property which would have ensued consequent on the sale in execution. By reason of the fact, as will appear later, the decision of this court is based on its interpretation of s 129(4)*(b)* of the NCA, it is not necessary to deal with the high court's reasons and its findings in respect of s 129(3)*(a).*

[10] Before us, Ms Dzai, counsel for the debtor sought to argue that the high court was incorrect to refuse the rescission. The high court refused to grant leave on this point. Moreover, there was no cross-appeal in regard thereto. This question is therefore not before us. Ms Dzai otherwise supported the judgment of the high court. She also contended that the settlement agreement concluded between the parties on 10 December 2010 invalidated the writ that gave rise to the sale in execution. This submission flies in the face of the express terms of the settlement agreement providing that in the event that the debtor failed to make good her arrears, the bank would be able to proceed forthwith to sell the property in execution. Ms Dzai otherwise supported the judgment of the high court. She also contended that the settlement agreement concluded between the parties on 10 December 2010 invalidated the writ which gave rise to the sale in execution. This submission flies in the face of the express terms of the settlement agreement providing that in the event that the debtor failed to make good her arrears, the bank would be able to proceed forthwith to sell the property in execution.

[11] Mr Gautschi, counsel for the bank, submitted that the case turns on the interpretation of ss 129 (3) and (4) of the NCA. Subsections 129(3) and (4) of the NCA read as follows:

'(3) Subject to subsection (4), a consumer [ie a person in the position of the debtor] may –

(a) at any time before the credit provider [ie a person in the position of the bank] 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 para *(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 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.'

[12] The high court concluded that, in order for a consumer to be able to re-instate a credit agreement, the debtor need not pay the full accelerated debt but merely the arrear instalments. I agree. This view also has academic support.'[1] Although it had originally adopted the position that it was the full accelerated debt that had to be paid, the bank now wisely and correctly accepts that the high court's conclusion was the proper one to make in this regard.

[13] The high court found that the reasonable costs of enforcing the agreement must be either taxed or agreed. I agree, but this point is irrelevant because, at the time of the sale in execution, the aggregate of the charges for recovery of the debt was less than the amount in respect of which the debtor was in arrears.

[14] The high court also found that:

'FRB [the bank] in the present case did not present costs to Nkata [the debtor] and invite her to pay them. FRB simply debited the amounts to the bond account. If the amounts in

[1] See R Brits 'Purging mortgage default: Comments on the right to reinstate credit agreements in terms of the National Credit Act' (2013) 24 *Stellenbosch Law Review* Vol 1, 165 at 178-9.

question were owing by Nkata, it is clear from FRB's conduct that the bank was content to settle the costs by lending her the money through a debit to her bond account.'

and

'By debiting the legal costs to the account rather than demanding separate payment thereof, the credit provider indicates to the consumer that the credit provider is content to lend the corresponding amount to the consumer and to receive payment thereof in instalments as if the debited costs were part of the capital. For the purposes of s 129(3)*(a)* the costs, if properly debited, lose their separate character as costs of enforcing the agreement. Put differently, the enforcement costs which the consumer must pay as contemplated in s 129(3)(a) in order to obtain reinstatement are those costs of which the credit provider is at that time requiring payment.'

[15] Mr Gautschi submitted that this was an impermissible interpretation. He contended that this interpretation was not only novel and imaginative but also that it did not accord with reality and is quite unjustified. Mr Gautschi put forward the proposition that a customer of a bank necessarily operates an account with it. By debiting the account of its customer with charges and costs relating to the recovery of a debt due – which in any event is permitted in express terms by the mortgage agreement in this case – the bank is simply claiming the amount. The bank, so the argument went, says in effect: 'This is what we say you owe us.' Without further ado, that does not constitute a payment by the customer. Mr Gautschi submitted that if a customer were, for example, to continue to make deposits into the bank account, without protest after receipt of a bank statement reflecting the debit or debits, this silence may justify the inference that the customer has paid the amounts claimed by the bank.

[16] Additionally, Mr Gautschi contended that, properly construed, s 129(3)*(a)* requires some form of communication by the consumer with the credit provider that she intends to reinstate, for how else can a determination be made as to what the 'reasonable costs of enforcing the agreement up to the time of re-instatement' might be?

[17] In order to understand the prohibition on re-instating a credit agreement, as provided for in s 129(4), one needs first to know what the requirements or conditions

for re-instatement are, as set out in s 129(3)*(a)*. At least to this extent, sub-ss 129(3)*(a)* and s 129(4) must be read conjunctively. It is not necessary, however, to decide the matter in terms of the gravamen of the submissions made by Mr Gautschi relating to the interpretation of s 129(3)*(a)*. I refer, in particular, to those aspects which, by reference to s 129(3)*(a)*, touch upon the interpretation of what may constitute payment of default charges and costs and the need, if any, for there to be a communication by the consumer to the credit provider of an intention to re-instate the credit agreement. I come to this conclusion by reason of the interpretation of 'execution' in s 129(4)*(b)* which, in my opinion, a court is compelled to make.

[18] Referring to s 129(4)*(b)* of the NCA, the high court found that:
'The judgment is only actually 'executed' when money is raised pursuant to a sale of attached property and paid to the judgment creditor.'
In coming to this conclusion, Rogers J referred to the judgment of Peter AJ In *Nedbank Ltd v Fraser & another and Four Other cases*[2] and the article written by Reghard Brits, to which I have referred earlier, 'Purging mortgage default: Comments on the right to reinstate credit agreements in terms of the National Credit Act'.[3]

[19] In *Nedbank Ltd v Fraser & another and Four Other cases*[4] the judge said:
'In the case of immovable property, the right of redemption is extinguished only when registration takes place into the name of the purchaser after the sale in execution.'[5]
In coming to this conclusion, he relied on *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co*;[6] *Simpson v Klein NO & others*[7] and *Shalala v Bowman NO & others*.[8] In my respectful opinion, the court misconstrued these authorities.

[20] The word 'execution' is not defined in the NCA. First and most significantly, one needs to understand – as Mr Gautschi correctly submitted – that civil execution is a process rather than an event. In regard to this understanding there is no dearth of authority. The topic has vexed many judges both here and abroad: there is no

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[2] *Nedbank Ltd v Fraser & another and Four Other cases* 2011 (4) SA 363 (GSJ).
[3] Supra, fn 1.
[4] *Nedbank Ltd v Fraser & another and Four Other cases* 2011 (4) SA 363 (GSJ).
[5] Para 40.
[6] *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 at p558-9.
[7] *Simpson v Klein NO & others* 1987 (1) SA 405 (W) at 409-11.
[8] *Shalala v Bowman NO & others* 1989 (4) SA 900 (W) at 905.

shortage of instances where debt recovery has been troublesome, requiring judicial attention.

[21] In *Reid & another v Godart & another*[9] De Villiers JA said:

'…[T]he word "execution" means, as it seems to me, "carrying out" of or "giving effect" to the judgment, in the manner provided by law; for example, by specific performance, by sequestration, by the passing of transfer, by issue of letters of administration, by ejectment from premises, or by a levy under a writ of execution'.[10]

[22] In *Liquidators Union v Brown* Kotzé JA, after referring to the old common law authorities, said:

'But although the effect of a *pignus judiciale*[11] is that the control of the property arrested in execution passes from the judgment debtor, and therefore on his insolvency supervening does not come under the administration of the curator of the insolvent estate, the dominium remains in the debtor, who can, up to the last moment before actual sale, redeem his attached property: that is to say, the property subject to the *pignus judiciale*, for while the *pignus* lasts he remains the owner of the pledge….'[12]

For present purposes, the significance of this understanding is that, at common law, a debtor could redeem his attached property 'up to the last moment before the actual sale'.

[23] Section 129(3)*(b)* read with 129(3)*(a)*, together with s 129(4) of the NCA give the consumer the right to 're-instate' a credit agreement and 'resume possession' of the property in question (the equivalent of 'redemption' at common law) by paying the credit provider all amounts that are overdue, together with 'default charges' and 'reasonable costs of enforcing the agreement', but does not alter the common law consequence of 'the axe falling' upon the sale in execution. At common law one could, up to the time of the sale, redeem ownership and possession by discharging the full amount of the debt. Now, under the NCA, ownership and possession can be redeemed merely by paying the amount overdue, together with charges and costs. The Rubicon has been and remains the sale in execution. The NCA has not changed

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[9] *Reid & another v Godart & another* 1938 AD 511.
[10] At 514.
[11] An attachment by an officer of a court, consequent upon an order of the court.
[12] At 559.

this. On the contrary, it has expressly provided that a consumer may not 're-instate' a credit agreement after the execution of a court order enforcing the agreement.

[24] Insofar as redemption is concerned, s 129(4)*(b)* necessarily alters the common law only to the extent that redemption (re-instatement in the terms of the NCA) may occur not necessarily by payment of the full debt but merely to the extent of arrears, together with related charges. This takes account of the fact that nowadays many consumers borrow money over a protracted period of time in order to finance the acquisition of large purchases such as a home or a motor vehicle. Less affluent citizens may avail themselves of extended credit to purchase household appliances, for example.

[25] In *Simpson v Klein NO & others*[13] Kriegler J referred to *Liquidators Union v Brown.* Although he did say that:

'…(T)he words "actual sale" in the quoted passage from the judgment of Kotzé JA… were not intended to relate to the act or moment of the sale as such (ie when the property was knocked down to the highest bidder) but to delivery pursuant to and in terms of the sale',[14]

he nevertheless observed that:

'Neither Judge was concerned with the point in issue in this case, namely at which precise point in time fixed property, which has been attached and sold in execution, passes from the estate of the judgment debtor.'[15]

and

'In the case of immovables, however, ownership in the attached property can not pass during the sale in execution. It only passes subsequently upon formal transfer of the property by the deputy sheriff to the purchaser in execution.'[16]

In my respectful opinion, this reasoning of Kriegler J is unassailable. The context to which he was referring was, however, very different from that with which this court is now dealing. As Kriegler J was careful to point out:

'In so far as we are now dealing with s 20 of the Insolvency Act of 1936, whereas the learned Judge [Kotzé JA] had been commenting on the relevant provisions of Act 32 of 1916, care should be taken

[13] *Simpson v Klein NO & others* 1987 (1) SA 405 (W).
[14] At 411C-D.
[15] At 411B.
[16] At 411C.

to ensure that the comments relating to the former Insolvency Act are equally valid with regard to the current Insolvency Act'.[17]

[26] The context of a debtor's supervening insolvency, after a sale in execution of immovable property, but before transfer thereof, is very different from that with which we have to do in this case. Here the debtor is seeking to set aside a bona fide sale in execution to redeem for herself the property in question. The two situations cannot be considered to be coextensive or *in pari materia*. In the case of insolvency, the interests of a single creditor are in competition with the concursus creditorum. In the situation with which we are now dealing, it is the interests of the debtor which are in competition not only with a single creditor, the bank, but also an innocent third party, the purchaser of the immovable property. Furthermore, as Kriegler J was astute to indicate, the consequence of his judgment was not that the sale in execution was invalid or fell to be set aside but that the proceeds of the sale in execution did not fall outside of the estate of the debtor.[18]

[27] Moreover, as Kriegler J noted:

'It is, however, clear from the passage quoted that execution is a *process* for the enforcement of a judgment and entails a number of successive steps. Such execution is perfected eventually by a number of different procedures to be performed by the officer of the court. They include delivery to the purchaser of the goods attached and sold in execution, receipt of the price obtained at the sale in execution for such goods, the accounting for such receipts (including the calculation of the costs of execution), the payment to the judgment creditor or creditors of what is his or their due and the payment over to the judgment debtor of any balance which may then still remain. The whole of that *process* is embraced under the concept of execution.'[19] (Emphasis added.)

Section 129(4)(*b)* does not refer to the completion or perfection of a sale in execution. To infer that this is so would lead to absurd results. What if the deputy sheriff's fees and charges are to be taxed? What if the taxing master's decision is subject to review in the high court? What if that review is subject to an appeal? If one has regard to s 129(4) as a whole, it is clear that some kind of final, irrevocable step is envisaged, beyond which a consumer may not return. A bona fide sale in

[17] At p410H.
[18] At p412D-G.
[19] At 411I-312A.

execution is precisely such a step. Besides, even a perfected sale in execution may not be the end-game. What if the proceeds of the sale in execution of the immovable property are insufficient to discharge the debt but the debtor has other immovable properties? These could then be sold in execution until the debt has been discharged. When it refers to 'execution', s 129(4)*(b)* cannot have envisaged complete, absolute, perfect finality in the process of execution.

[28] *Shalala v Bowman*, the other case to which the court refers in *Nedbank v Fraser*, follows *Simpson v Klein*. In *Shalala v Bowman* Blum AJ deals with a company in liquidation. This does not add, in any significant way, beyond *Simpson v Klein,* to the issues to be decided in this case. The other case to which the court referred was *Syfrets Bank Ltd & others v Sheriff of the Supreme Court, Durban Central, & another; Schoerie NO v Syfrets Bank Ltd & others*.[20] Like *Shalala v Bowman*, it deals with the effect of a company's liquidation on a sale in execution. Combrink J disagreed with Blum AJ's reasoning in *Shalala v Bowman* and found that a bona fide sale in execution of immovable property which had taken place not only before a company had been placed in liquidation but also before registration of transfer is unaffected by the order of liquidation.[21] Combrink J quoted approvingly[22] from the judgment of Booysen J in *Strydom NO v MGN Construction (Pty) Ltd & another: In re Haljen (Pty) Ltd (in Liquidation)*,[23] which, in turn, quoted from *Rennie NO v Registrar of Deeds & another*[24] with approval.[25]

[29] In *Rennie v Registrar of Deeds* Schock AJ said:

'Execution is, in my view, "put into force" within the meaning of those words in the said section when, in pursuance of a writ of execution, the Sheriff or the messenger of the court, as the case may be, enters into possession of the property, i.e. when execution is levied. This has always been the interpretation of those words placed on the corresponding and substantially similar section in the English Companies Acts from which these words in our Companies Act (and its predecessors) were taken. Moreover this interpretation has been

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[20] *Syfrets Bank Ltd & others v Sheriff of the Supreme Court, Durban Central, & another; Schoerie NO v Syfrets Bank Ltd & others* 1997 (1) SA 764 (D).
[21] At 777B-782F.
[22] At 779F-780C.
[23] *Strydom NO v MGN Construction (Pty) Ltd & another: In re Haljen (Pty) Ltd (in Liquidation)* 1983 (1) SA 799 (D).
[24] *Rennie No v Registrar of Deeds & another* 1977 (2) SA 513 (C*).*
[25] At 803A-G.

applied in our Court by *Maasdorp J* (as he then was), in the case of *In re Cape Cold Storage and Supply Co Ltd: Hendry v Trollip* (1908) 25 SC 502, in construing similar words in the Cape (pre-Union) Companies Act. It is also in accordance with the interpretation applied by *Clayden J* in the case of *Pols v. Pols – Bouers en Ingenieurs (Edms) Bpk* 1953 (3) SA 107 (T) at 110E-H in construing a similar provision of the 1926 Companies Act. There is a *dictum* to the contrary by *Jennet J* in *Ex parte: Flynn In re United Investments & Development Corporation Ltd (in Liquidation)* 1953 (3) SA 443 (E) at 445B-C, but it appears that he did not have the benefit of the judgment in *Pols*' case, *supra*. The reasoning of *Jennet J* seems to me, with respect, quite unconvincing. An execution is surely put into force once and for all and not – as *Jennett J* suggests in the above-cited passage – every time a further step in the *process* of execution is taken. The weight of authority thus clearly supports the view that execution – in terms of the said section – was "put into force" when the messenger of the Court attached the said erf and this is the meaning which commends itself to me.'[26] (Emphasis added.)

For Schock AJ the 'once and for all' character of the process of execution came into operation upon attachment but an awareness of context is, as always, important: Schock AJ had to determine the critically important step in the process of execution in relation to the time when an order is made for the winding-up of a company. What is important for present purposes is that, in Schock AJ's reasoning, execution did not 'occur' only once there had been a distribution of the proceeds of the sale in execution – or even after some step after that.

[30] In *Maharaj Brothers v Pieterse Bros Contruction (Pty) Lt & another*[27] Caney J, after referring to English authorities as well as *Reid v Godart*, said:

'Execution in its widest sense means carrying out of or giving effect to a judgment in the manner provided by law…

In a narrower sense it is the *process* by which the Sheriff or the messenger of the magistrate's court "procures for a judgment creditor the fruits of his judgment". *In re A. Company* 1915 (1) Ch. 520 (C.A.) at p.527.'[28] (Emphasis added.)

[31] I am fortified in my opinion that civil execution is a 'process-oriented' concept rather than one which refers to a single event but that the event of a sale in

[26] At 513C-G.
[27] *Maharaj Brothers v Pieterse Bros Construction (Pty) Ltd & another* 1961 (2) SA 232 (N).
[28] At 238C-D.

execution denotes finality and a point of no return, by reference to English cases. In *In re: Overseas Aviation Engineering (G.B) Ltd*[29] Lord Denning MR said, by reference to s 325 of the English Companies Act, 1948:

'The word "execution" is not defined in the Act. It is, of course, a word familiar to lawyers. "Execution" means, quite simply, the *process*: for enforcing or giving effect to the judgment of the court: and it is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment…

Applying this meaning of the word "execution", I should have thought it plain that when a judgment creditor gets a charge on the debtor's property, it is a form of "execution", for it is a means of enforcing the judgment.'[30] (Emphasis added.)

In *Overseas Aviation Engineering*, Lord Denning referred, with approval, to *Blackman v Fysh*[31] in which Kekewich J said:

'What is the meaning of "taken in execution"? Read irrespectively of authorities, it means taken by *process* of law for the enforcement of a judgment creditor's right and in order to give effect to that right.'[32] (Emphasis added.)

[32] In *Fagot v Gaches*[33] Du Parcq LJ said:

'To my mind, "to proceed to Execution on, "or" to proceed to the enforcement of a Judgment is only a way of saying "to Execute" or "to enforce"….'[34]

[33] In summary then, there is an almost across-the-board judicial consensus not only in South Africa but also in England, from which so much of our law of procedure (our 'adjectival law' in contrast to our 'substantive law') derives, that 'execution' refers to a process. It is also clear that the precise meaning to be given to 'execution' in a particular statute depends very much on context.

[34] In the article by Reghard Brits, which was mentioned previously, he comments on the right to reinstate credit agreements in terms of the National Credit Act'.[35] He argues that '…section 129(4) qualifications should by and large be

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[29] *In re: Overseas Aviation Engineering (G.B) Ltd* [1963] Ch. 24 (C.A.); [1962] 3 All ER 12 (C.A.).
[30] At 39-40.
[31] *Blackman v Fysh* [1892] 3 Ch 209 (C.A.).
[32] At 217.
[33] *Fagot v Gaches* [1943] 1 KB 10 (C.A.).
[34] At 12.
[35] R Brits 'Purging mortgage default: Comments on the right to reinstate credit agreements in terms of the National Credit Act' (2013) 24 *Stellenbosch Law Review* Vol 1, 165. See fn 1.

regarded as the boundaries for debtors' rights under section 129(3) to reinstate credit agreements that are in default'[36] and argues that s 129(4)*(a)* and *(b)* should respectively be construed '…so that reinstatement is only prohibited once the judgment had been enforced or *the property sold*'.[37] (Emphasis added.) Brits goes on to argue that:

'…[T]o allow reinstatement to occur after sale but prior to registration would render auction sales very insecure (and hence unpopular) and would cause great inconvenience for auction purchasers as well as the deeds registration system. The public auction process would not be able to fulfil its debt recovery function properly. Also, lower prices (which will, no doubt, accompany the high risk of sales failing due to reinstatement) will in return prejudice debtor's, which is contrary to the NCA's core purposes.'[38]

I agree.

[35] In *ABSA Bank Limited v Van Eeden & others*[39], after referring to the maxim *quoniam fiscalis hastae fides facile convelli non debeat*, to which reference was made in *Sookdeyi & Another v Sahadeo & Another*,[40] it was said that public confidence in the process of execution is fundamentally important. The maxim may be translated as explaining the judicial preference for deference to sales in execution, once these have taken place, 'by reason of the fact that public confidence in the institutional weapon of execution should not lightly be disturbed' (my translation).[41] For obvious reasons, this deference is to be applied with even greater rigour once there has been delivery (in the case of movables) or transfer registered in the deeds registry office (in the case of immovable property).[42] In any event, sight

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[36] At p175.
[37] At p175.
[38] At p177.
[39] *ABSA Bank Limited v Van Eeden & others* 2011 (4) SA 430 (GSJ).
[40] 1952 (4) SA 568 (A).
[41] In *Sookdeyi & another v Sahadeo & another* 1952 (4) SA 568 (A) at 571H-572A, Van Den Heever JA said, in a unanimous judgment, that: 'It was a principle in the Netherlands that a perfected sale in execution should after transfer or delivery of the subject matter not be lightly impugned *quoniam fiscalis hastae fides facile convelli non debeat*. (Groenewgen *de Legib. Abrogate, ad C.* 4.44.16; *ad C.* 8.44 (*sibi* 45) 13; Neostad *Decisiones*, Decis.75; *Voet* 6.1.13 and, dealing with execution *in rem*, Bynkershoek *Observ. Tumult*. Cas 45; *Cf Voet* 42.1.31 *verbis: Et quamvis nec arbiter...*). This reluctance to rescind perfected sales *sub hasta* has been received in our case law (*Lange and Others v Leisching and Others*, 1880 Foord 55; *S.A. Association v van Staden*, S.C. 95 at 98; *Conradie v Jones* 1917 O.P.D. 112). These authorities indicate that in certain exceptional circumstances a sale in execution may nevertheless be impugned. The rules in regard to this qualified inviolability of a sale in execution were in so far as magistrates' courts are concerned, codified in sec. 70. It has to be construed in harmony rather than conflict with the Common Law.'
[42] Ibid.

must not be lost of the truth that the higher the price fetched at public auctions, the better it is for both credit providers and consumers: the higher the price, either the less the residual indebtedness of the consumer or the greater her surplus. Whichever of these two possible outcomes ensues, both the credit provider and the consumer may be said to 'win'. The more interested buyers that attend an auction, the higher the price is likely to be. Facile judicial intervention in sales in execution will discourage interested buyers from attending these auctions. Why bid, if it is considered likely that a court will set the sale aside?

[36] Sight should also not be lost of the fact that, as Mr Gautschi correctly submitted, a re-instatement of a credit agreement, necessarily entails a revisiting, a revision thereof and, consequently, its amendment. The credit provider's 'permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement' are added to the amount which the consumer must pay. In terms of s 116 of the NCA, a change or amendment to a credit agreement (unless it reduces the consumer's liabilities or increases the credit limit) is void unless 'the change is recorded in writing and signed by the parties'.[43] Not only is formality required when an agreement is re-instated but any change or amendment to a credit agreement after a sale in execution would generate a conflict between the purchaser at a sale in execution, on the one hand and the credit provider and the consumer, on the other. No such formalities occurred in the present case.

[37] As Innes J keenly recognised long ago in *Walker v Syfret NO,* [44] when it comes to finding the point of no return in matters concerning the enforcement of a transaction, the interests of innocent third parties are paramount.[45] He said: '[N]o authority directly in point has been quoted to us, but the matter seems clear upon principle'. This provides another clue in the process of analysis of what 'execution' in s 129(4)*(b)* might mean.

[38] Yet another pointer to the fact that 'execution' in s 129(4)*(b)* refers to the moment of sale at the public auction is to be found in the fact that, in terms of s

[43] Subsection 116(*c)* of the NCA.
[44] *Walker v Syfret NO* 1911 AD 141.
[45] At 166.

129(4)*(a)(i)*, re-instatement may not occur after the *sale* of any property pursuant to an attachment order. (Emphasis added). An order of attachment differs from a writ issued from the office of the registrar, in terms of Rules 45 and 46 of the Uniform Rules of Court, after a court has given judgment requiring a litigant to make a payment of money. An order of attachment commonly arises where the court grants it in order to protect a litigant's interest in property that is the subject of a dispute. In this regard, the judgment of Millin J in *Loader v De Beer*,[46] which has been followed in numerous instances thereafter, is instructive. The order is often called an attachment *pendent lite.* The judgment of Margo J in *Van Rhyn v Reef Developments A (Pty) Ltd*[47] provides a good example.[48] An order of attachment of property need not, of course, be confined to a situation where there is a *lis* pending between the parties. Therefore it would seem, if s 129(4)*(b)* is read not only consecutively but also in harmony with s 129 (4)(*a)(i),* that the mischief at which these two subsections were directed was re-instatement after a sale in execution.

[39] Furthermore, if the high court's conclusion that execution only takes place when the proceeds of the sale in execution are paid over to the judgment creditor is correct, it would mean that the provisions of s 129(4)*(a)(i)* are not only nugatory but also superfluous. If it was the legislator's intention that it is the transfer of immovable property, followed by payment to the credit provider of the proceeds – and, by parity of reasoning, delivery and then payment to the credit provider in the case of movables – which is decisive, why then have a provision that prohibits re-instatement after the 'sale of any property pursuant to an attachment order'?

[40] There is still further reason why the construction which the bank wishes to place on the interpretation of 'execution' in s 129(4)*(b)* is correct. Rule 46(13) of the Uniform Rules of Court provides that:

'The sheriff conducting the sale *shall* give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him or her

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[46] *Loader v De Beer* 1947 (1) SA 87 (W).
[47] *Van Rhyn v Reef Developments A (Pty) Ltd* 1973 (1) SA 488 (W).
[48] At 492B-F.

shall be as valid and effectual as if he or she were the owner of the property.'[49] (Emphasis added.)

As Hoexter JA said in *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & others*:[50]

'It is usual to credit the Legislature with a knowledge of the existing law on the subject dealt with. In order properly to interpret a statute a court is entitled, and in some cases bound, to look at earlier statutes dealing with the same subject-matter. That for purposes of judicial construction of a more recent statute an examination of earlier statutes dealing with like topics affords a useful aid is an established principle of our law.'[51]

The high court's interpretation of 'execution' runs contrary to the peremptory provisions of Rule 46(11) relating to the effecting of transfer upon payment by the purchaser who was at a sale in execution.

[41] In his concluding remarks, Brits says:

'One can accordingly conclude that reinstatement is possible in the mortgage context and that foreclosure will be prevented and reversed if the debtor purges the default (along with the permitted charges). However, reinstatement can only occur up until the point that the auction sale is concluded. After this point, and up until registration takes place, only redemption (paying the full outstanding debt) can save the debtor's home.'[52]

I disagree that after the sale in execution but before registration of transfer has taken place, redemption can occur by paying the full amount of the debt. No such inference is possible from reading the NCA and the proposition is contrary to the common law. I otherwise agree with what Brits has said in this passage.

[42] There is yet another reason that the high court's interpretation of 'execution' is, in my respectful opinion, incorrect: it would mean that whenever a credit provider settles a matter to allow a debtor a rescheduled arrangement for repayment, after an execution order has been obtained, the execution order ipso facto lapses. This would entail such a disincentive for settling on such a basis that it would be unlikely that

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[49] See the remarks in Erasmus' *Superior Court Practice* Service Edition 32 (2009) at B1 333-334 concerning the formulation of this rule.

[50] *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & others* 1985 (4) SA 773 (A).

[51] At 805G. See also *Falcon Investments Ltd v CD of Birnam (Suburban) (Pty) Ltd & others* 1973 (4) SA 384 (A) at 401B and the judgment of Van Winsen J in *Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 (3) SA 583 (C) at 588C-D.

[52] At p182.

credit providers would enter into such arrangements. The rescheduling or restructuring of debt is, however, one of the features of modern credit provision, which the NCA is designed to promote.[53] The impracticality of the high court's interpretation must weigh heavily against its being correct.[54]

[43] In *Ferris & another v FirstRand Bank Limited & another* [55] Moseneke ACJ, delivering the unanimous judgment of the Constitutional Court, affirmed the principle that the NCA does not exist merely to advance the interests of consumers but also of credit providers as well.[56] Endless cat-and-mouse games between credit providers and consumers serve the interests of neither class. Indeed, they undermine the whole system of credit provision in the country. Added to Moseneke's ACJ's judgment in *Ferris*, is the fact that the interests of the general public, when they bid at public auctions, are relevant as well.

[44] The provisions of s 129(4)*(b)* of the NCA are peremptory. In clear terms they provide that a consumer may not re-instate a credit agreement after the execution of any court order enforcing that agreement. Reinstatement can only occur prior to a sale in execution at a public auction. The debtor fell foul of this provision. The short answer for a consumer in distress is that she must timeously re-instate the credit agreement and, where this is required by the circumstances, apply for and successfully obtain a rescission of the judgment and the setting aside of the writ of attachment and a stay of execution before that sale has taken place in order to avoid the fall of the axe.

[45] Accordingly, the high court's conclusion that execution only takes place when the proceeds of the sale in execution are paid over to the judgment creditor is erroneous. The order of the high court was wrongly made. The appeal must succeed. The appeal has dealt with weighty matters. The costs of two counsel are justified.

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[53]See for example ss 86(8) and 87(1)*(b)(ii)* of the NCA.
[54] See for example *Bothma-Batho Transport (Edms) Bpk v Bothma & Seun Transport* (Edms) Bpk 2014 (2) SA 494 (SCA) para 12, read with *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[55] *Ferris& another v FirstRand Bank Limited & another* 2014 (3) SA 39 (CC).
[56] Paras 14 to 17.

[46] The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The following is substituted for the order of the high court:

'The application is dismissed with costs.'

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N P WILLIS

JUDGE OF APPEAL

APPEARANCES:

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