OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No.: **15952/2016**
Reportable

In the matter between:

THEMBINKOSI KHULEKANI RUDOLF JIYANA	First Applicant
NOMVO JIYANA	Second Applicant

and

ABSA BANK	First Respondent
CAPE TOWN NORTH SHERIFF	Second Respondent
GARY NIGEL HARDISTY	Third Respondent
JENNIFER JANINE DOROTHY HARDISTY	Fourth Respondent
REGISTRAR OF DEEDS, WESTERN CAPE	Fifth Respondent

JUDGMENT delivered **29 JUNE 2017**

MEER J.

[1] The Applicants seek by way of declaratory relief an order that a default judgment granted against them on 15 April 2014, and the subsequent execution against their home and primary residence, at […] E.[…], Parklands, Cape Town, ("the property") be set aside. They seek moreover a declaration that the auction, sale and transfer of the property to the Third and Fourth Respondents has no legal effect and be set aside.

[2] The basis upon which the relief is sought is that upon the reinstatement of a credit agreement (which financed the Applicants' purchase of the property by way of a mortgage loan agreement) between the Applicants and the First Respondent, the latter was obliged to first send a notice in terms of Section 129(1) of the National Credit Act 34 of 2005 ("the NCA"), before approaching the court to seek judgment. The First Respondent's failure to do so, contend the Applicants, resulted in the default judgment granted on 15 April 2014 being a nullity. The Applicants contend that in granting the default judgment, the Court violated the Applicants' rights to property protected by section 25(1) of the Constitution, their rights in terms of section 34 thereof, and the rule of law by delivering judgment against the Applicants and ordering their property to be declared executable in the absence of compliance with sections 129(1), 130(1) and 130(3) of the NCA.

[3] The relevant sections aforementioned state:

> **"129. Required procedures before debt enforcement.**—(1) If the consumer is in default under a credit agreement, the credit provider—
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> (*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
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> (*b*) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before—
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> (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."

"130. Debt procedures in a Court.—(1) 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 (10), 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.

...

(3) 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;

(*b*) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(*c*) that the credit provider has not approached the court—

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having—

(*aa*) surrendered property to the credit provider, and before that property has been sold;

(*bb*) agreed to a proposal made in terms of section 129 (1) (*a*) and acted in good faith in fulfilment of that agreement;

(*cc*) complied with an agreed plan as contemplated in section 129 (1) (*a*); or

(*dd*) brought the payments under the credit agreement up to date, as contemplated in section 129 (1) (*a*)."

[4] The First Respondent opposes the application. The other Respondents have chosen not to participate and have not filed any pleadings. The stance of

the First Respondent is that the matter is *res judicata,* not subject to a further application and stands to be dismissed. The First Respondent contends that subsequent to the granting of the default judgment on 15 April 2014, the Applicants unsuccessfully applied for the rescission thereof and their subsequent applications for leave to appeal against the dismissal of their rescission application in this Court, the Supreme Court of Appeal and the Constitutional Court were dismissed. Thereafter the Applicant's *acquiesced* to the default judgment, and it is therefore not open to the Applicants to bring this application.

Background Facts

[5] The relevant facts are to a large extent common cause. The Applicants purchased and took transfer of the property during 2004. The First Respondent provided finance in terms of a loan agreement. Clause 8 thereof provides for default by the mortgager. In such event all amounts which were secured under the bond would, at the option of the First Respondent and without the bank being required to give notice to the mortgagor, immediately become payable in full, and the bank would be entitled to institute proceedings for the recovery of all such amounts and for a court order declaring the mortgaged property executable.

[6] Had the NCA been in effect when the agreement was made, the agreement would have fallen within its application. In terms of Item 4 of Schedule 3 to the NCA, however, the NCA applies to the agreement. In particular, by virtue of sub-item 4(2) of the Schedule, Chapter 6 of the NCA (which deals with debt enforcement at sections 129 and 130), applied fully to the pre-existing agreement from 1 June 2007.[1]

1This is the effective date on which chapter 6 came into operation in terms of Proclamation 22 published in Government Gazette 28824 on 11 May 2066.

[7] Between 2005 and 2014 the First Respondent instituted several proceedings against the Applicants due in the main to their defaulting as mortgagors under the credit agreement. All in all it would seem this Court has been approached some 13 times, as chronicled below:

7.1 On 22 March 2005 the First Respondent issued summons out of the Magistrate's Court for payment of the sum of R488 578.72 together with interest and costs as well as an order declaring the immovable property executable. The action was settled and a deed of settlement concluded on 25 April 2015.

7.2 On 6 November 2006 the First Respondent issued another summons out of this Court under Case No. 12109/06 arising from the Applicants' alleged failure to pay R17 248.63 in arrear instalments. The capital amount then owing was claimed together with an order declaring the property executable. On 10 December 2007 the First Respondent applied to the Registrar for default judgment, which was granted on 24 June 2008 under Case No. 12109/06. The Applicants then launched an application for rescission of judgment (under Case No. 16634/2008) and an application for a stay of execution (under Case No. 16633/2008).

Justice Thring's Order of 13 October 2008

7.3 On 13 October 2008 Justice Thring granted an order by agreement in all three case numbers referred to in the previous paragraph. The Applicants were ordered to repay the arrears on their home loan account by making specified payments to the bank.

7.3.1 Clause 2 of the order provided that should the Applicants fail to make any of the payments on or before the due dates and/or

comply with any of the terms of the order on or before the due dates, "the full outstanding balance in terms of the mortgage bond shall become immediately due and payable".

7.3.2 Clause 4 of the order provided that "the remaining terms and conditions of the mortgage bond shall remain in full force and effect". The Applicants contend that these clauses effectively facilitated the reinstatement of the mortgage bond agreement, in terms of section 129(3) of the National Credit Act, by providing for payment of arrears, and the continuation of the existing debtor/creditor relationship.

7.3.3 Clause 7 of the order provided that in the event of the Applicants not complying with the terms of the order, the bank would be entitled, on 5 days' notice to the Applicants, to apply for judgment for the outstanding balance of the mortgage bond, together with interest and legal costs, as well as an order declaring the property executable forthwith.

7.3.4 In terms of clause 5 of the order a sale in execution that had been arranged for 14 October 2008 was cancelled, and the bank withdrew the relief prayed for in this respect with each party to pay their own costs. In terms of clause 6 the application for rescission brought by the Applicants under Case No. 16634/08 was to proceed on an unopposed basis with each party to pay their own costs.

Order by Justice Le Grange on 3 November 2008

7.4 In terms of an order made by Justice Le Grange on 3 November 2008 the default judgment granted by the Registrar on 24 June 2008 under Case No. 12109/06 was rescinded.

[8] Thereafter the Applicants made 2 payments on 28 October 2008 and as of that date there were no more arrears on the account.

[9] The Applicants contend that upon a proper construction of section 129(4) of the Act, which was then of full force and effect, the credit agreement between the Applicants and the First Respondent had been reinstated by the orders of Justices Thring and Le Grange. The procedures before further debt enforcement (as required by section 129(1) of the Act and the peremptory debt procedures in a Court as required by section 130(1)(a) and (b) and 130(3) of the Act), contend the Applicants, had to be applied before any further debt enforcement by the bank and determination of the matter by the Court, could be sanctioned by law.

Further legal proceedings instituted by the First Respondent

[10] The Applicants again fell into arrears with their monthly instalments and on 30 August 2012 the First Respondent brought an application in terms of Rule 41(4) against them. The application was however not proceeded with.

[11] **Default Judgment granted by Justice Blignault 15 April 2014**

11.1 After 21 May 2013 the Applicants' account fell into arrears yet again. The First Respondent set down an application on 27 March 2014 for payment of the capital amount of R391 797.06, interest and an order declaring the property executable. The application was set down under Case No's 12109/2006, 16634/2008 and 16633/2008, being the matters in respect of which Justice Thring had granted the order by agreement and Justice le Grange had granted the rescission application aforementioned.

11.2 There was no service of the application on the Applicants and the matter was removed from the roll. A fresh application for the same relief was issued and enrolled for 15 April 2014. The Deputy Sheriff unsuccessfully attempted to effect service on the Applicants at the property. The return of service reflects that when he attempted to do so the premises were locked and on 2 April 2014 he again attempted service. The return of that date reflects that the Applicants had left the given address as informed by the occupier and their present whereabouts are unknown. The return reflects moreover "both phone numbers phoned. No response either." The application proceeded unopposed and on 15 April 2014 Blignault J granted default judgment against the Applicants and an order declaring the property executable, in their absence. It is this order that the Applicants are seeking to challenge in the present application.

Events after default judgment of 15 April 2014

[12] Pursuant to the default judgment, a sale in execution of the property under attachment was first arranged for 19 August 2014. On 10 June 2014, in Case No. 10095/2014, the Applicants applied for the rescission of the judgment granted against them by Blignault J. The rescission application was heard by Rosenberg AJ and was dismissed on 6 November 2014. Thereafter a warrant of execution was issued and the Sheriff attached the Applicants' property.

[13] The Applicants then proceeded with an application for leave to appeal against the judgment by Rosenberg AJ in Case No. 10095/2014. On 10 December 2014 the application for leave to appeal was dismissed with costs. A second sale in execution of the property was arranged for 3 February 2015.

Applications for Leave to Appeal to the Supreme Court of Appeal and the Constitutional Court

[14] On 26 January 2015 the Applicants applied for leave to appeal to the Supreme Court of Appeal. Consequently, the First Respondent stayed the execution sale scheduled for 3 February 2015. On 26 March 2015 the Supreme Court of Appeal dismissed the application for leave to appeal.

[15] Thereafter on 4 June 2015 the Applicants approached the Constitutional Court, under Case No. CCT98/2015, for leave to appeal. On 27 July 2015 the Constitutional Court dismissed the application.

Deed of Settlement concluded between the Applicants and First Respondent

[16] During August 2015 the Applicants and the First Respondent concluded a deed of settlement. In clause 1 thereof the Applicants confirmed that the judgment of 15 April 2014 against them stands, and accepted liability to the First Respondent jointly and severally for payment of the sum of R391 797.06, interest and an order declaring the property executable with costs on an attorney and client scale. The Applicants undertook to pay their monthly instalments and the arrears in three amounts of R44 669.64 per month on or before the last day of each month, as from 31 December 2015.

[17] The Applicants failed to comply with the deed of settlement and the First Respondent arranged a further sale in execution of the property for 5 April 2016. On 29 March 2016 the Applicants brought an application for the review of the taxed bill of costs. This application was dismissed on 21 October 2016. Thereafter on 30 March 2016, seven days before the sale in execution, the Applicants brought an urgent application interdicting the sale. On 31 March 2016 that application was dismissed with costs. Applications for leave to appeal to this Court and the Supreme Court of Appeal against the dismissal of that application, were unsuccessful.

The Applicants' Argument

[18] Relying on the judgments of *Nkata v Firstrand Bank Ltd and Others* 2014 (2) SA 412 (WCC), and *Nkata v Firstrand Bank Ltd* 2016 (4) SA 257 (CC) (which judgments are discussed below), the Applicants argue that the default judgment granted by Blignault J on 15 April 2014 was void in the absence of compliance with sections 129(1), 130(1) and 130(3) of the NCA. As a result of the reinstatement of the credit agreement pursuant to the order of Thring J, they contend, it was incumbent upon the First Respondent to start afresh by sending a section 129(1) notice to the Applicants before seeking judgment in April 2014. As this did not occur, the order of Blignault J, so the argument goes, as aforementioned, violated the Applicants' rights to property protected by section 25(1) of the Constitution, the Applicants' rights in terms of section 34 thereof, and the rule of law.

[19] In challenging the default judgment of 15 April 2014, the Applicants note that the founding affidavit of the manager of the First Respondent's home loans division failed to disclose that the default judgment granted by the Registrar under Case No. 12109/2006 on 24 June 2008, was rescinded on 3 November 2008 and that therefore the order declaring the property especially executable had been rescinded. The Applicants point out that the First Respondent's manager relied on paragraph 7 of the order granted by Justice Thring, that is to the effect that in the event of the Applicant not complying with the terms of that order the bank would be entitled, on 5 days' notice to Applicants, to apply for judgment on the balance under the mortgage bond, interest and legal costs and an order declaring the property executable. This part of the order, they argue, could not lawfully be given effect to because it conflicted with the express notice provisions in section 129(1), section 130(1) and section 130(3) of the

NCA, all of which became peremptory after the credit agreement was reinstated.

[20] In order to enforce the debt in terms of the credit agreement between the parties, the Applicants argue, the First Respondent would have had to comply with section 129(1) of the NCA. It would have had to issue a new summons. In terms of section 130(1) of the Act, the First Respondent, the Applicant contends, was not entitled to approach the Court unless it had given notice to the Applicants as contemplated in section 129(1) and they had not responded to the notice or responded by rejecting the bank's proposals. The Court, they argue, was not entitled to determine the matter unless it was satisfied that section 129 procedures had been complied with, as required by section 130(3), all of which became peremptory after the credit agreement was reinstated.

The Res Judicata Argument

[21] The Res Judicata defence relied upon by the first Respondent, pertains to the rescission application in this Court and applications to the Supreme Court of Appeal and Constitutional Court. It is important to note that in the present application the Applicants argue on the same facts that were before Rosenberg AJ, in the application to rescind the default judgment of 15 April 2014. That application was dismissed by Rosenberg AJ on 6 November 2014. Thereafter, as aforementioned, applications for leave to appeal before Rosenberg AJ, the Supreme Court of Appeal and the Constitutional Court, were dismissed. The First Respondent contends that the matter is accordingly res judicata and stands to be dismissed, as appears more fully below.

[22] The First Applicant, who is an attorney, appeared on behalf of the Applicants in the rescission application that was dismissed by Rosenberg AJ. It would appear from the judgment of Rosenberg AJ of 6 November 2014, that the Applicant, in argument, raised the First Respondent's failure to comply with the

notice requirement in terms of section 129 (1) in the proceedings pertaining both to the 2008 order of Thring J and the 2014 default judgment of Blignault J. Rosenberg AJ however ruled that it was not open to the Applicants to rely on this NCA non-compliance argument, as the argument had not been addressed at all in their pleadings. I quote from the relevant sections of the judgment.

> "[9] Rescission of the relevant paragraphs of the judgment and order of 13 October 2008 was contended for by the First Applicant, an attorney who appeared on his behalf and on behalf of his wife, the Second Applicant, on the following grounds:
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> - No notice had been given by the Respondent to the Applicants in terms of s 129(1) of the National Credit Act 34 of 2005 ('the NCA') and in the result the Respondent was precluded by s 130(1) of the NCA from approaching the Court for the order it obtained.
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> - The Court failed properly to take into account and evaluate the Applicants' rights in terms of s 26(3) of the Constitution, regard being had to the fact that the bonded property was their primary residence.
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> [10] Rescission of the judgment of 15 April 2014 was sought on the same two grounds.
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> [13] Turning to the first ground of attack on the judgment of 15 April 2014, namely non-compliance with s 129(1)(e) and s 130(1) of the NCA, the problem for the Applicants in this regard is that the application does not rely on any such non-compliance as constituting an error in the granting of the judgment. The issue of compliance or non-compliance with these provisions of the NCA is not addressed at all in the papers. This being so, one is left to speculate, on the basis of possible inferences to be drawn from certain of the annexures to the affidavits in the present application, as to the question of possible non-compliance with s 129 and s 130 of the NCA. Absent a proper factual basis being laid for the argument, it is in my view not open to the Applicants to rely on NCA non-compliance.
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> [14] In any event, the judgment of 15 April 2014 was based upon the Applicants' alleged breach of the provisions of the judgment of 13 October 2008. Adopting the

two step approach adopted in Grainco (Pty) Ltd v Broodryk No en Andere, while the underlying mortgage bond agreement is a credit agreement for the purposes of the NCA, the judgment itself clearly is not."

[23] Thus the First Respondent's failure to comply with the notice requirement in terms of section 129(1) as a ground for setting aside both the judgments of Thring J and Blignault J, was raised in the rescission application before Rosenberg AJ, and the Applicant was at that stage aware of this legal point which now features prominently in the application before me.

[24] It is to be noted that whilst the First Applicant raised non-compliance with the section 129(1) notice in the rescission application before Rosenberg AJ, he did not specifically argue the reinstatement of the agreement in terms of section 129(3) of the Act. At the time the Applicant's rescission application was heard in June 2014, there was binding precedent in this division as per the judgment of Rogers J in *Nkata v First Rand Bank Limited and Others* 2014(2) SA 412 (WCC), to the effect that a consumer may reinstate a credit agreement by the payment of the arrear instalments. Rogers J held at paragraph 38 that in order to effect reinstatement in terms of section 129 (3)(a), Nkata, the debtor before him, did not need to pay the full accelerated debt but only the arrear instalments. At paragraph 34, Rogers J said that if Nkata again fell into arrears in respect of the reinstated mortgage loan agreements, the bank would arguably need to obtain a fresh judgment and authority to execute after complying again with the provisions of section 129(1). The *Nkata judgment* was delivered in this Court on 20 November 2013, almost seven months prior to the Applicants' application for rescission of judgment on 6 June 2014.

[25] Some time was spent during argument concerning the implications of the Applicants' failure to raise the reinstatement argument, in its current formulation before me, in the rescission application and the applications for leave to appeal. The Applicants do not explain why the reinstatement of the agreement in terms of section 129(3), in the light of the *Nkata* judgment, was not argued in the

rescission judgment before this Court and the subsequent applications for leave to appeal in this Court, the Supreme Court of Appeal and the Constitutional Court. The *Nkata* judgment of Rogers J was, as aforementioned, binding, albeit that an appeal had been noted against it. In an appeal to the Constitutional Court, after the SCA had overturned the decision of Rogers J, the latter's decision in the first *Nkata* judgment was ultimately upheld. See *Nkata v Firstrand Bank* 2016 (4) SA 257 (CC). Of relevance to this application, the Constitutional Court found[2] that the High Court correctly held that reinstatement in terms of section 129(3)(a) occurred by operation of law. The Court also "readily embraced 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"[3].

[26] Mr Donen for the Applicants said that the First Applicant was not aware of the first *Nkata* judgment at the time of the rescission application. He submitted also that the Applicants had not appreciated the true nature of their cause of action until after the Constitutional Court judgment in *Nkata*. He submitted that in confirming the order of Rogers J, the speculation by Rogers J in the first Nkata judgment at paragraph 34, that upon reinstatement of a credit agreement, section 129(1) would have to be complied with, prior to a fresh judgement being sought, was supported by the Constitutional Court. The present application, he said, was inspired by the first Nkata judgement that was upheld by the Constitutional Court. During that process the principle was established as to how reinstatement operates if arrears are paid. The Applicants, he contended, finally found out what the law was after the Constitutional Court judgment and so they have pursued what he referred to as the "Nkata line" in this application. They therefore, he contended, have a right to have their real dispute with the First Respondent resolved by application of the law which they presently raise in their application.

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[2] At para 105
[3] At para 108

[27] Mr Van Riet for the First Respondent submitted that the Applicant, an attorney, could not have contended for the notice requirement in terms of s 129(1) before Rosenberg AJ, without being aware of the legal argument that a consumer may reinstate a credit agreement by the payment of arrears, which was established as law in the judgment of Rogers J in *Nkata v First Rand Bank Limited and Others* 2014 (2) SA 412 (WCC). Mr Van Riet submitted moreover that in the application for leave to appeal to the Constitutional Court, the Applicants alleged that even after they had paid their arrears in full in terms of the order by Justice Thring, the Respondent proceeded with an application in terms of Rule 41(4) against them while all the outstanding arrears had been paid. Implicit in that allegation, suggested Mr Van Riet, was the fact that the Applicants knew that the agreement had been reinstated. Thus, argued Mr Van Riet, both the point pertaining to the reinstatement of the credit agreement and the failure to serve a notice in terms of section 129(1) were made before this Court and the Constitutional Court.

[28] It is to be noted that this Court, the Supreme Court of Appeal and the Constitutional Court, with knowledge that the Applicants had paid their arrears on the account at some stage prior to the judgment of Blignault J, rejected the Applicants' argument and concluded that there were no prospects of success in the rescission application.

[29] The introduction only in the application before me of the argument in its current form, concerning the failure to serve the notice aforementioned after the reinstatement of the credit agreement, being a violation of the Applicants' constitutional rights, after all of three courts had pronounced in applications on the same facts, brings me to a consideration of the applicability of the doctrine of *res judicata*, raised by the First Respondent in opposition to this application.

[30] The defence of *res judicata* and the history thereof in our law was conveniently summarised by Blignault J in *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* 2005 (6) SA 23 (C). In *Consol,* after setting out the classic formulation of the requirements for the defence of *res judicata,* namely a judgment in an action (1) with respect to the same subject matter, (2) based on the same ground, and (3) between the same parties, Blignault JA went on to state at paragraph 50 as follows:

> "The English courts have for many years recognised the principle that *res judicata* does not only cover the express judicial declaration in the earlier proceedings, but also points that should have been raised but were omitted to be raised in the earlier proceedings. The decision generally recognised as first expressing this principle is that of *Wigram VC* in *Henderson v Henderson* 1843(3) Hare 100 (67 ER 313) at 114 – 15 (Hare) where the following was said:
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> > 'In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

At paragraph 52 Blignault J went on to state that there did not appear to be any considerations of logic or equity militating against the application of the *Henderson* principle in the case before him, and that he proposed to follow it.

Similarly, there do not appear to me to be any considerations of logic or equity militating against the application of the *Henderson* principle in the present application.

[31] The Supreme Court of Appeal has confirmed that the true basis that underlies the principle of *res judicata* is abuse of the court process. In *Janse van Rensburg NNO v Steenkamp and Another; Janse van Rensburg NNO v Myburgh and Others* 2010 (1) SA 649 (SCA), Heher JA held as follows at 660H – 661D:

> "[29] In *Arnold v National Westminster Bank plc* [1991] 3 All ER 41 (HL) at 48j Lord Keith pointed out that, although Henderson's was a case of action estoppel, the statement of the law has been held to be applicable also to issue estoppel. The learned Law Lord had earlier referred (at 48e) to *Brisbane City Council v Attorney-General for Queensland* [1978] 3 All ER 30 (PC) ([1979] AC 411) at 35-36 (at 425 AC), where Lord Wilberforce said:
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> > "The second defence is one of res judicata. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of *Wigram VC* in *Henderson v Henderson* (1843) 3 Hare 100, [1843-60] All ER Rep 378 and its existence has been reaffirmed by this Board in *Hoystead v Taxation Comr* [1926] AC 155, [1925] All ER Rep 56. A recent application of it is to be found in the decision of the Board in *Yat Tung Co v Dao Heng Bank* [1975] AC 581. It was, in the judgment of the Board, there described in these words (at 590): ". . . there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. This reference to "abuse of process" had previously been made in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257 per Somervell LJ, and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse, otherwise

there is a danger of a party being shut out from bringing forward a genuine subject of litigation.'

[30] I respectfully agree. The identification with abuse of the process accords with the policy expressed in the maxim *nemo debet bis vexari pro una et eadem causa* which underlies the principle of *res judicata*."

[32] More recently the Constitutional Court in *S v Molaudzi* 2015 (2) SACR 341 (CC) considered the doctrine of *res judicata* and concluded that the Court had the power to relax the doctrine in exceptional circumstances. This is not dissimilar to the stance adopted in *Henderson supra* that a Court will not (except under special circumstances) allow the same parties to open the same subject of litigation.

[33] The facts of *Molaudzi* are relevant to a consideration of res judicata in the context of this application. There, the Applicant sought leave to appeal against his convictions and sentences imposed by the North West High Court, Mafikeng, for *inter alia* robbery and murder. The appeal was largely grounded on the inadmissibility of extra-curial statements. An application for leave to appeal by Mr Molaudzi in 2013 to the Constitutional Court did not succeed, on the basis that it was based on an attack on the factual findings made in the trial Court and did not raise a proper constitutional issue for the Constitutional Court to entertain.

[34] Thereafter in 2014 two of Mr Molaudzi's co-accused applied for leave to appeal against their convictions and sentences, but raised constitutional arguments regarding the evidence admitted against them. In particular, they challenged the constitutional validity of the admissibility of extra-curial statements of an accused against a co-accused in a criminal trial. The Constitutional Court considered the challenge to raise a meritorious constitutional issue, granted leave to appeal and subsequently over-turned the

convictions of *Molaudzi's* two co-accused. They were subsequently released from prison.

[35] Thereafter Mr Molaudzi brought a further application for leave to appeal in which he raised the same constitutional arguments as his co-accused. The Constitutional Court acknowledged that Mr Molaudzi's second application raised issues that are *res judicata*, despite different grounds of appeal having been raised in the first application. The Court found that if it could not entertain Mr Molaudzi's second application he would be denied his right to equality before the law *viz-a-vis* his co-accused. Grave injustice would result from denying him the same relief, simply because in his first application he did not have the benefit of legal representation, which resulted in his failure to raise a meritorious constitutional issue. The interests of justice, the Court found, required it to entertain the second application on its merits, despite the previous unmeritorious application, and relax the principle of *res judicata.* It is to be noted that the constitutional arguments made in the second application were not previously before the Court. The Court went on to state at paragraph 45:

> "Where significant or manifest injustice would result, should the order be allowed to stand, the doctrine ought to be relaxed in terms of sections 173 and 39(2) of the Constitution in a manner which permits this court to go beyond the strictures of Rule 29 to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy. This accords with international approaches to res judicata. The present case demonstrates exceptional circumstances that cry out for flexibility on the part of this Court in fashioning a remedy to protect the rights of an applicant in the position of Mr Molaudzi."

[36] The Court acknowledged generally *apropos* the doctrine of *res judicata* as follows at paragraph 16:

> "[16] The underlying rationale of the doctrine of res judicata is to give effect to the finality of judgments. Where a cause of action has been litigated to finality between

the parties on a previous occasion, a subsequent attempt by one party to proceed against the other party on the same cause of action should not be permitted. It is an attempt to limit needless litigation and ensure certainty on matters that have been decided by the courts."

[37] The Court went on to state at paragraphs 37 and 38:

"[37] The incremental and conservative ways that exceptions have been developed to the res judicata doctrine speak to the dangers of eroding it. The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demand that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of res judicata.

[38] In this matter the interests of justice require this court to balance the rule of law and legal certainty in the finality of criminal convictions, as well as the effect on the administration of justice if parties are allowed to approach the court on multiple occasions on the same matter, against the necessity to vindicate the constitutional rights of an unrepresented, vulnerable party in a case where similarly situated accused have been granted relief. As in this case, the circumstances must be wholly exceptional to justify a departure from the res judicata doctrine. The interests of justice are the general standard, but the vital question is whether there are truly exceptional circumstances."

[38] At paragraph 42 the Court stated:

"[42] [I]n truly exceptional cases, where a mechanical application of res judicata would fail to give effect to the fundamental rights of an accused and would result in a grave injustice, this court is required, even obliged, to relax the doctrine to the extent necessary, to provide an appropriate remedy...".

[39] While Molaudzi concerned an application for leave to appeal in a criminal matter, the principle that the doctrine of *res judicata* can be relaxed in truly exceptional cases where its application would fail to give effect to fundamental rights, would, in my view, apply equally to civil matters..

[40] Mr Donen for the Applicants did not refer to any exceptional circumstances which warranted the relaxation of the *res judicata* doctrine in this matter. Instead he contended that the present matter was distinguishable from *Molaudzi's* case, *inter alia* because the Applicants' cause of action has neither been raised nor litigated between the parties, and res judicata accordingly does not apply.

[41] I am unable to agree. The cause of action and factual basis that gave rise to the rescission application was the default judgment of Blignault J on 15 April 2014. The rescission application sought to set aside that judgment. The subsequent three applications for leave to appeal all the way to the Constitution Court, likewise concerned that cause of action. The cause of action in the application before me is based on the same facts as these prior applications, and whilst the application before me is described as a constitutional review of the default judgment granted by Justice Blignault, it similarly seeks to set aside Blignault J's judgment. The notice of motion, in doing so, seeks a declaration that the credit agreement was reinstated, and accordingly Blignault J's judgment has no real force.

[42] I note also that the judgment of Rosenberg AJ dated 6 November 2014 in the rescission application, as aforementioned, indicates that the Applicant raised the fact that no notice had been given by the First Respondent to the Applicants in terms of section 129(1) of the NCA and in the result the First Respondent was precluded from approaching the Court for the order it obtained. In this application before me the basis upon which the relief is sought, similarly, is that the First Respondent was obliged to first send a notice in terms of section

129(1) of the NCA before approaching the Court to seek judgment, and the failure so to do resulted in the default judgment of Blignault J being a nullity. The fact that this argument might not have been raised in precisely the same manner as it is now being raised before me, does not detract from the fact that in essence the cause of action before me, before Rosenberg AJ, the SCA and the Constitutional Court, pertained to the setting aside of the judgment of Blignault J on the same facts. The fact that non-compliance with the NCA was not raised in the pleadings before Rosenberg AJ and therefore not adjudicated upon by him does not detract from this.

[43] Nor does the fact that the Applicant did not fully argue non-compliance with section 129(1) and section 130(1) of the NCA, or the reinstatement of the credit agreement, exclude the doctrine of *res judicata.* For, as is specified in the Henderson principle referred to above, parties to litigation are required to bring forward their whole case and a court will not, except under special circumstances, allow the same parties to open the same subject of litigation in respect of the matter which might have been brought forward but was not, only because they have, from negligence, inadvertence or even accident, omitted part of their case. *Res judicata,* as aforementioned, applies to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[44] The evidence makes clear that the Applicant, an attorney, ably and relentlessly pursued this matter, raised the non-compliance with a section 129(1) notice, was aware of it but failed for whatever reason to formulate it in the pleadings and pursue it. Even had he not been aware of this aspect in the previous litigation, the Henderson principle does not excuse him, requiring as it does a litigant like him to put forward every point which properly belongs to the subject of litigation, exercising reasonable diligence. The Applicant failed to do so. The first *Nkata* judgment of Rogers J, which was established law almost seven months prior to the application for rescission on 6 June 2014 before

Rosenberg AJ, as aforementioned, was not referred to. The fact that the first *Nkata* judgment was the subject of an appeal at the time does not detract from the fact that it was established law and binding in this Division.

[45] The Applicants' contention that they did not appreciate the true nature of their cause of action until after the Constitutional Court judgment in *Nkata,* on 19 November 2015, and consequently now have the right to have their real dispute resolved by application of the law which they presently raise in their application, goes squarely against the principal of finality of judgments referred to in *Molaudzi supra.* There would be no end to litigation if parties were, after the conclusion of their cases, permitted to come back to court on a reformulation of their cause of action informed by a later appreciation of the true nature thereof, as the Applicants now seek to do. There would be no finality to judgments if parties could argue other points on the basis of subsequent legal findings by our Courts. It is incumbent upon parties to understand the true nature of their cause of action and litigate their whole case to finality. The Applicants did not do so and it is not open to them to traverse the same ground based on a true appreciation of their cause of action derived from the Constitutional Court ruling.

[46] I note also that it is trite that generally law developed by our Courts is not retrospective in effect. Nor are statutes, unless specifically provided for. Even the declaration of invalidity of a law by the Constitutional Court does not invalidate anything done or permitted in terms thereof before the coming into effect of the declaration of invalidity, unless the Constitutional Court in the interests of justice and good governance orders otherwise. See Section 98(6) of the Constitution of the Republic of South Africa Act 108 of 1996. In *S v Zuma and Others* 1995 (4) BCLR 401 (SA) the reason for this was stated as follows at paragraph 43 at 423 A - B:

"Paragraph (a) of section 98(6) is intended to ensure that the invalidation of a statute existing at the date of commencement of the Constitution should not ordinarily have any retrospective effect, so as to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under that statute."

How then can the legal principle which the Applicants contend the Constitutional Court established in the Nkata judgment become applicable to the Applicants' case that was litigated to finality prior to that date? To make it applicable would undo decisions and actions, dislocate and inconvenience contrary to *Zuma* supra. What was referred to in argument as the "new law", after the Constitutional Court *Nkata* judgment cannot be used either to re -open the Applicants' case prior thereto, or to attack the judgments of Thring and Blignault which predated the "new law". For, on the Applicants' version, it was the Constitutional Court's Nkata judgment of November 2015 that established the principle as to how reinstatement operates if arrears are paid, and such principle on this version could not have been established when the judgments of Justices Thring and Blignault were delivered in 2008 and 2014 respectively. Were this not so, there would be no finality to litigation, the flood gates would open and the court process would be gravely abused. The contention by Mr Donen that this application "is not a res judicata situation" as it is trumped by conduct contrary to the Constitution by Blignault J, which must be declared invalid, cannot thus be accepted.

[47] In the light of the above, I note that just as the Constitutional Court in Molaudzi acknowledged that Molaudzi's second application raised issues that were res judicata despite different grounds of appeal having been raised in the first application, so too must it be acknowledged that the application before me raises issues that are res judicata despite the contention that different grounds were raised in the former applications. There are, however, no exceptional circumstances approximating those in Molaudzi, namely the denial of a right to equality before the law, or no legal representation and the resultant failure to

raise a meritorious issue. Nor, in my view, are there any other exceptional circumstances warranting a relaxation of the res judicata doctrine, which must accordingly apply.

[48] The following factors in addition, militate against the relaxation of the doctrine of *res judicata*:

48.1 The property has already been sold in execution and was subsequently transferred to the Third and Fourth Respondents. These Respondents, as innocent third parties, stand to suffer significant prejudice should the Applicants be allowed to re-open their case.

48.2 The Applicants give no indication as to what effect they could have used their rights had they received a section 129(1) notice. See *Absa Bank Limited v Peterson* 2013(1) SA 481 (WCC).

48.3 On 10 August 2015 as aforementioned, the Applicant signed a deed of settlement wherein they confirmed that the judgment of Blignault J against them stands and accepted liability to the Plaintiff for payment of the amounts due and an order declaring the property executable. Their acquiescence is inconsistent with their current intention to have the case re-opened and the judgment set aside. As was said in *Nkata v Firstrand Bank Limited and Others* 2014(2) SA 412 (WCC) at 421 A – C:

> "The principles of peremption apply not only to appeals but also to the remedy of rescission (See Sparks v David Polliack and Co (Pty) Ltd 1963(2) SA 491 (T) at 496 D-F). The general principle is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate.' In order to show that a person has acquiesced in a judgment, the Court must be satisfied upon the evidence 'that he has done an act which is necessarily inconsistent with his

> continued intention to have the case re-opened or to appeal' (Hlatshwayo v Mare & Deas 1912 AD 242 at 259).
>
> Here Nkata initially decided to challenge the default judgment. One of the points she raised in the first application was the alleged non-compliance with s 129(1). Her conduct in settling that case on the terms I have described is entirely inconsistent with the continued intention on her part to have the case re-opened by way of rescission."

For all of the above reasons, I accept the First Respondent's defence of *res judicata*, and the application cannot succeed.

[49] In a supplementary note Mr Donen submitted in support of this application, firstly, that it did not constitute a vexatious proceeding and secondly, that the Applicants had not waived their statutory and constitutional rights by failing to assert them previously. Given my finding above that the application cannot succeed due to the applicability of the doctrine of *res judicata,* it is not necessary for me to consider these aspects.

[50] In view of all of the above I grant the following order:

1. The application is dismissed with costs, such to include the costs of two counsel.

_____
Y S MEER
Judge of the High Court