

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

CASE NO: 2012/7071

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED.

21 February 2013

FHD VAN OOSTEN

In the matter between

**FIRST NATIONAL BANK**

a division of **FIRST RAND BANK LTD**

and

**GODFREY WILFRED ABT**

**APPLICANT**

**RESPONDENT**

*Practice - application in terms of rule 46(11) by Bank for declaring respondent's immovable property specially executable - respondent's counterclaim for rescission of default judgment - defence raised that bank failed to comply with s129 of national Credit Act 34 of 2005 - s 130(4)(b) of Act provides for adjournment of matter to enable compliance with s 129/130 of Act - such order granted.*

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**JUDGMENT**

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**VAN OOSTEN J:**

[1] The applicant (the bank) in this application seeks an order in terms of Rule 46(11) declaring the respondent's immovable property specially executable (the main application). The respondent in a counter application applies for rescission of the default judgment pursuant to which the order in the main application is sought, alternatively postponement of the main application pending the finalisation of a pending action instituted by the respondent against Mutual and Federal Insurance Company Ltd.

[2] The litigation between the parties commenced when summons was issued by the bank against the respondent on 24 February 2012 for payment of the sum of R785 567.00 being the arrears due in terms of a One Account Facility Agreement concluded between the bank and the respondent on 26 January 2006. As security for the payment of the loan facility a One Account Freehold Mortgage Bond in favour of the bank was registered over the respondent's immovable property. The summons also contains a prayer that leave be granted to the bank to seek an order, on the same papers duly supplemented, declaring the immovable property immediately executable. The summons was duly served on the respondent who failed to enter an appearance to defend. Judgment by default was sought and granted on 9 May 2012 for payment of the amount claimed, interest thereon and costs of suit.

[3] On 21 April 2012 the bank launched the present application. The respondent's counter application is firstly, as I have mentioned, for rescission of the default judgment, which I shall now to deal with. Counsel for the respondent fairly conceded that, except for what follows, the respondent has not made out any defence to the bank's action. The only defence relied on, and pursued before me, was the respondent's allegation that he had not, prior to summons being issued, received the notice in terms of s 129(1)(a) of the National Credit Act 34 of 2005 (the Act), which, as referred to in the summons, was sent to him on 8 December 2011, by registered post. It appears *ex facie* the documents attached to the summons, including a stamped notice of acceptance by the SA Post Office, that it was properly despatched by registered post. This however, as held by the Constitutional Court in *Sebola and another v Standard Bank of South Africa Ltd and another* 2012 (5) SA 142 (CC), in the absence of a 'track and trace' report form obtainable from the SA Post Office website, is not enough to prove receipt thereof. It


follows that the respondent's denial that he had received the notice, cannot be refuted and must be accepted.

[4] The matter however, does not end there. Section 130(4)(b) of the Act provides that, in the event of a finding that the credit provider has not complied with the relevant provisions of the Act, the court must adjourn the matter and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed. The section applies to "any proceedings contemplated in this section" which would include the present application which is a continuation of the relief sought in the action. I accordingly propose to order an adjournment of this matter pending compliance with s 129 and 130 of the Act.

[5] I do not consider it necessary or appropriate at this stage to comment on the alternative relief sought by the respondent. Those aspects will be dealt with by the court finally hearing this application.

[6] In the result the following order is made:

1. The matter is postponed *sine die*.
2. The matter may not be enrolled again for hearing until sections 129 and 130 of the National Credit Act 34 of 2005 have been complied with, in respect of which it is ordered that the "Notice in terms of section 129(1) of the National Credit Act 34 of 2005 (NCA)", a copy of which is annexed to the plaintiff's summons as "C1" shall stand as the required notice in terms of section 129(1)(a) of the Act which has been duly delivered to the respondent on the date of this judgment.
3. Costs are reserved.



FHD VAN OOSTEN  
JUDGE OF THE HIGH COURT

**COUNSEL FOR APPLICANT**

**ADV C DÉNICAUD**

*APPLICANT'S ATTORNEYS*

*GLOVER INC*

*COUNSEL FOR RESPONDENT*

*ADV AP DEN HARTOG*

*RESPONDENT'S ATTORNEYS*

*HARVEY NOSSEL*

*DATE OF HEARING*

*20 FEBRUARY 2013*

*DATE OF JUDGMENT*

*21 FEBRUARY 2013*