

SOUTH AFRICA / JUDGMENT

Cattigan and Another v Firststrand Bank Limited a division of First National Bank (NCT/1537/2011/128 (1)) [2011] ZANCT 4 (1 December 2011)

[2011] ZANCT 4

COURT

National Consumer Tribunal

BEFORE

D Terblanche, T Woker, B Dumisa

CASE / FILE NUMBER

NCT/1537/2011/128 (1)

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IN THE NATIONAL CONSUMER TRIBUNAL

HELD IN CENTURION

CASE No:NCT/1537/2011/128 (1)

DATE:01/12/2011

In the matter between:

V and S CattiganApplicantand

Firststrand Bank Limited a division of First National Bank.....Respondent

Application for Review of Sale Judgment

INTRODUCTION

1. The Applicants in this matter are Mrs Vanie Cattigan and Mr. Selveraj Cattigan. At the hearing Mrs Cattigan represented both

Applicants.

2. The Respondent in this matter is Firststrand Bank a division of First National Bank. The Respondent was represented by Mr Glover from Glover Incorporated.

3. This an application for the Tribunal to review the sale of goods as provided for in section 128 (2) of the National Credit Act,

2007. The goods in question involved immovable property which had been owned by the Applicants and which was sold at a sale in execution on 2 February 2011.

The Respondent, in its answering affidavit, took certain points in limine, namely that the sections upon which the Applicants rely in their application, 1 sections 127 and 128 of the National Credit Act, Act 34 of 2005 (the Act) are not applicable to the matter.

5. At the hearing, held on 10 November 2011 the Tribunal decided to hear the parties on the point in limine as, in its view, a finding in favour of the Respondent on this point would dispose of the matter.
6. This judgment relates only to the Tribunal's reasoning and finding in respect of the point in limine.
7. The Applicants purchased certain immovable property in August 2007. In order to finance this purchase the Applicant's passed a mortgage bond in the Respondent's favour as security for a loan of R654, 000.00 and thereafter passed another mortgage bond as security for a loan of R236,000.00.
8. The Applicants breached the terms of the mortgage bond agreements by failing to pay certain instalments. In terms of the bond agreements the full balance of the bonds became due and payable. The total balance owing and payable to the Respondent according to the certificate of balance dated 22 October 2009 was R789, 339.69. Interest on this amount was calculated daily at the rate of 10.25% per annum and compounded monthly from 14 August 2009 to date of final payment.
9. The Applicants failed to pay the outstanding balance and the Respondent instituted legal proceedings for the recovery of the full outstanding balance in terms of the mortgage bond agreement. On 23 April 2010 judgment by default was granted against the Applicants for inter alia:
 - a. the payment of R789.339-69 with interest calculated daily on such amount at the rate of 10.25% per annum and compounded monthly from 14 August 2009 to date of final judgment; and
 - b. an Order declaring executable, the mortgaged property.
10. On 11 August 2010 the Acting Sheriff of Pinetown seized and placed under judicial attachment the mortgaged property.
11. This property was sold by the Sheriff on public auction on 2 February 2011.

The sale of the property realised the sum of R298.000.00.

BASIS FOR THE APPLICATION

12. The Applicants based their application for the review of sale on sections 127 and 128 of the Act. These sections deal with the

situation where a consumer under an instalment agreement, secured loan or lease surrenders goods to the credit provider. The credit

provider is then required to follow a specific procedure as set out in the Act before the goods are sold. Once the goods are sold, the consumer may approach the Tribunal for the Tribunal to review the sale of goods. If the Tribunal is not satisfied that the credit provider sold the goods as soon as reasonably practicable or for the best price reasonably obtainable, the Tribunal may order the credit provider to credit and pay to the consumer an additional amount exceeding the net proceeds of the sale.

13. The Applicants argued that these provisions applied to the sale of their mortgaged property because they had entered into an agreement with the Respondent in terms of which the Respondent would attempt to have the property sold via their quick sale process. The Applicants argued that by entering into the quick sale process with the Respondent, they were in effect surrendering their property to the Respondent and for this reason, sections 127 and 128 applied to the sale of their property. A number of estate agents were appointed to sell the property but this process was not successful. The Applicants were not satisfied with the price which was obtained for the property on public auction and were therefore requesting the Tribunal to review the sale.

ISSUE TO BE DECIDED

14. The issue the Tribunal must determine is whether sections 127 and 128 apply to the Applicants' case. Pertinently, the Tribunal must determine whether the sale of the Applicants' immovable property at a public auction by the sheriff of the court subsequent to an order of the High Court rendering the property specially executable can be reviewed in terms of section 128 of the Act. Further the Tribunal must decide whether section 131 extends the application of section 127 to the Applicants' case before the Tribunal.

THE HEARING

15. The hearing was held on 10 November 2011. In its answering affidavit the Respondent took the point in limine that sections 127 and 128 did not apply to the sale of immovable property because these sections apply to the sale of moveables only.
16. The Tribunal issued a directive prior to the date of the hearing to the Respondent (and for the Applicant to consider) to address it on the relevance and applicability, if at all, of section 131 of the Act in relation to the point in limine. Section 131 deals with an attachment order with respect to property that is the subject of a credit agreement. It provides that if a court grants an attachment order with respect to property which is the subject of a credit agreement (as opposed to being surrendered to the credit provider by the consumer) the credit provider is required to follow the procedure set out in sections 127 (2) to (9) and section 128 read with the changes required by the context. The effect of the section is therefore to extend the application of the provisions of sections 127(2) to (9) to the applicable situations provided for in section 131.

17. At the hearing the Respondent argued that the sections on which the Applicants had based their application for review did not apply to the sale of immovable property and that section 131 did not apply in the circumstances of this particular matter. The Respondent supplied the following reasons in support of its argument:

- (1) The Supreme Court of Appeal in *Roussouw v First Rand Bank* 2010 (6) SA 439 (SCA) held that the types of agreements referred to in section 130, namely an instalment sale agreement, a secured loan and a lease

as defined in section 1 of the Act all relate to moveable property. Therefore these sections do not apply to the sale of immovable

property. Although the SCA was dealing specifically with section 130 (2), both section 130 (2) and section 127 refer to the same types of agreements. As the SCA found that section 130 (2) did not apply to immovable property, likewise, section 127 does not apply to immovable property as the same types of agreements are specified in the sections.

- (2) Section 131 refers to the repossession of goods that are the subject of a credit agreement. The mortgaged property was not the subject of a credit agreement. Rather, the Respondent had granted the Applicants a loan of money and against this loan of money, the Applicants had granted the Respondent a mortgage bond over the property which they had purchased in order to secure this loan. The heading of section 131 refers to the repossession of goods. Repossession is defined as the retaking of possession when a buyer defaults on payments. In this instance the Respondent has never been in possession of the immovable property and was merely the grantor of a loan which was secured by way of a mortgage bond.

18. The Applicant in her reply reaffirmed her view that sections 127 and 128 do govern the sale of her property.

ASSESSMENT

19. Section 127 provides for the surrender of goods under an instalment agreement, secured loan or lease. Both an instalment agreement and a lease as defined in the definition section refer to the sale or lease of moveable property. A secured loan is defined as an agreement in terms of which a person advances money or grants credit to another and retains or receives a pledge or cession of the title of any moveable property or other thing of value as security for all amounts due under that agreement. Under this section a consumer may surrender moveable property to a credit provider which must then sell the moveable property in order to satisfy the debt which is owed by the consumer to the credit provider under a credit agreement.
20. Section 128 provides that a consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of section 27 may apply to the Tribunal to review the sale. If the Tribunal is not satisfied that the credit provider sold the goods as soon as reasonably possible, or for the best price reasonably obtainable, the Tribunal may order the credit provider to credit and pay to the consumer an additional amount exceeding the net

proceeds of sale. This section empowers the Tribunal to review the sale, conducted by the credit provider and if it is not satisfied with the sale, the Tribunal may order the credit provider to pay an additional sum of money to the consumer.

21. Section 131 reads as follows:

'If a court makes an attachment order with respect to property that is the subject of a credit agreement, section 127 (2) to (9) and section 128, read with the changes required by the context, apply with respect to any goods attached in terms of that order.'

22. The important point to note about section 131 is that it does not appear to be limited to instalment agreements, secured loans or leases as is done specifically in section 127.

23. The question to be decided therefore is whether section 131 applies when immovable property is attached by the court in order that it may be sold to satisfy a judgment debt.

24. Section 131 states that where the court makes an attachment order with respect to property that is the subject of a credit agreement,

section 127 (2) to (9) and section 128 apply subject to changes which are required by the context.

25. Sections 127(2) to (9) deal with the processes which a credit provider must follow when property which has been sold to a consumer

is returned to the credit provider because the consumer is unable to meet her obligations under the credit agreement.

26. This property is returned to the credit provider either because the consumer surrenders the goods (under section 127) or because a court has issued a writ of attachment (under section 131).

27. Section 131 is discussed in the case of Absa Bank Ltd v De Villiers 2009 (5) SA 40 (C). The court explains that when a consumer is in default, the credit provider may apply for a court order to attach the goods which were the subject of the credit agreement. (It must be noted that where a consumer does not voluntarily hand back the goods

to the credit provider, the credit provider can only regain possession of the goods with a court order even in circumstances where the credit provider is the owner of the goods). The De Villiers case involved the attachment of a motor vehicle which was the subject

of an instalment sale agreement. In terms of the agreement, ownership of the vehicle was ceded and transferred to the credit provider. The consumer failed to pay the required instalments and so the credit provider brought an application in terms of s130 (1) for an order authorising the sheriff to attach the motor vehicle and to hand the vehicle over to the credit provider for safe keeping. Because a court attachment was involved rather than a voluntary surrender the matter was governed by section 131. In terms of section 131 the credit provider must then follow the process set out in section 127 (2) - (9) in order to realise the value of the goods. Once the goods have been sold, this amount is credited to the consumer's outstanding account. If the amount 7 is

less than the settlement value, the credit provider may demand payment from the consumer of this outstanding balance. If the consumer fails to pay this outstanding amount within 10 days after receiving the required notice, the credit provider may apply for judgment in terms of the Magistrate's Court Act for the recovery of the remaining settlement value. If however, the consumer pays the amount demanded after receiving the demand notice, judgement against him or her will be prevented, (see section 127 (8) (a) and (b). See also judgment at 49E – 50E).

28. A different process is followed when a creditor seeks to enforce a judgment debt. In order to enforce a judgment debt, one may issue a writ of execution (in the High Court) or a warrant of execution (in the Magistrate's Court). In both these scenarios, the effect of the writ or warrant is to instruct the sheriff of the court to attach the property of the judgment debtor so that if the judgment remains unpaid after the attachment, the attached property can be sold at a public auction and the proceeds used to pay the money owed to the judgement creditor (see Pete Hulme Du Plessis and Palmer Civil Procedure: A practical guide 359).
29. When the Applicants defaulted on their mortgage loan repayments, the full amount of the loan became due and payable and judgment was taken against them for this full amount. The property which was security for the loan rather than "the subject of the loan agreement" was attached so that the sale proceeds could be used to pay off the judgement debt (or at least a portion of the outstanding judgment debt). It is clear from the facts, as set out above, that the Respondent never at any time had possession of the immovable property. Neither, did the Respondent repossess the property. The property was attached by the sheriff of the court pursuant to a writ of attachment issued by the High Court.
30. Section 131 is not intended to govern the process in the circumstances of this case. The process is governed instead by the

High Court Rule 46 which deals with execution against immovable property when property is sold to satisfy a judgment debt. Sections

127 - 131 are intended to deal with the situation where the credit provider initially had possession of the property (either actual

physical possession or ownership was transferred to it), the property was then given to the consumer under a credit agreement and then the property was finally returned to the credit provider (which must assume responsibility for disposing of the property) because the consumer was unable to meet his obligations under the credit agreement. If the property is sold and this governs the full amount of the debt, or the consumer is able to pay off the outstanding amount after the sale, there will be no judgment debt

ORDER OF THE TRIBUNAL

31. In summary therefore, the Tribunal finds that section 127 and 128 apply to the sale of moveable property only and that section 131 does not apply in the circumstances of this case. The point in limine taken by the Respondent is therefore upheld and the application for the review of the sale is dismissed.

Dated this 1st day of December 2011.

[SIGNED] D Terblanche

Prof T Woker and Prof B Dumisa concurring.

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