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16/05/2018

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: A431/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	16/5/2018
DATE	MOKOSE SNI

In the matter between:

DIEDERIK KORSTEN DE BEER

Appellant

and

NEDBANK LIMITED

Respondent

JUDGMENT

MOKOSE AJ

[1] The appellant is appealing against the judgement of the Magistrate in which summary judgement was granted in favour of the respondent. The appeal is premised upon Sections 86, 129 and 130 of the National Credit Act ("the Act").¹

¹ Act 34 of 2005

- [2] In defence to a claim for payment of the balance on a home loan due to a default in monthly payments, the appellant was of the view that he was entitled to make application for debt review having received notice in terms of Section 129 of the Act.
- [3] The Magistrate was of the view that the appellant was not entitled to apply for debt review and granted summary judgment with a penalising cost order. This was premised on the view that the appellant was well aware of the provisions of Section 86(2) of the Act and that legal proceedings had commenced against him upon despatch of the letter in terms of Section 129 of the Act. The appellant however contends that the Magistrate erred in applying the old wording of Section 86(2) of the Act.
- [4] It is important to set out the facts in chronological order:
- (i) The letter in terms of Section 129 of the Act dated 3 November 2016 was received by the respondent by email on 4 November 2016;
 - (ii) The appellant contacted the respondent to negotiate a settlement of the matter;
 - (iii) The summons was issued on 5 December 2016;
 - (iv) The appellant applied for debt counselling on 8 December 2016 on which day the respondent was sent a 17.1 notice;
 - (v) Summons was served on the appellant on 19 December 2016;
 - (vi) An application for summary judgment was served on the appellant's attorneys of record on 11 January 2017;
 - (viii) Summary judgment was granted in favour of the respondent on 11 May 2017.

THE LAW

- [5] Section 86(2) of the Act, as amended, provides that an application in terms of this section (for debt review) may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that agreement has proceeded to take the steps contemplated in Section 130 of the Act to enforce that agreement.
- [6] Section 129 of the Act deals with the procedure to be followed before debt enforcement. It serves three purposes:
- (i) it brings to the attention of the consumer the default status of his credit agreement;
 - (ii) it provides the consumer with an opportunity to rectify the default status of the credit agreement to avoid legal action being instituted; and
 - (iii) it gives the credit provider the ability to institute legal proceedings against the consumer who is in default of the credit agreement.
- [7] Section 130 of the Act deals with the procedure to be followed in court. It provides that two requirements that have to be met before a credit provider may approach the court are:
- (i) that at least 10 days must have lapsed since the notice in terms of Section 129 has been sent;
 - (ii) that the consumer has not responded to the notice or responded thereto by rejecting the credit provider's proposals.

[8] Section 86(2) of the Act was amended and promulgated with effect from 13 March 2015. Prior to March 2015 the section read as follows:

“An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in Section 129 to enforce that agreement.”

[9] The only difference between the wording of the Act then and now are the reference of Section 129 (then) and Section 130 (now).

THE MERITS

[10] The appellant submits that the Magistrate erred in finding that the respondent had already commenced legal proceedings by the despatch of a notice in terms of Section 129 of the Act and as such, the appellant is barred from applying for debt review.

[11] Section 129 of the Act is for the benefit of the consumer who is afforded an opportunity by the Act to embark on a process envisaged by the Act to either seek debt counselling or alternative dispute resolution. Section 130 of the Act regulates debt procedures in court. It ensures that any shortcoming in the pre-summons procedures are made good.

[12] The respondent averred that it had complied with Section 129(1)(a) of the Act but that the appellant had failed to respond prior to the institution of the proceedings. As

such, it was entitled to proceed in terms of Section 130 of the Act. Furthermore, it was entitled to issue summons which then had the effect of precluding the appellant from applying for debt counselling.

[13] The appellant, on the other hand, averred that he did respond to the notice in terms of the said section by making proposals to bring the account up to date but that such proposals were not accepted by the respondent. Thereafter he went through the motions of applying for debt review which application was made bona fide.

[14] The issue for the court to determine is whether the appellant was entitled to apply for debt review when the letter in terms of Section 129 had been despatched and summons subsequently issued. The matter I am specifically called upon to determine is the meaning of the words "*commence any legal proceedings to enforce the agreement*".

[15] Section 86(2) of the Act provides that an application may not be made for debt review in respect of a particular credit agreement if at the time of the application the credit provider under the credit agreement had proceeded to take steps contemplated in terms of Section 130 of the Act. The respondent referred the court to the case of **Nedbank Limited v National Credit Regulator 2011 (3) SA 581** where Malan JA at para [14] said the following:

"I do not agree with these conclusions. One of the objects of the NCA is the provision of a consistent and accessible system of consensual dispute resolution. A notice in terms of Section 129(1)(a), however, does not exclude the resolution of a dispute relating to a specific credit agreement in this manner. The purpose of a

Section 129(1)(a) notice is the resolution of a dispute and the bringing up to date of payments under a specific credit agreement. While it is a step prior to the commencement of legal proceedings it is also the first step the credit provider has proceeded to take.....to enforce that agreement (S86(2)). It does not exclude a debt review save in so far as it relates to the particular credit agreement under consideration. Nor does it exclude a general debt review pursuant to SS83 and 85."

[16] It is noted that the summary judgment was granted by the Magistrate on 11 May 2017, long after the amendment to Section 86(2) had been promulgated. The Magistrate said the following in her judgment:

"It is trite that legal proceedings against any defendant commences on dispatch of the Section 129 letter against the said defendant. It is not in dispute that in this matter, the applicant (Plaintiff) has already commenced with legal steps against the respondent (Defendant). Further, the applicant had rejected the respondent's application for debt review due to this reason and already informed the respondent and debt counsellor of this rejection. In light hereof, the respondent is barred from using his application for debt review or communication with the attorney as a defence in this summary judgment against him."²

[17] Counsel for the appellant brought to the court's attention the matter of *Nedbank v Mokhonoana* 2010 (5) SA 551 at para [14] where Ellis AJ said the following:

"I agree with the latter submission. Commencement of legal proceedings has a distinct and far-reaching effect on the rights of a consumer. In terms of Section 86(2) of the Act a consumer is precluded from applying to a debt counsellor to have him or her declared over-indebted after the commencement of the proceedings. Legal

² Appeal Bundle page 101

uncertainty will abound if the consumer's ability to apply for debt review is determined by the date of issue of the summons of which he or she may not be aware (as opposed to the date of service thereof). I therefore find that as a matter of law that legal proceedings for purposes of Section 129(1)(b) of the Act is commenced not by the issue of summons but by the service thereof."

[18] Counsel for the respondent was inclined to follow the unanimous decision of the Full Court of this court in the unreported matter of S E Jansen van Vuuren v Standard Bank of South Africa dated 19 May 2015 where Potterill J ruled that *"the Section 129 notice delivered....thus constituted a step contemplated in Section 129 of the National Credit Act and this credit agreement was thus excluded from any debt review process."*³

[19] Potterill J at paragraph [25] confirmed that the court had been furnished with Government Notice 35327 which needed no further address. Government Notice 35327 deals with Debt Counselling Regulations. The amendment to the Act (particularly Section 86(2)) was promulgated with effect from 13 March 2015. There is no mention in the Full Court judgment of this amendment being applicable to the matter and having been taken into account despite the matter having been heard on 13 May 2015 and judgment having been handed down on 19 May 2015. For that reason, the matter on hand is distinguishable from the Jansen van Vuuren matter (supra).

[20] Section 3 of the Act deals with the purpose of the Act which is *inter alia*, to promote and advance the social and economic welfare of South Africans, promote a fair,

³ Paragraph [23]

transparent, efficient and accessible credit market and industry and to protect consumers by promoting equity in the credit market by balancing the respective rights and responsibilities of the credit providers and consumers.

[21] I am inclined to follow the judgment of Ellis AJ in the Mokhonoana matter (supra). I am of the view that the purpose of the Act as stated in Section 3 is to promote the fair and transparent treatment of both consumers and debt providers. I am also of the view that the intention of the legislature was not to bar the consumer from applying for debt review once the summons have been issued. The intention of the Act and Section 129 in particular, is the following:

- (i) to bring to the attention of the consumer the default status of his credit agreement;
- (ii) to provide the consumer with an opportunity to rectify the default status of the credit agreement to avoid legal action being instituted; and
- (iii) to give the credit provider the ability to institute legal proceedings against the consumer who is in default of the credit agreement.


[23] As such, I am of the view that the words "*commence any legal proceedings to enforce the agreement*" does not mean the issuing of summons but means the date when the summons were brought to the attention of the consumer being the date of service of the summons.

[24] The appellant further appealed in terms of Section 85 of the Act for this court to exercise its discretion in terms of the Act and declare the appellant over-indebted and make an order contemplated in Section 87 to relieve his over-indebtedness. In light

of the fact that the court upholds the appeal, it declines to make an order to declare the appellant over-indebted.

[25] In the premises, I make the following order:

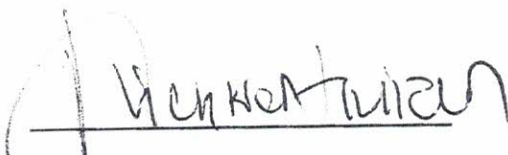
- (i) the appeal is upheld;
- (ii) the order of the court a quo is substituted with the following:-
 - (a) The defendant is granted leave to defend the action.
 - (b) Costs to be costs in the cause.



MOKOSE AJ

Acting Judge of the High
Court of South Africa
Gauteng Division,
PRETORIA

I agree and is so ordered



JANSE VAN NIEUWENHUIZEN J

Judge of the High Court of South
Africa Gauteng Division, Pretoria

Adv AJ Le Grange instructed by

Theron Jordaan & Smit Inc

For the Respondent:

Adv GF Ackermann instructed by

Meyer, Van Sittert & Kropman Attorneys

Date of hearing: 17 April 2018

Date of judgment: 16 May 2018 .