THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 391/09

In the matter between:

SELVIN LABAN NAIDOO **Appellant**

v

ABSA BANK LTD **Respondent**

Neutral citation: *Naidoo v ABSA Bank* (391/2009) [2010] ZASCA 72 (27 May 2010)

Coram: Mthiyane, Heher, Cachalia, Shongwe and Tshiqi JJA

Heard: **11 May 2010**

Delivered: **27 May 2010**

Summary: A credit provider need not comply with the procedure provided for in s 129(1)(a) of the National Credit Act 34 of 2005 before instituting sequestration proceedings against a debtor because such proceedings are not proceedings to enforce a credit agreement.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Gyanda J sitting as court of first instance).

The following order is made:

(i) The appeal is dismissed with costs;

(ii) The application to lead further evidence is dismissed with each party paying its own costs.

JUDGMENT

CACHALIA JA (Mthiyane, Heher, Shongwe and Tshiqi JJA concurring):

[1] The appellant was sequestrated by an order of Gyanda J at the respondent's instance in the Durban High Court on 25 May 2009. The sequestration order followed the appellant's failure to meet his payments to the respondent under instalment sale agreements relating to six motor vehicles and two home loan agreements. The National Credit Act 34 of 2005 ('the NCA') applies to these agreements – the appellant is a 'consumer' and the respondent a 'credit provider' as envisaged in s 1 of the NCA.[1]

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[1] **'consumer'**, in respect of a credit agreement to which this Act applies, means-
(a) the party to whom goods or services are sold under a discount transaction, incidental credit agreement or instalment agreement;
(b) the party to whom money is paid, or credit granted, under a pawn transaction;
(c) the party to whom credit is granted under a credit facility;
(d) the mortgagor under a mortgage agreement;
(e) the borrower under a secured loan;
(f) the lessee under a lease;
(g) the guarantor under a credit guarantee; or
(h) the party to whom or at whose direction money is advanced or credit granted under any other credit agreement;

[2] The appellant contends that it was not competent for the respondent to have instituted proceedings for his sequestration before complying with the procedure provided for in s 129(1)(a) of the NCA. (This section is set out in para 3 below.) The appellant did not raise this defence in his papers opposing the sequestration application in the high court. Nor did he do so when he appeared personally before the learned judge to resist the application for his final sequestration. His counsel, however, invoked it as a ground in his application for leave to appeal against the sequestration order. The high court accordingly referred the dispute to this court by granting the necessary leave.

[3] Mr Reddy, who appears for the appellant, came into the matter belatedly after counsel who had prepared written submissions withdrew. So, adopting his predecessor's written argument, he submits that the procedures before debt enforcement provided for in s 129(1)(a) read with s 130(3) of the NCA should be interpreted to cover circumstances relating not only to the enforcement of a credit agreement but also to sequestration proceedings since the unpaid claims, which are the subject of the sequestration application, arise from credit agreements to which the NCA applies. The relevant parts of these provisions read as follows:

'Section 129 **Required procedures before debt enforcement**

(1) If the consumer is in default under a credit agreement, the credit provider –

(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

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'credit provider', in respect of a credit agreement to which this Act applies, means-
(a) the party who supplies goods or services under a discount transaction, incidental credit agreement or instalment agreement;
(b) the party who advances money or credit under a pawn transaction;
(c) the party who extends credit under a credit facility;
(d) the mortgagee under a mortgage agreement;
(e) the lender under a secured loan;
(f) the lessor under a lease;
(g) the party to whom an assurance or promise is made under a credit guarantee;
(h) the party who advances money or credit to another under any other credit agreement; or
(i) any other person who acquires the rights of a credit provider under a credit agreement after it has been entered into.

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

(b) . . . may not commence any legal proceedings to enforce the agreement before –

(i) first providing notice to the consumer, as contemplated in paragraph *(a)* . . .

(ii) . . .'

and

'Section 130 **Debt Procedures in a Court**

. . .

(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) . . .'

[4] Mr Reddy's submission, as I understand it, implicitly contains a concession that sequestration proceedings are not in and of themselves 'legal proceedings to enforce the agreement' within the meaning of s 129(1)(b). That his concession is correct is clear from the recent judgment in *Investec Bank Ltd v Mutemeri*[2] where Trengove AJ concluded that an order for the sequestration of a debtor's estate is not an order for the enforcement of the sequestrating creditor's claim and sequestration is thus not a legal proceeding to enforce an agreement.[3] He did so after carefully considering the authorities which have held that 'sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the

[2] 2010 (1) SA 265 (GSJ) at paras 27-31.
[3] Ibid para 31.

machinery of the law in motion to have the debtor declared insolvent'[4] – they are not proceedings 'for the recovery of a debt'.[5] The learned judge's reasoning accords with this court's description of a sequestration order as a species of execution, affecting not only the rights of the two litigants but also of third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent – it is not an ordinary judgment entitling a creditor to execute against a debtor.[6]

[5] However, Mr Reddy contends that the effect of s 130(3)(a) of the NCA, when read with s 129(1), indicates that the legislature intended to encompass all proceedings to which the NCA applies and not merely proceedings to enforce a credit agreement. This is because, he submits, the words in s 130(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. . .' suggest that all proceedings of which the underlying *causa* is a credit agreement to which the NCA applies fall within its ambit.

[6] Read in isolation the language of s 130(3) may convey the meaning for which the appellant contends. In *Ex Parte Ford and Two Similar Cases*[7] the court was faced with the question whether s 85 of the NCA was applicable to proceedings for the voluntary surrender of an estate. The section's phraseology is almost identical to that of s 130(3) and gives the court a discretion 'despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered' to refer the matter to a debt counsellor for debt review.[8] And once a debt counsellor becomes involved the credit provider

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[4] *Collett v Priest* 1931 AD 290 at 299.
[5] *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 (2) SA 856 (W) at 863D-865A. Although not cited by Trengove AJ the same conclusion was arrived at in *WP Koöperatief Bpk v Louw* 1995 (4) SA 978 (C) at 987G.
[6] *Samsudin v De Villiers Berrange NO* [2006] SCA 79 (RSA).
[7] 2009 (3) SA 376 (WCC).
[8] Section 86.

'may not exercise or enforce by litigation or other judicial process any right . . ..'[9] The learned judge observed that the language of s 130(3) is cast widely and the limitation of the provision to proceedings in which a credit agreement is being considered did not imply that the proceedings in question were restricted only to those in which the enforcement of a credit agreement is in issue. And so, the court concluded, s 85 was also applicable to proceedings for voluntary surrender under the Insolvency Act.[10] Whether the learned judge was correct in this conclusion I need not decide because *Ford* is distinguishable from the present matter. Section 85, which *Ford* was concerned with, is to be found in Part D of Chapter 4 and provides for the alleviation of over-indebtedness through a process of debt relief in the form of debt restructuring.[11] Sections 129-133 on the other hand deal with debt enforcement and are to be found in Part C of Chapter 6. Section 130(3) must therefore be interpreted in the context of that part of the chapter within which it is situated – not in isolation and outside of its context.

[7] It is clear from the language employed in s 130(3)(a) that the proceedings referred to there do not extend the remit of s 129, as the appellant contends, but as Trengove AJ has correctly pointed out, it simply provides that where a credit provider decides to institute proceedings to enforce the agreement, he may do so only after having complied with the procedure in s 129(1)(a).[12] Similarly the reference in s 130(3)(a) to s 127 and to s 131 refers specifically to procedures which are applicable to those proceedings involving the surrender and attachment of goods respectively under a credit agreement – not to 'any proceedings' concerning a credit agreement. It follows that the appellant's insistence that the respondent had to comply with the procedure provided for in

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[9] Section 88(3).
[10] See above (n7) at para 12.
[11] For a discussion of this judgment see Van Heerden and Boraine 'The Interaction Between the Debt Relief Measures in the National Credit Act 34 of 2005 and Aspects of Insolvency Law' 2009 (12) 3 *PELJ* 22 at 46.
[12] See *Mutemeri* (above) (n 2) at para 33. For a discussion of this judgment see Boraine and Van Heerden 'Is Sequestration "Debt Enforcement" for Purposes of the National Credit Act 34 of 2005?' (Soon to be published in *PELJ.*)

s 129(1)(a) before commencing sequestration proceedings against him has no merit.

[8] It bears mentioning that academic writers have observed that it is not completely clear whether the word 'enforce' as it is used in s 129(1)(b) carries the meaning which is usually ascribed to it in legal parlance – the enforcement of payment or of another contractual obligation – or includes the credit provider's remedy to cancel the agreement and claim damages. Enforcement and cancellation are mutually exclusive remedies and a credit provider must, in the event of a debtor's breach of an agreement, elect which of the two courses to pursue. They conclude that 'enforce' must bear a wider meaning so as to include all contractual remedies, including cancellation. This interpretation, they say, will avoid a debtor being left without the procedural protection of s 129(1)(a) in the event of a credit provider electing to cancel the agreement.[13] This view was endorsed recently by a full court in *Absa Bank Ltd v De Villiers*.[14] It is, however, not necessary for me to say more on this question because on either interpretation and for the reasons already given a sequestration proceeding is not the kind of proceeding to which s 129(1)(b) refers.

[9] There remains one other matter. The respondent brought an application to lead further evidence in this court to prove that it had in any event complied with s 129(1)(a). It asked for costs of the application only if the appellant opposed it. The appellant did so vigorously. It is therefore necessary to decide the question of costs in this application.

[10] It appears from the respondent's application that, after leave to appeal had been granted, its attorneys discovered fortuitously that they had posted s 129 notices to the appellant's chosen *domicilium citandi et executandi.* The notices stated that if the appellant did not avail himself of the remedies to which

[13] J M Otto *The National Credit Act Explained* (2006) p 87-88; Van Heerden and Boraine (n9) p 39-41.
[14] 2009 (5) SA 40 (C).

consumers are entitled under s 129(1)(a) it would institute legal proceedings for the return of the goods and hold the appellant liable for any damages it may have suffered. After the appellant had failed to respond to the notices, the respondent instituted sequestration proceedings against him. The respondent sought to place this further evidence before us as a precautionary measure in the event of it being unsuccessful in its main submission.

[11] Even though I have held that a credit provider need not comply with the procedure provided for in s 129(1)(a) before instituting sequestration proceedings against a consumer (the s 129 notices are therefore immaterial to the outcome of this appeal) it should be borne in mind that when the high court granted leave to appeal to this court there was no decided case on this question. The *Mutemeri* judgment was delivered after the high court granted the appellant leave to appeal on this point. So, given the uncertainty on this legal issue, the respondent in my view acted reasonably by attempting to place this evidence before this court. The appellant's opposition to the application on the other hand was not based on whether the evidence sought to be admitted on appeal was relevant. Instead he attempted, without any factual basis, to impugn the respondent's motives in bringing the application. However, because of the view I have taken on how s 129(1) and s 130(3) should properly be interpreted, the further evidence has no bearing on the outcome of the appeal. In the circumstances I think it is appropriate for each party to pay its own costs on this aspect.

[12] In the result I make the following order:

(i) The appeal is dismissed with costs;

(ii) The application to lead further evidence is dismissed with each party paying its own costs.

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A CACHALIA

JUDGE OF APPEAL

APPEARANCES

APPELLANTS:	G Reddy Instructed by Anand Pillay & Associates, Pietermaritzburg Symington & De Kok, Bloemfontein
RESPONDENT:	A Stokes SC Instructed by Johnston & Partners, Durban Naudes, Bloemfontein