THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 198/2017

In the matter between:

DAVID CARL MOSTERT	**FIRST APPELLANT**
DAVID CARL MOSTERT NO	**SECOND APPELLANT**
LEE ANNE ELIZABETH MOSTERT NO	**THIRD APPELLANT**
SANDRA MARGARET MOSTERT NO	**FOURTH APPELLANT**

and

FIRSTRAND BANK LIMITED	
t/a RMB PRIVATE BANK	**FIRST RESPONDENT**
SHERIFF OF THE HIGH COURT	**SECOND RESPONDENT**

Neutral citation: *Mostert v Firstrand Bank t/a RMB Private Bank* (198/2017) [2018] ZASCA 54 (11 April 2018)

Coram: Shongwe ADP and Van der Merwe JA and Rogers, Hughes and Schippers AJJA

Heard: 15 March 2018

Delivered: 11 April 2018

Summary: Debtor and creditor – remedying of default in a credit agreement in terms of s 129(3) of the National Credit Act 34 of 2005 – s 129(3) requires payment by or on behalf of the consumer – consumer relied on payments during 2013 and 2015 – not established that 2013 payment settled the arrears – 2015 payments did settle the arrears but were not made by or on behalf of the consumer.

ORDER

On appeal from: Western Cape Division, Cape Town (Gamble J sitting as court of first instance):

1 The appeal is dismissed.
2 The appellants are directed to pay the costs of the appeal on the scale of attorney and own client, including the costs of two counsel, jointly and severally.

JUDGMENT

Van der Merwe JA (Shongwe ADP and Rogers, Hughes and Schippers AJJA concurring)

[1] The first appellant is Mr David Carl Mostert. Mr Mostert and the third and fourth appellants are the trustees of the Carpe Diem Trust IT561/1991 (the Trust). The Trust is the owner of Erf 382, Bishopscourt, Cape Town (the property). The first respondent, Firstrand Bank Limited t/a RMB Private Bank (RMB), obtained a judgment in the Western Cape Division in terms of which the property was declared specially executable. The second respondent, the sheriff of the Western Cape Division (the sheriff), did not participate in the litigation relevant to the appeal. The property is quite valuable (during August 2013 it was valued at R40 million) and is the residence of Mr Mostert and his wife and family. The question in the appeal is whether RMB should be prohibited from taking steps to execute the judgment in respect of the property.

Background

[2] During March 2005 Mr Mostert and RMB entered into a written loan agreement. In terms of the loan agreement RMB advanced the amount of R20 million to Mr Mostert. This amount, together with agreed interest thereon, had to

be repaid over a period of 240 months at a rate of R176 742.14 per month. In terms of the loan agreement the loan was inter alia to be secured by suretyships and a mortgage bond over the property. In compliance herewith the Trust, New Port Finance Company (Pty) Ltd (New Port) and a company now known as TPC Marketing (Pty) Ltd (the sureties), each bound themselves jointly and severally as surety and co-principal debtor *in solidum* for payment of all sums of money owing by Mr Mostert to RMB. The suretyship of the Trust was supported by the registration of a first mortgage bond in the amount of R30 million over the property in favour of RMB. The loan agreement was amended in writing on several occasions, mainly in respect of the amount of the loan and the monthly repayments. The last amendment of the loan agreement was effected on 30 March 2007. In terms thereof the amount of the loan was increased to R30 million and the repayment (over the remaining period of 216 months) increased to the considerable sum of R311 235.06 per month.

[3] Mr Mostert failed to make payment in terms of the loan agreement. As a result, during December 2009, RMB issued summons in the Western Cape Division against Mr Mostert and the sureties, for payment of the full outstanding balance of the loan, interest and costs. On 3 March 2010 a written settlement agreement was entered into between RMB, Mr Mostert and the sureties. This agreement provided for specified payments, which had to settle the arrears in terms of the loan agreement by 1 March 2011. This agreement further provided that Mr Mostert would cede all his shares in CSHELL 374 (Pty) Ltd (CSHELL) to RMB and would sign a special power of attorney authorizing RMB to sell the shares in the event of default of the settlement agreement.

[4] The settlement agreement was not complied with. RMB consequently brought an application for default judgment against Mr Mostert and the sureties. The application was opposed and answering and replying affidavits were filed. On 12 September 2011, the Western Cape Division granted judgment against Mr Mostert and the sureties jointly and severally for payment of the sum of R33 625 364.58, interest thereon at a rate 11,75 per cent per annum from 12 November 2009 to date of payment and costs as between attorney and own client. In addition, as I have said, the property was declared specially executable.

[5] On the same day Mr Mostert undertook to make payment of the amount of R1 million by the end of September 2011 and to make quarterly payments of R500 000 each until the arrears in respect of the loan agreement were settled. The undertaking clearly envisaged that payment in accordance therewith would take place in addition to the monthly instalments payable in terms of the loan agreement. As a result of the undertaking RMB held execution of the judgment in abeyance.

[6] But Mr Mostert did not keep to his undertaking. He only made payment of the amount of R920 000 in respect of his undertaking to pay R1 million by the end of September 2011. He failed to make any payment in respect of the quarterly payments of R500 000 each that he had promised would take place on 30 June 2012 and 30 September 2012. When RMB thereafter informed Mr Mostert of its intention to have the property sold in execution, Mr Mostert took the stance that RMB had lost the right to execute the judgment. He alleged that during September 2011 RMB had agreed: (i) that he be granted the opportunity to settle the arrears in respect of the loan agreement by inter alia making payments in accordance with his undertaking and (ii) that once the arrears were paid RMB would not be entitled to rely on the judgment and in case of default, had to commence legal proceedings afresh. He further alleged that the arrears were settled '. . . during or about June 2013'. He therefore contended that RMB was not entitled to execute the judgment. During May 2014 Mr Mostert and the Trust (the appellants) instituted an action in the Western Cape Division against RMB and the sheriff. Relying essentially on the aforesaid allegations, the appellants claimed an order declaring that RMB is not entitled to sell the property in execution.

[7] RMB, however, persisted in the contention that it was entitled to proceed with the sale of the property. This was finally conveyed by RMB's attorneys to Mr Mostert's attorneys in a letter dated 15 December 2015. In support of RMB's stance the letter inter alia stated that no payments had been made by Mr Mostert or the Trust in respect of the judgment debt since August 2013. This prompted the present application, which was launched by the appellants against RMB and the sheriff during February 2016. In the founding affidavit the appellants essentially relied on the allegations referred to above, namely that the agreement reached with RMB during September 2011 and the compliance therewith by the settling of the

arrears by about June 2013, precluded execution of the judgment. In response only to the allegation in the letter of 15 December 2015 that no payments had been made since August 2013, it was stated in the founding affidavit that payments totaling R7 739 476.40, representing the proceeds of the sale of shares in CSHELL, were made to RMB during 2015.

[8] In the notice of motion the appellants claimed an interim interdict prohibiting the sale in execution of the property pending the final determination of their 2014 action. In the alternative, and in the event that the court should determine that the merits of RMB's entitlement to execution of the judgment fell to be determined in the application (rather than the 2014 action), they claimed an order declaring that neither RMB nor the sheriff '. . .is permitted to take any further steps in regard to the execution or disposal' of the property. In addition, in view of the factual disputes between the parties evidenced by the correspondence between the respective attorneys, they claimed an order referring the matter for oral evidence. In effect therefore, the alternative relief claimed was also of temporary nature, pending determination of the alleged agreement of September 2011 by oral evidence.

[9] In the answering affidavit RMB denied the alleged agreement of September 2011 and the alleged payment of the arrears. In order to displace the impression that Mr Mostert diligently adhered to his payment obligations, RMB attached a schedule to the answering affidavit reflecting the installments due in terms of the loan agreement and the amounts actually paid during the period from 30 September 2011 to 29 February 2016 (the schedule). The schedule reflected that an amount of R925 181.00 had been paid on 31 May 2013 (the 2013 payment). RMB also acknowledged receipt of the aforesaid payments during 2015, that is the amount of R3 178 554.94 on 31 March 2015 and the amount of R4 million on 30 September 2015 (the 2015 payments), but pointed out that both these payments were made by New Port. In the replying affidavit the appellants alleged, for the first time, that the loan agreement had been reinstated in terms of s 129(3) of the National Credit Act 34 of 2005 (the NCA) as a result of payments made during 2013 or the 2015 payments.

[10] The court a quo (Gamble J) correctly considered the matter on the basis that interim relief was claimed. He analyzed the evidence and concluded that the appellants did not *prima facie* establish the alleged agreement of September 2011. Therefore the appellants did not show the first requirement for an interim interdict. In its judgment the court a quo stated that it was common cause that by mid-2013 the outstanding arrears due to RMB had been settled, but did not consider the reinstatement of the loan agreement as a result thereof. In respect of the question whether the 2015 payments remedied the default in the loan agreement in terms of s 129(3), the court held that the point was raised only in the replying affidavit and could not be relied upon by the appellants and that, in any event, the 2015 payments were not made by the consumer as required by s 129(3). It consequently dismissed the application with costs on the scale of attorney and client including the costs of two counsel where so employed, such costs to be borne by the appellants jointly and severally. The court a quo subsequently granted leave to the appellants to appeal to this court.

[11] In this court the appellants abandoned any reliance on the alleged agreement of September 2011. They contended that the loan agreement had been reinstated as a result of the 2013 payment or that the 2015 payments remedied the default and that the Trust was entitled to rely on s 129(3) to resist execution of the judgment against it. The appellants asked that the order of the court a quo be replaced with a final order declaring that RMB is not permitted to execute the judgment in respect of the property.

[12] On behalf of RMB it was submitted that the reliance on s 129(3) was impermissibly raised only in the reply and that the appeal should be dismissed for that reason alone. On the merits RMB argued that it had not been established that the 2013 payment settled the arrears. RMB conceded that the 2015 payments had settled the arrears in terms of the loan agreement. However, it argued that the 2015 payments were not made by Mr Mostert. Therefore, so it was contended, the 2015 payments did not remedy the default in terms of s 129(3) and that even if they did, RMB’s rights to execute against the Trust were not affected.

New case in reply

[13] It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence. As a respondent has the right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. This, however, is not an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit. See the oft-quoted *dictum* in *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* (1) 1978 (1) SA 173 (W) at 177G-178A and the judgment of this court in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 26. In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs.

[14] I now consider whether the appeal should be dismissed for the sole reason that the appellants raised reinstatement of the loan agreement only in reply. It appears that only after the judgment of the Constitutional Court in *Nkata v Firstrand Bank Ltd* [2016] ZACC 12; 2016 (4) SA 257 (CC), did the appellants contend that the loan agreement had been reinstated despite the fact that judgment had been granted and the property declared specially executable. I do not think that that was unreasonable or indicative of carelessness. Apart from an *obiter dictum* in *Nedbank v Fraser* [2011] ZAGPJHC 35; 2011 (4) SA 363 (GSJ) paras 39-42, this meaning of s 129(3) and 129(4) was explained only in the judgment that went on appeal in *Nkata*, reported as *Nkata v Firstrand Bank Limited & others* [2014] ZAWCHC 1; 2014 (2) SA 412 (WCC).

[15] The appellants did not raise new facts in their replying affidavit. What they said in reply was that the payments referred to in the founding affidavit had reinstated the loan agreement by operation of law. RMB did not apply for the striking out of the new matter in the replying affidavit, nor did it seek leave to file further

affidavits. On the contrary, RMB fully argued the merits of the matter in the court a quo and in this court. Importantly, RMB did not at any stage indicate that it had been prejudiced in any manner. I think that it is fair to say that counsel for RMB did not press this argument. In my view the merits of the matter can properly be determined on the evidence on record. Whether that evidence is sufficient to sustain the relief claimed, is of course another matter, to which I shall return. A consideration that weighs heavily with me is that the parties have since 2009 been involved in protracted litigation in respect of the same subject matter, no doubt at considerable expense. In my view it is in the interests of justice that the litigation between the parties proceed to finalization. In the exercise of the discretion of this court in the exceptional circumstances of this case, I conclude that the applicability of s 129(3) should be considered in respect of the 2013 payment and the 2015 payments.

The 2013 payment

[16] In this regard it must in the first place be emphasized that the appellants now seek final relief in motion proceedings. Therefore, where there is a dispute of fact on the papers, the version of RMB must be accepted unless it is clearly untenable, farfetched or could for some other reason be rejected out of hand.

[17] In respect of payment of the arrears during 2013, Mr Mostert said only the following in the founding affidavit:

'30. I complied with the terms of the 2011 settlement agreement in 2011 and 2012, resulting in the payment of the outstanding arrears and the revival of the original loan agreements during or about June 2013. The First Respondent consequently reverted thereafter to charging the pre-default interest rate under the loan agreements.'

Mr Mostert placed no evidence before the court in respect of what the amount in arrears then was, what payments were made to settle the arrears and when they were made. Not even in the replying affidavit did he do so, despite the fact that the schedule reflected the 2013 payment.

[18] As I have said, RMB pointed out in the answering affidavit that Mr Mostert failed to settle the arrears inter alia because he only paid the amount of R920 000 at the end of September 2011 and did not pay the amount of R500 000 in terms of his undertaking on both 30 June 2012 and 30 September 2012. RMB denied the

allegation that the arrears had been paid and denied that it reverted to the pre-default interest rate as a result of payment during 2013. In amplification it mentioned the possibility that its system may have read the 2015 payments as having settled the arrears. In the circumstances RMB's answer can hardly be described as a bare denial and can certainly not be rejected on the papers. It also follows that the statement by the court a quo that it was common cause that the arrears had been settled by mid-2013 was clearly wrong and probably made *per incuriam*.

[19] In argument the appellants attempted to show that an analysis of the schedule indicated that the 2013 payment had settled the arrears. But the schedule did not deal with arrear amounts, it only reflected the instalments due and the payments made during the period that it covered. At best for the appellants, the *dictum* of Botha JA in *Administrator, Transvaal & others v Theletsane & another* [1990] ZASCA 156; 1991 (2) SA 192 AD at 197D is applicable:

'It is clear, in my view, that the room for deciding matters of fact on the basis of what is contained in a respondent's affidavits, where such affidavits deal equivocally with facts which are not put forward directly in answer to the factual grounds for relief on which the applicant relies, if it exists at all, must be very narrow indeed.'

[20] In the result the appellants failed to show that the 2013 payments settled the arrears. It follows that it is not necessary to consider whether there was a duty on the appellants to deal with the question whether RMB had demanded payment of its prescribed default administration charges or of the reasonable costs of enforcing the loan agreement up to 31 May 2013.

The 2015 payments

[21] As I have said, RMB conceded that the 2015 payments had settled the arrears. In respect of the 2015 payments the papers are also silent on the question of default administration charges and reasonable costs of enforcement. On the view that I take of the matter, it is not necessary to delve into these aspects.

[22] The next question is whether a default in a credit agreement may be remedied by payment that was not made by or on behalf of the consumer in respect of that credit agreement. The answer must of course be found in the interpretation of s

129(3). It is trite that that exercise requires giving meaning to the words used in this section within the broad context in which they were used. The context includes the overarching aims of the NCA, and the purpose of s 129(3) within the context of s 129 as a whole.

[23] Section 129(1) and (3) provide:

'**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 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) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before —

(i) first providing notice to the consumer, as contemplated in paragraph *(a)*, or in section 86 (10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

(2) . . .

(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.'

[24] The core objective of the NCA is the protection of consumers by securing a credit market that is fair and equitable. The means by which it seeks to do so is by balancing the respective rights and responsibilities of credit providers and consumers. In line herewith it has been held that the correct interpretation of s 129 of the NCA is one that strikes an appropriate balance between the competing interests of the parties to a credit agreement. The purpose of s 129(1) is to ensure that the attention of the consumer is drawn to the default under the credit agreement and to advise the consumer of the options that he or she may utilize to remedy the default. Thus, the aim of s 129(1) is to facilitate consensual resolution of credit agreement disputes. See *Sebola & another v Standard Bank of South Africa Ltd & another*

[2012] ZACC 11; 2012 (5) SA 142 (CC) paras 40 and 46; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC) paras 19-23; *Nkata* paras 53 and 92-98.

[25] The language of s 129(3) is clear. I find nothing in the context thereof that justifies departure from the clear meaning of the words of s 129(3). On the contrary, it fits neatly into the scheme and purpose of the NCA and s 129. Section 129(3) provides a novel and extraordinary remedy (*Nkata* paras 100 and 142) only to a consumer who is in default in respect of a credit agreement to which he or she is a party. I believe that that is why Moseneke DCJ said the following in *Nkata* (para 104):

'At the outset, I observe that ss 129(3) and (4) start with what a consumer may and may not do. It is the consumer who may reinstate a credit agreement. This she may do "any time before the credit provider [cancels] the agreement". So, as long as the agreement is current, she may elect to reinstate it. The clear import is that for purposes of reinstatement the consumer is the protagonist. She may disclose her design to the credit provider but she is not compelled to give notice to or seek the consent or cooperation of the credit giver.'

[26] Payment in terms of s 129(3) may of course be made on behalf of the consumer. Payment accepted on behalf or in the name of the consumer is equal to payment by the consumer in person. But when payment is not thus made by the consumer, it falls outside the scope of s 129(3). This accords with what I have said before. When payment of arrears does not emanate from the consumer's bona fide effort to resolve the default, but from the credit provider having had to enforce rights against a third party, the consumer is not deserving of the protection of s 129(3).

[27] The common law tells us how a payment by a third party is made on behalf of a debtor. In *The Law of Contract in South Africa*, 2nd edition, volume II, Sir John Wessels said at 606:

'2133. By the Civil Law, however, a creditor is not as a rule entitled to refuse payment from a third party where it makes no difference to him by whom the contract is performed, provided the performance is effective and in terms of the contract (Vinnius, *ad Inst.,* 3.30pr., n.9; Pothier, *Oblig.,* ss. 464, 494).

2134. It must, however, be quite clear that the third party makes the payment for the benefit of the debtor (Van Leeuwen, *Cens. For.,* 1.4.32.3).'

In *Commissioner for Inland Revenue v Visser* 1959 (1) SA 452 (AD) the court explained at 457H-458A that when the payment in that matter was made, the person making the payment clearly professed to pay on behalf of another and in the latter's name and that the payment was accepted as having been so made. The court proceeded to say:

'The effect of such a payment may be gathered from the following passage in Part III, Chap. 1, art. 1 of Pothier's *Obligations* (I quote from *Evans'* translation at p. 330):

"It is not essential to the validity of the payment, that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it includes the extinction of the obligation, and the debtor is discharged even against his will . . ."

Grotius, 3.39.10; *Voet,* 46.3.1 and van Leeuwen, *Censura Forensis,* 1.4.32.3, are to the same effect.'

See also *Absa Bank Ltd v Moore & another* [2016] ZACC 34; 2017 (1) SA 255 (CC), where Cameron J said (para 33) that our common-law jurisprudence and case law hold that '. . . a debt paid by a third party *in the name* of the debtor extinguishes the debt, even when payment is unauthorised, or even when the debtor opposes it.' (my emphasis). The position is succinctly stated in GB Bradfield*, Christie's Law of Contract in South Africa,* 7th edition (2016) p 471, namely that '. . . a third party may intervene and validly perform with or without the knowledge of the debtor and even against the debtor's will, provided the third party makes clear that it is performing in the name and on behalf of the debtor.'

[28] The definition of 'consumer' in s 1 of the NCA includes a guarantor under a credit guarantee. A credit guarantee is a credit agreement that meets all the criteria set out in s 8(5). It suffices to say that s 8(5) includes a suretyship in respect of the obligations in terms of a credit facility or credit transaction. Thus, a surety is a consumer in respect of the credit agreement to which he or she is a party, that is the suretyship. In terms of s 4(2)*(c)* the NCA applies to a credit guarantee only to the extent that it applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. A surety may thus remedy a default in respect of the suretyship in terms of s 129(3). The surety is not, however, a consumer in respect of the credit agreement in respect of which the suretyship was granted. The surety may

make payment of arrears on behalf of the consumer but that will not always be the case.

[29] The following is what happened on the facts on which this matter has to be determined. Mr Mostert was the holder of shares in CSHELL. Mr Mostert and RMB are in agreement that the shares were 'pledged' to RMB as security for the loan agreement. It does not appear from the papers whether this means that the aforesaid documents referred to in the 2010 settlement agreement were executed, but in my view nothing turns hereon. What is clear, however, is that Mr Mostert pledged the shares to RMB in consequence of the 2010 settlement agreement. On the evidence that I have to accept, Mr Mostert was in arrears in respect of the loan agreement at all times between the 2010 settlement agreement and the 2015 payments. Thus, at a time when he was in arrears in respect of the loan agreement, Mr Mostert transferred the shares to New Port. This took place without the knowledge or consent of RMB. Only when CSHELL was in the process of buying back the shares from New Port did it come to the attention of RMB that Mr Mostert had disposed of the shares. A buy-back agreement between CSHELL and New Port was subsequently recorded in writing.

[30] RMB insisted that New Port cede the proceeds of the sale of the shares to CSHELL to it on an out and out basis. It is common cause that the 2015 payments were made by New Port and that they represented the proceeds of the sale of the shares to CSHELL. Although a written out and out cession agreement between New Port and RMB was only finalised during October 2015, there can be little doubt that the 2015 payments were made only because of RMB's conduct in following up its security. In the result the 2015 payments were not made on behalf or in the name of Mr Mostert. In fact, they were not even made pursuant to New Port's obligation as a surety. Because of RMB's insistence New Port simply paid the proceeds of the sale of the pledged shares directly to RMB. It follows that the 2015 payments did not remedy Mr Mostert's default in the loan agreement. It also follows that it is not necessary to consider the question whether remedying of the default would have inured to the benefit of the Trust.

[31] In the result the appeal must fail. Mr Mostert and the Trust are liable to pay costs on the scale of attorney and own client, in terms of the loan agreement and the suretyship respectively, and the latter provides for liability *in solidum.*

[32] The following order is made:

1 The appeal is dismissed.

2 The appellants are directed to pay the costs of the appeal on the scale of attorney and own client, including the costs of two counsel, jointly and severally.

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C H G van der Merwe

Judge of Appeal

APPEARANCES

For Appellant:	R G Goodman SC, with him G Quixley Instructed by: Taylor Incorporated, Cape Town Webbers Attorneys, Bloemfontein
For First Respondent:	B J Manca SC, with him J E Smit Instructed by: Werksmans Attorneys, Johannesburg Symington & De Kok, Bloemfontein