THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20003/2014

Reportable

In the matter between:

Firstrand Bank Limited **Appellant**

and

Raymond Clyde Kona **First Respondent**

Amie Gertrude Kona **Second Respondent**

Neutral Citation: *Firstrand Bank v Kona & another* 20003/2014 [2015] ZASCA 11 (13 March 2015)

Coram: Mpati P, Cachalia and Mbha JJA and Van der Merwe and Meyer AJJA

Heard: **26 February 2015**

Delivered: **13 March 2015**

Summary: National Credit Act 34 of 2005 – interpretation of s 88(3) – existence of debt re-arrangement order not a bar to the grant of a sequestration order.

Court – precedent and *stare decisis* – observance of doctrine mandatory.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Phatudi J sitting as court of first instance):

(a) The appeal succeeds with costs, which costs shall be paid out of the joint estate of the respondents as part of the costs of sequestration.

(b) The order of the court a quo is set aside and replaced with:
'The joint estate of the respondents is placed under final sequestration.'

JUDGMENT

Meyer AJA (Mpati P, Cachalia and Mbha JJA and Van der Merwe AJA concurring)

[1] This is an appeal against an order of the North Gauteng High Court, Pretoria (Phatudi J) on 7 March 2014 discharging a provisional order of sequestration of the joint estate of the respondents, who are married in community of property. The appeal is with leave of the high court.

[2] It is common cause that the appellant has a liquidated claim against the respondents. As at 26 August 2011 their indebtedness to the appellant amounted to R953 903.48 plus interest thereon at the rate of 7.30 per cent per annum. The indebtedness arose as a result of an overdraft facility the appellant had granted to the respondents pursuant to the conclusion of a written loan agreement on 7 August 2006. The facility was subsequently increased. The moneys borrowed from the appellant were secured by a first and a second mortgage bond registered in favour of the appellant over an immovable property owned by the respondents and in which they reside. The National Credit Act 34 of 2005 (the NCA) applies to the loan

agreement. The appellant is a 'credit provider' and each respondent a 'consumer' as contemplated in s 1 of the NCA.

[3] During the year 2008 the respondents applied to a registered debt counsellor, Mr Rael Zimmerman, for a debt review in terms of s 86(1) of the NCA. They submitted an application, as required in terms of reg 24(1)(a) read with Form 16 of the regulations promulgated in GN R489, *GG* 28864, 31 May 2006 (the NCA regulations) to the debt counsellor. The debt counsellor dispatched notices dated 25 July 2008 in accordance with s 86(4)(*b*) read with reg 24(2) and Form 17.1 to credit bureaux and the respondents' credit providers that were listed in their application, advising them that the respondents have applied for debt review in terms of s 86 of the NCA. He conducted an assessment in terms of s 86(6) and concluded that the respondents were over-indebted. He thereafter sent further notices dated 3 September 2008 in accordance with reg 24(10) and Form 17.2 to credit bureaux and the respondents' credit providers advising them that the respondents' application for debt review had been successful and that their debt obligations were being restructured.

[4] The proposal which the debt counsellor made to the respondents' credit providers, including the appellant, reflects a substantial monthly shortage of their income over their expenditure. The debt counsellor recommended that the period for payment in respect of each credit agreement be extended and that the monthly payments be reduced accordingly. He also recommended that the interest accruing on the debt owed to the appellant be reduced to a rate of 5 per cent per annum. Interest reductions in respect of other debts were also recommended. The appellant was one of the credit providers which did not consent to the debt counsellor's proposal.

[5] The debt re-arrangement order proposed was put before the Magistrate's Court, Alberton, in terms of s 86(7), read with ss 87 and 79 of the NCA, by means of a substantive application. BMW Financial Services (SA) (Pty) Ltd and the appellant opposed the application. On 20 August 2009 the magistrates' court issued an order declaring the respondents to be over-indebted and re-arranging their obligations in accordance with the debt re-arrangement proposed by the debt counsellor. (Whether the reduction in contractually agreed interest rates renders the debt re-

arrangement order invalid as contended for by the appellant is a matter that needs not be decided in this matter.) The respondents failed to effect proper and punctual payment to the appellant of the reduced monthly instalments due to it in terms of the debt re-arrangement order.

[6] Because the respondents were in default under the loan agreement and with their obligations in terms of the debt re-arrangement order, the appellant adopted the stance that it was entitled to enforce its rights and securities under the loan agreement and mortgage bonds in terms of s 88(3) of the NCA. Section 88(3) reads as follows:

'Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-

(a) the consumer is in default under the credit agreement;
and

(b) one of the following has occurred:
(i) An event contemplated in subsection (1) (*a*) through (*c*); or
(ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.'

(Section 86(4)(*b*)(i) referred to in s 88(3), read with reg 24(2) and Form 17.1, enjoins a debt counsellor to notify all credit providers listed in a consumer's application that the consumer has applied for debt review in terms of s 86 of the NCA. The references in s 88(3) to other provisions of the NCA are not presently relevant.)

[7] The appellant accordingly instituted an action against the respondents in the North Gauteng High Court on 20 January 2011 claiming payment of the sum of R923 911.72, interest thereon at the rate of 7.30 per cent per annum from 1 January 2011, an order declaring the immovable property executable and costs on the scale as between attorney and client. The action was defended and the respondents successfully resisted summary judgment.

[8] On 5 March 2012 the appellant launched an application for the sequestration of the respondents' joint estate. It relied on the outstanding indebtedness as at 26 August 2011 of R953 903.48 and interest thereon at the rate of 7.30 per cent per annum. The respondents opposed the sequestration application, and answering and

replying affidavits were exchanged. On 5 August 2013 the opposed application for the provisional sequestration of the respondents' joint estate was heard by Van Oosten J. His judgment was delivered on 8 August 2013. He issued an order provisionally sequestrating the respondents' joint estate and a rule nisi calling upon the respondents and all other interested parties to show cause on the return day why the provisional order should not be confirmed.

[9] On 19 September 2013 the respondents launched an interlocutory application in which they sought to set aside the provisional order. The appellant filed an affidavit in opposition to this application. I need not express any view on this somewhat unusual procedure that was adopted. It was not objected to by the appellant. On 7 March 2014 Phatudi J made an order setting aside the provisional order, discharged the rule nisi and ordered the appellant to pay the respondents' costs.

[10] In setting aside the provisional sequestration order the high court held that an application by a credit provider for the sequestration of a consumer's estate constitutes 'other judicial process' in terms of s 88(3) of the NCA by which the credit provider exercises or enforces a right under the credit agreement between itself and the consumer. The words 'other judicial process', so the high court held, mean 'any motion proceedings including sequestration applications'. The high court also inferred from the appellant's 'papers and submissions made' that it 'opted to pursue the recovery of the debt by way of insolvency proceedings'. The high court further held that a debt re-arrangement order contemplated in s 86(7)(c)(ii) of the NCA, unless and until set aside by a competent court, constitutes a bar to the compulsory sequestration of a consumer's estate.

[11] The appellant's purpose in applying for the sequestration of the respondents' estate may well have been to obtain payment of its debt. However, Solomon JA said this in *Estate Logie v Priest* 1926 AD 312 at 319:

'It appears to me that it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt. In truth that is the motive by which persons, as a rule are actuated in claiming sequestration orders. They are not influenced by altruistic considerations or regard for the benefit of other creditors, who are

able to look after themselves. What they want is payment of their debt, or as much of it as they can get.'

A credit provider's motive is irrelevant to the question whether sequestration proceedings are proceedings to 'exercise or enforce by litigation or other judicial process any right or security' as characterized by s 88(3) of the NCA. (See *Investec Bank Ltd & another v Mutemeri & another* 2010 (1) SA 265 (GSJ) paras 27-28; *Firstrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) paras 23-24.)

[12] In *Naidoo v ABSA Bank Ltd* 2010 (4) SA 597 (SCA) para 4 this court held 'that sequestration proceedings are not in and of themselves "legal proceedings to enforce the agreement" within the meaning of s 129(1)(*b*)'. In this regard Cachalia JA said the following:

'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 and Another v Mutemeri and Another*, 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. 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 machinery of the law in motion to have the debtor declared insolvent" - they are not proceedings "for the recovery of a debt". 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.'

(Footnotes are omitted.)

[13] The same reasoning, as was pointed out by Wallis J in *Evans*, para 25-

'. . . also led Trengove AJ to conclude that sequestration proceedings are not proceedings "in respect of a credit agreement" within the meaning of s 130(3) of the Act, or an endeavour to exercise or enforce by litigation or other judicial process any right or security under the credit agreement as referred to in s 88(3) of the NCA.'

Wallis J, bound to accept the authority and the binding force of a decision of this court as he was, followed these conclusions and the reasoning by which they were arrived at and added-

'. . . that it avoids what would otherwise be the very odd conclusion, that the NCA operates to preclude credit providers from sequestrating the estates of their debtors, but does not prevent other creditors from doing so. If sequestration of a person's estate, while they are under debt review, was to be rendered impermissible, there appears to be no sound reason why it should be available to creditors who are not credit providers under the NCA. Conversely, there is no obvious reason why credit providers should be a class of creditor excluded from invoking the mechanisms of the Insolvency Act.'

[14] I conclude, therefore, that an application by a credit provider for the sequestration of a consumer's estate in which it relies on its claim in terms of a credit agreement to qualify as a creditor for the purpose of instituting sequestration proceedings does not constitute 'litigation or other judicial process' by which the credit provider exercises or enforces any right or security under the credit agreement within the meaning of s 88(3) of the NCA. An application for the sequestration of a consumer's estate is thus not precluded by the prohibition on the institution of proceedings envisaged in s 88(3) of the NCA.

[15] Recognizing that the provisions of s 88(3) constitute no bar to the institution of sequestration proceedings implies further that the existence or validity of a debt re-arrangement order is immaterial to an application for sequestration of the consumer's estate, unless the debt re-arrangement order is raised as a circumstance for the court to exercise its discretion in favour of the debtor. (See *Evans*, paras 29-37.) Circumstances that would have justified the high court to have exercised the discretion vested in it in terms of s 12(1) of the Insolvency Act 24 of 1936 in favour of the respondents are absent. There is no evidence that establishes that the respondents' debts would be paid within a reasonable time. On the contrary, the evidence shows that the respondents did not comply with the terms of the debt re-arrangement order and that the payments made to the appellants in terms of that order did not even discharge the monthly interest accruing on the debt.

[16] Finally, I consider it necessary to express a view on the high court's conclusion that a debt re-arrangement order contemplated in s 86(7)(c)(ii) of the

NCA constitutes a bar to the compulsory sequestration of a consumer's estate, unless and until set aside by a competent court. That conclusion is premised on the erroneous finding that an application for sequestration seeks to enforce the credit agreement, and is in conflict with this court's interpretation in *Naidoo*. It misconstrues the nature and effect of a debt re-arrangement order.

[17] As was said by Wallis J in *Evans*, para 35-

'[t]he effect of a debt re-arrangement order is to place a moratorium on credit providers pursuing their contractual remedies, for so long as the debtor complies with the terms of the debt re-arrangement order. Once it is recognised that an application for sequestration is not the enforcement of the credit agreement, it must follow that any moratorium to claiming payment, under the credit agreement that exists by virtue of a debt re-arrangement order, is not a bar to the grant of a sequestration order.'

[18] The moratorium is lifted by operation of law - and accordingly without the need to have the debt re-arrangement order set aside - once the consumer is in default of the relevant credit agreement and is in default of the debt re-arrangement order. In *Firstrand Bank Ltd v Fillis* 2010 (6) SA 565 (ECP) para 16, Eksteen J, in construing s 88(3) of the NCA, stated that-

'[i]t follows . . . that once the jurisdictional requirement set out in s 88(3)(*a*) co-exists with any one of the jurisdictional requirements set out in s 88(3)(*b*), the credit provider is at liberty to proceed and to exercise and enforce, by litigation or other judicial process, any right or security under his credit agreement, without further notice.'

[19] Both the Constitutional Court in *Ferris & another v Firstrand Bank Ltd* 2014 (3) SA 39 (CC) para 16, and this court recently in *Jili v Firstrand Bank* (763/13) [2014] ZASCA 183 (26 November 2014) para 22, cited with approval the passage in *Fillis* quoted above. Moseneke ACJ, in delivering the unanimous judgment of the court in *Ferris*, said the following:

'[14] . . . Once the restructuring order had been breached, FirstRand was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Section 88(3)(*b*)(ii) does not require further notice — it merely precludes a credit provider from enforcing a debt under debt review unless, among other things, the debtor defaults on a debt-restructuring order. Moreover, s 129(2) expressly stipulates that the requirement to send a notice under s 129(1) is not applicable to debts subject to debt-restructuring orders.'

[20] Leach JA in *Jili*, para 25, concluded that-

'. . . the appellant's default under the debt re-arrangement order entitled the respondent, without further ado, to proceed to recover the motor vehicle in question from her.'

[21] The decision of this court in *Naidoo* and that of the Constitutional Court in *Ferris* were referred to in the judgment of the high court. The legal principles enunciated in the two decisions were binding on that court and precluded it from arriving at any of the three conclusions to which I have referred. The statement of principle by Didcott J in *Credex Finance (Pty) Ltd v Kuhn* 1977 (3) SA 482 (N) that is thus concisely summarised in the headnote to that judgment is in point:

'The doctrine of judicial precedent would be subverted if judicial officers, of their own accord or at the instance of litigants, were to refuse to follow decisions binding on them in the hope that appellate tribunals with the power to do so might be persuaded to reverse the decisions and thus to vindicate them *ex post facto*. Such a course cannot be tolerated.'

[22] The Constitutional Court, in *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC), paras 28-30, expressed itself in no uncertain terms about observance by courts of the maxim *stare decisis* or the doctrine of precedent. Brand AJ, in delivering the unanimous judgment of the court said:

'Considerations underlying the doctrine were formulated extensively by Hahlo & Kahn [Hahlo & Kahn *The South African Legal System and its Background* (Juta), Cape Town 1968) at 214-15]. What it boils down to, according to the authors, is: '(C)ertainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*.' Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'

(Footnotes are omitted.)

[23] The formal and substantive requisites for a final sequestration order have been established. There are no circumstances that warrant the exercise of a court's

discretion in favour of the respondents. The high court should have sequestrated the joint estate of the respondents.

[24] In the result the following order is made:

(a) The appeal succeeds with costs, which costs shall be paid out of the joint estate of the respondents as part of the costs of sequestration.

(b) The order of the court a quo is set aside and replaced with:

'The joint estate of the respondents is placed under final sequestration.'

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PA Meyer

Acting Judge of Appeal

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