THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 13 March 2015

STATUS Immediate

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

Firstrand Bank v Kona & another (20003/2014) [2015] ZASCA 11

MEDIA STATEMENT

Today, the Supreme Court of Appeal (SCA) upheld the appeal by Firstrand Bank (the appellant) and set aside the order of the North Gauteng High Court, Pretoria. In the result, the joint estate of Raymond Clyde Kona and Amie Gertrude Kona (the respondents) was placed under final sequestration.

The issue before the SCA was whether s88 (3) of the National Credit Act (the Act) prevented a credit provider from applying for the sequestration of a consumer where that consumer was the subject of a debt-rearrangement order.

The appellant had a liquidated claim of around R950 000 against the joint estate of the respondents. The provisions of the Act applied to the relevant transaction and the appellant was a 'credit provider' and the respondents were 'consumers' for the purposes of the Act. In 2009, the respondents were declared over-indebted by a magistrate's court and their debts were re-arranged. Subsequently, they failed to meet their obligations to the appellant in terms of the debt-rearrangement order. The appellant accordingly sought to have the joint estate of the respondents sequestrated.

The respondents argued that the appellants were prohibited from applying for their sequestration in terms of s 88(3) of the Act, which provides inter alia that a credit provider who has received notice of an application for debt review may not 'exercise or enforce by litigation or other judicial process any right or security under [an affected] credit agreement' unless certain conditions are met. The court a quo upheld the respondents' argument, and ruled that a sequestration application constituted 'other judicial process', that the appellant intended to pursue recovery of the debt through sequestration

proceedings, and that a debt-rearrangement order under the Act, unless and until set aside by a competent court, constitutes a bar to the compulsory sequestration of a consumer's estate.

The SCA, referring to a number of cases previously decided both by itself as well as by the Constitutional Court, held that there was clear authority to the effect (i) that sequestration proceedings are not treated as 'other judicial process' for the enforcement of a credit agreement for the purposes of the Act, and that s (88)(3) therefore does not impose a bar on the institution of sequestration proceedings; (ii) that the motive of the appellant in applying for sequestration is irrelevant in this context; and (iii) that the moratorium imposed by the debt-rearrangement order is automatically lifted once the conditions in s88 (3) are met. It is not necessary to have the moratorium lifted by court order. Therefore, the decision of the court a quo was incorrect and was set aside.

The SCA further expressed its displeasure with the court a quo, which referred to a number of cases which were binding on it but nevertheless came to a conclusion contrary to those decisions and the established law. The SCA reaffirmed the importance of the principle of *stare decisis* and the binding nature of precedent, and held that the high court should not have ruled as it did.

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