REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO. EL 298/11

ECD 298/11

In the matter between

QAQAMBILE LIQAQAMBILE DWENGA	Applicant
and	
FIRST RAND BANK LIMITED	First Respondent
THE SHERIFF OF THE ABOVE HONOURABLE COURT	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent
CARL ARNOLD THEODORE BURGER	Fourth Respondent

JUDGMENT

HARTLE, J:

[1] The applicant seeks an order rescinding a default judgment granted against him under case number EL 140/09, ECD 440/09. The claim in the action arises upon his indebtedness to the first respondent under a mortgage loan.

[2] He seeks a further order setting aside the sale in execution in respect of the property which the fourth respondent purchased at a public auction on 11 February 2011. It is his primary residence and the subject matter of the mortgage in favour of the first respondent.

[3] Registration of transfer of the property to the fourth respondent is in process. Although the applicant did not seek any order staying transfer pending the final disposal of the present application, the first respondent has "*out of respect for the authority of (*this*) Court*" instructed its attorneys not to proceed with the registration in the meantime.

[4] It appears from annexure "C" to the applicant's founding affidavit that default judgment was granted by the Registrar, Grahamstown, on 7 July 2009. The full order reads as follows:

> "Having read the Plaintiff's Summons, the Written Application for Default Judgment and other documents[1] filed of record

1 It is not apparent what these documents were.

AND Defendant being in default

IT IS ORDERED:

1. That judgment by Default be and is hereby granted in favour of the Plaintiff against the Defendant for:

    a) Payment of the amount of R858 554.74 (EIGHT HUNDRED AND FIFTY EIGHT THOUSAND RAND FIVE HUNDRED AND FIFTY FOUR RAND AND SEVENTY FOUR CENTS);

    b) payment of interest on the capital sum aforesaid at the rate 14.45% per annum, calculated and compounded monthly in arrears from 1 January 2009, to date of payment, both dates inclusive (sic);

2. An Order declaring the property known as Erf 20495 East London, Buffalo City Local Municipality, Division of East London, Province of the Eastern Cape, in extent 1000 square metres, held under Deed of Transfer No. T3157/2007 to be specially executable;

3. Costs of suit on the scale as between Attorney and Client, including collection commission as provided for in the bond, to be taxed."

[5] The amount for which judgment was entered constituted the full balance owing under the mortgage loan – ostensibly as at 5 January 2009[2] - as opposed to instalments due but unpaid.

[6] In this regard, clause 16 of the bond stipulates that if the applicant fails to pay any amount due in terms of the bond, then, at the option of the first respondent,

2 This is the amount which the applicant owed according to the certificate of balance attached to the summons, marked annexure "B".

all amounts whatsoever owing to it by him "*shall forthwith be payable in full*" and that it would thereupon be entitled - among the exercise of other rights available to it in terms of the bond - to institute proceedings for the recovery thereof and for an order declaring the property executable. According to the brief legend referred to in the simple summons, the amount was claimed on the basis that it represented "… the principal debt together with finance charges thereon… due and owing by the Defendant to the Plaintiff as at 5 January 2009 under Mortgage Bond No. B 4135/2007… which amount (became) payable in terms of Clause 16 of the said Bond by reason of the Defendant's failure to pay either punctually or at all the instalments that fell due under the said bond, notwithstanding demand."

[7] What "*demand*" had preceded does not appear from the summons. The first respondent put up a copy of a notice, annexure "RF 6" to its answering affidavit, which it contextualized as its purported compliance with the provisions of section 129(1)(a) of the National Credit Act, No 34 of 2005 ("NCA") at the time, but this document could not have been included as an annexure to the summons. The process itself refers only to annexures "A" and "B", the mortgage bond and certificate of balance respectively[3].

[8] The applicant alleges that he only became aware of the judgment on or about 14 February 2011 when he was so advised by his attorneys. Neither had he before had sight of the summons. A few days earlier he was confronted by the fourth respondent who informed him of his acquisition of the property at the sale in

3 This conclusion is consistent with the averment in the first respondent's answering affidavit that whereas the applicant had put up a copy of the summons "*without the annexures*", it was annexing "*RF 1*", a copy of the summons "*including the annexures thereto*'. Those annexures, in turn, are limited to the mortgage bond and certificate of balance aforesaid.

execution. A timely mandate to his attorneys led to an investigation of the circumstances under which the judgment had been granted, and a copy of the court file was produced. Despite the summons not having come to his notice before, he accepts, however, that service thereof was properly effected in accordance with the rules of this court at his elected *domicilium* referred to in the mortgage agreement. According to the third respondent's return, it was affixed to the door of the applicant's property on 21 February 2009.

[9] The primary basis upon which the applicant contends he is entitled to the relief sought is that, as at the dates when both the summons was served and judgment was entered by the Registrar respectively, he was not in arrears with his bond. On the contrary, he was in credit. He explains that due to the tentative nature of his business – he leases machinery and undertakes building construction to provincial government departments which invariably fail to pay him promptly - a custom had developed whereby the first respondent would overlook his tardy payment of instalments under the bond. The account would be in arrears for a short period only, because he would redress the situation with a "*lump sum payment*" as soon as he, in turn, received payments from the recalcitrant government departments. Mostly these payments would bring the bond account into credit.

[10] At the beginning of February 2009, he received a call from one *Michelle*, an employee of the first respondent, to advise him that his bond was in arrears in the sum of R63 218.48. No mention was made that legal proceedings had been instituted or that the first respondent had elected at its option to foreclose the

mortgage[4]. He informed her - as was now the pattern - that he would make a payment into the account as soon as he was in receipt of funds. On 18 February 2009 – and whilst he was working away in Kokstad – the promised funds materialized. He immediately paid a sum of R72 482.33 into the account. Therefore, by 21 February 2009 when the summons was served, the account would have been in credit in the sum of R9 263.85. (I interpose to mention that this is not in dispute)[5]. This payment was made as per his separate arrangement with *Michelle* and was not foreshadowed by any formal demand. On the contrary, he says that he wished by the fulfillment of his undertaking to the first respondent to avert litigation.

[11] In addition, a further amount of R30 000.00 was paid into the bond account on 30 June 2009. The effect of this was that on 7 July 2009, when the Registrar granted default judgment, the account would again have been in credit in the sum of R12 694.92. (This figure is in dispute but for the reasons which follow this is not of any consequence)[6].

[12] A further ground on which he relies for the rescission is an absence of a notice in terms of section 129(1) of the NCA preceding the issue of summons. He attached two such notices which were indeed addressed to him at "*P O Box 604, East London, 5200*", the first of which followed after the issue of the summons

4 The summons forming the subject matter of the judgment was ostensibly signed by the issuing attorney on 16 February 2009, and issued by the Registrar, East London, on 17 February 2009.

5 What the first respondent disputes, however, is that the amount paid constituted full payment of the amount claimed in the summons.

6 The first respondent contends that "*the bond account went into arrears* (immediately after the payment)*"* and that, as at 6 July 2009, there was a "*short-payment*" of R2 700.00

(dated 15 April 2009), and the second after the date of the default judgment (dated 12 August 2009). He alleges that on neither of these dates either was he in arrears with his bond account[7]. Being unaware that judgment was granted against him, he continued in 2010 – against odds and in an embattled financial year – to make payment into the account. This period was characterized by frequent contact from the first respondent's call department to remind him of his arrears situation. By the end of the year he had managed to reduce the arrears to a sum of R47 286.54, but was not overly anxious about this because a large payment due to him in the sum of R682 068.38 was anticipated in January 2011. Therefore, when one *Delicia* of the first respondent's Cape Town office contacted him on 13 December 2010 regarding the state of his account and warned him that the property would be sold in execution, he was not concerned about her threat. This was because he was confident that he would be able to bring up the arrears upon receipt of the funds due to him. He had no inkling that judgment had in the meantime being entered against him.

[13] The first respondent opposes the application. It submits that the applicant - despite his protestations to the contrary - was aware that judgment had been taken against him and that it was against this background that all subsequent discussions concerning the payment of the arrears had taken place. Furthermore, he had over a period since the grant of the mortgage loan regularly defaulted on the periodic instalments and it was entitled in the circumstances to invoke the acceleration clause and claim the full amount outstanding in terms of the bond agreement. Once it had done so (I understand this to mean a reference to foreclosing on the bond), any payments received from him were relevant only to "*indulgences*"

7 The first respondent disputes this, but on the view which I take below nothing turns on this.

shown by it to him. Therefore, his "*reliance*" on arrangements made with it from time to time was misplaced. This is because clause 19 of the bond clearly provides that any failure by it to exercise its rights in terms of the agreement and any indulgence allowed to him could not have operated as a "*waiver or abandonment*" by it of its rights in terms thereof.

[14] It referred to an extract from its computer records relating to calls made to and received from the applicant which confirm the haphazard maintenance of his account right up until 10 February 2011, but it deals only briefly with the situation which pertained prior to the institution of the action[8]. (The records incidentally give credence to the applicant's version that he kept the first respondent abreast of his financial constraints and often delayed payment subject to the availability of funds through his business pursuits, albeit that most of the calls in this connection were at the bank's initiative rather than his own).

[15] In addition it refutes that the issue of summons was not preceded by a valid section 129(1) notice. In substantiation of its denial in this regard, it attached to its answering affidavit a notice dated 26 November 2008, addressed to the applicant at "*9 Culloden Road Street* (sic)*, Haven Hills, East London, 5200*",[9] the contents of which are set out below:

8 In this regard the first respondent contends that the applicant had "*repeatedly*" been in default after the bond was registered, going "*in and out of arrears on several occasions during 2007, 2008 and 2009*". Further, whilst he had made payment arrangements with it, he had not adhered thereto, resulting in the account being in arrears in the sum of R53 333.03 as at the date of the certificate of balance.

9 This was the *domicilium* address selected by the applicant in the bond.

"**NOTICE IN TERMS OF SECTION 129(1) OF THE NATIONAL CREDIT ACT 34 OF 2005"**

Home Loan Account Account No.	3-000-011-235-815
Loan Amount	R800,000.00
Current Outstanding Balance	R837,635.89
Amount in arrears	R32,484.94

You are hereby advised that your Home Loan account is in arrears in the amount as set out above and as a result thereof, your access to credit with the Bank has been suspended. Your attention is drawn to the fact that interest **14.95%** nominal per annum and compounded monthly ll be charged on the daily outstanding balance. You are encouraged to immediately pay the arrears so as not to tarnish your credit record.

Please take note that should you not rectify the arrear status to your account within 20 business days from date delivery hereof, the Bank will notify the Credit Bereau of such default. Maintaining a healthy credit record is important for your future credit requirements with the Bank or any other institution and therefore we encourage you to respond to this notice as a matter of urgency.

In terms of the National Credit Act, 34 of 2005, you have the right to approach a debt counsellor, however, should you choose to exercise this right you are not to incur any further charges under any credit facility nor enter into any further credit agreement other than a consolidation agreement or an agreement rearranging your obligations to the Bank.

In the event that you are experiencing financial difficulties in maintaining your repayments or should you have any queries regarding the arrears on your Home Loan account, please do not hesitate to call **Sizwe Ntshalintshali 011 – 352 3845**.

Should you fail to reply to this notice or to contact a debt counselor within 10 business days from date of delivery hereof, the Bank will institute legal proceedings for the recovery of the arrears." (Sic)

[16] The letter is signed by the "*Head of Arrears, FNB Shared Services – Credit Risk Management*". It is apparent from a sticker affixed to the copy that it was posted to the applicant's *domicilium* by registered mail. A receipt number is endorsed on the sticker. I need mention that the applicant alleges that he first had

sight of it only upon reading the first respondent's answering affidavit, but I will assume for purposes of deciding this matter that the notice was properly dispatched to him at his elected *domicilium*[10]. It is the contents of the notice and its efficacy in the circumstances which I have a problem with. I return to deal with this aspect below.

[17] A court is entitled to set aside a judgment granted in default of appearance "*upon good cause shown*".

[18] The requirements for such an application are:

(a) the applicant must give a reasonable explanation for his default,

(b) his application must be *bona fide* and not made with the intention of delaying the plaintiff's claim; and

(c) he must show that he has a *bona fide* defence to the claim[11].

[19] Good cause is shown when there is evidence of a substantial defence and a *bona fide* and presently held desire on the part of the applicant to raise the defence

10 It would not avail the applicant to say that the notice was not "*delivered*" to him within the meaning envisaged by section 130(1)(a) of the NCA. Provided the notice has been delivered in accordance with one of the six methods referred to in section 65(2) - on the face of it this appeared to be the case *in casu* – it is not necessary to prove that it came to his notice. Actual receipt of the notice is the consumer's responsibility and not that of the credit provider. (See *Rossouw & Another v First Rand Bank Ltd t/a FNB Homeloans (formerly First Rand Bank of South Africa Ltd*) 2010 (6) SA 439 (SCA) at par [32]). The notice therefore needn't reach the consumer for it to be effective

11 *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 O at 476 – 477. *De Witts Auto Body Repairs v Fedgen Insurance Company* 1994 (4) SA 705 E at 708 H – 709 D.

concerned.

[20] The court has a wide discretion in evaluating "*good cause*" in order to ensure that justice is done[12]. For this reason it has refrained from attempting to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of an indulgence, as any attempt to do so would hamper the exercise of its discretion[13].

[21] Although an acceleration clause, including *a Lex commissoria,* in a mortgage agreement, has been held to be perfectly permissible and justifiable in a commercial context[14], to my mind it is self evident that the principal obligation to which it is accessory – which is in the nature of a credit agreement - must necessarily yield to the relevant provisions of the NCA pertaining to the enforcement of the foreclosure remedy which avails the mortgagee in the case of the mortgagor's default under the bond. Mortgage bonds typically contain clauses empowering the mortgagee to foreclose the mortgage. It is usually stated that in the event of a breach by the debtor of his duties under the principal obligation, the capital amount of the bond, together with interest and all other payments will become due and payable and that the mortgaged property may be declared executable by the court for the satisfaction of the mortgagee's claim. Cancellation,

12 See *Waal v Prinswil Beleggings* 1984 (1) SA 447 T.

13 See also *Abraham v City of Cape Town* 1995 (2) SA 319 C at 321 I – J.

14 *Absa Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T) at 565 D – F; *Nedbank Ltd v Fraser & another and other cases* 2011 (4) SA 363 (GSJ) at par [37] *et seq.* See also *Boland Bank v Pienaar and Another* 1988 (3) SA 618 (AD) as an example of how reliance on a foreclosure clause is respected despite the seeming iniquity of a mortgagor being able and willing subsequently to purge his default.

or termination, is also necessarily implied thereby. But cancellation is in my view not an act which the mortgagee performs unilaterally and at its whim.[15] It is in itself the enforcement of a debt within the meaning contemplated in the NCA.[16]

[22] In the first instance the NCA requires that certain procedural steps relative to that specific remedy of enforcing the entire agreement are taken before a court can be approached for an order in such terms. This is the "*first step*" in this regard.[17] The latter requirement – i.e. compliance with the provisions of section 129 (1) (b) and 130 (1) (b) - is a "*critical cog of a plaintiff's cause of action*".[18] Accordingly a failure to comply with the peremptory requisites for commencing legal proceedings under a credit agreement must, of necessity, preclude a credit provider from enforcing its claim even where - such as in the present instance - the applicant unabashedly admits that he was tardy with his payments on a regular basis.

[23] Secondly, the NCA allows for re-instatement of a credit agreement before

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15 For this reason I believe that the interpretation by *Bertelsmann* J in *Absa Bank v Ntsane, supra*, at 565 E - F that acceleration happens *"automatically"* and that the decision to accelerate payment precedes the debt enforcement needs necessarily be reviewed to bring it in line with the provisions of the NCA. Acceleration and the concomitant termination is in my view the debt enforcement.

16 See *The National Credit Act Explained, J M Otto* at pages 103 – 104 where the author opines that enforcement is credit providers "*using any of their remedies*", including the implementation of a *lex commissoria*, otherwise the consumer would be left without protection against cancellation by the credit provider for this "*serious*" remedy which "*goes against the grain of the Act*". The effect of this is that the credit provider is required to send a default notice not only when it chooses to claim the amount due (i.e. the arrear instalments due and payable), but also where it is intent on cancelling the contract, claiming return of any goods involved or claiming damages instead of performance. This is an argument which found favour in *Absa Bank Ltd v De Villiers & another* 2009 (5) SA 40 (C). The court held that that the use of the word "*enforce"* was intended by the NCA to be used in a wide sense, namely the exercise of any of its contractual remedies by the credit provider. See also *Nedbank Limited v National Credit Regulator* 2011 (3) SA 581 (SCA) at 589 A – B in which the latter judgment was followed.

17 *Nedbank Limited v National Credit Regulator, supra*, at 590 C

18 *Rossouw & another v First Rand Bank supra* at par [38].

cancellation thereof[19] and precludes the determination of commenced proceedings under circumstances where, *inter alia*, the consumer has brought his payments under the credit agreement up to date.[20]

[24] The relevant provisions of section 129 provide as follows:

> "**129. Required procedures before debt enforcement.—**
>
> (1) If the consumer is in default under a credit agreement, the credit provider—
>
> (*a*) may draw[21] the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (*b*) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before—
>
> (i) first providing notice to the consumer, as contemplated in paragraph (*a*)….; and
>
> (ii) meeting any further requirements set out in section 130.
>
> (2) ….
>
> (3) Subject to subsection (4)[22], a consumer may—
>
> (*a*) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider

19 Section 129(3) of the NCA.

20 Section 130 (3) (c) (ii) (dd) of the NCA.

21 In *Nedbank Limited v National Credit Regulator, supra*, at 586 F – 587 A the court confirmed that despite the use of the word "*may*", the notice referred to in the section is indeed a "*mandatory requirement prior to litigation to enforce a credit agreement*." See also *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) at paragraph 27.

22 None of which provisions are relevant for present purposes.

all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and—

(*b*) ….

(4) ….".

[25] This section must of necessity be read with the provisions of the ensuing section 130, which give perspective to the need for the notice and the circumstances under which the credit provider can or cannot proceed to the next step. It also provides the subtext under which commenced proceedings can be determined relative to the prescribed notice. These are the following:

130. Debt procedures in a Court.—(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and—

(*a*) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in …. section 129 (1)…;

(b) in the case of a notice contemplated in section 129 (1), the consumer has—

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(*c*) ….

(2) …..

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that—

(*a*) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures

required by those sections have been complied with;

(*b*) ….

(*c*) that the credit provider has not approached the court—

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having—

(*aa*) ….

(*bb*) agreed to a proposal made in terms of section 129 (1) (*a*) and acted in good faith in fulfilment of that agreement;

(*cc*) complied with an agreed plan as contemplated in section 129 (1) (*a*); or

(*dd*) brought the payments under the credit agreement up to date, as contemplated in section 129 (1) (*a*).

(4) In any proceedings contemplated in this section, if the court determines that—

a) …..

(*b*) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (*a*), or has approached the court in circumstances contemplated in subsection (3) (*c*) the court must—

i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;

(*c*) ….

(*d*) ….

(*e*) …..”

[26] The main aim of the default notice is to notify the consumer of the possible assistance at his disposal before legal action will be taken[23]. It *inter alia*

23 LAWSA Vol 5(1), 2nd Edition at par 143.

encourages him to approach a debt counsellor as soon as possible to assist him to develop and agree on a plan to bring the arrear payments under the credit agreement up to date. This is in line with the purpose of the NCA, *inter alia,* to provide for a consistent and harmonious system of debt restructuring, enforcement and judgment that places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements[24]. *Taylor*[25] suggests that the legislature intended the eventual compliance with the contractual obligations by the consumer by whatever means possible.

[27] Self-evidently, therefore, it is critical that the notice should provide the consumer with sufficient information to allow him or her to exercise any of the rights described in section 129(1)(a) to achieve such purpose. It should in my view also - as a basic premise - properly call attention to the nature and extent of the default and the proposed enforcement thereby, for how else can the consumer meaningfully "*respond to (*the*) notice*" as section 130(1)(a)(i) requires of him to do. "*Respond*" is not defined, but against the objectives which I have outlined above, the reaction sought to be invoked is one whereby the consumer endeavours to fulfil his obligations under the credit agreement either by bringing his payments thereunder up to date or coming to a suitable arrangement in this regard.

[28] The notice should be crafted in plain and understandable language, to inform the consumer how to go about avoiding the agreement from being cancelled and/or

24 Section 3(i) of the NCA.

25 (2009) 42 De Jure 103 – 105.

legal action being taken[26]. In my view it should also call attention to the alleged breach justifying foreclosure under the mortgage agreement and warn of the serious consequences in this regard.

[29] A quick glance at the default notice on which the first respondent relies for its compliance with section 129(1)(a) will immediately demonstrate that it is defective in several material respects. In the first instance it does not adequately warn that the default sought to be remedied thereby relates to the repeated arrears on the basis of which clause 16 is sought to be invoked.[27] Further: it only offers a single proposal limited to the referral to a debt counsellor[28]; it fails to state what the intent of that proposal is or why it is critical; the reference to the minimum period of twenty (20) days referred to in section 130(1) is only given significance in the context of explaining to him that the first respondent will "*notify the Credit Bureau of such default*"; he is invited only to "*reply*" to the notice, which is not the same as asking him to "*respond*" as is required by section 130(1)(b)(i) and therefore ambiguous; and finally the consequence (of the failure to "*reply*") is limited to the institution of legal proceedings for the "*recovery of arrears*", a vastly different enforcement than the one envisaged by the summons which later ensued. Generally the notice conveys absolutely no sense of urgency at all[29] and is totally ineffective for its purposes, most especially a foreclosure of the bond due to the

26 *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi* 2009 (2) SA 348 (B) at 351 B.

27 The amount in arrears is stipulated in the heading of the notice which then goes on, in the body, to advise him that he is in arrears "*in the amount as set out above*." The "*current outstanding balance*" in the sum of R837 635, 89 is not given any context, neither prominence nor significance. Nowhere is it suggested that possible foreclosure is on the cards.

28 There are in fact four proposals envisaged by section 129 (1) (a).

29 For example, he is "*encouraged*", as opposed to being admonished or warned, to pay the arrears, and then only so as not to tarnish his credit record.

applicant's repeated failure to pay the periodic instalments.

[30] In order to demonstrate its deficiency, it is significant by way of comparison to advert to the warning expressed in the other two notices which were posted to the applicant's P O Box address after the issue of summons. Each of these concludes with the following injunction:

> "Should you fail to reply to this notice within 10 business days of date of delivery, by
>
> a) not making a deposit to pay the arrears[30] and bring the account up to date or
>
> b) not contacting us in order to make a repayment arrangement or
>
> c) not approaching a debt counselor for assistance in this matter,
>
> the bank will institute legal proceedings, without any further notice, for recovery, of the full outstanding balance in terms of the mortgage agreement."

[31] Whilst there may have been a sound basis for the first respondent to exercise its right to cancel the contract and recover the full outstanding balance, such enforcement is not unequivocally heralded by the section 129(1)(a) notice, leaving aside its other deficiencies. The notice may well have achieved the objective of drawing the applicant's attention to his default (limited to the arrear amount of R32 484, 94), but it does not go far enough in my view by calling attention to the consequences envisaged by clause 16 of the bond or that the enforcement intended by the notice was foreclosure. Mr. *Cole*'s argument that the summons stood as the notice to the applicant of the invocation of clause 16 overlooks the peremptory nature of section 129 (1) (a), which requires the applicant to have first been

30 The arrears referred to in both letters is again a reference to only the outstanding amounts, R8 638.29 on 15 April 2009 and R7 570.89 on 12 August 2009 respectively. In these notices the applicant is, however, sufficiently apprised that his failure to take one of the three steps outlined in the notice will result in the issue of summons to recover the full outstanding amount in terms of the bond, as opposed to just the outstanding instalments.

warned, by the prescribed notice, of the first respondent's intention to enforce even its foreclosure remedy.

[32] In my view, therefore, the applicant's submission that the first respondent failed to comply with the provisions of section 129(1)(a) - thus resulting in an absence of a complete and proper cause of action - has merit, albeit for a different reason than the one contended for by him. Further it appears that if the first respondent had asserted - at the time of the default judgment application - that it had so complied with the relevant provisions of the NCA, such averment too would have been erroneous.[31]

[33] But even overlooking the defects in the purported notice, the applicant "*responded*" to it (albeit unwittingly) after its dispatch and before the service of summons on him by redressing the specific arrears which it called upon him to effect payment of. It is common cause, as I indicated above, that as at the date of the service of the summons, the payment by the applicant just before this resulted in his bond account being "*in credit*"[32]. Mr. *Crisp* on behalf of the applicant contends that, as a result, the notice was no longer valid once the applicant brought his arrears up to date. The payment would have impaired its effectiveness as a platform for the continued enforcement of the proceedings relating to the default

31 The summons went no further than broadly alleging compliance with sections 129 and 130 without demonstrating a basis for this, but the conclusion is made on the assumption that the 26 November 2008 was indeed placed before the Registrar.

32 I also assume, in favour of the applicant that the credit, which was not insubstantial, would have been more than sufficient to meet the first respondent's "*permitted default charges and reasonable costs of enforcing the agreement up to the time of the re-instatement*" referred to in section 129 (3) of the NCA, this after payment would have been apportioned in accordance with the provisions of section 126 (3) of the NCA.

sought to be remedied thereby. As was observed by Gautschi AJ in *Starita (aka Van Jaarsveld) v ABSA Bank Ltd & another*[33] there is no time period specified in the NCA for the continued validity of a section 129 notice, nor can one be implied. Its ongoing validity depends on the facts of the case. For instance, if the arrears specified in the notice are fully extinguished after notice has been given, it cannot then be utilized for any legitimate purpose if further arrears occur thereafter. It has run its course so to speak and no longer has any efficacy.

[34] I fully align myself with this reasoning. In the present matter the applicant fully extinguished the arrears and left something in reserve more than adequate to cover costs and charges.[34] The payment may have been too late to avert the issue of the summons in its entirety, but the process could only have remained extant thereafter in order for the first respondent to have recovered its costs of issuing the summons. Therefore, by the time the application for default judgment was placed before the Registrar for her consideration, it could similarly not be asserted that the applicant was in default of payment of the arrears he had been called upon by the purported notice to remedy, because he had fully purged those. Further, not only would the agreement have been automatically[35] re-instated by the payment before the service of the summons, pursuant to the provisions of section 129(3), but the provisions of section 130(3)(c)(dd) of the NCA would in my view have precluded

33 2010 (3) SA 443 (GSJ) at paragraph [10].

34 See fn 31 above.

35 See the unreported judgment of Eksteen J in *Nedbank Ltd v Barnard*, case no 1142/2008 (PE) - delivered on 1 September 2009 - at paragraph 15, in which it was held that the consumer can unilaterally re-instate a credit agreement by paying to the credit provider the arrears that are overdue plus sufficient amounts of money to cover the charges referred to in section 129 (3). Once this has occurred the agreement is automatically re-instated. Nothing in the section requires a "*consultative process*" with the credit provider before this happens. The mere fact that such payments are made would be sufficient for the latter to infer the intention of the consumer to re-instate the contract.

the further enforcement of the proceedings.

[35] Mr *Cole* (for the first respondent) contended that this defence could not avail the applicant because the payment made by him, although it addressed the arrears, was not adequate to meet payment of the full amount claimed. This argument may well have been a sound one if the notice had adequately warned that the "*foreclosure*" remedy was what was sought to be enforced thereby, but as indicated above it failed woefully to call such consequence to the applicant's attention. Absent proper notice as a peremptory requisite for the enforcement of a foreclosure remedy, cancellation was not permissible and therefore it still remained open for the agreement to be reinstated by the applicant's payment on 18 February 2010. [36]

36 An issue I need not consider because of the conclusion reached herein is whether a somewhat different situation may have pertained if the default notice properly called attention to the arrears equating to the full outstanding balance. In *Nedbank Ltd v Fraser, supra*, (at paragraph [41]) the view was expressed that, notwithstanding reliance by the mortgagee on a acceleration clause, a judgment debtor could still redeem immovable property from the execution process by making payment "*not of the full sum of the judgment debt, interest and costs, but of the* ***overdue amounts of the arrears*** *together with default charges and legal costs of enforcing the agreement up to the time of re-instatement"*, but I doubt that this interpretation can be correct against the accepted basis on which a foreclosure clause vests a mortgagee with the right to refuse to accept the late performance by the mortgagor. (Also not on the score that re-instatement can occur **after** judgment because invariably by that date the credit agreement would have been terminated, thus precluding re-instatement within the meaning envisaged in section 129(3) of the NCA). If the mortgagee has commenced proceedings to give effect to the more drastic remedy of foreclosure, presumably only payment of the full outstanding amounts, plus costs etc, would be adequate in that event to purge the breach justifying it. "*Re-instatement*" as envisaged by section 129(3) is then a remote prospect. On this basis the enforcement of an acceleration clause appears inimical to the express purpose of the NCA which is to promote responsible consumer obligations. It does not appear to me to be proper that the consumer is at the mercy of a mortgagee who can decide at whim after it has sought to rely on the acceleration clause whether to indulge him or not by accepting instalments and holding off execution for as long as it feels so inclined. Such "*arrangements*" would obviously fall outside of the confines and strictures of the NCA and leave the consumer without the protection afforded to him by the Act. He would also be discouraged from bringing up the arrears if he knew that it was open to the credit provider at any stage to stop "indulging" him, and

[36] In conclusion therefore I am satisfied that the applicant has demonstrated that he has a substantial defence to the first respondent's claim.

[37] As for his explanation for his default of appearance, I find no reason not to accept his word in this regard. The first respondent sneered at the suggestion that he could have been in the dark as to the fact of the judgment, but its own data records are consistent with the absence of such a discussion having taken place between the applicant and its employees, except towards the end when there was a reference to the sale in execution which the applicant explained he was not concerned about. Indeed it is doubtful that the first respondent itself was aware that judgment had been entered against the applicant, given that it continued to forward section 129 (1) (a) notices to him, both after service of the summons had been effected and even after judgment had been entered by the Registrar. Further, if the applicant was indeed aware that judgment had been entered, it is improbable that he would not earlier have sought the setting aside thereof when he was in a good place so to speak and, on his understanding of the situation, ahead with his payments at the time.

[38] Further, he demonstrated in my view by the payments made by him as and when he had funds at his disposal a real desire to avoid the loss of his home. This

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then to proceed to execution. In our country people are unfortunately not model debtors who perfectly manage to meet their obligations on due date strictly in accordance with the letter of the contract, but that does not appear to be a reason to disqualify them from the protection of the Act in this regard. It is the beacon of re-instatement, and the legitimate entitlement thereto, that keeps the hope alive in consumers that they will weather the hard times and keep their homes, and dignity in the process.

is exactly the aim of the NCA, *inter alia*, to promote the cause of the consumer by giving him a meaningful opportunity to bring his payments up to date. Similarly, upon discovering the fact that the judgment had been entered against him, he wasted no time in instructing his attorneys to investigate how this had come to pass and sought to rescind the judgment as soon as possible thereafter. In the circumstances I cannot find that his application is made with the intention of simply delaying the first respondent's claim. Although the first respondent was perfectly at liberty to exercise its rights under the bond agreement – by properly invoking the acceleration clause upon appropriate notice in terms of section 129(1)(a) – Mr. *Cole*'s criticism of him as a "*recidivist non payer*", is not a basis to disqualify him from asserting his defence in the peculiar circumstances of the matter where the notice relied on as the pre-litigation requisite bore no correlation with the breach identified thereby.

[39] In the premises the applicant is entitled to an order rescinding the judgment. In the view I have taken it is, therefore, unnecessary for me to have regard to the further contention of the applicant that it was not competent for the Registrar to have declared the property executable as offering a basis to reconsider her judgment. In any event the order which I propose to make will result in the automatic setting aside of the attachment of the property and consequent sale in execution[37]. The applicant should further be granted leave to defend the action although, for the reasons outlined above, the first respondent will in my view be unable to resuscitate the 26 November 2008 default notice.

37 *Naidoo v Somai* 2011 (1) SA 219 (KZD) at 221 G – H. Once a judgment has been rescinded the consequences thereof (for example the issue of a writ in execution, a writ of ejectment, the attachment of property and ejectment from property), fall to be set aside. The approach to be adopted is obviously different if transfer has already been effected. In that event re-transfer needs be undertaken. (*Vosal Investments (Pty) Ltd v City of Johannesburg* 2010 (1) SA 595 (SGJ) at 602 H).

[40] In the result I make the following order:

1. the default judgment granted by the Registrar, Grahamstown, on 7 July 2009 under case number El 140/09; ECD 440/09 is set aside - as also the consequent sale in execution of the property (Erf 20595, East London, Buffalo City Municipality held under Deed of Transfer No. T 3157/2007) to the fourth respondent pursuant thereto;

2. the applicant is granted leave to defend the action; and

3. the first respondent is directed to pay the costs of the application.

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B C HARTLE

JUDGE OF THE HIGH COURT

Date of Application : 26 July 2011

Date judgment delivered : 29 November 2011

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Counsel for the First Respondent	:	Advocate Shaun Cole
Instructed by	:	Changfoot-Van Breda 57 Recreation Road Southernwood EAST LONDON (REF. N J RISTOW/CP/SPI11/0158)
Appearance for Second, Third and Fourth Respondents	:	Nil