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

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

28/4/2021
DATE

SIGNATURE

CASE NO.: 2020/11111

In the matter between:

ANOOSHKUMAR ROOPLAL N.O. Applicant

and

NDIVHUWO KHANGELA First Respondent

AZWINNDINI CONSTANCE KHANGELA Second Respondent

JUDGMENT

ROBINSON AJ:

INTRODUCTION

[1] This is an application brought by the applicant in his capacity as liquidator of the VBS Bank ("the bank"). The applicant seeks relief against both respondents. It is common cause that the first and second respondents are married in community of property.

[2] Two agreements are in issue, a vehicle finance agreement as well as a mortgage agreement. The former was concluded between the bank and the first respondent, whilst the latter was concluded between the bank and both respondents.

[3] In respect of the vehicle finance agreement, the applicant claims cancellation of the sale; delivery and return of the vehicle, this being a Mercedes Benz; and payment of an amount of R2,555,191.66, jointly and severally, plus interest at the agreed rate of prime, calculated daily and compounded monthly in arrears from 29 February 2020 until date of payment to VBS, less the market value of the vehicle as at the date of cancellation, if any, as determined in terms of the vehicle finance agreement.

[4] In respect of the mortgage agreement the applicant seeks payment of the sum of R5,767,735.24, jointly and severally, plus agreed interest at the rate of 10.50%, calculated daily and compounded monthly in arrears from 29 February 2020 until date of full payment, (both dates inclusive), being the money outstanding and payable to VBS under that agreement.

[5] The applicant seeks costs of the application on the scale of attorney and client.

[6] Each of the two agreements in question is a credit agreement as contemplated in the National Credit Act, 2005 ("the Act"). It is not seriously in dispute that the money claimed is owed. Whether the

applicant is entitled to relief depends on whether or not it has complied with section 129(1) of the Act.

[7] It is accordingly immediately apparent that notice as contemplated in section 129(1) had to be provided to each of the first and second respondents, these being consumers as contemplated in the Act.

[8] In this regard the founding affidavit claims that the applicant's attorneys addressed a letter of demand dated 29 September 2019 to the first and second respondents in accordance with section 129(1) of the Act. The names of Ndivhuwo Khangale (the first respondent) and Azwinndini Constance Khangale (the second respondent), appear at the top of the letter. The letter is addressed to the address of the mortgaged property, this being 538 Furrow Road (Feartherfalls Estate) Erf 538 Homes Haven, Ext 16, Mogale City Local Municipality Gauteng. The address is stated in the letter to be the *domicilium* address and residential address. The letter was also sent by email to the address khangalen@gmail.com.

[9] The *domicilium* address to which the section 129 letter was addressed and at which it was delivered is in fact the *domicilium* address indicated and disclosed in the mortgage finance agreement entitled "LARGE MORTGAGE CREDIT AGREEMENT IN TERMS OF THE NATIONAL CREDIT ACT NO 34 OF 2005". In terms of paragraph 34 of that document, the parties choose the Featherfalls address as the *domicilium citandi et executandi* (address for service and execution).

However, in paragraph 35 of that agreement, the parties appoint another address for the purposes of notice in terms of section 129. The clause reads as follows:

> "The parties appoint the following addresses as their postal addresses for any notice in terms hereof or as may be required by the Act and any notice so sent shall be deemed to have been received by the party it's addressed to ten (10) days after despatch thereof by pre-paid registered post:
>
> 35.1.2 The Consumer — 77 Milkwood Ext 23, Ormonde Johannesburg, 2091
>
> 35.3 The parties record that they elect that all notices to be sent by one party to the other in terms hereof or in terms of the Act must be sent by prepaid registered post."

[10] The large mortgage credit agreement is concluded between VBS Mutual Bank and Ndivhuwo Khangela and Azwinndini Constance Khangela, these being jointly referred to as the consumer. The Act in question is defined as the National Credit Act 34 of 2005.

[11] It is not in dispute that the respondents are in arrears with the bond payments. In its application the applicant states that, as at the time of the deposition to the affidavit, which was on 24 March 2020, the respondents were in arrears in the sum of R1,469,876.09 and that therefore the full amount of R5,767,735.24, being the amount which remains overdue and owing, is now payable to VBS under the mortgage credit agreement.

[12] In the section 129 letter of 29 October 2019, the applicant's attorneys address both the mortgage and vehicle finance agreements. Attention is drawn to the provisions of section 129(1)(a) of the National Credit Act and the letter advises the reader thereof to refer any dispute to a debt counsellor or alternative dispute resolution agent, consumer court or ombud with jurisdiction so that such dispute may be resolved and an arrangement can be made to bring the payment due to the bank under the mortgage loan agreement up to date.

[13] The respondents in their answering affidavit object that there was non-compliance with the Act. In particular the respondents object to the letter of 29 September 2019 on the following grounds:

[13.1] the notice was delivered to the first respondent and not to the second respondent;

[13.2] the applicant has failed to establish that the notice had been delivered to the first respondent;

[13.3] the second respondent is a consumer in her own right and ought to have received her own separate notice in terms of section 129 of the Act;

[13.4] it was not appropriate to deliver one notice to two separate consumers;

[13.5] the applicant was not entitled to deliver a single notice in respect of two independent credit agreements. It ought to have delivered

two separate notices in respect of each credit agreement.

[14] In the circumstances the respondents submit that the applicant has failed to deliver a notice in terms of section 129 of the Act in respect of each credit agreement as contemplated in the Act and/or to draw the default to the notice of the second respondent as required by section 129(1)(a) of the Act. Accordingly the applicant has failed to comply with the provisions of the Act and more specifically section 130 thereof.

[15] In reply the applicant refers to a further delivery by hand and by registered post to the first respondent and the second respondent, this time to each of them separately and each of them in respect of the separate agreements. Accordingly, four letters were hand delivered, this to the Featherfalls Estate address. The letters were also sent by registered post and to this end copies of registered slips are attached to demonstrate that two registered letters were sent to a Mrs. A C Khangale at the Featherfalls Estate address, as well as two letters to a Mr. N K Khangale. On the registered letter slip appears a stamp from what appears to be Benmore post office dated 15 July 2020. This is evidently not compliance with the requirements in *Sebelo v Standard Bank of South Africa*[1]. The further problem facing the applicant is that the Featherfalls Estate is not the address designated for the purposes of notice in terms of the Act.

[16] During the first day on which this application was heard, I pointed out

[1] 2012 (5) SA 142 (CC).

to counsel for the applicant, Mr. Mohapi, that there was no satisfactory proof of hand delivery to the Featherfalls Estate address. Evidently, Mr. Rooplal would not have personal knowledge thereof. I permitted the matter to stand down to enable the applicant to provide proof of service affidavits, which it did in respect of both the first notice of 2019 as well as the second letters of 14 July 2020. I afforded Mr. Ndobe an opportunity, should any of the respondents wish to respond to the service delivery affidavits, but Mr. Ndobe indicated that he did not require to submit such a response. Subsequently, and on the hearing on Thursday 15 April 2021, this Court, having consulted the terms of the mortgage agreement again, realised that the notices were delivered to the *domicilium* address, but that they were not in terms of paragraph 35 sent by registered post to the address indicated in paragraph 35, this being the 77 Milkwood Extension address. Accordingly, the hand delivery to the Feather Falls Estate address was called into question as far as s129(1) notice was concerned. In those letters, and as far as the vehicle finance agreement is concerned, the applicant conveys the fact of cancellation thereof.

[17] Adv. Mohapi submitted in this regard that the *domicilium citandi et executandi domicilium* address counts equally well for purposes of section 29(1) notice. To that Adv. Ndobe countered that a *domicilium citandi et executandi* address was for purposes of services of legal process, which is further supported by the phrase (address for service and execution) whereas paragraph 35 very clearly indicated the

preference of the consumer as contemplated in section 129(6) of the Act. I accept the submissions made by Adv. Ndobe in this regard.

[18] The matter does, however not end there. It is not in dispute that the first notice dated 29 October 2019 was in fact received by the first respondent. The first respondent himself admits as much in paragraph 9 of his affidavit, where he states "*in support of the clear intent on the part of the Applicant to deliver the Notice to the First Respondent, the Notice was also delivered via email to the First Respondent and there is no email address to the Second Respondent.*" This point was made in support of the respondents' argument that in fact, no notice had been addressed to the second respondent. Be that as it may, it is clear that the first respondent did receive the notice. A copy of the cover email evidencing delivery of the letter to the first respondent is attached to the founding affidavit, showing that the email was sent on 29 October 2019 at 15:38. The covering email reads as follows: "*Dear Sirs, we attach a correspondence for your attention.*"

[18.1] Also attached to the founding affidavit and indeed referred to in the founding affidavit itself is an email from Ndivhuwo Khangela dated 31 October 2019 10:20 and addressed to Ms. Matshebela of the applicant's attorneys, with the subject heading "*re Anooshkumar Rooplal N.O / Ndivhuwo Khangela and Azwinndini Constance Khangela*". Ms. Matshebela is the attorney in the employ of Werksmans attorneys, attending to this matter on

behalf of the applicant.

[18.2] The email commences as follows: "*Good day Ms. Matshebela I wish to acknowledge receipt of your letter of demand. I however, would like to bring the following to your attention.*"

[18.3] Eight points are listed in the email.

[18.4] The upshot of these points is that the first respondent is unable to pay because of the fact that VBS had become liquidated. It appears that the first respondent was reliant on payment from VBS and that because of the failure to pay by VBS, he in turn is unable to settle his debts. At item 6 the first respondent states "*I am currently unemployed and my company has not had any contract since VBS's liquidation. 7, I am therefore unable to make any payments at the moment and was hoping that should VBS pay some money owed to my company, I will also be able to start servicing my loans. 8, I am committed to paying every money owed to VBS by myself and my wife Constance Khangela.*"

[18.5] This was not placed in dispute in the answering affidavit, more particularly the email is referred to at paragraph 38 of the founding affidavit and dealt with in paragraphs 38 to 39. Indeed in paragraph 38 of the answering affidavit the first respondent states as follows: "*In support of the clear intent on the part of the Applicant to deliver the Notice to the First Respondent, the Notice was also delivered via email to the First Respondent and there is*

no email address to the Second Respondent."

[18.6] It is therefore not in dispute that the first respondent received the letter on which the applicant relies in support of its compliance with sections 129 and 130.

[18.7] Indeed, on 31 October 2019 at 15:30 Ms. Matshebela responded to the email of the first respondent by informing him that the applicant was reiterating the contents of its letter of demand of 29 October 2019 by demanding payment of 1, R2,448,402.59 under the vehicle finance agreement and R5,488,449,79 being the total amount outstanding as at 29 October 2019 under the mortgage credit agreement, with interest thereon and legal costs on an attorney and client scale within ten days of receipt of the letter of demand.

[19] There is accordingly no dispute that the first respondent received the letter of 29 October 2019.

[20] Mr. Ndobe argued at the hearing that it was for the credit provider to establish that strict compliance in terms of section 129 of the National Credit Act has taken place. In this regard I enquired of both counsel whether I was precluded by any authority from taking cognisance of the fact that in fact the first respondent did receive notice before the institution of the legal proceedings. Neither counsel could refer me to authority. I consider the issue resolved by the decision of the Supreme Court of Appeal in the matter of *Naidoo v the Standard Bank of South*

Africa[2]. In this matter what was in issue was whether failure strictly to comply with section 129 in circumstances where the appellant had admitted that the section 129(1) notice had come to its attention, was required. Majiedt JA rejected the contentions from the appellant that such strict compliance was required. The ultimate purpose of section 129 is to ensure that a consumer is notified of his or her default and of the various options available to him or her. The SCA had little patience with the contentions of the appellant in *Naidoo* that, despite his admission that the section 129(1) notice had come to his attention, the bank had not shown that it had effected the notice by registered mail, shown that the notice was delivered to the correct post office and, in order to prove delivery furnish a post-despatch (track and trace) print out from the post office website, this relying on *Sebola*. The Court held as follows: "*But this line of argument was wisely not pursued during oral argument by counsel… all that is required of a credit provider is to 'satisfy the Court from which enforcement is sought that the notice, on a balance of probabilities, reached the Consumer*" (*Sebola* para 74). *Ultimately, the question is whether delivery as envisaged in the Act has been effected (Kubyana paras 31, 36, 39, 52 and 53).*"

[21] I am therefore satisfied that the section 129(1) notice of 29 October 2019 did come to the attention of the first respondent.

[22] I merely add that I have not been persuaded by the argument on behalf

[2] (20595/14) [2016] ZASCA 9(9 March 2016)

of the respondents that two separate notices and two separate applicants ought to have been brought. Counsel could not refer me to any authority in this respect. I see no reason why costs should be increased by the issuing of two separate applications nor indeed why both credit agreements could not be addressed in one letter. The Act requires of the credit provider to inform the consumer of the basis of the claim, the amount claimed as well its options under section 129(1)(a) of the National Credit Act. All this is clearly communicated in the letter of 29 October 2019. That the letter erroneously claims that the second respondent is a party to the vehicle finance agreement is in my view neither here nor there. In any event, and on the own admission of the respondents, this letter did not reach the second respondent and a separate letter ought to have been addressed to her.

[23] I am therefore satisfied that the applicant has established its case as against the first respondent and that judgment can be granted against the first respondent as far as the vehicle finance agreement is concerned. For the reasons stated below, judgment cannot at this stage be granted in terms of the mortgage agreement.

[24] I am not satisfied that the Act has been complied with in respect of the second respondent. In this regard I am in agreement with Mr. Ndobe that the second respondent is a consumer in her own right and that notification ought to have been given to her. I am also in agreement with Mr. Ndobe that, where a credit provider fails to follow the strictures

of section 129 to the letter by failing to provide notification as chosen and indicated in the relevant agreement, the credit provider bears the risk of showing that the notice had in fact come to the notice of the consumer. In this regard there is no evidence that it had in fact come to the notice of Mrs. Khangela. The question is whether the attachment of the notices to the replying affidavit was sufficient to bring it to her attention. In this regard Mr. Ndobe submitted that it came to the notice of the respondents' attorneys, but that there is no evidence that it did come to the notice of the second respondent. Whether that is so or not I do not know, but the fact that I do not know is the precise point. In my view it is incumbent upon the applicant to ensure a notice is sent to the second respondent by way of pre-paid registered post and addressed to the address chosen in the mortgage agreement, this being 77 Milkwood Ext 23, Ormonde, Johannesburg 2091. Thus, in terms of section 130(4)(b) the application as against the second respondent is to be postponed until such time as the applicant can show that the requisite notification had been given to the second respondent.

[25] In respect of *Benson*, that judgment is arguably distinguishable because the founding affidavit in this case contains no clear notification to the second respondent. Although the letter of 29 October 2019 contains her name at the top thereof, it only contains the email address of her husband, the first respondent, and then commences with the salutation "*Dear Sirs*". In addition, it commences with a

discussion of the vehicle finance agreement to which the second respondent is not a party.

[26] It may be unduly formalistic to require the applicant to act in terms of section 130(4) but, if this court is to err in this regard, albeit reluctantly, it would err on the side of caution. The provisions of section 130(4) are clear, namely that, should the Court determine that the credit provider has not complied with the relevant provisions of the Act, the Court must adjourn the matter before it and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

[27] Before me Mr. Ndobe was in agreement that, were I to be of the view that a case has been shown satisfactorily against the first respondent in respect of the vehicle finance agreement, I would be entitled to grant an order against the first respondent and postpone the matter as against the second respondent.

[28] I am of the view that it would be inappropriate to grant judgment against the first respondent on the mortgage agreement whilst postponing that judgment against the second respondent. That might amount to cancelling the agreement as against the one and keeping it *in esse* as against the other. For that reason, the relief sought in respect of the mortgage agreement is postponed as against both respondents.

[29] In the circumstances I make the following order:

[29.1] The cancellation of the Sale on Suspensive conditions, concluded between VBS Mutual Bank and the first respondent ("the vehicle finance agreement") (FA8 to the founding affidavit) is confirmed;

[29.2] The first respondent is ordered to return the Mercedes Benz vehicle being the subject matter of the vehicle finance agreement to the applicant;

[29.3] The first respondent is ordered to pay the sum of R2,555,191.66 plus interest at the agreed rate of prime, calculated daily and compounded monthly in arrears from 29 February 2020 until date of full payment, less the market value of the vehicle as determined in terms of the vehicle finance agreement;

[29.4] As against the respondents and in respect of the relief sought in respect of the Large Mortgage Credit Agreement concluded between VBS Mutual Bank and the respondents (FA4 to the founding affidavit):

[29.4.1] this application is adjourned;

[29.4.2] the applicant is ordered to deliver a section 129(1) notice to the second respondent by sending such notice by prepaid registered post to the following address: 77 Milkwood Ext 23, Ormonde, Johannesburg, 2091.

[29.5] The costs of this application are reserved.

[29.6] The applicant is permitted to approach this court with its papers suitably supplemented to provide proof of notification.

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

DATES OF HEARING:	14 April 2021
DATE OF JUDGMENT:	

APPEARANCES:

COUNSEL FOR APPLICANT:	Adv. SL Mohapi
INSTRUCTED BY:	Werksmans Attorneys
COUNSEL FOR RESPONDENT:	Adv. SM Ndobe
INSTRUCTED BY:	Ndobe Incorporated Attorneys