# REPUBLIC OF SOUTH AFRICA

## IN THE HIGH COURT OF SOUTH AFRICA
## GAUTENG DIVISION, PRETORIA

CASE NO: 28722/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

10/05/2018
.....
DATE

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SIGNATURE

10/5/18

In the matter between:

**FIRSTRAND BANK LIMITED** — **PLAINTIFF**

**AND**

**SIFISO WELCOME XABA** — **1ST DEFENDANT**

**LINDIWE MARTHA XABA** — **2ND DEFENDANT**

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## JUDGMENT

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**HEYSTEK, AJ**

[1] It is common cause that the defendants concluded a home loan agreement with the plaintiff. Also, that pursuant thereto a bond was registered in favour of the plaintiff as continuing security for the total amount owing from time to time by the defendants to the plaintiff in respect of all amounts advanced.

[2] It is further common cause that in breach of the provisions of the home loan agreement, as read with the bond, the defendants failed to pay all monthly instalments on due date.

[3] The plaintiff addressed notices to the defendants in terms of s 129(1)(a) of the National Credit Act, Act No. 34 of 2005 ("the NCA"). The notices were sent by registered post to both the *domicilium* and residential address of the defendants. Shortly after the commencement of the trial the parties informed the Court that they have reached an agreement to the effect that the facts as they appear on the relevant postal documentation are correct. Therefore, that the notices were sent to the addresses reflected on the notices by registered mail and that they were sent to the defendants as allocated on the relevant track reports. The relevant tracking and tracing reports show the relevant addresses of the addressees together with the corresponding item number (being the registered letter). They show receipt by the original Post Office on 17 March 2016, as well as the fact that they were scanned last by the Edleen branch on 31 March 2016. On the same day the 'First Notification' was sent to the recipient (i.e. the defendants). There is no further indication as to what happened thereafter, particularly as to whether the item was collected, or else whether it had been returned.

[4] The Certificate of Balance singed by the Manager – Foreclosures of the plaintiff recorded an outstanding amount as at 15 March 2016 at R973 054.15, with interests accruing at the variable rate of 11.35% per annum, calculated daily and compounded monthly from 1 March 2016. This is accordingly the sum which the plaintiff alleged was due and outstanding when it issued its Summons on 11 April 2016. It was further alleged by the plaintiff in paragraph

8.4. whether the defendants remedied their default, by paying the plaintiff "*all amounts that are overdue*", together with the plaintiff's prescribed administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

**SECTION 129(1)(a) NOTICE**

[9] As I have stated the tracking report provide proof that notification of the item had been given to the defendants on 31 March 2016. No further evidence was provided to the Court. The defendants themselves also did not testify to refute delivery of the statutory notice.

[10] Mr Nxumalo appearing for the defendants criticised the fact that the notice was only sent once. He submitted that delivery of the notice is vital and that the plaintiff must prove that a reasonable debtor would have had sight thereof.

[11] The ratio in the case of *Khubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) at par 53 is apposite to the present matter, where it was held that: -

"*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 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. Put differently, even if there is evidence indicating that the s 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour.*"

[12] The parties did not reach the further stages of the enquiry as set out in the above judgment. As I have said, no further evidence was lead other than that notification of the registered letter (i.e. the statutory notice) was sent to the defendants. Importantly, the defendants did not rebut the inference that the plaintiff has complied with its allegations under the NCA to effect delivery.

[13] Sub-s (7) was added by s. 32 (c) of Act 19 of 2014 (with effect from 13 March 2015). It provides that Proof of delivery contemplated in ss (5) is satisfied by-

(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

(b) the signature or identifying mark of the recipient contemplated in ss (5) (b) [which is not relevant for present purposes).

[14] There has been proof that the notice had been delivered to the relevant post office. I accordingly find that the plaintiff did comply with the provisions of s 129(1) of the NCA.

**INSTITUTION OF THE PROCEEDINGS**

[15] As explained by Jafta J in the *Khubyana* case at par 69 et seq., ss 129 and 130 suspend the credit provider's rights under the credit agreement until certain steps have been taken. Where the consumer does not take up the opportunity to refer the dispute to one of the bodies listed in s 129(1)(a), the credit provider becomes free to enforce the credit agreement in the ordinary courts. When a credit provider seeks to enforce the agreement by way of litigation, it must first show compliance with s 130, which, by extension, refers back to s 129 (*ibid* at par 73). There is accordingly a strong link between ss 129 and 130, hence they are required to be read together for a proper understanding of their scheme (per Jafta J at par 69).

[16] In terms of s 130(1)(a) at least 20 days must elapse since the credit provider delivered the notice to the consumer before a credit provider "*my approach*" the Court for an order to enforce a credit agreement. On the facts, as I have found below, the expiry of the 20 days' period in which the defendants had to

be in default before the plaintiff was entitled to approach the court, is not really in dispute.

[17] In addition, at least 10 business days must have elapsed since the plaintiff delivered the notices contemplated in s 129(1) before approaching the court for the purpose to enforce the credit agreement.

[18] It is common cause that the ten-day period did not elapse if the relevant date is the date of issue of Summons, which in this case occurred on 11 April 2016 (whilst the first notifications were sent to the defendants' residential and *domicilium* addresses on 31 March 2016).

[19] As far as enforcement of the agreement is concerned, s 129(1)(b) refers to the 'commencement of any legal proceedings', whilst s 130(1) refers to the right of the credit provider to "*approach the court for an order to enforce a credit agreement*". The Shorter Oxford English Dictionary defines "*approach*" *inter alia* as: "*Come near in space; move towards; come into the presence of (someone); seek a meeting or relationship with...*" Read in isolation, the wording utilised by the legislature in enacting s 130(1) is somewhat less stringent and ordinarily would include a date much later in the proceedings (such as when the matter is for example heard before court). Reading the two sub-sections in context, however, and seeking to achieve a purposive construction, keeping in mind the purpose of Act which is *inter alia* aimed at "*a consistent and harmonised system of debt restructuring, enforcement and judgment*" (viz. s 3(h)), it seems to me that the legislature did not thereby intend to refer to a date that the debtor in all likelihood may very well be unaware of, namely the date of the institution of the proceedings. The date when the debtor will be alerted to the action and the date that he is informed of his rights under the NCA is the date that summons is served. I am aware that the NCA requires strict compliance. On this interpretation, however, the debtor is allowed the full benefit of the 10-day period in order to regulate his or her affairs.

[20] The plaintiff relies on the decision in the matter of *Nedbank Ltd vs Mokhonoana* (2010 (5) SA 551 (GNP), a case from this division, where it was

held that legal proceedings for purposes of s 129(1)(b) of the NCA commenced not by the issue of a Summons but by the service thereof. Therefore, as was held by Ellis AJ, once it is established that 10 business days have elapsed between delivery of the notice and service of summons, which is what happened in the present matter, then the process cannot be faulted and the plaintiff's entitled to its judgment. In that case it was held [at paras par 13 - 14] that service of summons rather than the issue thereof should be determinative.

Ellis AJ proceeded to state the following at par 14:

"*Commencement of legal proceedings has a distinct and far-reaching effect on the rights of a consumer. In terms of s 86(2) of the Act, a consumer is precluded from applying to a debt counsellor to have him or herself declared overindebted after the commencement of legal proceedings. Legal 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 as a matter of law that legal proceedings for purposes of s 129(1)(b) of the Act are commenced not by the issue of a summons, but by the service thereof.*"

[21] In *Mills v StarwellL Finance (Pty) Ltd* 1981 (3) SA 84 (N) it was held that the time of service of summons is the time as at which to determine whether the court before which the defendant is summoned is a court of competent jurisdiction. The date of service of summons (and not the date of issue thereof) was therefore held to be the date when the incidence of jurisdiction is determined in terms of s 28 (1) *(a)* of Act 32 of 1944 (in respect of whether the defendant was employed within the jurisdiction).

[22] For purposes of prescription for example, the mere issue of summons has no effect on prescription, and service is required (per Schreiner ACJ in the case of *Kleynhans v Yorkshire Insurance Co. Ltd* 1957 (3) SA 549 (AD) at 549E, as well as the findings by Steyn JA at 551A-B).

[23] As stated by Mhlantla AJ in the ***Kubyana*** case at par 18:

*"It is well established that statutes must be interpreted with due regard to their purpose and within their context. This general principle is buttressed by s 2(1) of the Act, which expressly requires a purposive approach to the statute's construction. Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament."*

It was held further that *"the correct interpretation of s 129 is one that strikes an appropriate balance between the competing interests of both parties to a credit agreement"* (per Mhlantla AJ at par 21).

[24] Given the different wording employed in the NCA regarding this particular requirement, and attempting to apply the relevant provisions of the NCA holistically and in striking a balance between the competing interests of both parties, I am of the opinion that the correct date for purposes of s 130(1) is not the date of the issue of legal proceedings, but a later date, which for present purposes I accept to be the date of service of the Summons.

[25] This is also the view ascribed to by the learned authors of the *Guide to the National Credit Act* at 12-18 (fn 97).

[26] I accordingly find that the plaintiff has complied with the requirements set out in s 130(1)(a).

**DEFAULT**

[27] Under this heading I address both the factual requirement that defendants must have been in default under the credit agreement for at least 20 days before the plaintiff was entitled to approach the court (viz. s 130(1) of the NCA), as well as the question whether the defendants succeeded to establish that the agreement has been reinstated as contemplated by s 129(3) of the NCA.

Default of at least 20 days: factual enquiry

[28] The statements issued to the defendants over the period October 2015 until 10 September 2016 show that the defendants have made irregular payments in respect of their monthly instalments due to the plaintiff.

[29] The Home Loan Statement as at 19 March 2016 therefore clearly indicated the "*Overdue Amount*" of R22 064.87. The statement runs for the period 27 September 2015 until 10 March 2016, covering at least 5 months transactions. The basic repayment (i.e. the instalment) is reflected to be the sum of R11 081.92. Instead of making full and punctual payments, the statement reflects irregular payments. It appears, for example, that no payments were made in November 2015, January 2016 and March 2016, whilst roughly double the instalments were paid over several days during December 2015. Mr Gomes in his evidence explained that these payments simply did not result in bringing the defendants outstanding debt up to date. As at 19 March 2016 the aforementioned amount of R22 064.87 therefore remained overdue. Mr Gomes testified that his is equivalent to two months instalments. There was some cross-examination directed on this aspect with defendants' counsel seeking to enquire whether Mr Gomes can identify the 2 months that the defendants had been in arrears. I am satisfied however that Mr Gomes merely sought to convey that the total overdue amount is roughly equivalent to two months instalments and that he never attempted to limit the plaintiff's case to any two particular months. It is this same amount that is reflected on the s 129(1) notices.

[30] I am satisfied that, on the evidence, plaintiff has shown that by the time Summons was issued and served in April 2016, defendants were in default and had been in default under the credit agreement for 20 days. This is even more clearly established as at the time when the plaintiff seeks an order to enforce the credit agreement, namely at the time of the current proceedings on 2 – 3 May 2018, since it is common cause that no further payments have been made since the last payment on 4 July 2016.

[31] I am therefore satisfied that the requirements of s 130(1(a) have been met and that the plaintiff is therefore entitled to approach the Court for the orders it seek.

Reinstatement?

[32] The payments by the defendants after Summons are common cause. The issue, however, is whether this resulted in payment of "*all amounts that are overdue*" as contemplated in s 129(3).

[33] The evidence, however, show that defendants' indebtedness also prevailed notwithstanding the payment made by them on 5 May 2016, 23 June 2016 and 4 July 2016. These payments are all reflected on the bank statement as at 10 September 2016. The overdue amount as reflected on the statement indicated that, despite the payments, a sum of R39 898.39 remained overdue.

[34] During his testimony in court Mr. Gomes made the calculations on a month-to-month basis by taking the previous statement's overdue amount of R22 064.89 as at 19 March 2016; by adding each monthly instalment as it become due thereafter on the 1st day of the respective months; by adding the interest component; and by subtracting the payments if and when made. He also discarded the legal fees as set out therein. He demonstrated through this exercise that the defendants' account remained overdue for each and every month of the relevant exercise (ie from April 2016 until 10 September 2016 when the overdue amount reached the total of R 39 898.39).

[35] At no stage therefore during this period did the defendants successfully pay up the full overdue amount.

[36] The defendants cannot therefore establish that they have remedied their default and that the loan agreement had been reinstated. I also hold that the defendants carried the onus to persuade the Court that the agreement had in fact been reinstated. I hold that they did not establish their defence, which is in the nature of a special defence, upon a preponderance of probabilities and that it cannot succeed (see *Pillay v Krishna* 1946 AD 946 at 952).

[37] The "Collection Information" printouts from the plaintiff's system, produced on 24 March 2016, 11 May 2016, 24 May 2016, 27 June 2016 and 12 August 2016 respectively, also dealt with and confirmed in the evidence of Mr. Gomes, provide further irrefutable proof that the defendants account throughout remained due (i.e. they reflect the outstanding payments on the account at the date of the respective "snapshots" of the defendants account with the bank).

**CONCLUSION**

[38] The plaintiff accordingly succeeded in its claim and is entitled to an order for payment of the capital sum due together with interest and costs. It is common cause that in terms of the loan agreement as read with the bond, plaintiff is entitled upon the default of the defendants to claim the full outstanding balance. In terms of clause 2.16.2 of the loan agreement the defendants are liable for costs on the attorney and client scale.

[39] The Certificate of Balance which contains the debit balance as on 2 August 2017 takes into account the monies paid after Summons, as well as the applicable rate changes effected until that date. I am at the mind to grant the order on the amounts as reflected herein and which had been confirmed by the evidence of Mr. Gomes.

[40] The plaintiff handed up a draft order that is in conformity to the above certificate.

[41] According I grant the following order:

**It is ordered that:**

1. The first and second defendants shall jointly and severally:

    1.1. pay the plaintiff R1,167,347.93 (one million one hundred and sixty seven thousand three hundred and forty seven rand and ninety three cents);

1.2. pay the plaintiff interest on the sum of R1,167,347.93 calculated at the variable rate of 1.1% above prime from 1 March 2018 to date of payment; and

1.3. pay the plaintiff's costs of suit to date on the attorney and client scale.

2. The plaintiff's prayer 3 for an order declaring ERF 156 REMBRANDT PARK TOWNSHIP, REGISTRATION DIVISION I.R., PROVINCE OF GAUTENG specially executable is postponed *sine die.*

A M HEYSTEK
ACTING JUDGE OF HE HIGH COURT
GAUTENG DIVISION, PRETORIA

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| COUNSEL FOR APPLICANT | ADVOCATE R H WILSON |
| APPLICANT'S ATTORNEYS | |
| COUNSEL FOR RESPONDENT | ADVOCATE S NXUMALO |
| RESPONDENT'S ATTORNEYS | |
| DATE OF HEARING | 2 - 3 MAY 2018 |
| DATE OF JUDGMENT | 10 MAY 2018 |