



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 01 April 2020

STATUS Immediate

FirstRand Bank Ltd v McLachlan and Others (394/2019) [2020] ZASCA 31 (01 April 2020)

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

Today the Supreme Court of Appeal (SCA) upheld the appeal of the appellant, FirstRand Bank Ltd, against the decision of the Gauteng Division of the High Court, Johannesburg (the high court).

In 2006 the appellant and the second and third respondents (the respondents), Roshen and Komarie Maharaj, entered into a Grant of Loan Agreement (the Loan Agreement), in terms of which the appellant advanced an amount of R2.1 million to the respondents. The monthly instalment was fixed at R20 335,07, inclusive of 10,05 per cent interest per annum calculated daily and compounded monthly. The interest was variable at the instance of the appellant.

In 2010, the respondents lodged an application for debt review in terms of s 86 of the National Credit Act 43 of 2005 (the NCA). The first respondent, Minetta Cecilia Petronella Mclachlan, a debt counsellor, prepared a debt repayment proposal that was referred to a magistrate in terms of s 86(8)(b) of the NCA. In 2011, the magistrate's court, Westonaria (the magistrate's court) granted a debt re-arrangement order in terms of s 86(7)(c)(ii) in favour of the respondents. In granting the order, the court did not adopt the repayment proposal submitted by the debt counsellor. In terms of the order, the respondents were declared to be over-indebted and their obligations were re-arranged. With regard to the Loan Agreement, the monthly instalments were reduced to R8 185,50 per month and the period was extended to 261 months at a fixed interest rate of 12,55 per cent.

The respondents complied with the order until June 2017, when the appellant made application for a rescission of the order in terms of rule 49(8) of the Magistrates' Court Rules on the basis that the order was void *ab origine* for being *ultra vires* the NCA. The magistrate upheld the application and rescinded the debt review order. In an appeal to the full bench of the high court, the order of the magistrate was set aside. This order which the appellants then appealed to the SCA.

In the interpretation of the NCA, the SCA held that, firstly, a debt review court was empowered to re-arrange or 'restructure the consumer's obligations under the credit agreement. It was not empowered to alter or amend the obligation. Therefore, a re-arrangement order does not, and cannot, extinguish the underlying contractual obligations. Secondly, in re-arranging the obligations, a debt review court was enjoined to do so with due deference to the legislative purposes of the NCA that include ss 3(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit

providers and consumers; 3(g) addressing over-indebtedness of consumers based on the principle of satisfaction by the consumer of all responsible financial obligations; and 3(i) providing for a consistent and harmonised system of debt restructuring, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

The SCA further held that the debt review order reduced the monthly instalments substantially from that proposed by the debt counsellor and extended the period for repayment beyond that which the debt counsellor had envisaged. The reduction of the monthly instalment was so substantial that it does not remotely cover the monthly interest due in terms of the order. Such an order does not serve to protect the interests of the consumer who would be left with a substantial debt that they would in all likelihood be unable to pay. The debt review order was therefore ultra vires the provisions of the NCA and was accordingly void *ab origine*.

The SCA held that the law on which judgments are appealable was settled. The judgment sought to be appealed lacked any of the following attributes (i) the finality of the order; (ii) the definitive rights of the parties; and (iii) the effect of disposing of a substantial portion of the relief claimed. Therefore, the rescission order granted by the magistrate's court was not appealable in terms of s 83(b) of the Magistrates' Court Act 32 of 1944. The appeal was accordingly upheld.