IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: A18/2018

In the matter between:

THEMBINKOSI KHULEKANI RUDOLPH JIYANA	First Appellant
NOMVO JIYANA	Second Appellant
and	
ABSA BANK LIMITED	First Respondent
CAPE TOWN NORTH SHERIFF	Second Respondent
GARY NIGEL HARDISTY	Third Respondent
JENNIFER JANINE DOROTHY HARDISTY	Fourth Respondent
REGISTRAR OF DEEDS, WESTERN CAPE	Fifth Respondent

Coram: Allie, Samela et Boqwana, JJ

JUDGMENT

BOQWANA, J

Introduction

[1] This is an appeal against a judgment by Meer J, granted on 29 June 2017, in which she found in favour of the first respondent on the basis that the issue brought before her by the appellants could not succeed due to the applicability of the doctrine of *res judicata*.

[2] The appellants had brought an application before the Court *a quo* seeking the following declaratory orders: (a) that the credit agreement between the appellants and the first respondent was lawfully reinstated in terms of s129 (3) of the National Credit Act 34 of 2005 ("the NCA"); (b) that the default judgment granted on 14 April 2014 by the late Justice Blignault, in the appellants' absence, and the subsequent execution against the appellants' home and primary residence, known as Erf […], Parklands, situate in the City of Cape Town ("the property") had no legal force and should be set aside; and (c) that the public auction of the property, as well as its transfer to the third and fourth respondents, had no legal effect and should also be set aside.

Factual background

[3] The appellants are husband and wife, and have been residing in the property for a period of 12 years, having bought it in January 2004. A mortgage bond in favour of the first respondent was registered over the property, pursuant to a loan agreement the appellants had with the first respondent.

[4] The parties have over the years litigated against each other in respect of the bond account's accumulated arrears. The history relating to this particular matter began with the lodging of summons, by the first respondent, on 06 November 2006 under case number 12109/2006 for, inter alia, payment of a claim in the amount of R491 292.32 and for an order declaring the property executable. On 24 June 2008, the Registrar granted default judgment and a warrant of execution was issued. Pursuant thereto the appellants applied for a stay of execution and rescission of the default judgment under different case numbers.

[5] On 13 October 2008 the parties took an order by agreement before Thring J, in terms of which they agreed that the default judgment could be rescinded unopposed. Indeed the judgment was so rescinded by Le Grange J, on 3 November 2008

[6] The parties also agreed that the appellants would be allowed to settle the arrears by instalments, upon certain conditions. The appellants would:

> "1. …repay the arrears on their home loan account in the sum of approximately R58 059.04 by making the following payments to the Respondent by way of direct deposits into the Applicants' [Appellants] mortgage bond account number ….
>
> 1.1 R 58 059.04 on or before 7 November 2008;
>
> 1.2 Applicants [Appellants] shall pay the normal bond instalments as determined by the Mortgage Bond and the standard terms and conditions pertaining thereto. The current monthly instalment amount is R 7059.42 and the next bond instalment in due on 20 October 2008
>
> 2. Should the Applicants [Appellants] fail to make the aforesaid payments on or before the due dates thereof and/or comply with any of the terms of this order on or before the due dates, the full outstanding balance in terms of the Mortgage Bond shall become immediately due and payable.
>
> ….
>
> 4. The remaining terms and conditions of the Mortgage Bond shall remain in full force and effect.
>
> ….
>
> 7. In the event of the Applicants [Appellants] not complying with the terms of this order, the Respondent [First Respondent] shall be entitled, on 5 (five) days' notice to Applicants [Appellants], to apply for Judgment for the then outstanding balance under the Mortgage Bond, together with interest and legal costs, as well as an order declaring Erf […] Parklands, situate in the City of Cape Town, commonly known as […], Parklands, in extent 325m² executable forthwith."

[7] The appellants allege that they made payment of the sum of R58 094.04, which was the arrear amount, in accordance with Thring J's order. They further allege that no legal costs or other charges were payable in terms of this Order and this effectively reinstated the credit agreement in terms of s129 (3) of the NCA. In their view, the first respondent would have had to send a s129 (1) notice before it obtained a judgment upon any default subsequent to the reinstatement of the agreement.

[8] According to the first respondent, the appellants failed to make further payments as agreed in Thring J's order, resulting in them falling into arrears again. In March 2014 the first respondent proceeded with an application for payment in the amount of R391 797.06 together with an order to declare the property specially executable. This application was unopposed and served before the late Blignault J, who granted judgment by default in favour of the first respondent, against the appellants, on 15 April 2014.

[9] On 14 June 2014, the appellants applied for the rescission of the default judgment granted by Blignault J. The rescission application was heard by Rosenberg AJ and dismissed on 6 November 2014. Pursuant thereto a warrant of execution was issued and the sheriff attached the property.

[10] The appellants applied for leave to appeal, which was dismissed by Rosenberg AJ on 10 December 2014. The appellants thereafter petitioned the Supreme Court of Appeal ("SCA") resulting in a stay of sale in execution, which had been scheduled by the first respondent to take place on 3 February 2015. The SCA dismissed the petition for leave to appeal on 26 March 2015.

[11] On 4 June 2015 the appellants approached the Constitutional Court for leave to appeal and their application was dismissed by the Constitution Court on 27 July 2015.

[12] During August 2015, the parties once again entered into another deed of settlement. The appellants allegedly failed to comply with this settlement

agreement, which led to the first respondent arranging a further sale in execution of the property on 5 April 2016.

[13] A dispute arose as to the amount owed, as well as the legal costs. The appellants brought a review of the taxed bill of costs on 29 March 2016, which was dismissed on 21 October 2016.

[14] On 30 March 2016, 7 days before the scheduled sale in execution, the appellants lodged an urgent application to stay the sale in execution before Veldhuizen J, which was dismissed. An application for leave to appeal which followed thereafter was also dismissed. The appellants petitioned the SCA in this respect too. It is not clear what the outcome of that application was, as it was pending when papers in respect of this matter were filed before the Court *a quo*.

[15] There are apparently opposed eviction proceedings currently pending, brought by the third and fourth respondents against the appellants.

Issue on appeal

[16] The appellants' case, in a nutshell, is that Blignault J, in violation of s130 (3) of the NCA determined the first respondent's application and granted an order enforcing a credit agreement between the appellants and the first respondent, without satisfying himself that the requirements of s129 (1) had been complied with. This follows from the findings of Rogers J in *Nkata v Firstrand Bank Ltd and Others 2014 (2) SA 412 (WCC)* ("*Nkata HC"*) and particularly at para 34 of that judgment.

[17] This effectively amounted to a constitutionally reviewable failure of justice; a breach of the rule of law requirements stipulated in s1 (c) of the Constitution; and a violation of the appellants' protected rights entrenched in terms of ss34, 25 (1) and 25 (3) of the Constitution.

[18] Mr Donen SC, who appeared for the appellants, argued pointedly that clause 7 of the order by Thring J was in breach of the NCA, in that reliance on that clause

by the first respondent, and consequently its failure to issue the s129 (1) notice and ultimately the Court's granting of the order (without such compliance), resulted in a miscarriage of justice. According to Mr Donen SC, this failure rendered the orders, not only of Blignault J, but that of Thring J too, void *ab initio.*

[19] He referred to the decisions of *S v Moodie 1961 (4) SA 752 (A) at 759 A-D,* and *Oliver & Another v Attorney-General, Cape Provincial Division, and Others 1995 (1) SA 455 (C) at 460 – G to 462 J*, to contend that Blignault J's order should be viewed as one of those orders which amounted to a failure of justice *per se*. In his view, this is more so when placed in a constitutional context, which underlines compliance with property related requirements and imposes a duty upon the Court to ensure that those are observed prior to any order relating to property being granted.

[20] He contends further that these issues were raised by the appellants for the first time before Meer J in the Court *a quo;* they had never been raised and determined by any court of law in South Africa. In other words, they are new and therefore the *res judicata* principle is not applicable. The Court *a quo* misdirected itself when it found otherwise.

[21] The first respondent, on the other hand, holds the view that the real issue between the parties, which occupied the Courts from the time the rescission application was brought before Rosenberg AJ, is Blignault J's judgment. In this connection it submits that the failures contended for by the first respondent do not, in any event, render Blignault J's order null and void. At best they amount to an irregularity which can be rescinded or set aside.

[22] Mr Van Riet SC, who appeared together with Mr Jonker for the first respondent, submitted that failure to comply with s129 (1) has never been held by the Courts to render a default judgment null and void. He referred to various judgments, including that of *Nkata HC* which was later confirmed in *Nkata v Firstrand Bank Ltd 2016 (4) SA 257 (CC)* ("*Nkata CC*") by the Constitutional Court. In both instances the Courts accepted that there was non-compliance with

s129 (1), but yet found that the default judgment stood. If the default judgment was not void *ab initio*, the issues brought before the Court *a quo* were *res judicata*. According to the first respondent, the appellants were advancing a case already determined by Rosenberg AJ and dismissed up to the Constitutional Court. They could therefore not launch an application based on the same facts.

Meer J's judgment

[23] The Court *a quo* considered various judgments relating to the doctrine of *res judicata*, including the principle expressed in *Henderson v Henderson 1843 (3) Hare 100 (67 ER 313) at 115 (Hare)* ("the Henderson principle") which states that when a given matter becomes a subject of litigation, "*the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case*."

[24] Rejecting the appellants' contention, that the cause of action they were raising before her had neither been raised, nor litigated, between the parties and accordingly *res judicata* did not apply, Meer J stated the following:

> "[41] I am unable to agree. The cause of action and factual basis that gave rise to the rescission application was the default judgment of Blignault J on 15 April 2014. The rescission application sought to set aside that judgment. The subsequent three applications for leave to appeal all the way to the Constitution Court, likewise concerned that cause of action. The cause of action in the application before me is based on the same facts as these prior applications, and whilst the application before me is described as a constitutional review of the default judgment granted by Justice Blignault, it similarly seeks to set aside Blignault J's judgment. The notice of motion, in doing so, seeks a declaration that the credit agreement was reinstated, and accordingly Blignault J's judgment has no real force.

[42] I note also that the judgment of Rosenberg AJ dated 6 November 2014 in the rescission application, as aforementioned, indicates that the Applicant raised the fact that no notice had been given by the First Respondent to the Applicants in terms of section 129(1) of the NCA and in the result the First Respondent was precluded from approaching the Court for the order it obtained. In this application before me the basis upon which the relief is sought, similarly, is that the First Respondent was obliged to first send a notice in terms of section 129(1) of the NCA before approaching the Court to seek judgment, and the failure so to do resulted in the default judgment of Blignault J being a nullity. The fact that this argument might not have been raised in precisely the same manner as it is now being raised before me, does not detract from the fact that in essence the cause of action before me, before Rosenberg AJ, the SCA and the Constitutional Court, pertained to the setting aside of the judgment of Blignault J on the same facts. The fact that non-compliance with the NCA was not raised in the pleadings before Rosenberg AJ and therefore not adjudicated upon by him does not detract from this.

[43] Nor does the fact that the Applicant did not fully argue non-compliance with section 129(1) and section 130(1) of the NCA, or the reinstatement of the credit agreement, exclude the doctrine of *res judicata.* For, as is specified in the Henderson principle referred to above, parties to litigation are required to bring forward their whole case and a court will not, except under special circumstances, allow the same parties to open the same subject of litigation in respect of the matter which might have been brought forward but was not, only because they have, from negligence, inadvertence or even accident, omitted part of their case. *Res judicata,* as aforementioned, applies to every point which properly belongs to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[44] The evidence makes clear that the Applicant, an attorney, ably and relentlessly pursued this matter, raised the non-compliance with a section 129(1) notice, was aware of it but failed for whatever reason to formulate it in the pleadings and pursue it. Even had he not been aware of this aspect in the previous litigation, the Henderson principle does not excuse him, requiring as it does a litigant like him to put forward every point which properly belongs to the subject of litigation, exercising reasonable diligence. The Applicant failed to do so. The first *Nkata* judgment of Rogers J,

which was established law almost seven months prior to the application for rescission on 6 June 2014 before Rosenberg AJ, as aforementioned, was not referred to. The fact that the first *Nkata* judgment was the subject of an appeal at the time does not detract from the fact that it was established law and binding in this Division.

[45] The Applicants' contention that they did not appreciate the true nature of their cause of action until after the Constitutional Court judgment in *Nkata*, on 19 November 2015, and consequently now have the right to have their real dispute resolved by application of the law which they presently raise in their application, goes squarely against the principal of finality of judgments referred to in *Molaudzi supra.* There would be no end to litigation if parties were, after the conclusion of their cases, permitted to come back to court on a reformulation of their cause of action informed by a later appreciation of the true nature thereof, as the Applicants now seek to do. There would be no finality to judgments if parties could argue other points on the basis of subsequent legal findings by our Courts. It is incumbent upon parties to understand the true nature of their cause of action and litigate their whole case to finality. The Applicants did not do so and it is not open to them to traverse the same ground based on a true appreciation of their cause of action derived from the Constitutional Court ruling."

Evaluation

[25] Against that background, the central issue before this Court is whether Meer J, being a single judge, could "review" the judgment of Blignault J, on the basis that it was void *ab initio* on constitutional grounds, as contended by the appellants.

[26] It seems to me, the first question to ask is whether Blignault J's order was void, because if the appellants cannot come home on that, then the only basis upon which Blignault J's order could be challenged before another judge would be by way of a rescission.

[27] It is not disputed by the first respondent that, as clarified by the *Nkata* judgments, the credit agreement was reinstated in terms of s129 (3), once the appellants made payment of the amount of R58 059.04, pursuant to Thring J's

order. Accordingly, as Rogers J postulated at para 34 of Nkata HC, a "new" s129 (1) notice would arguably had to have been issued and Blignault J ought to have been satisfied that that was done prior to determining the matter and granting a judgment in favour of the first respondent.

[28] Section 129 (1) provides that:

"(1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agents, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and

(ii) meeting any further requirements set out in section 130."

[29] Section 130 (1) states:

"

(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), or section 129 (1), as the case may be;

(b) in the case of a notice contemplated in section 129 (1), the consumer has –

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

[30] Whilst section 130 (3) stipulates that:

"(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-

(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court-

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having-

(aa) surrendered property to the credit provider, and before that property has been sold;

(bb) agreed to a proposal made in terms of section 129 (1) (a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129 (1) (a); or

(dd) brought the payments under the credit agreement up to date, as contemplated in section 129 (1) (a)." (Own emphasis)

[31] Compliance with section 129 (1) is therefore crucial prior to the court determining any matter involving a credit agreement, despite the contrary in any agreement. The question is whether Blignault J's alleged failure to satisfy himself in regard to that compliance, rendered his order a nullity. In *The Master of the High Court (Northern Gauteng High Court, Pretoria) v Motala NO & Others 2012 (3) SA 325 (SCA)*, at paras 11 to 12, Ponnan JA referred to a line of authorities

which indicated that, as a general rule a judgment was ineffectual and a nullity when it was given without jurisdiction in the judge pronouncing it, or where it was given against a party not cited to appear. In this regard it was held that those kinds of judgments were null and void and could be disregarded.

[32] In *Motala NO,* Kruger AJ had appointed provisional judicial managers of a company thereby usurping a power expressly reserved by statutory enactment to the Master of the High Court. Ponnan JA found that Kruger AJ's order was a nullity and "…*a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing…*" (at para 14). In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC), Cameron JA, however, while endorsing the findings in *Motala NO*, took a view that "*The courts alone,…, are the arbiters of legality*." This is to guard against the risk of disorder or self-help, by for example public officials who would ignore irregular administrative actions on the basis that they are a nullity (para 103 and footnote 78).

[33] These principles have been followed in various judgments including *Tödt v Ipser* 1993 (3) SA 577 (A) at 589 B-C, where the Court held that "…*in our law the tendency is against holding that judgments are void*" except in the already stated situations. See also Minister *of Agricultural Economics and Marketing v Virginia Cheese and Food Co* (1941) (Pty) Ltd 1961 (4) SA 415 (T) at 422F – 423A; *Van Rensburg NO v Naidoo NO 2012 JDR 2480 (ECP) at para 13; Trade Fairs and Promotions (Pty) Ltd v Thomson and Another* 1984 (4) SA 177 (W) at 183 D – E, There are numerous other judgments that endorse this view.

[34] In *Nkata HC* , Rogers J at para 21 held:

> "The non-compliance with s 129 (1) of the Act afforded Nkata with a bona fide defence to FRB's action. Whether in the event that defence would have been merely dilatory would have depended on Nkata's reaction after FRB gave due notice pursuant to a direction of the court in terms of s 130(4) (b) of the Act. A bona fide defence is an important component of showing good cause for rescission as contemplated in rule

> 31(2) (b). The non-compliance with s 129(1) also leads to the conclusion, in my opinion, that default judgment was 'erroneously' sought and granted within the meaning of rule 42(1)(a) (see *Buys v Changing Tides 17 (Pty) Ltd NO* [2013] ZAWCHC 150). Compliance with s 129(1) is a substantive legal prerequisite for the valid institution of legal proceedings on a credit transaction to which the Act applies. The notice annexed to the summons (the notice addressed to c/o 4 Devonshire Hill, Rondebosch) did not, ex facie the summons, constitute a valid notice in respect of the first mortgage loan agreement and bond on which FRB was suing. (The summons alleged that Nkata's chosen domicilium was […] V Street, and this was also the chosen address appearing in the first mortgage bond annexed to the summons. The summons contained no allegation that Nkata had selected the Rondebosch address for purposes of receiving all notices under the Act.)" (Own emphasis)

[35] At para 28, he goes on to say that:

> "Nkata has not in the present case satisfactorily explained the lengthy delay in seeking rescission. The absence of a satisfactory explanation appears sufficiently, I think, from my summary of the facts. Even when she learnt in March 2013 of the sale in execution scheduled for 24 April 2013, she took until 13 May 2013 to launch the present application. By then the property had been sold in execution to Kraaifontein Properties and the latter had on-sold the property to a third party. Clearly there will be prejudice to third parties if the default judgment were to be rescinded." (Own emphasis)

[36] The Constitutional Court, in *Nkata CC*, also found that there was non-compliance with s129 (1). It recognised that the bank had not given notice in terms of s129 (1) of the NCA to Nkata before issuing summons. It then acknowledged that Rogers J had refused to set the default judgment aside. The Court rejected Nkata's continued attempt to reopen the issue by rescission, as being inconsistent with her conduct of agreeing to settlement, in the same manner as Rogers J did and found. It maintained that the default judgment stood.

[37] Perhaps the question of whether non-compliance with ss129 and 130 of the NCA rendered the process void was best explained by Cameron J in *Sebola and*

Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC), at paras 52 and 53, where he said the following:

> "In my view the notice requirement in s129 cannot be understood in isolation from s130. This emerges from three considerations.
>
> First, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while s 129 (1) (b) appears to prohibit the commencement of legal proceedings altogether ('may not commence'), s 130 makes it clear that where action is instituted without prior notice, the action is not void. Far from it. The proceedings have life, but a court 'must' adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter. The bar on proceedings is thus not absolute, but only dilatory. The absence of notice leads to a pause, not to nullity." (Own emphasis, footnote omitted)

[38] This position was restated by the SCA in *Investec Bank Ltd t/a Investec Private Bank v Ramurunzi* 2014 (4) SA 394 (SCA), where it is stated (at para 23) that "… *the proceedings have a life, as Cameron J has said, and are not void, despite the absence of a s129 notice. The very fact that a court must make an order as to how the proceedings are to be continued indicates the validity of the summons rather than its nullity*."

[39] I accept that in this case we are not concerned with the validity of summons, but with whether the judgment of the court, in the absence of a s129 (1) notice, was *void ab initio.* The Court is precluded by s130 (3) from determining the matter until it has been satisfied that there had been compliance with s129. However, as illustrated by the judgments I have referred to, non-compliance with s129 has not been held to render a default judgment a nullity.

[40] In my view, the fact that the order taken by agreement (Thring J's order) had a clause which permitted the first respondent to approach the Court for judgment upon default on five days' notice to the appellants, without requiring it to first comply with s129 (1), in an instance where the arrears had been paid up, does not render the default judgment void. This is because the duty, statutorily, is placed

upon the Court to satisfy itself that, "*[d]espite any provision of law or contract to the contrary…*", there was compliance with s129, before it can determine the matter. In other words, whether or not there is a contract contrary to the provisions of s 130 (3), the duty is placed on the court to satisfy itself that there was compliance. Therefore the existence of the contract makes no difference to the duty imposed on the Court by s130 (3). The Court's error in this regard would be susceptible to a rescission, or, if a misapplication of the law, perhaps an appeal.

[41] Even in the case of *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC), where a Uniform Rule of Court empowering Registrars to grant orders declaring immovable property executable, was found to be constitutionally invalid, the Constitutional Court, at para 58, held that: "*…the mere constitutional invalidity of the rule, under which the property was declared executable, is not sufficient to undo everything that followed. In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier, and they will have to set out a defence to the claim for judgment against them. It may be that in many cases those aggrieved may find these requirements difficult to fulfil." (Footnotes omitted.)*

[42] Therefore, on a point as fundamental as constitutional invalidity, the Court did not find a default judgment issued in terms of that rule to be ineffectual and null. Aggrieved parties would still need to raise those defences, in the normal course, and fulfil the requirements for a rescission of a judgment.

[43] Same can be said in this case too, which involves a court granting an order in a situation where there was arguably non-compliance with s129, despite the requirements of the NCA.

[44] Therefore, having examined the cases as to which matters will nullify a Court order, I am not persuaded that Blignault J's order can be described as one falling within that category. It is so that s130 (3) enjoined him to satisfy himself that s129 (1) was complied with before granting an order. His failure to do so amounted to no more than an irregularity, which irregularity has not been held by

the Courts to nullify a judgment. It is an irregular step that could be set aside by a Court of a same standing in rescission proceedings.

[45] It is also telling that in the deed of settlement entered into between the parties on 10 August 2015, the appellants confirmed in clause 1 of that agreement "*that the judgment against them stands and accept liability to Plaintiff jointly and severally, if the one pays the other will be absolved*…" Meer J noted this and referred to the principle of peremption raised in *Nkata HC* at 421 A-C that "'*no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate.' In order to show that a person has acquiesced in a judgment, the Court must be satisfied upon the evidence 'that he has done an act which is necessarily inconsistent with his continued intention to have the case re-opened or to appeal*.'" The appellants' conduct by acquiescing that the judgment stood, in the deed of settlement, signed after the rescission was argued and refused by Rosenberg AJ, is clearly inconsistent with their latest nullity argument.

[46] As an aside, although we do not have the benefit of reasons, it is possible that Blignault J was not alive to the fact that the appellants had brought their arrears up to date, at a certain point after Thring J's order. This possibly was not shared with him. Therefore when the Court made the order, it might not have had crucial information before it, which would mean the judgment was erroneously made (which fits in perfectly with the requirements of bringing a rescission application in terms of Rule 42). In that regard the Court could not be blamed for having acted contrary to the law, because until such time as it was aware that the arrears had been paid up at some point, s 129 (1) would not have arisen.

[47] The appellants would, in rescission proceedings, place before the Court facts the Court was not aware of when granting the default judgment, including the fact that they had paid the arrears in full after Thring J's order, which facts may *inter alia* result in the order being rescinded.

[48] I also find the circumstances of this case distinguishable from *Nkata*, in that in *Nkata* the default judgment was issued in September 2010, after which *Nkata* made payments in March 2011 and March 2012, which wiped out her arrears. Payment of arrears there was made after the default judgment was granted. The Court accordingly found that the credit agreement was reinstated as a matter of law, as Nkata had made payments as contemplated in s129 (3) (*Nkata HC* at para 45). As a result Rogers J declared that the default judgment (granted in September 2010), and the writ that followed therefrom, ceased by operation of law to have any force or effect from 8 March 2011. It is key to note that the default judgment had force up until 8 March 2011(despite the fact that there had been non-compliance with s129 (1)).

[49] In this case, however, the agreement would have been reinstated before the default judgment was granted. The significance of this is that in *Nkata* the issue of a s129 (3) arose as a factor separate from the rescission point because payment of arrears was made after the default judgment, rendering the judgment of no force and effect, from the period that the arrears had been paid in full. The non-compliance with s 129 (1) in that matter was argued as part of the rescission.

[50] In this case, however, the picture is different; the agreement was reinstated before the default judgment was issued. The effect of the reinstatement in this case would have been that "fresh" compliance with s129 (1) was required, along the lines proposed by Rogers J in para 34 of *Nkata HC*, before the Court could determine the matter, as required by s130 (3).

[51] This is a very important difference because in *Nkata* the default judgment could not be enforced after 8 March 2011 (payment of arrears), whereas in this case, the default judgment stood until it could be set aside, because the complaint is not the fact that there has been payment of arrears, but that a "fresh" notice s129 (1) was not sent prior to the granting of the order by the Court, and that complaint would have to be considered by the Court hearing the rescission.

[52] If that approach is correct, which in my view it is, the appellants are then faced with the hurdle of *res judicata*, which incorporates the Henderson principle. They have to show that the issue they are raising is not the same as that which occupied the rescission.

[53] In my view, the rescission proceedings were the appropriate proceedings for determination of Blignault J's failure to comply with ss129 and 130. That being the case, all matters pertaining to the rescission of an order, including explanation for default and any other errors that Blignault J would have made in granting the default judgment, should have been raised with and determined by Rosenberg AJ in the rescission application.

[54] Upon examining Rosenberg AJ's judgment, it is clear that the issue of non-compliance with s129 (1) was raised by the appellants in argument. Rosenberg AJ found that this issue was not raised in the papers, and how it constituted an error was therefore not stated. Accepting this non-compliance would require the Court to separate and draw inferences from annexures. Rosenberg AJ made another finding at paragraph 14 of his judgment that"… [*i*]*n any event, the judgment of 15 April 2014 was based upon the Applicants' alleged breach of the provisions of the judgment of 13 October 2008. Adopting the two step approach adopted in Grainco (Pty) Ltd v Broodryk NO en Andere, while the underlying mortgage bond agreement is a credit agreement for the purposes of the NCA, the judgment itself clearly is not."* (Footnote omitted)

[55] Therefore, non-compliance with ss129 and 130 of the NCA was before Rosenberg AJ; the fact that he determined the issue in the way he did, does not make it a new issue. Secondly, to the extent that it was not raised in the legally comprehensive manner that it had been raised before the Court *a quo*, does not make it new. Thirdly, even if it was not raised before Rosenberg AJ, the appellants are confronted with the principle that they should have raised all of their case then. Fourthly, even if Rosenberg AJ's judgment does not pertinently mention s129 (3), the only context within which the appellants would have raised the applicability of

s129 (1), would have been because the credit agreement had been reinstated. Otherwise it would not make sense to raise non-compliance with s129 (1), if it was not in the context of the reinstatement of the agreement by virtue of s129 (3). By the time that the rescission was argued before Rosenberg AJ, *Nkata HC* was a binding precedent in this division, as the Court *a quo* found.

[56] It is also worth noting, that it appears that when the summons was issued in 2006 culminating in the Thring J order, s129 (1) was not in operation. It came into operation on 1 June 2007. It follows logically then that the appellants could not have raised the s129 (1) non-compliance, as a step that was not followed prior to the issuing of the summons in 2006. The only reason compliance with s129 (1) would have been relevant before Rosenberg AJ, would have been because of the reinstatement of the agreement by virtue of s129 (3).

[57] Furthermore, it is instructive that the SCA and Constitutional Court, despite the fact that s129 (1) had been raised as an issue before Rosenberg AJ, refused to grant leave to appeal the rescission judgment. The applicability of not only s129, but of ss25 and 26 of the Constitution was raised on the papers petitioning the Constitutional Court. We allowed this evidence to be handed up on the basis that it was relevant to the question whether the issues were *res judicata*.

[58] Having found that the issues were *res judicata*, Meer J correctly went on to determine whether there were any exceptional circumstances that would warrant relaxation of the *res judicata* doctrine, albeit not having been asked to do so by the appellants. She correctly found that there was no basis to do so. Whilst there seems to have been non-compliance with the NCA requirements, which would potentially deny the appellants the opportunities afforded by the provisions of the Act, as consumers, there are no exceptional circumstances to the level found in the *S v Molaudzi* 2015 (2) SACR 341 (CC) decision. The appellants were presented with opportunities to make arrangements with the first respondent on how payments of the instalments could be made. They entered into settlement agreements on numerous occasions.

[59] They also do not state what they could have done had they received the s129 (1) notice prior to the judgment being granted by Blignault J, and how non-compliance had prejudiced them by denying them that opportunity Although the appellants were not legally represented, the first appellant was an attorney. Whilst he should not be treated differently from other litigants, it is important to note that he was not in circumstances close to those of *Molaudzi.* Finally, the interests of the third and fourth respondents are also an important consideration. This is one case where the principle of finality of judgments ought to be observed to safeguard those interests.

[60] For these reasons, there is no basis to interfere with the Court *a quo's* decision, in my view, and the appeal should fail.

[61] In the result, I would make an order in the following terms:

1. The appeal is dismissed with costs, including the costs of two counsel.

_____

N P BOQWANA

Judge of the High Court

I agree and it is so ordered,

_____

R ALLIE

Judge of the High Court

I agree,

_____

M I SAMELA

Judge of the High Court

Date of Hearing: 01 August 2018

Judgment delivered: 21 August 2018

APPEARANCES

For the Appellants:	Adv. M. Donen SC
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