

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 25680/2019**

(1) <u>REPORTABLE:</u>
(2) <u>OF INTEREST TO OTHER JUDGES:</u>
(3) <u>REVISED.</u>
.....
DATE
SIGNATURE

In the matter between:

**NEO VIOLET THOOTHE**

Applicant

and

**NEDBANK LIMITED**

Respondent

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**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL**

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**MAKUME J:**

- [1] This is an application for leave to appeal the judgment I granted against the Applicant on the 14<sup>th</sup> March 2022.
- [2] In that judgment I ordered that the Applicant pays to the Respondent an amount of R1 628 400.25 together with interest and also declared certain immovable property known as Portion [...] of Erf [...] [...] Extension [...], Roodepoort specially executable.
- [3] The grounds of appeal are based on non-compliance with an order granted by Acting Judge De Villiers dated the 29<sup>th</sup> February 2020 regarding service of the Notice in terms of Section 129 of the National Credit Act.
- [4] In that order De Villiers AJ had directed that the Section 129 notice be served on the Applicant's chosen domicilium being [...] [...] Lodge [...], [...] Extension [...], Roodepoort.
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- [5] It is common cause and not in dispute that the Sheriff made three attempts to serve the notice in compliance with the De Villiers order but failed in that the premises were always locked. Ultimately the Respondent's attorneys forwarded the Section 129 notice to the Applicant's attorneys S Ndobe who acknowledged receipt and informed the Respondent's attorneys that he will "out of courtesy" bring it to the attention of his client.

[6] In my judgment dated the 14<sup>th</sup> March 2022 I indicated that this Court was satisfied that the Section 129 notice had been brought to the attention of the Applicant and that she is aware of the action against her.

[7] Section 129 (1)(b), reads as follows:

“Subject to Section 130(2) may not commence any legal proceedings to enforce the agreement before first providing notice to the consumer as contemplated in paragraph (a)....”

[8] Attorneys S M Ndobe who is the Applicant’s attorney of record and has appeared for her the all along argued that this Court erred in granting Summary Judgment despite the fact that the Section 129 notice was not served on the Applicant in terms of the order by De Villiers AJ. This argument is raised against the background of the same attorney who undertook to bring it to the notice of his client that the Section 129 has now been served on him. I find it disturbing that Mr Ndobe now contends that there was no obligation on him to bring that Section 129 notice to the attention of his client. He does not say that he did not hand the notice to his client all that he says in argument is that he had no obligation to do it.

[9] The relationship between an attorney and his client is based on a contract of mandate which mandate imposes fiduciary obligation on the attorney. See: **Incorporated Law Society Transvaal v Meyer 1981**

**(3) SA 962 (T) page 970; Eksteen v Van Schalkwyk 1991 (2) SA 39 T.**

[10] An attorney has a duty of care towards his or her client, the Court, the opponent and third parties. (See: **Flionis v Bartlett 2006 (3) SA 575 (SCA)**). The facts in this matter clearly indicate that Ndobe was under a legal duty to advise his client what the effect of the Section 129 notice envisaged and his failure to do so in my view amounts to negligence on the part of an attorney. Section 129 calls upon the consumer to refer the credit agreement to a debt counsellor, alternatively dispute resolution agent, consumer court or Ombud. Such referral is aimed at resolving any dispute under the agreement or to develop and agree on a plan to bring the payments under the agreement up to date. Attorney Ndobe by failing to bring this notice to his client clearly misdirected himself when he says there is no obligation on him to do so. He did not act in the best interest of his client.

[11] Having said that I must now consider whether the Applicant has made out a case in terms of Section 17(1) of the Superior Court Act 10 of 2013. The question to be answered is whether there are reasonable prospects of success of the appeal or there is some other compelling reason why the appeal should be head. The Applicant has made no attempt to address this Court on the requirements of Section 17 not only in his notice but nowhere in the heads of argument.

[12] I reiterate that the Applicant has long been aware of the Section 129 notice which as her attorney conceded was attached to the summons, secondly the Section 129 notice was served on her attorney Mr Ndobe. I see no justifiable reason why Mr Ndobe will hold on to that letter and not advise his client of the avenues open to her in order to avoid action being instituted against her.

[13] In the result I make the following order;

ORDER

- i) The Application for leave to appeal is dismissed.
- ii) The Applicant is ordered to pay costs of this application which costs shall include costs of Counsel.

DATED at JOHANNESBURG this the 8<sup>th</sup> day of NOVEMBER 2022.

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**M A MAKUME  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 07 NOVEMBER 2022

DATE OF JUDGMENT : 08 NOVEMBER 2022  
FOR APPLICANT : ATT S.M. NDOBE  
INSTRUCTED BY : NDOBE ATTORNEYS  
FOR RESPONDENT : ADV K. MEYER  
INSTRUCTED BY : HUCK, STUPEL & ROSS