IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) **REPORTABLE: YES / NO**
(2) **OF INTEREST TO OTHER JUDGES: YES / NO**
(3) **REVISED**

13/06/2014 — **DATE**

SIGNATURE

13/6/14

CASE NUMBER: A15/13

In the matter between

NAVIN NAIDOO — APPELLANT (Defendant in court a quo)

And

THE STANDARD BANK OF SOUTH AFRICA — RESPONDENT (Plaintiff in court a quo)

JUDGMENT

Masipa J

INTRODUCTION

[1] This is an appeal against the whole of the judgment of JW Louw dated 6 March 2012. In terms of the judgment the learned judge refused an application by the appellant for a postponement and granted judgment against the appellant in favour of the respondent. I shall refer to the parties as they appeared in the court a quo.

THE BACKGROUND

[2] The plaintiff, who is the present respondent, instituted action against the defendant, who is the present appellant, in the Court a quo in terms of which it claimed, inter alia, payment of an amount of R3 412 946.69 together with interest at an agreed rate from 20 January 2010, in terms of a written agreement of loan secured by a continuing covering mortgage bond registered in favour of the respondent.

[3] The loan agreement, the mortgage bond and the fact that monies were lent in advance were not disputed. However the defendant defended the action and raised two special pleas:-

1. That the plaintiff had failed to comply with the provisions of the National Credit Act 34 of 2005.

2. That the loan agreement was a reckless credit agreement as envisaged in the NCA.

[4] The matter was set down for trial for the 6 March 2012 by way of the notice of set down served on 26 January 2012.

[5] On 31 January 2013 the parties had a pre-trial meeting. At that meeting the defendant informed the plaintiff that he was considering applying for a postponement. The defendant's substantive application for postponement was served on 29 February 2012. The plaintiff opposed the application and served its answering affidavit on 5 March 2012.

[6] On 6 March 2012 the defendant was represented by his present attorneys of record and counsel. The Court a quo considered the application for a postponement after which the application was refused. Counsel for the defendant then informed the Court that she had no instructions to proceed on trial and withdrew from the matter. The defendant's attorney remained on record.

[7] The trial proceeded and, after considering the evidence of the legal manager who gave evidence on behalf of the plaintiff, and after submissions by counsel for the plaintiff, the Court granted judgment against the defendant.

[8] The Court a quo refused to grant leave to appeal. On 23 October 2012 the Supreme Court of Appeal granted the defendant leave to appeal to the Full Bench of this Division.

THE APPEAL

[9] The defendant sought condonation for the late filing of the notice of appeal and the record. In view of the fact that the Supreme Court of Appeal granted leave to appeal it would serve no purpose to debate the merits and the demerits of the condonation application. For that reason the condonation application is granted.

ISSUES TO BE DETERMINED ON APPEAL

[10] The following are issues to be decided on appeal.

1. Whether the court a quo exercised its discretion properly when it refused the appellant's application for a postponement.
2. Whether judgment was correctly granted considering the appellant's defences.
3. Whether the certificate of balance was valid.

I shall deal with each in turn.

[11] Did the Court a quo exercise its discretion properly when it refused an application for a postponement brought by the appellant who was then the defendant?

[12] The grant or refusal of an application is always a matter of discretion by the court hearing the postponement and the court sitting as a court of appeal will not interfere with that discretion as long as the discretion was exercised judicially.

[13] In the matter of **National Coalition for Gay and Lesbian Equity and Others v Minister of Home Affairs and Others 2002 (2) SA1 (CC) at par. 11, p 14A-F** the Constitutional Court set out the relevant principles when considering an appeal against the refusal of an application for a postponement, as follows:

"[11] A Court of Appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter, before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."

[14] In the present case the main ground for the application for postponement was that the defendant had not been given adequate time to prepare for trial. It was submitted that since the plaintiff's notice of set down had been served on the defendant on 26 January 2012 the defendant only had a mere six in which to prepare for trial. That time was not adequate considering that the defendant spent nine months of his time in Australia where he practiced as a medical doctor. It was further submitted that the plaintiff had failed to comply with the aforementioned Rule 7(5) and/or the Gauteng North Practice Manual in that it had failed to timeously give notice in writing to the defendant of the date which has been allocated by the Registrar for hearing. There was a suggestion that such failure was partly the cause of the defendant's unreadiness to proceed with the trial. This suggestion has no foundation as is clear from correspondence between the parties that the plaintiff was not to blame for the delay. On the contrary there is evidence that the plaintiff ensured that the defendant was continually apprised of the status of the matter.

[15] Courts are hesitant to refuse a postponement where the reasons for the postponement have been fully explained and where the applicant for the postponement needs time to properly prepare for the case. In the present case the learned judge in the court a quo found the reasons placed before him unconvincing. Inter alia, he accepted that the defendant worked outside South Africa. He, however, noted that the defendant had been in the country since 21 February 2012 and that he had had ample time to prepare for his case. He stated that time used preparing the application for a postponement could have been used to prepare for trial. The learned judge stated, further, that having regard to the technical nature of the disputes that

the defendant relied upon, the matter could be disposed of quickly. I cannot find fault with this conclusion.

[16] It was obvious that the application for the postponement was only a ploy to buy time for the defendant. There really was no reason why the defendant was not ready to proceed with the trial. From the papers before the court a quo it was clear that the plaintiff had done all it could in its power to make ensure that although there were problems in the office of the Registrar with typing an official notification of the trial date, the defendant was informed regularly of the progress regarding the trial date. More importantly on the 6 July 2011the plaintiff's attorneys addressed a letter to the defendant's attorneys, marked Annexure "SB2". The relevant portion of the letter reads as follows:

"*Please note that the date has not formally been allocated by way of notification from the Registrar, although we have ascertained that the matter will be heard on the 6th of March 2012*".

[17] It is clear that the defendant knew nine months in advance when the trial was going to proceed. In addition when the plaintiff received formal notification from the Registrar of the trial date on 26 January 2012 it ensured that the same day it served a notice of set down on the defendant's attorneys. There was, therefore, no merit in the submission that the defendant had very little time to prepare for trial as it was only apprised of the trial date six weeks before the trial. In my view this submission was correctly rejected by the court a quo. The learned judge also correctly considered the prejudice that the respondent would suffer if the postponement was granted.

[18] In **Bookworks (Pty) Ltd v Greater Johannesburg TM Council 1999(4) SA 799 (WLD) at page 805 para G - H** the following was said:

"*It is difficult to discern a general principle underlying all cases in which a discretion conferred on a court of first instance has been categorized as narrow. What does seem clear is that where the court of first instance is in a better position than an appeal Court to decide a question which involves the exercise of a value judgment, especially a question of procedure (I use the word in a fairly loose sense), an appeal Court will be*

reluctant to interfere. A decision to grant an amendment of pleadings or a postponement falls into this category: ***R v Zackey 1945 AD 505 at 510 - 11.***"

[19] In the same case on page 806 F-G the court went on to explain the importance of not needlessly interfering in the discretion of a court a quo. *". . . different judicial officers, acting reasonably, could legitimately come to different conclusions on the same facts, . . . if an appeal were to be allowed in such cases, appeal Courts would be overburdened by unsuccessful litigants hoping that the majority might differ from the conclusion of the court below."*

[20] In the present case I can find no reason to interfere with the decision of the court a quo. I am of the view at that the court a quo exercised its discretion judiciously.

DEFENCES

[21] The court a quo had to deal with two special pleas namely, that there was non-compliance with section 129 of the NCA, that the loan granted by the plaintiff to the defendant amounted to reckless credit and thirdly that the certificate which certifies the outstanding balance owing to the plaintiff was not a proper certificate.
The court a quo found that the special pleas as well as the issue of the Certificate of Balance were crisp points that could be disposed very quickly. Insofar as the Certificate of Balance was concerned the judge stated that issue could be remedied by handing up further certificate during the trial. I shall deal with each in turn.

NON COMPLIANCE WITH SECTION 129 OF THE NATIONAL CREDIT ACT 34 OF 2005 ("NCA")

[22] The defendant contended that the plaintiff had not complied with the prescripts of the NCA and was, therefore, not entitled to the relief asked for in the pleadings.

[23] In the defendant's First and Second Special Pleas the defendant specifically denied that the plaintiff had complied with the provisions of the NCA or that a notice in terms of section 129 (1) of the NCA was delivered to the defendant. The defendant seemed to place emphasis on the word 'delivered' and relied on the matter of **Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South**

Africa Ltd (640/2009) [2010] ZASCA 130; 2010 (6) SA 439 (SCA); [2011] 2 All SA 56 (SCA) (30 September 2010).

[24] It is so that **Section 129 of the National Credit Act, 34 of 2005 ("NCA")** places an obligation on a credit provider, such as the plaintiff in this matter, to ensure that a notice in terms of this section is delivered to the consumer, the defendant in this matter. The purpose of the notice is to draw the default to the attention of the consumer and to inform him of a variety of options open to him to remedy the default.

[25] The meaning of "deliver" was discussed in two recent Constitutional Court matters namely, **Sebola and Another v Standard Bank of South Africa Limited and Another 2012 (5) SA 142 (CC)** and **Kubyana v Standard Bank of South Africa Limited [2014] ZAC 1(decided on 20 February 2014).** In both these matters the Court stated what a credit provider must do to ensure effective delivery and to prove to the satisfaction of the Court that there has been due compliance with the provisions of the NCA.

[26] In Sebola supra the Constitutional Court held that the real question to be decided was whether the credit provider did draw the default to the notice of the consumer and made certain proposals to the credit provider to resolve the dispute. If the answer was yes there had been compliance. If the answer was no then there had been no compliance.

[27] It was argued, on behalf of the defendant that ex facie the notice in accordance with section 129 and if regard is had to the issues raised in the pleadings the Court had erred in finding that there had been compliance with the provisions of the NCA. It was submitted that the issues raised on the pleadings justified an order in terms whereof the proceedings ought to have been adjourned in accordance with section 130(4).
That the present case is not one of those cases which warrant an adjournment in terms of section 130(4) is clear from the facts of the matter, the correspondence between the parties as well as the pleadings.

[28] The defence, by the defendant, is hard to understand as his version shows clearly that he had sight of the section 129 notice.

[29] The defendant made the following admissions in his pleading in his first special plea para 4c, para 4d and para 5 on p. 54:

"*4c The Defendant has responded to the Plaintiff's section 129 Notice. The Defendant's reply to the Plaintiff was within 20 days of having been made aware of the Plaintiff's section 129 Notice. The Plaintiff has failed to acknowledge the Defendants response to its section 129 Notice;*

4d The Defendants response was sent to the Plaintiff, and/or its legal representatives prior to the service of the Summons commencing this Action;

5. The Defendant has put a proposal forward to the Plaintiff that is believed will allow for the ultimate settlement of the outstanding debt, inclusive of all arrears, albeit over a longer time period than was initially contracted for. The defendant's proposal is what is envisaged by the Act as debt-reorganization in the case of over-indebtedness as defined by section 79(1) of the Act."

[30] In his judgment the learned judge noted that although there was an allegation that the notice in terms of section 129 was sent to the wrong address, it was not denied in the plea that the notice did come to the defendant's notice. There can, therefore, be no question of the defendant having been deprived of an opportunity to remedy his breach. The defendant was granted such an opportunity and, on his own version, even responded to such notice. Counsel for the defendant sought to argue that the defendant was denied an opportunity to defend the matter and perhaps withdraw the admission when the learned judge determined the merits and granted a default judgment. There is no merit in this argument. The defendant made his choice when he limited his instructions to counsel to argue only a postponement. With a legal background he knew exactly what would happen if the postponement application was dismissed. This defence was, therefore, correctly rejected, in my view.

RECKLESS CREDIT

[31] The second special plea raised was that the loan granted by the plaintiff to the defendant amounted to reckless credit in terms of the NCA and that for that reason the plaintiff was not entitled to the order which it sought in the summons.

[32] The first question is whether the NCA is applicable to the agreement in the present case..

Sections 80, 81, 82, 83 and 84 of the NCA form part of Part D of Chapter 4 of the Act. In terms of section 4(2) of Schedule 3 to the Act it is provided that Part D of Chapter 4 of the Act applies to a pre-existing credit agreement only to the extent that it does not concern reckless credit.

[33] The effective date of Part D of Chapter 4 of the Act is 1 June 2007. It is common cause that the loan agreement was concluded on 31 January 2007 while the relevant mortgage bond was registered in the offices of the Registrar of Deeds on 22 February 2007. The loan agreement was therefore concluded prior to 1 June 2007 which is the effective date of Part D. It is therefore clear that the NCA is not applicable as the criteria for determining reckless credit are those which applied at the time the agreement was concluded. (See section 80(2)). This defence also lacks merit and was correctly dismissed by the court a quo.

THE CERTIFICATE OF BALANCE

[34] Although there was a dispute in respect of the certificate of balance the defendant made no submissions either in the Heads of Argument or orally. The plaintiff's claim is for a liquidated amount being the outstanding balance due in terms of the loan agreement. The loan agreement and mortgage bond provide that a certificate of balance signed by any of the plaintiff's managers, whose appointment need not be proved, will, on its mere production be proof, unless the contrary is proved, of the amount due. The court a quo found that no case had been made out in respect of the contention that the balance of certificate could not be relied on. I can find no fault with this finding for reasons already set out. For that reason this ground of appeal also cannot succeed.

[35] In the result I would grant the following order:

1. The appeal is dismissed
2. The appellant is ordered to pay the costs

TM MASIPA

JUDGE OF THE HIGH COURT

I agree

AJ BAM

JUDGE OF THE HIGH COURT

I agree

S STRAUSS

ACTING JUDGE OF THE HIGH COURT

Counsel for the appellant: U Lottering

Instructed by Spies Bester Potgieter Attorneys

Counsel for the respondent: MT Shepherd

Instructed by Hack Stupel & Ross Attorneys

Date of Hearing: 11 June 2014

Date of Judgment: 13 June 2014