



DEBT RELIEF

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CONSTITUTIONAL COURT RESCUES DEBTORS

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## CONSTITUTIONAL COURT RESCUES DEBTORS

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In the recent Constitutional judgment of *Nomsa Nkata vs FirstRand Bank Limited and Others CCT 73/15* the court has thrown a lifeline to distressed consumers.

The Constitutional Court interpreted Section 129(3) of the National Credit Act ("Act") and by doing so found that homeowners that fell into arrears with their loan repayments could reinstate their credit agreement with the bank if the arrears were paid in full. This applies even after a bank has obtained judgment on the outstanding debt of a consumer.

The facts of this case was that Ms. Nkata fell into arrears with her bond as she missed a few payments. Firstly, FNB attended to bring the default to her attention by way of notice in terms of Section 129(1) of the Act but they experienced difficulty in finding the correct address. Thereafter the bank instituted legal action against Ms. Nkata and obtained default judgment

in September 2010 for the total outstanding debt.

Initially Ms. Nkata's house was not sold, as she reached an agreement with the bank to continue paying for her bond in terms of a "quick-sell agreement". She caught up on her payments in March 2011 and applied for a rescission of judgment, which the High Court refused.

She fell behind on her payments again and following numerous failed debt review applications, FNB sold her property to a third party in 2013.

She again approached the High Court for relief and claimed that by paying the outstanding debt (excluding legal costs and other charges) in March 2011, she had reinstated her credit agreement with FNB. The court found in her favour and the sale of the house was set aside.

FNB appealed to the Supreme Court of Appeal ("SCA") and in March 2015 the SCA found in the bank's favour.



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### UPDATE: Protection of Personal Information Act, 4 of 2013

Interviews for POPI's "watchdog" commenced in April 2016 with ten shortlisted candidates, of which one candidate is the former Chief Electoral Officer at the IEC, Advocate Pansy Tlakula. The appointment of the Information Regulator would be ensuring that this Act's full enforcement is one step closer.

The Information Regulator will have a central office in Gauteng and has so far only been allocated R50 million for set-up costs. This is of concern as, with such a small budget, it is feared that this office will not be established this year, which could delay the enforcement of POPI.

The Information Regulator will have extensive powers to investigate and punish where the act is contravened in any way.

In the interim, Companies & Institutions are using this delay as an advantage to become POPI Compliant.

At the SCA the bank contended that the reinstatement did not occur as she failed to pay legal fees and other charged debited to her account.

The Socio-economic Rights Institute ("SERI") appeared as *amicus curiae* (friends of the court) and supported Ms. Nkata's argument in that the credit agreement was reinstated by operation of law before the house was sold.

As a last resort, Ms. Nkata appealed to the Constitutional Court and in a majority judgment, the appeal was upheld with costs.

The Constitutional Court found that *"because the constitutional values of fairness and equality inform the purposes of the Act, the interpretation of the Act should strike the appropriate balance between the competing rights of the consumer and the credit provider."*

*The majority held that the purpose of this section is to encourage consumers to pay their overdue debts, default charges and legal costs. Consumers in good standing are rewarded with reinstatement of the credit agreement and the return of their attached property."*

In essence the court said that Financial Institutions had to acknowledge the imbalance in the negotiating power between themselves and consumers. It is not only a matter of profit, but also the civilized values of the constitution.

The court further held that the consumer cannot be expected to take proactive steps to find out what legal costs need to be paid for reinstatement to take place, nor can it be expected to initiate taxation of these costs. The credit provider must take the necessary steps to recover the legal costs.

In summary, consumers don't have to lose their homes if they are able to pay their overdue debts before the property is sold at an auction. If they can settle their overdue debts, Section 129(3) affords them the opportunity to reinstate the original credit agreement. Further, the credit provider now has a duty to notify a consumer of the legal costs and additional charges due. This judgment is not a "get out of jail free card" for the additional costs incurred by the credit provider in recovering the debt and consumers are still liable for the default costs.



**REFERENCES / SOURCES:**

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- Constitutional Court of South Africa Media Summary - *Nomsa Nkata v FirstRand Bank Limited and Others CCT 73/15* <http://www.constitutionalcourt.org.za/site/Casedocs/CCT73-15/Summary/CCT%2073-15%20-%20Nkata%20v%20First%20Rand%20Bank%20Limited%20and%20Others%20Judgment%20media%20su.pdf>

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