THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 15 December 2016

STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Kaknis v Absa Bank Limited & another (08/16) [2016] ZASCA 206 (15 December 2016)

MEDIA STATEMENT

Today the Supreme Court of Appeal handed down a judgment concerning the interpretation and application of the provisions of s 126B of the National Credit Act 34 of 2005 (the Act), which came into operation with effect from 13 March 2015. The issue was whether or not s 126B(1)*(b)* of the Act applies retrospectively. This section seeks to prohibit the collection of or re-activation of a debt under a credit agreement to which the Act applies, which has been extinguished by prescription under the Prescription Act 68 of 1969. It applies where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had he or she been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise.

The issue arose from the grant of two summary judgments against the appellant, Mr Kaknis, by the Eastern Cape Local Division of the High Court, Port Elizabeth in favour of Absa Bank Ltd (Absa) and Man Financial Services SA (Pty) Ltd (MFS). It was common cause in the court a quo that the parties had concluded installment sale agreements during 2006 and 2008, in terms of which the appellant bought vehicles and trailers from Absa and MFS. And that on 3 October 2014, after the respondents' claims had become prescribed, the appellant concluded an acknowledgement of debt in favour of the respondents. In terms of this agreement, the appellant acknowledged his indebtedness to Absa in an amount over R2,7 million, plus interest, and an amount of R702 496, plus interest, in respect of MFS. The appellant failed to pay in terms of the acknowledgement of debt, and he also did not surrender any of the assets as was agreed in the agreement. Arising from this failure, the respondents proceeded to issue summons and to apply for summary judgment. The appellant raised the defence

that the claim had prescribed, and relied on the provisions of s 126B(1)*(b)*(ii) of the Act. The high court dismissed the appellant's defence that the respondents' claims against him had prescribed and held that s 126B did not apply retrospectively.

In dismissing the appeal, the majority court of the SCA held that s 126B(1)*(b)* of the Act has no retrospective operation and provided no defence to the appellant. The majority in its reasoning invoked the presumption against the retrospective operation of statutes, and found that the section was not intended to take away or impair vested rights acquired under existing laws. According to the majority court, the existing law before s 126B(1)*(b)* of the Act was introduced, was to the effect that an agreement that revived a prescribed debt of this kind was perfectly valid, and because the legislature is presumed to know the law, the legislature must be taken to have been aware that retrospective application of s 126B(1)*(b)* would nullify agreements that had validly been entered into and would take away existing rights. The court concluded that there was no indication in s 126B(1)*(b)* of any intention to do so. The court also found that the appellant's reliance on schedule 3 of the Act was misplaced.

In a dissenting judgment, Shongwe JA held that s 126B was intended to prohibit credit providers from benefiting from debts which had become prescribed and was aimed at protecting 'poor' consumers from enforcement of such debts, in order to prevent unfairness or injustice. Shongwe JA reasoned that to construe s 126B of the Act as not applying retrospectively would be at odds with Constitutional Court jurisprudence in interpreting the Act, which has emphasised the protection to consumers, and would also create a peculiar situation where certain consumers whose agreements were entered into before s 126B came into effect, were afforded less protection than those who did so after, thus creating a differentiation between classes of consumers.

Also dissenting, and in agreement with Shongwe JA, Willis JA held that the principle against the retrospective operation of the law was not an absolute one. And further, that a reading of the Act comprehensively, as a whole, and also with reference to the string of cases of the Constitutional Court in interpreting the Act and its purpose, the SCA should have found in favour of the consumer, the appellant, rather than the respondent credit providers.

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