

## **SUMMARY**

In this matter the applicant seeks to set aside a sale, by auction, of an immovable property. The applicant bases her application on the ground that the sale in execution proceeded in breach of an agreement concluded between the applicant and the first respondent.

This application was opposed by the first respondent.

The applicant and the first respondent entered into a loan agreement on 21 February 2012 in terms of which the first respondent advanced to the applicant the sum of R475 000.00. The loan was secured by a mortgage bond registered against the property in an amount of R545 700.00. Legal action had been instituted by the first respondent as a result of the applicant's breaches. An order was granted declaring that the subject property was executable.

The applicant founds her claim for the relief sought on the basis that the first respondent agreed to stay the sale in execution upon payment of half of the arrears then owed by the applicant. The applicant claims that the first respondent was not entitled to proceed with the auction and therefore the sale in execution should be set aside. In her application, the applicant tendered full payment of the arrears and legal costs.

## **HELD**

The court held that, although the first respondent had undertaken to stay the sale upon payment of an amount of R35 000.00 prior to the sale, and upon proof of payment being furnished, the applicant had nevertheless failed to comply with her obligations in terms of the alleged agreement.

The court considered section 129 (3) of the National Credit Act which provides, that, in order to revive a credit agreement, the consumer should pay all outstanding amounts and all other costs of enforcing the agreement before the credit provider has cancelled the agreement. Further to the above, section 129 (4) of the National Credit Act in turn provides that a credit provider may not reinstate or revive a credit agreement after:

(a) the sale of any property, pursuant to:

- (i) an attachment order; or
- (ii) surrender of property in terms of section 127;
- (b) the execution of any other court order enforcing that agreement; or
- (c) the termination thereof in accordance with section 123.

To substantiate the above assertion, reference was made to the case *Nkata v Firstrand Bank Ltd and Others* where it was held that the barrier to revival of the credit agreement applies only when the proceeds from the sale in execution have been realised. This happens to be the case in this matter and the applicant's tender would really be of no assistance to the applicant. In the circumstances it was ordered that the application be dismissed with costs.

## **VALUE**

It serves as no benefit to revive a credit agreement once proceeds from sale execution have been realized by the Creditor.

Written by Puseletso Radebe and supervised by Charlotte Clarke, 12 November 2018

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