



## SUPREME COURT OF APPEAL OF SOUTH AFRICA

### **MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL**

**FROM** The Registrar, Supreme Court of Appeal  
**DATE** 11 April 2018  
**STATUS** Immediate

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

*Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.*

The first appellant, Mr David Carl Mostert, and the first respondent Firstrand Bank Limited t/a RMB Private Bank (RMB), entered into a loan agreement in terms of which RMB lent and advanced the amount of R30 million to Mr Mostert. The loan had to be repaid in monthly instalments. The second, third and fourth appellants, the trustees of the Carpe Diem Trust (the Trust), bound the Trust to RMB as surety and co-principal debtor for the due compliance by Mr Mostert of his obligations in terms of the loan agreement. The Trust also registered a first mortgage bond over its property situated at Bishopscourt, Cape Town (the property) in favour of RMB. The property is the residence of Mr Mostert and his family.

Mr Mostert failed to comply with his obligations in terms of the loan agreement. RMB consequently obtained judgment against Mr Mostert and the Trust for the full outstanding balance in terms of the loan agreement and the

property was declared specially executable. The appellants brought an application in the Western Cape Division, Cape Town, for an order prohibiting RMB to execute the judgment against the property. The Western Cape Division dismissed the application and the appellants appealed to the Supreme Court of Appeal (SCA).

The appellants contended that the loan agreement had been reinstated in terms of s 129(3) of the National Credit Act 34 of 2005 (the Act) by payment of the arrears in terms of the loan agreement on 31 May 2013 (the 2013 payment) or during 2015 (the 2015 payments). RMB denied that the 2013 payment had settled the arrears but admitted that the 2015 payments had done so. The 2015 payments were, however, made by a third party. The 2015 payments constituted the proceeds of shares which Mr Mostert had pledged to RMB as security, but had disposed of without the knowledge and consent of RMB. The third party sold the shares but paid the proceeds thereof to RMB, only because of RMB's insistent conduct in following up its security. The appeal raised three issues:

- (i) Whether the appellants should be permitted to rely on s 129(3) of the NCA for the first time in reply;
- (ii) Whether the 2013 payment had settled the arrears in terms of the loan agreement; and
- (iii) Whether the 2015 payments remedied Mr Mostert's default within the meaning of s 129(3) of the NCA.

Today the SCA dismissed the appeal. It held that in the exceptional circumstances of the case it was in the interests of justice to permit the appellants to rely on the case made only in reply. It held that it was not shown that the 2013 payment had settled the arrears. The SCA interpreted s 129(3) of the NCA in its context and concluded that the remedying of a default in a credit agreement in terms thereof takes place only by payment made by or on behalf of the consumer. As the 2015 payments were not made by or on behalf of Mr Mostert, but resulted from RMB's enforcement of its rights against a third party, they did not remedy his default. The SCA therefore held that the

Western Cape Division correctly dismissed the appellants' application to prevent execution of the judgment in respect of the property.

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