

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 24054/20

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| <ol style="list-style-type: none">1. REPORTABLE: NO2. OF INTEREST TO OTHER JUDGES:
NO3. REVISED: NO <hr/> |
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In the matter between:

ABSA HOME LOANS

GUARANTEE COMPANY (RF) (PTY) LTD

First Plaintiff/Respondent

ABSA BANK LIMITED

Second Plaintiff/Respondent

And

GRAMONEY, PARMESAN THANGAVELOO

First Defendant/Applicant

GRAMONEY, SINDHA

Second Defendant/Applicant

JUDGMENT

Olivier, AJ:

Introduction & background facts

- [1] The Applicants/Defendants bring this application in terms of Rule 30 of the Uniform Rules of Court. Their complaint relates to the Plaintiffs' particulars of claim. For the sake of convenience, I refer to the parties as they are cited in the action.
- [2] It is unnecessary to deal extensively with the background facts.
- [3] The Defendants concluded a home loan agreement with Sanlam Home Loans 101 (Pty) Ltd ("Sanlam 101") on 25 April 2006.
- [4] The loan was guaranteed with an indemnity bond over the purchased property in favour of Sanlam Home Loan Guarantee Company (Pty) Ltd ("Sanlam Guarantee").
- [5] Sanlam 101 and Sanlam Guarantee had concluded an agreement on 5 July 2004 in terms of which Sanlam Guarantee would, from time to time, guarantee individual debtors' indebtedness to Sanlam 101 against registration and execution of an indemnity in favour of Sanlam Guarantee. This would entitle Sanlam 101 to call on Sanlam Guarantee to make payment of the Defendants' indebtedness in the event of breach, in accordance with the terms of the guarantee read with the loan agreement.

- [6] Sanlam 101 changed its name to ABSA Home Loans 101 (Pty) Ltd (“ABSA 101”) on 1 October 2010. On 9 June 2014 ABSA 101 transferred, sold, ceded and assigned its home loans business (including the loan agreement and indemnity bond of the Defendants) to ABSA Bank Limited (“ABSA) (the Second Plaintiff). Sanlam Guarantee subsequently changed its name to ABSA Home Loans Guarantee Company (RF) (Pty) Ltd (“ABSA Guarantee”) (the First Plaintiff).
- [7] At all material times ABSA managed, as agent, the home loans business of Sanlam 101, and then of its successor ABSA 101.
- [8] On 7 September 2020 the Plaintiffs issued summons against the Defendants, claiming the amount of R 1 377 057.65, together with interest thereon at a rate of 8.95% p.a. from 13 July 2020 to date of payment, as well as an order declaring the property specially executable. As at 12 July 2020 the Defendants were almost 53 months in arrears.
- [9] The Defendants’ primary complaint is that the Plaintiffs failed to attach to their particulars of claim, proof of their compliance with section 129 read with section 130 of the National Credit Act 35 of 2005 (“the Act”), specifically proof that the required notice had “in fact” been delivered to the Defendants. They made two further complaints in their notice. Although not formally withdrawn, they were not pursued with any vigour or enthusiasm during oral argument.
- [11] The Defendants seek an order setting aside the alleged irregular steps and ordering Plaintiffs to re-serve the Section 129 notice in compliance with the Act prior to taking any further steps in these proceedings. In their heads of argument, they phrase the relief differently: staying the legal proceedings in the main action until such time as Plaintiffs comply with the provisions of the Act; alternatively, the Defendants are afforded a period of 10 days from the

date of the order to exercise their rights as financially-distressed consumers in terms of section 129 of the Act.

Rule 30 of the Uniform Rules of Court

[12] Rule 30 is titled *Irregular proceedings*. Its purpose was explained recently by Sutherland DJP in *Hlophe v Freedom under Law*:

The Uniform Rules of Court prescribe the manner of presentation of documents that serve the process of court. Sometimes practitioners fail to satisfy these prescripts. Such failures are the subject matter of Rule 30 which deals with “irregular proceedings” and what an aggrieved party may do about the irregularities allegedly perpetrated by an adversary.¹

[13] Similarly, in *SA Metropolitan v Louw* it was stated that rule 30 is there to remove any hindrance to the future conduct of litigation caused by the non-observance of what the Rules of Court intended.² Rule 30, therefore, provides a mechanism for a party to proceedings who alleges that any other party has taken an irregular step, to apply to court to have the step set aside.

[14] There are requirements to meet for a successful application: the alleged irregular step by the respondent must be a step which advances the proceedings one stage nearer completion;³ the applicant must not him- or herself have taken a further step in the cause with knowledge of the irregularity; proof of prejudice to the applicant must be established;⁴ and subrule (1) does not apply to omissions, but only to positive steps or

¹ *Hlophe v Freedom under Law* 2022 (2) SA 523 (GJ) at para [11].

² *SA Metropolitan v Louw* 1981 (4) SA 329 O at 333G-H.

³ *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grögor* 1984 (1) SA 152 (W) at 153C.

⁴ *De Klerk v De Klerk* 1986 (4) SA 424 (W) at 426I.

proceedings.⁵ Importantly, rule 30 contemplates irregularities of form, not substance.⁶

Defendants' notices

[15] Defendants delivered a first Rule 30(1) notice on 22 October 2020, setting out four causes of complaint. It is unnecessary to deal with them. Three of these were answered by Plaintiffs amending their particulars of claim. Regarding the fourth cause, non-compliance with Section 129 of the Act, Plaintiffs informed the Defendants in their reply that this was a matter for trial, not a Rule 30 application.

[16] On 22 January 2021 the Defendants delivered three more notices: a second Rule 30(1) notice, a Rule 35(1) notice, and a Rule 35(6) notice. Plaintiffs' attorneys replied by letter dated 4 February 2021, in which they set out what they considered to be defects in the Defendants' various notices; they invited Defendants to withdraw the notices. Defendants subsequently withdrew the two Rule 35 notices (for discovery and inspection of documents respectively), but not the Rule 30(1) notice. The causes of complaint were not removed, according to the Defendants; consequently, they brought the present application proceedings.

[17] In the second Rule 30 notice Defendants identified three causes, two of which had already been raised in the first notice and remedied, according to the Plaintiffs:

[17.1.] First, that the standard mortgage conditions, in which Defendants "requested" ABSA Guarantee to guarantee their indebtedness to ABSA, are unsigned. Failure to attach the "signed requests" renders Plaintiffs' cause of

⁵ *Jyoti Structures Africa (Pty) Ltd v KRB Electrical Engineers; Masana Mavuthani Electrical & Plumbing Services (Pty) Ltd t/a KRB Masana* 2011 (3) SA 231 (GSJ) at 235.

⁶ *Singh v Vorkel* 1947 (3) SA 400 (C) at 406; *Odendaal v De Jager* 1961 (4) SA 307 (O) at 310F–G.

action unsustainable, according to Defendants. This was the same complaint made by Defendants in their first notice, which Plaintiffs addressed by an amendment of their particulars of claim. Should the Defendants dispute that the guarantee was indeed signed, they may raise this in their plea; it would be a matter for evidence at trial, say Plaintiffs.

[17.2.] Second, Plaintiffs have not attached the Power of Attorney in terms of which the Defendants authorised the execution and registration of the mortgage bond in favour of the First Plaintiff. In their founding affidavit to this application, Defendants specifically require Plaintiffs to furnish them with the requested Power of Attorney. Plaintiffs submit that this is not a primary fact of the sort that is required to be pleaded. It is evidence to show that the Defendants authorised registration of the mortgage bond in favour of ABSA Guarantee. Plaintiffs communicated to Defendants that the document will be discovered under Rule 35 once pleadings have closed. Also, if not discovered under Rule 35(1), Defendants can avail themselves of Rule 35(3) to call for the document.

[17.3.] Third, Defendants allege that the Plaintiffs have not complied with the Act. Specifically, the Defendants say that there is no proof that the section 129(1) notice was “in fact” delivered to them and that the documents annexed by the Plaintiffs to the particulars of claim — the track and trace reports of the Post Office – are merely “unconfirmed statements obtained from an electronic website platform”. They deny receiving the notices. The Defendants seem to contend that proof of actual delivery is required in terms of the Act.

[18] In their practice note and written heads of argument the Defendants only dealt with the third cause of complaint. The first two causes of complaint were also not addressed in their oral submissions and when asked by the Court whether they intended to deal with them, the Defendants did so only very briefly.

Defendants also did not consider the first and second causes of complaint in their replying affidavit. The relief they claim is focused specifically on Plaintiffs' alleged non-compliance with the Act and Defendants' rights in terms of the Act.

[19] At the start of his oral argument, Mr D'Oliveira submitted that he understood Defendants to rely only on the third cause of complaint in these proceedings; the first two complaints may be raised by them during the trial.

[20] This was neither disputed nor corrected by Mr Gramoney during his reply. Accordingly, I consider only the third cause of complaint.

Plaintiffs' submissions

[21] Plaintiffs argue that the points were erroneously taken. The application is fatally defective for two main reasons: first, the complaints relate to substance, not form; and second, the Defendants took a further step on 22 January when they delivered the rule 35 notices.

[22] Plaintiffs argue that Defendants do not distinguish properly between substantive and procedural matters, and also not between *facta probanda* and *facta probantia*. All of the causes of complaint, in particular the section 129(1) notice complaint, are complaints that the Plaintiffs failed to furnish evidence in support of their primary facts. A party is not required to plead every piece of evidence necessary to prove a fact; only every fact which is necessary to be proved.⁷

[23] I shall deal first with the submission that the Defendants had taken a further step.

⁷ See eg *Van der Merwe v Starbuck NO 2019 JDR 0408 (GP)*, a recent decision of this division, and authorities cited there.

Rule 35 notices

- [24] A Rule 30 application may be brought only where the Applicant, with knowledge of the irregularity, has not him- or herself taken a further step towards bringing the matter to conclusion,
- [25] Steps taken in preparation of trial, such as requesting particulars for trial, or serving a notice to produce, and convening and attending a pretrial conference, are further steps in the cause.⁸
- [26] Plaintiffs argue that the Defendants took a further step when they delivered the rule 35(1) and 35(6) notices on 22 January 2021, alongside the Rule 30(1) notice.
- [27] Rule 35(1) provides specifically that such notice shall not be given before close of pleadings, except with the leave of a Judge. Rule 35(6) applies only in instances where a party has already made discovery and the other party wants to inspect a disclosed document or tape recording.
- [28] The Rule 35 notices were patently premature, as pleadings had not yet closed.
- [29] Delivering Rule 35(1) and 35(6) notices would be a step in preparation of trial, as envisaged by Rule 30. Their delivery would therefore disqualify a party from availing themselves of Rule 30; in my view, it constitutes an irregular step itself.
- [30] Defendants must obviously have had knowledge of the Plaintiffs' alleged irregular step when they delivered the Rule 35 notices. That these notices

⁸ *Klein v Klein* 1993 (2) SA 648 (BG).

were delivered contemporaneously with the Rule 30 notice, and not at an earlier time, makes no difference.

[31] Plaintiffs' attorneys gave detailed responses to each of the notices, advising Defendants of their defects and possibly irregular steps. They afforded Defendants an opportunity to withdraw the Rule 35 notices, while reserving their right to approach the court regarding the irregularity of the notices. The Defendants acted sensibly and withdrew the Rule 35 notices.

[32] This application was launched on the same day as the notices' withdrawal – 22 March 2022. In my view the Rule 30 process is initiated by delivering the notice to the other party. It is at this first stage that Defendants should not have taken a further step. The subsequent withdrawal of the Rule 35 notices does not aid Defendants – they still took a further step.

[33] However, should I be wrong in finding that the Defendants had taken a further step, it is of no major consequence, considering my attitude towards the main cause of complaint, which I discuss in the next section.

Section 129 of the Act

[34] There are two aspects to this complaint: compliance with section 129 of the Act, and proof of compliance. Defendants allege that neither has been satisfied.

[35] The obligation imposed on the creditor is to draw the default to the notice of the consumer in writing, by making the document available to the consumer.⁹

[36] Defendants allege that there is no evidence confirming that the notices were in fact delivered to them. They say that the documents annexed to Plaintiffs'

⁹ See sections 129 & 65(2) of the Act.

particulars of claim are “unconfirmed statements obtained from an electronic website platform”.

[37] Plaintiffs submit that Defendants may plead that either Plaintiffs failed to comply with their obligations under sections 129 and 130 of the Act, or that Defendants did not receive the notices, or both. Evidence may be led at trial on these points. But, Plaintiffs contend, Defendants are not entitled to raise it as a defence to the action by way of a Rule 30 application.

[38] The issue was addressed fully in argument. It is unnecessary for me to make a finding. I consider the submissions only to determine if the complaint is one of substance, not form.

[39] Defendants rely solely on *Sebola v Standard Bank of South Africa Ltd*¹⁰ which preceded *Kubyana v Standard Bank of South Africa Ltd* by two years.¹¹ Both are judgments of the Constitutional Court. *Kubyana* reflects the current law. It sets out clearly what a credit provider needs to do to comply with section 129, in the case when delivery occurs through the postal service. As argued by Plaintiffs, they must show only that the notice was sent by prepaid registered post to the correct branch of the post office, that the post office sent a notification to the Defendants, that a registered article was available for their collection, and that the registered article reached the Defendants, which could be inferred from the post office having sent the notification.¹²

[40] Mhlantla AJ (as she then was) explains what happens once the credit provider has produced the track and trace report:

Once a credit provider has produced the track and trace report indicating that the s 129 notice was sent to the correct branch of the Post Office and has

¹⁰ 2012 (5) SA 142 (CC).

¹¹ 2014 (3) SA 56 (CC).

¹² *Ibid* at para [54].

shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand.¹³

[41] This means that the Defendants may lead evidence at trial to rebut the inference of delivery, by explaining why it is not reasonable to expect the notice to have reached their attention.

[42] Both points are ones of substance, not form. Therefore, neither compliance nor proof of compliance can be challenged under Rule 30. They are governed by legislation, and unrelated to “the manner of presentation of documents that serve the process of court.”¹⁴ It follows that the application must be dismissed on this ground. At trial, the parties will have an opportunity to argue the merits, should they so wish.

Costs

[43] It is trite that a court exercises its discretion when awarding costs. This discretion is wide, but not unlimited; it must be exercised judicially upon a consideration of all the facts. There are established principles which guide a court, but they are not hard and fast rules. As a rule of thumb, successful parties are entitled to their costs.¹⁵

¹³ *Ibid* at para [53].

¹⁴ See para [12] in the text above.

¹⁵ *Fripp v Gibbon & Co 1913 AD 354*, and more recently *Griessel NO v De Kock 2019 (5) SA 396 (SCA)* at para [24].

[44] Regrettably, it is becoming more prevalent for successful parties to ask for costs on an attorney-and-client scale, often without providing justification. Attorney-and-client costs are punitive in nature and should be the exception, not the rule. However, where the circumstances justify an attorney-and-client costs order, the court should grant it.

[45] Plaintiffs seek attorney-and-client costs for 3 reasons: the underlying contract provides for it; Defendants were pertinently informed of Plaintiffs' response to their Rule 30 notice in Plaintiffs' letter of 4 February 2021, in which the defects in their notices were pointed out; and Defendants have put Plaintiffs to the unnecessary trouble and expense of opposing this application.

[46] First Defendant, Mr Gramoney, represented Defendants, who are lay persons. They find themselves in a predicament. Unfortunately for them, their decision to bring this application was misguided. They persisted with the application notwithstanding Plaintiffs' attorneys' advice to them that a Rule 30 application was not the proper way to raise their objections.

[47] In terms of the agreement between the parties, Defendants are liable for any legal costs, including tracing costs and collection commission on an attorney-and-client scale, arising from default in terms of their obligations under the bond.

[48] The Plaintiffs are awarded costs on an attorney-and-client scale.

THE FOLLOWING ORDER ISSUES:

- a. The application is dismissed.
- b. Defendants to pay Plaintiffs' costs on an attorney-and-client scale.

M Olivier
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 16h00 on 16 August 2022.

Date of hearing: 25 May 2022

Date of judgment: 16 August 2022

On behalf of applicants/defendants: First Defendant in person

On behalf of respondents/plaintiffs: M De Oliveira

Instructed by: Tim du Toit Inc