



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Bayport Securitisation Limited and Another v University of Stellenbosch Law Clinic and Others
(Case no 507/2020) [2021] ZASCA 156 (4 November 2021)

Today the Supreme Court of Appeal (SCA) upheld the appeal by Bayport Securitization RF Limited and the Law Society of South Africa, the first and second appellants, against a judgment of the Western Cape Division of the High Court, Cape Town (high court).

The appeal concerned the construction to be placed on ‘collection costs’ as defined in s 1 and whether collection costs in s 101(1)(g), as read with s 103(5), of the National Credit Act 34 of 2005 (the NCA) included all legal costs pre-and post-judgment.

The high court favoured an interpretation that in terms of s 101(1)(g), collection costs included all legal fees incurred by the credit provider to enforce the monetary obligations of the consumer. Those included the costs incurred: (a) prior to the commencement of litigation; (b) post the commencement of litigation, but pre-judgment and (c) post-judgment. It was thus construed to include all legal fees incurred through the employment of attorneys and counsel, as well as the execution of the judgment.

On appeal, the appellants contended that collection costs as defined and referred to in s 101 (1)(g) did not include legal fees incurred by the credit provider through the initiation of legal proceedings. The respondents, on the other hand, argued that s 103(5) placed a maximum limit on the amount of legal costs that the credit provider could recover from a consumer. That in the context of microloans s 103(5) served to protect the consumer from collection costs far exceeding the amount that was initially borrowed. That by necessary implication meant that legal fees had to be included in the definition of collection costs.

The SCA held that it was trite that a statutory provision should not be interpreted so as to alter the common law more than was necessary unless the intention to do so was clearly reflected in the

enactment, whether expressly or by necessary implication. That collection costs, as defined and referred to in s 101(1)(g), should be given the same meaning as in *D & D H Fraser Ltd v Waller* 1916 AD 494 where a distinction was drawn between the collection fees charged by an attorney prior to litigation and the costs awarded in an action to recover the debt.

Held further that, that a distinction was to be drawn between collection costs and legal fees was fortified by the fact that in terms of the Superior Courts Act 10 of 2013, the Magistrates' Courts Act 32 of 1944 (MCA), or the Debt Collectors Act 114 of 1998 (whichever was applicable to the enforcement of the credit agreement) maximum tariffs were prescribed. That in terms of the tariff applied by taxing masters, legal costs were regarded as commencing with a summons and did not as a general rule allow for pre-litigation costs to be recovered from the losing litigant.

Held further that the respondents' submission, that the NCA placed a maximum limit on the amount of legal costs that could be recovered from a consumer, would lead to some glaring absurdities. To hold that collection costs included legal costs would be to oust or severely fetter the discretion of a court to make appropriate costs orders, including where necessary punitive costs orders. Had the legislature intended collection costs to include legal costs, it could easily have said as much.

As to paragraph (b) of the high court's order – which is to the effect that - s 103(5) of the NCA applied for as long as the consumer remained in default of his or her credit obligations, from the date of default to the date of collection of the final payment, irrespective of whether judgment had been granted – the SCA held that after a judgment has been granted against a consumer usually, save for necessary disbursements and charges allowed in terms of the relevant tariff, only interest accrues on the judgment debt. The remaining charges contemplated in s 101(1)(b) to (g) were not post-judgment charges. The judgment entered was for the capital sum fixed at a particular date together with interest. Consequently, s 103(5) did not apply post-judgment.

Accordingly, the appeal succeeded with no order as to costs.

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