IN THE HIGH COURT OF SOUTH AFRICA,PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 45980/2013
DATE: 27/2/2014

In the matter between:

ABSA BANK LTD Plaintiff

and

JHCI KRITZINGER Respondent

JUDGMENT

MURPHY J

1. The applicant has instituted action against the respondent for payment of R906 832,83 together with interest, for an order declaring certain immovable property, E… 7… S… Township, executable and for an order authorizing the issuing of a writ of execution against the immovable property.

2. The particulars of claim and the affidavit in support of the order authorizing a writ allege that the parties concluded a written loan agreement in November 2012 in the amount of R860 000 which would be advanced upon security of a first mortgage bond being passed over Erf 709 Sinoville. The loan is to be repaid by the respondent in 240 equal monthly instalments of R7 728,16.

3. The particulars of claim, dated 26 July 2013, allege that the respondent is in breach of contract through his failure to make the monthly re-payments. They do not expressly state the date from which the respondent fell into arrears but state the then current arrears to be an amount of R46 397,12, being approximately six months payments. The deponent to the affidavit in support of the writ, filed in October 2013, puts the arrear amount at R69 581,60 and states that the respondent has not made payment towards his mortgage bond since January 2009. This must be a typing error, and, considering the arrear amounts, it is probable that the respondent has not paid any amount since January 2013, two months after the loan was concluded.

4. After the respondent delivered a notice of intention to defend, the applicant delivered this application for summary judgment alleging that the respondent had no *bona fide* defence and that the notice of intention was filed solely for the purpose of delay.

5. In his affidavit opposing summary judgment the respondent raises four defences. Firstly, he contends that the application does not comply with the requirements of rule 32 in that the loan agreement, being a liquid document upon which the claim is founded, has not been annexed to the founding affidavit. In the particulars of claim it is alleged that the written loan agreement has been lost. Secondly, the respondent contends that the deponent to the affidavit does not have personal knowledge of the cause of action and all the transactions in the matter. Thirdly, he disputes the amount claimed. And fourthly, he submits that there has not been compliance with section 129 of the National Credit Act 34 of 2005 ("the NCA"), read with section 130.

6. Since non-compliance with the NCA may have the consequence of adjourning the application, it is preferable to examine the submission made in that regard first.

7. Section 130 provides that 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 for at least 20 business days and at least 10 business days have elapsed since the credit provider delivered a notice as contemplated in section 129(1)(a) of the NCA and the consumer has not responded to that notice or responded by rejecting the proposals of

the credit provider. The section 129(1)(a) notice should draw the default to the notice of the consumer 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.

8. In terms of section 129(1)(b) of the NCA, where the consumer is in default, the credit provider may not commence any legal proceedings to enforce the agreement before first delivering the section 129(1)(a) notice. In terms of section 130(3)(a) of the NCA, in any proceedings commenced in a court in respect of a credit agreement to which the NCA applies, the court may determine the matter only if it is satisfied that the procedures required by section 129 have been complied with. If the court determines that the credit provider has not complied with section 129 of the NCA, the court in terms of section 130(4)(b) of the NCA *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.

9. On 10 July 2013 the applicant dispatched three identical section 129(1)(a) notices to the respondent by registered mail to three different addresses; namely “Erf 7… S…..”; “P.O. Box 2…. M…… Park”; and “2… Peace C…., R…. A Estate, M Park”. The respondent averred that he did not receive any of

the notices and that he had no knowledge of the post office box and street addresses. His address indicated in the opposing affidavit is "2… M… Rd, S….". With regard to the notice dispatched to Erf 7…. S….., he submitted reasonably that such notice probably would not be delivered by the post office without there being any street address or post box address. The post office "track and trace" report reflects that the item was received at the Sinoville branch of the post office on 15 July 2013 and returned to sender. It arrived at the Pretoria GPO on 17 July 2013; thus confirming that no attempt was made to deliver it to any street address in Sinoville.

10. As stated, the written loan agreement has been lost. The mortgage bond describes the subject property only as Erf 7… S… without recording any street address. Clause 17.3 of the mortgage bond reflects that the respondent chose the mortgaged property as his *domicilium citandi et executandi*, but it too does not stipulate any street address.

11. Neither the particulars of claim nor the various affidavits provide any explanation for the applicant's decision to dispatch the notices to the street address or post box number in Montana Park.

12. In the result, I am compelled to accept the averment of the respondent that he did not receive any of the section 129(1)(a) notices.

13. In *Sebola v Standard Bank* 2012 (5) SA 142 (CC), the Constitutional Court held that the NCA does not demand that the credit provider prove that the notice has actually come to the attention of the consumer or proof of delivery to an actual address. The NCA requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer. To this end, the credit provider's particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection.

14. In the present case, as mentioned, the applicant did not make any averment justifying its dispatch of the notice to the two addresses in Montana which are unknown to the respondent. As for the dispatch of the notice to Sinoville, it is clear from the post office's "track and trace" report that it took no steps to deliver a registered item notification, opting instead to return the letter to sender, presumably because the registered letter was not addressed to a street address. Consequently, it may not be reasonably assumed that the notification of the arrival of the registered letter including the section 129(1)(a) notice at the post office ever reached the respondent. The available evidence provides a contrary indication.

Hence the registered letter slips and “track and trace” reports do not constitute adequate proof of delivery of the section 129(1)(a) notice in terms of section 130.

15. My finding to that effect has the inevitable consequence, in terms of section 130(4)(b) of the NCA, that this 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.

16. Counsel for the applicant relied on *dicta* in *ABSA Bank v Petersen* 2013 (1) SA 481 (WCC) at 492G in support of the submission that where a defendant does not give an indication as to what effect he would have used his rights in terms of section 129, had he received the notice, the court should not come to his assistance through the grant of appropriate relief. If that is indeed the understanding and interpretation of Binns-Ward J, as it would seem, I respectfully disagree. The approach, predicated on the notion that where illegality is not material relief may be denied, is inconsistent with the clear dictates of the legislature in section 130(4)(b) of the NCA regarding the consequences of non-compliance. The courts are not at liberty to ignore the letter and spirit of that provision. A court must adjourn the matter and give directions aimed at remedying the non-compliance. The idea behind this requirement is that the consumer should be allowed the benefit of the processes contemplated in section 129(1)(a)

of the NCA before proceedings are instituted and the matter is determined by a court. While this may at first glance seem onerous, sight must not be lost of the fact that the credit provider has a right to terminate any debt review proceedings, in terms of section 86(10) of the NCA, after 60 business days.

17. Accordingly, the application for summary judgment must be adjourned. It is therefore not necessary at this stage to consider the other defences raised by the respondent.

18. For the foregoing reasons, the following orders are made:

i) The application for summary judgment is postponed *sine die*.

ii) The applicant shall deliver a notice as contemplated in section 129(1)(a) of the NCA by hand, email or registered post to the respondent's attorney of record within 10 days of this order.

iii) The respondent shall exercise his rights in terms of section 129(1)(a) of the NCA to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer

court or ombud with jurisdiction within 10 days of delivery of the notice referred to in paragraph ii) of this order.

iv) In the event that the respondent does not exercise his rights as contemplated in paragraph iii) of this order, the applicant may set down the application for summary judgment, as supplemented by additional affidavits, on 5 days' notice to the respondent.

v) This order will not alter the right of the applicant in terms of section 86(10) of the NCA to terminate any debt review 60 business days after the applicant applies for such review, should he do so, in terms of paragraph iii) of this order.

vi) The costs occasioned by the postponement of the application for summary judgment will be costs in the application.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:	22 January 2014
For the Applicant:	Adv U. Lottering
Instructed By:	Hack Stuppel & Ross
For the Respondent:	Adv L Bierman
Instructed By:	Machobane Kriel Inc.