16 MAY 2018

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

TO SPEAK OR NOT TO SPEAK – JUST HOW FRANK DARE YOU BE?

The Constitutional Court recently grappled with the question as to whether or not the record of the "private deliberations" of the Judicial Services Commission (JSC) ought properly to be made available as part of the record of JSC proceedings, sought to be reviewed by the Helen Suzman Foundation (HSF).

DOES SOMEONE PAYING YOUR DEBT ON YOUR BEHALF ENTITLE YOU TO THE PROTECTION AFFORDED UNDER S129(3) OF THE NCA?

Section 129(3) of the National Credit Act, No 34 of 2005 (NCA) provides a novel and extraordinary remedy only to a consumer who is in default in respect of a credit agreement to which he or she is a party.

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The JSC (opposing the application) submitted that there were good reasons for the confidentiality of its deliberations.

The complexity of the debate is highlighted by the fact that three different judgments were delivered.

The application was pursued by the HSF against the background of a decision taken by the JSC, during October 2012, to recommend to the President the appointment of certain candidates as judges to the Western Cape Division of the High Court (and not to appoint others). The HSF approached the High Court seeking to have that decision reviewed and set aside, on the grounds that the decision was unlawful and irrational. In the normal course, the JSC was required to file the record of the proceedings sought to be set aside. The filed record did not include any transcripts or other contemporaneous record of the JSC's private deliberations. The HSF, however, became aware that the JSC routinely recorded its deliberations, and that the deliberations in question had in fact been recorded. It accordingly requested the JSC to file a recording of the deliberations, on the basis that the recording formed part of the record to be produced for purposes of the review proceedings. The JSC declined, and the HSF launched an interlocutory application, aimed at compelling the JSC to file the recording of the deliberations. That interlocutory application ultimately found its way to the Constitutional Court, where argument was heard during August 2017 (and judgment was delivered on 24 April 2018).

The JSC (opposing the application) submitted that there were good reasons for the confidentiality of its deliberations. These included the promotion of the rigour and candour of deliberations; the encouragement of future applications; the protection of the dignity and privacy of candidates; and the fact that an obligation to disclose those confidential discussions might have the unintended consequence of discouraging the JSC from recording its deliberations in the future!

One of the dissenting judgments was delivered by Kollapen AJ. In motivating the need to decline disclosure of the confidential deliberations, the learned judge stated the following:

> Openness is also double-sided. It is imperative that what is constitutionally necessary is seen and heard. However, in order to ventilate what must be seen and heard and to preserve certain core constitutional values, there also has to be an environment in which open and uncensored debate flourishes. In some instances, confidentiality is necessary to ensure such an environment exists, so that what must be shown and said is brought into the light, to factor into constitutionally necessary debates.

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Plainly, the members themselves fear, from their own actual experience in the process, that the confidentiality of the engagements between the members of the JSC is essential, if honest and robust debate is to be preserved.

Kollapen AJ went on to emphasise that the confidentiality of the deliberative process must be a significant factor in the freedom to express views, have them critiqued and change them, if need be. He went on to state that:

> I cannot imagine that any claim to absolute openness in that setting can have, as its consequence, qualitatively better adjudication. On the contrary, the loss of confidentiality may have a chilling effect on the ability to speak and debate openly...
>
> There must be a substantial risk that the loss of confidentiality in the deliberative process may result in deliberations that are not open, frank or robust, but rather a carefully choreographed dialogue that is heavily influenced by the knowledge that every part of it is part of a disclosable record.

The majority judgment, however, followed a different line of thinking and, on the premise that the deliberations are relevant to the decisions ultimately reached, determined that it was appropriate that any record of those deliberations should not be excluded from the record to be produced for purposes of review.

What cannot be ignored, however, is the fact that the JSC itself persisted with the view, throughout, that the confidentiality of its deliberations promoted effective judicial selection, by ensuring the candour and robustness of future deliberations. Plainly, the members themselves fear, from their own actual experience in the process, that the confidentiality of the engagements between the members of the JSC is essential, if honest and robust debate is to be preserved. That being the case, it seems overwhelmingly likely that the JSC will, henceforth, discontinue its practice of recording its deliberations.

It remains to be seen whether the majority decision in this matter might result in other (perhaps unintended) consequences. Might board members of public companies, or members of committees tasked with responsibility for sensitive but important decisions, now resist participation in debate under circumstances where their meetings are being recorded (for purposes of facilitating the accurate preparation of minutes)? Might members of such boards or committees now resist the practice of permitting that their discussions be recorded? Time will tell!

Jonathan Witts-Hewinson

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Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

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DOES SOMEONE PAYING YOUR DEBT ON YOUR BEHALF ENTITLE YOU TO THE PROTECTION AFFORDED UNDER S129(3) OF THE NCA?

The recent Supreme Court of Appeal (SCA) decision considered whether Firstrand Bank t/a RMB Private Bank (RMB) should be stopped from taking steps to execute a judgment in respect of a property when a consumer has raised the remedy contained in s129(3).

Section 129(3) of the National Credit Act, No 34 of 2005 (NCA) provides a novel and extraordinary remedy only to a consumer who is in default in respect of a credit agreement to which he or she is a party. This section provides that a consumer may at any time before the credit provider has cancelled the credit 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 administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

During March 2005, Mr Mostert and RMB entered into a written loan agreement. In terms of this loan agreement RMB advanced, after numerous amendments, an amount of R30 million to Mr Mostert.

The recent Supreme Court of Appeal (SCA) decision in *Mostert v Firstrand Bank t/a RMB Private Bank* (198/2017) [2018] ZASCA 54 considered whether Firstrand Bank t/a RMB Private Bank (RMB) should be stopped from taking steps to execute a judgment in respect of a property when a consumer has raised the remedy contained in s129(3).

During March 2005, Mr Mostert and RMB entered into a written loan agreement. In terms of this loan agreement RMB advanced, after numerous amendments, an amount of R30 million to Mr Mostert. The loan was secured by suretyships provided by Carpe Diem Trust (Trust) (administered by Mr Mostert and the appellants), New Port Finance Company (Pty) Ltd (New Port) and TPC Marketing (Pty) Ltd. In support of the suretyship provided by the Trust, a mortgage bond was registered in the amount of R30 million over Mr Mostert's family home in Bishops Court, Cape Town.

During December 2009, due to Mr Mostert's failure to make payment to RMB in terms of the loan agreement, RMB issued summons against Mr Mostert and the sureties for payment of the full outstanding balance of the loan, interest and costs. On 3 March 2010, Mr Mostert and RMB entered into a settlement agreement which agreement required specified payments in order to settle the arrears in terms of the loan agreement by 1 March 2011. This agreement further provided that Mr Mostert would cede his shares in CSHELL 374 (Pty) Ltd (CSHELL) to RMB as further security.

Mr Mostert reneged on the settlement agreement and RMB brought an application for default judgment which application was successful. In addition to the relief granted, the property was also declared immediately executable.

In order to stop RMB from proceeding with execution proceedings and selling the Trust's property, Mr Mostert provided RMB with an undertaking that he would make specified payments to RMB in terms of the default judgment order.

When Mr Mostert once again failed to perform, RMB informed him that it was going to proceed with execution proceedings. In response, Mr Mostert and the Trust launched an action against RMB and the sheriff arguing that the

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CONTINUED

The SCA held that in general an applicant will not be permitted to supplement his case in the replying affidavit, however, it is always up to the court's discretion as to whether to allow a new matter to be considered in reply.

arrears had been settled in terms of the settlement agreement and RMB was accordingly no longer able to proceed against the property and would have to start its litigation afresh. RMB defended this action and persisted that it was entitled to proceed against the property. In addition to his action, Mr Mostert launched an application seeking an interim interdict prohibiting the sale of the property pending the final determination of the action. Interestingly, in his replying affidavit, Mr Mostert for the first time alleged, in terms of s129(3), that the loan agreement had been reinstated due to payments made during 2013 and 2015.

It was common cause that payments had been made in terms of the loan. These payments were as follows, R925,181 on 31 May 2013, R3,178,554.94 on 31 March 2015 and R4 million on 30 September 2015. RMB, however, argued that even though the payments made in 2015 settled the arrears owing, the payments were not made by Mr Mostert (the consumer) but rather by New Port. In addition, RMB also alleged that an applicant cannot make his case in reply as the remedy contained in s129(3) was only raised in Mr Mostert's replying affidavit. The High Court dismissed Mr Mostert's application which resulted in this appeal.

The SCA held that in general an applicant will not be permitted to supplement his case in the replying affidavit, however, it is always up to the court's discretion as to whether to allow a new matter to be considered in reply. In this instance, despite the remedy only being raised in reply, the SCA exercised its discretion and elected to consider Mr Mostert's defence in terms of s129(3).

The most important aspect of the SCA's decision, however, was determining 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 SCA held that the core objective of the NCA is the protection of consumers by securing a credit market that is fair and equitable. Payment in terms of s129(3) may of course be made on behalf of the consumer. But when payment is not made by the consumer, it falls outside the scope of s129(3).

In this instance, despite Mr Mostert's shares in CSHELL having been ceded to RMB, Mr Mostert transferred the shares to New Port when the loan owing to RMB was still in arrears. Only when CSHELL was trying to repurchase the shares from New Port, did RMB become aware that Mr Mostert had unlawfully disposed of the shares. At RMB's insistence and enforcement of its security, New Port paid the proceeds of the sale of the shares to RMB. These payments were those received by RMB in 2015. It naturally follows that the 2015 payments which settled the arrears of the loan did not remedy Mr Mostert's default.

Accordingly, in making its finding the SCA held that 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 s129(3).

Nicole Meyer

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