Reportable:	**YES** / NO
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NO: M 153/2016

In the matter between:

JOEL MOSENYE MAKUBALO	1st Applicant
DIKELEDI ADOLPHINA MAKUBALO	2nd Applicant

and

NEDCOR BANK LTD	1st Respondent
THE SHERIFF – RUSTENBURG	2nd Respondent
PIETER HOFFMAN EIENDOMS BELEGGINGS (PTY) LTD	3rd Respondent
REGISTRAR OF DEEDS	4th Respondent
SOLLY PHASHA	5th Respondent
ABSA BANK LIMITED	6th Respondent

DATE OF HEARING	:	08 JUNE 2017
DATE OF JUDGMENT	:	29 JUNE 2017
COUNSEL FOR THE APPLICANT	:	ADV. S. MUSHET
COUNSEL FOR THE 1ST RESPONDENT	:	ADV. G.F ACKERMAN
COUNSEL FOR THE 6TH RESPONDENT	:	ADV. J. LOURENS

JUDGMENT

HENDRICKS J

[1] This is an application for a declaratory order that the sale in execution of the immovable property of the applicants be declared unlawful and invalid as well as other ancillary relief. The salient factual background to this matter is as follows. The first applicant purchased the immovable property situated at erf […], T. Unit B, Rustenburg through a mortgage loan granted to him by the first respondent bank.

[2] The first applicant experience some difficulties with regard to his employment and was consequently dismissed. This brought some financial hardships to bear. Court processes were instituted and the

matter is not yet finally adjudicated. Due to financial constraints the first applicant could not honour his financial obligations towards the first respondent. On 22 September 2012 the first respondent obtained judgment in the Magistrate Court, T. against the first applicant for the arrears and outstanding balance of R30 556.30. A warrant of execution was levied against the property which was scheduled to be ultimately sold in execution on 05th December 2014.

[3] On 05th December 2014, the date of the sale in execution (public auction), the outstanding amount due to the first respondent was R39 249.03. On the very same date the first applicant caused an amount of R43 000.00 to be transferred electronically to the first respondent. There is a dispute with regard to the exact time of this transaction and when it was communicated to the attorneys of record of the first respondent. The first applicant was notified that the sale in execution was duly proceeded with and that the property was sold to the third respondent.

[4] The third respondent bought the said property for an amount of R271 000.00. He in turn sold-on the property to the fifth respondent for an amount of R450 000.00. The sixth respondent provided financial assistance to the fifth respondent to acquire the said property. This application is opposed by the first respondent. The sixth respondent does not oppose the application but merely guards its own interest in the matter. The sixth respondent also made some

recommendations to which I will revert later on in this judgment. An application is also made by the first respondent to strike out certain averments in the affidavits deposed to by the first applicant.

[5] The relief sought in the Notice of Motion is to the following effect:

> *"1.* ***DECLARING*** *the sale in execution by the Second Respondent of the immovable property, Erf Number […] T. Unit B, Rustenburg, North West Province ("the property") on 5th December 2014 and the subsequent transfer and registration of the property in the name of the Third Respondent which was then on 26th March 2015 duly registered in the First Applicant's name to be unlawful and invalid for want of compliance by the First and Second Respondents with section 66 of the Magistrates' Court Act 32 of 1994 read Rule 43 of the Magistrates' Court Rules and due to the Applicants having settled in full the judgment debt together with interest and costs on 5th December 2014 prior to 12h00 as was agreed with the First Respondent's Attorneys.*
>
> *2.* ***DECLARING*** *the Third Respondent's purported sale of the property on 18th December 2014 to the Fifth Respondent as well as the subsequent registration of the transfer of the property in the name of the Fifth Respondent to be unlawful and invalid for want of compliance with section 2(1) of the Alienation of Land Act 68 of 1981 in that the Third Respondent was not the registered owner of the property on 18th December 2014 and as such did not have the powers to sell, dispose or alienate the property to the Fifth Respondent;*

3. ***DECLARING*** *the registration of the transfer of the property in the name of the Fifth Respondent on 29th May 2015 without the production of the prescribed certificate as provided in section 118 (1) and (1A) of the Local Government: Municipal Systems Act 32 of 2000 to be unlawful and invalid;*

4. ***DIRECTING AND ORDERING*** *the Fourth Respondent to forthwith remove and/or cancel the deeds of transfer issued in favour of or in the names of the Third and Fifth Respondents from the register of deeds and restore the Applicants as the registered owners of the property.*

5. ***DIRECTING AND ORDERING*** *the Fourth Respondent to cancel the mortgage bond held by the Sixth Respondent in respect of the property arising from the cancellation of the registration of the transfer of the property to the Fifth Respondent as prayed for in paragraph 4 above.*

6. ***DIRECTING AND ORDERING*** *the Third Respondent to refund in full and with interest calculated at the rate of 9% (nine per cent) per annum the amount of R490 000,00 paid by the Sixth Respondent as the purchase price property on behalf of the Fifth Respondent pursuant to a loan agreement with the latter consequent upon Prayers 4 and 5 above.*

7. ***DIRECTING AND ORDERING*** *any or all of the Respondents who oppose/s the Applicants' application to pay the Applicants' costs jointly and severally, with each paying the other to the absolved, at a scale as between an attorney and client.*

*8. **GRANTING** the Applicants further and/or alternative relief."*

[6] In his heads of argument on behalf of the applicants and also during oral submissions, Mr. Mushet submitted that although the case of the applicants is somewhat different from what is contained in the notice of motion, this matter primarily revolve around the issue as to whether the credit agreement between the first applicant and the first respondent was reinstated in terms of section 129 (3) of the National Credit Act 34 of 2005("NCA"). Mr. Ackerman on behalf of the frist respondent contended that the applicants should stand or fall by the case which they set out for the first respondent to meet. He submitted that the case as put forward by the applicants was that there was non-compliance with the prescripts of section 66 of the Magistrates' Court Act 32 of 1994.

[7] In **Cusa v Tao Ying Metal Industries and Others 2009 (1) BLCR 1 (CC)** the following is stated in paragraph [68] of the majority judgment:

> *"These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise the result would be a decision premised on*

an incorrect application of the law. That would infringe the principle of legality."

See also: **Carmichele vs Minister of Safety and Security** 2001 (4) SA 938 (CC).

[8] I find the aforementioned dictum quite apposite. In the present case there was no need for this Court to raise the issue pertaining to section 129 (3) of the Act *mero motu* and to require the parties to deal therewith. The issue was already raised by Mr. Mushet on behalf of the applicants. Furthermore, it was comprehensively dealt with by both Mr. Mushet and Mr. Ackerman on behalf of the first respondent in respect of their respective heads of argument. In addition, there was a section 129 notice letter addressed to the applicants which makes the prescripts of this section and the Act applicable to the present matter. I am of the view that justice require that the matter be dealt with in accordance with section 129 of the Act.

[9] In the letter dated 8 December 2011 addressed by the attorney of record of the first respondent to the applicants, ("Notice in terms of section 129 (1) (a) of the National Credit Act 34 of 2005"), the following is stated in paragraph 4 thereof:

"Should you fail to respond to this notice within 10 business days of delivery hereof, or should you choose to dismiss the suggestions contained herein, or should you decide not to reply in

any way to this notice, and should your remain in default with your liabilities in terms of the agreement for a period of 20 days calculated from the date upon which your default commenced, the Nedbank Ltd shall be entitled to cancel the agreement and/or it shall be entitled to proceed with the legal steps in order to enforce the agreement. This may include taking judgment against you, attaching your property, and selling same by way of execution."

[10] In terms of the contents of the aforementioned section 129 notice letter, the first respondent had an election to make. It could either cancel the agreement or take legal steps to enforce the agreement which include the taking of judgment, attaching the property and selling it by way of execution. The Magistrates' Court order is for payment of the amount of R30 466.24 plus interest and that the property be declared executable. No order for cancellation of the agreement was granted by the Magistrate Court. This order amounts to the acceleration of the outstanding amount of the agreement. Mr. Mushet contended that the agreement was never cancelled and the account of the first applicant with the first respondent is still open. This much is common cause. After the sale in execution, an amount was deposited into the very same account which the first applicant holds with the first respondent. I am in agreement with this submission made by Mr. Mushet that the agreement was never cancelled and that the first respondent elected to apply for specific performance in terms of the agreement.

[11] Prior to the amendment of Section 129 (3) and (4) of the NCA by Act 19 of 2014, Section 129 read as follows:

"(3) Subject to subsection (4), a consumer may

(a) at any time before the credit provider has cancelled the agreement reinstate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement, and

(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.

(4) A consumer may not reinstate 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."

[12] It is clear from the wording of Section 129 (3), as it was applicable then, that a consumer such as the first applicant may at any time before the credit provider has cancelled the agreement, reinstate it. As already alluded to in paragraph [10] above, the credit agreement was never cancelled by the first respondent, the credit provider. Furthermore, in terms of section 129 (3) the consumer (the first applicant in this case) must pay all overdue amounts, including reasonable default charges and reasonable costs of enforcing the agreement. It is common cause that the outstanding amount as at the 05th December 2014 was R39 249.03. The judgment amount was R30 556.30. The statement dated 28th February 2015 contain a summary of transactions up until and including 01 December 2014. The outstanding balance reflected on 01 December 2014 is R39 189.98 which include legal fees and interest. Payment in the amount of R43 000.00 on the 05th December 2014 is in excess of the outstanding amount of R39 189.98 (as at 01 December 2014) and R39 249.03 (as reflected on the statement bearing the date of 06 December 2014). The amount of R43 000.00 that was paid on the 05th December 2014 therefore include at least all overdue amounts, including reasonable default charges and reasonable costs of enforcing the agreement as at 05 December 2014.

[13] Rodgers J in **Nkata v Firstrand Bank Ltd and Others** 2014 (2) SA 412 (WCC) stated in paragraph [37] – [39] the following:

"[37] In my opinion the fact that a contractual acceleration clause has become operative does not, for purposes of s 129(3)(a), obliterate the distinction between the arrear instalments and the full debt. The lawmaker must be taken to have been aware that most credit transactions concluded by banks and other financial institutions contain acceleration clauses as a standard provision. The right of reinstatement conferred by s 129(3)(a) would be rendered nugatory if the 'overdue' amount contemplated by s 129(3)(a) were the full accelerated debt rather than the arrear instalments. In most credit transactions there would be nothing to reinstate if the consumer could only 'reinstate' the agreement by paying the full debt. The very notion of reinstatement, in the context of s 129(3), is that the consumer may put the agreement back into the position it was prior to his or her falling into default. This accords with certain of the stated purposes of the Act, namely of promoting responsibility in the credit market by encouraging 'the avoidance of over-indebtedness and fulfilment of financial obligations by consumers' (s 3(c)(i)); providing mechanisms 'for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations' (s 3(g)); and providing a 'consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements' (s 3(i)).

[38] It follows that, in order to effect reinstatement in terms of s 129(3)(a), Nkata did not need to pay the full accelerated debt but only the arrear instalments. It is common cause

that she did so in March 2011 and again in March 2012. (The conclusion I have reached on this aspect accords with the obiter views expressed by Peter AJ in Nedbank Ltd v Fraser and Another and Four Other Cases 2011 (4) SA 363 (GSJ) para 41. See also Brits op cit at 179 and 181 – 2.)

[39] *A credit agreement can only be reinstated if it has not already been cancelled by the credit provider. Mr Van Reenen conceded that there had been no cancellation here. That concession was correctly made. What FRB did was to seek specific performance of the mortgage loan agreements by relying on the acceleration clause. In the case of the loan of money, there may not be a material difference between the monetary amount claimable by the lender upon cancellation on the one hand, and by way of specific performance of the accelerated debt on the other, but conceptually there is a distinction between the two cases. Where an agreement is terminated by the credit provider because of the consumer's breach, the contract is terminated by the act of the credit provider (provided he has complied with the procedures laid down in the Act). The remedies then available to the credit provider are those provided by law where a contract has been terminated because of breach. Where the credit provider invokes an acceleration clause, the contract remains in force and the consumer is obliged to make specific performance of the accelerated indebtedness. If the consumer pays the accelerated indebtedness, the contract will be terminated — not by the act of the credit provider but through performance by the consumer. (I therefore disagree with the view expressed by Hartle J in Dwenga v FirstRand*

Bank Ltd and Others [2011] ZAECELLC 13 para 21, to the effect that 'cancellation or termination is . . . necessarily implied' by the invocation of an acceleration clause. Once it is appreciated that the enforcement of an acceleration clause does not in law constitute a cancellation of the agreement, the difficulties mentioned by the learned judge in her obiter observations in fn 36 of the judgment — to the effect that the enforcement of acceleration clauses is inimical to the purpose of the Act in promoting responsible consumer behaviour, a purpose served, inter alia, by holding out the possibility of reinstatement as a beacon of hope — fall away.)"

[14] In dealing with the interpretation of "all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement", the Constitutional Court per Moseneke DCJ held as follows in **Nkata v Firstrand Bank Ltd and others** 2016 (4) SA 257 (CC):

"[121] On these facts, I find that the credit agreement was indeed reinstated on 8 March 2011 when Ms. Nkata settled in full her bond arrears of R87 500. At that point, the Bank's legal costs were not due and payable. It is undisputed that the Bank had not given Ms. Nkata notice of the nature and extent of the legal costs. It had not demanded their payment properly or at all. Also, the legal costs were not shown to be reasonable. Their nature and extent had not been agreed to by Ms. Nkata and had not been assessed

for reasonableness by taxation or other acceptable means. Instead, the Bank chose to be the sole arbiter of the extent of the legal costs and one-sidedly debited the costs against the bond account of Ms. Nkata.

[122] In this regard, I agree with the High Court that the consumer could not be expected to take proactive steps to find out what the costs would be for reinstatement to be effected. Neither could a consumer be expected to start taxation or agree with the credit provider on the quantification of these costs. The credit provider is required to take the appropriate steps if it wants to recover the costs for enforcing an agreement with the consumer. The Bank knows well that it is entitled to reasonable costs only. It must take steps to place its legal costs within this statutory pigeon hole

[123] Properly understood, section 129(3) does not preclude the reinstatement of a credit agreement where the consumer has paid all the amounts that were overdue but has not been given due notice of the reasonable legal costs, whether agreed or taxed, of enforcing the credit agreement. The legal costs would become due and payable only when they are reasonable: agreed or taxed, and on due notice to the consumer."

[15] As at 5 December 2014, no other amounts, including legal fees, were either demanded, agreed to, or assessed by the taxing master for reasonableness. Accordingly, no other amounts were due or owing to

the first respondent. The amendment to section 129(3) in fact makes it clear that the amounts to be paid are to be calculated at the time the default was remedied. In the case at hand, that date is 5 December 2014. Accordingly, on 5 December 2014, the first applicant made payment of all amounts due in terms of section 129(3) of the NCA.

[16] Section 129 (4) provide that a consumer may not reinstate a credit agreement after:

(a) the sale of the property;

(b) the execution of a court order enforcing that agreement;

(c) the termination thereof in accordance with Section 123

Sub-paragraph (c) above does not find application in the present matter.

[17] Rodgers J in **Nkata** (WCC), *supra,* states the following in paragraphs [49] and [50]:

> *"[49] Where a credit provider obtains a monetary judgment against the consumer for the outstanding amount of the loan, the court order will not include an order for the attachment of any property. In such cases the rules of court entitle the judgment creditor to obtain a writ of execution. The writ is addressed by the registrar to the sheriff. A writ of execution is not itself an 'order'. It is a process which may be issued where an order for the payment of money has*

been made. Even where the loan agreement is secured by a mortgage bond and the court declares the bonded property to be specially executable, the court's order does not include an order for the attachment of the property. The order of executability merely entitles the creditor to levy execution on the immovable property in terms of rule 46 without first attempting execution against movables in terms of rule 45. The court does not order the immovable property to be attached; it is for the judgment creditor to determine how it will go about execution.

[50] Accordingly, I do not think that in the present case the default judgment granted by the registrar on 28 September 2010 constituted an order for the attachment of property, nor did the default judgment acquire that character when FRB elected to obtain a writ of execution against the mortgaged property. It follows that s 129(4)(a)(i) is not applicable."

[18] At paragraph [53], in dealing with 'execution' in terms of Section 129 (4) the following is stated by Rodgers J:

"If 'execution' in s 129(4)(b) included the mere obtaining of a writ of attachment of movables or immovables or the attachment of goods by the sheriff, there would usually be very little time between the granting of the enforcement order and its 'execution' and thus very little scope for the consumer to purge his default. The common-law principle is that a judgment debtor can purge his default at any time prior to the sale of attached property (see the

authorities cited by Peter AJ in Fraser para 40, though at common law the full accelerated debt would have to be paid in order to avoid the sale in execution). In themselves, the steps of obtaining a writ and causing property to be attached are merely steps towards execution and can be undone at common law if the judgment debtor pays the full judgment debt. The judgment is only actually 'executed' when money is raised pursuant to a sale of attached property and paid to the judgment creditor."

<u>See also</u>: **Nedbank Ltd v Fraser and Another and Four other cases** 2011 (4) SA 363 (GSJ)

[19] The majority judgment in the Constitutional Court in **Nkata vs Firstrand Bank Ltd and Others** 2016 (4) SA 257 (CC) stated the following in paragraph [131]:

"[131] There is no compelling reason why the meaning of "execution" in section 129(4)(b) should be given the extended meaning preferred by the Bank. The extended construction would render the section unuseful. The High Court was correct that the barrier to a revival of the credit agreement applies only when proceeds from a sale in execution have been realised. Only then would the revival be of no use to either party. I have already observed that section 129(3) had created a novel remedy to foster payment of overdue debts and to rescue attached property, provided the consumer had lawfully revived the credit agreement. The provision amounts to a statutory remedy for rendering a default judgment and attachment order

> *ineffectual. That explains why once the credit agreement has been reinstated by paying all overdue amounts and allied administrative and legal costs, the consumer "may resume possession of any property that had been repossessed by the credit provider". This plainly means that the default judgment and subsequent attachment would be rendered without force or effect."*

[20] According to Mr. Ackerman, time is of the essence in this matter. Much depends on the time of concluding of the sale in execution (the auction). In terms of the return filed by the Sheriff, the public auction or sale in execution was concluded at 10H00. This was the scheduled time. Therefore, so it was contended, at the time of the proverbial fall of the hammer, it was all over for the applicants. The proceeds of the sale was according to the submission by Mr. Ackerman, realised when the 10% deposit was paid.

[21] I have difficulty with the aforementioned proposition by Mr. Ackerman. First and foremost it is debatable whether at exactly 10H00 was the sale in execution concluded and the 10% deposit paid over. All this must have occurred in a matter of seconds, which is doubtful. Secondly, the payment of the 10% deposit was made to the Sheriff and not to the first respondent. It is therefore not as if the realisation of the sale was completed by payment of the 10% deposit to the credit provider, the first respondent. Thirdly, it is common cause that the outstanding amount as balance of the purchase prize was not

paid on the 05th December 2014 but was subsequently paid upon demand on 19th January 2015. This was done after the first applicant paid the amount of R43 000.00 in excess of the outstanding balance of R39 249.03 on 05th December 2014 to the first respondent. Lastly, it is common cause that the property was only registered in the name of the third respondent as purchaser, on 26 March 2015. When the first applicant made payment of at least all the overdue amounts, including default charges and reasonable costs for enforcing the agreement, no proceeds from the sale in execution were realised.

[22] A very disturbing factor in this case is that after an amount in excess of what was the outstanding balance on the account was paid, same was communicated on the same day of the sale in execution (public auction) to the attorneys of record acting on behalf of the first respondent. Despite this, they proceeded with further steps to have the remainder of the sale price paid by the third respondent as purchaser more than six (6) weeks thereafter and even subsequently caused the property to be registered in its name. They could have and should have informed their client, the first respondent about this state of affairs and advised them not to proceed with their endeavours to execute on the sale of the property in execution.

[23] The statement of the applicant reflected a credit of R3 750.97 as at 08th December 2014, three (3) days after the sale in execution (public auction). This must have been detected by the first respondent. It is

furthermore very disturbing to note that the outstanding balance on 05th December 2014 was a meager R39 249.03 whereas the property was sold for R271 000.00. The value of the property at that time was R450 000.00. The fifth respondent purchased the property from the third respondent for an amount of R490 000.00. The offer to purchase was made on the 18th December 2014, merely 13 days after the sale in execution, when the property was not even registered in the name of the third respondent.

[24] The acceptance of the offer to purchase was signed on behalf of the third respondent on the 18th December 2016. In the said document it is alleged that the third respondent is the registered owner of the property. This is a misrepresentation. On the 18th December 2014 the remainder of the purchase price of the property was not paid. It was only paid on demand on 15th January 2015. There was therefore not yet full compliance with the terms of the sale agreement of the property sold in execution when the offer to purchase was signed. Furthermore, the property was only registered in the name of the third respondent on 26 March 2015. This serves as proof that the proceeds of the sale in execution was not yet realised when the said property was already offered to be on-sold to the fifth respondent.

[25] Mr. Lourens on behalf of the sixth respondent submitted that in the event that this Court finds in favour of the applicants, then an order should be made which will take care of possible future litigation

between the parties. This must be done, so he submitted, in an effort to proverbially turn back the clock to what the situation was on or before 05th December 2014. This Court has an inherent jurisdiction to regulate its own processes. Furthermore, this Court is empowered by the Constitution of the Republic of South Africa (Act 106 of 1996) to develop the common law and to promote fair and equitable justice. I find the proposal of Mr. Lourens quite appropriate.

[26] In so far as costs are concerned, there is no plausible reason why costs should not follow the result. Mr. Ackerman on behalf of the first respondent submitted that in the event that this Court finds in favour of the applicants, it should be ordered that the applicants pay 80% of the costs of the first respondent. I do not agree. On the contrary, I am of the view that it is as a result of the first respondent that this whole process was forged ahead with.

[27] Upon been made aware of the fact that the account was paid in full on 05th December 2014, the first respondent through its attorneys, should have informed the Sheriff and the third respondent of the state of affairs and the sale in execution(public auction) should have been cancelled. This was supposed to happen in view of the fact that the third respondent purchased the said property at the sale of execution (public auction) under a cloud that the first applicant may still perform in terms of the agreement between him and the first respondent.

Furthermore, because the agreement could still be reimbursed by operation of law.

See: Nkata vs Firstrand Bank Ltd and Others 2016 (4) SA 257 (CC)

[28] This whole scenario could have been avoided had the first respondent acted reasonably and not forged ahead with the sale in execution and subsequent registration of the property in the name of the third respondent. The actions of the first respondent calls for a punitive costs order on an attorney and client scale. In my view, the sixth respondent only guard its interest in this matter and should not be mulct with a cost order.

[29] An application was made by the first respondent to strike out certain words and/or paragraphs of the affidavits deposed to by the first applicant. It is alleged that these paragraphs contain allegations which are maliciously vexatious and slanderous and should therefore be struck out. The first applicant *inter alia* stated in his affidavits that the conduct of the first respondent is "extremely immoral" and "abhorrent" and also accuses the first respondent of lying and misleading this Court, which conduct is "malicious, dishonourable and unethical."

[30] Mr. Mushet on behalf of the applicants submitted that these are emotionally charged averments based on the fact that the applicants lost their house. It is understandable, so it was contended, that the first applicant under the circumstances would be emotional; hence the utterances. Understandable as it might be that the first applicant would be emotional about losing his house for a meager R39 249.03, whereas he paid more than this amount to stop the sale in execution, he was not supposed to make such utterances. These paragraphs or rather these words should be struck out as being vexatious and slanderous. The striking-out of those words or paragraphs does not go to the root of this matter and does not affect the order that will be made. The costs of the application to strike out must be laid at the door of the applicants.

Order

[31] Consequently, the following order is made:

(i) It is declased that the credit agreement between the first respondent (Nedbank Ltd) and the first applicant (Joel Mosenye Makubalo) was lawfully reinstated on the 05th December 2014.

(ii) The sale in execution (public auction) and registration of the property situated at Erf […], T., Unit B, ("the property") in the name of the third respondent is set aside.

(iii) The sale of the property by the third respondent to the fifth respondent and the registration of the property in the name of the fifth respondent is set aside.

(iv) The fourth respondent (Registrar of Deeds) is ordered to re-register the property in the names of the applicants (or in the name of the first applicant, as the case might be) upon payment of the required fees for re-registration, if any.

(v) It is declared that the third respondent is entitled to repayment of the purchase price it paid, in consequence of the conditions of sale entered into between itself and the second respondent (Sheriff, Rustenburg) on the 05th December 2014.

(vi) It is further declared that the sixth respondent (ABSA Bank Ltd) is entitled to repayment of the purchase price it paid, on behalf of the fifth respondent (Solly Phasha), in consequence of the agreement of sale entered into between the fifth respondent and the third respondent on the 18th December 2014 ("the agreement of sale").

(vii) In the circumstances, the:

(a) applicants, first respondent or second respondent, as the case may be, is directed to refund the third respondent the purchase price of R271 000.00, which was paid by the third respondent consequent upon the conclusion of the conditions of sale together with the prescribed rate of interest of 9% *per annum* calculated from the date of this order; and

(b) third respondent is directed to refund the sixth respondent, the purchase price of R490 000.00 which was paid on behalf of the fifth respondent, consequent upon the conclusion of the agreement of sale, together with the prescribed rate of interest of 9% *per annum* calculated from the date of this order;

(viii) The first applicant is ordered to pay the costs of the application to strike out;

(ix) The first respondent is ordered to pay the costs of the applicants in the main application on the scale as between attorney and client. The costs of the sixth respondent is excluded.

(x) The sixth respondent is ordered to pay its own costs.

R D HENDRICKS
ACTING DEPUTY JUDGE PRESIDENT
NORTH WEST DIVISION OF THE HIGH COURT, MAHIKENG