REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No. 08/47568

Date: 7 July 2014

Reportable

Of Interest To Other Judges

In the matter between:

FIRST RAND BANK LIMITED **PLAINTIFF**

and

SONJA ALFREDE CHARLOTTE HARDIJZER **DEFENDANT**

Coram: Baqwa J

Heard: 25May2014

Delivered: 7/7/14

JUDGMENT

Summary Repayment of the full outstanding balance on the loan and execution against the immovable property - whether or not Defendant's act of applying for debt review and making debt restructuring proposal to the Plaintiff constitutes an act of insolvency. Compliance with Section 129 of the NCA is peremptory and an essential part of a credit provider's cause of action.

Annotations

Case law

Rossouw and Another v First National Bank 2010(6) SA 439 (SCA)

African Bank v Myambo NO and Others 2010(6) SA 298 (GNP) at 311A-D *Nedbank Ltd &others v National Credit Regulator & another 2011 (3) SA 581 (SCA)*

Knox D'Arcy AG v Land and Agricultural Development Bank of SA [2013] ZASCA 93 *at paragraph 35*

Moaki v Reckitt and Colman (Africa) Ltd 1968 SA 98(A) at 102A

Durbach v Fairway Hotel Ltd 1949(3) SA 1081 (SR) at 1082

Improfed (Pty) Ltd v National Transport Commission [1993] ZASCA 1993(3)

SA 94 (A) at 107 C-H

Sebola and Another v Standard Bank of South Africa Ltd and Another 2012(5) SA 142 (CC)

Allan Michael Pottas & 2 Others v Firsrand Bank and 5 Others unreported case number 613/09 ECP

Mahomed v Hadgee 1952(1) SA 410 (A) at 418H

Dinath v Breedt 1966(3) SA 712 (T) at 715G

Nedbank Ltd v Maxwell unreported case, no 18027/2010 (GSJ)

First Rand Bank Ltd v Evans 2011 (4) SA 597 (KZD)

Nedbank Limited v Heather Ann Maxwell: Case No. 18027/2010 (SGJ), Delivered 28/08/2010

First Rand Bank Ltd v Janse Van Rensburg [2012] 2 All SA 186 (ECP)

Parties

[1] The Plaintiff is First National Bank a Division of First Rand Bank Limited

1.1 .a public company incorporated in terms of the Companies Act 61 of 1973;

1.2 registered as a bank in terms of the Banks Act 94 of 1990 *(''the Banks Act')',*

1.3 registered as a credit provider in terms of the National Credit Act 34 of 2005 *("the NCA"),and*

1.4.With its principal place of business at 3rd Floor, 1 First Place, Bank City, Simmonds Street, Johannesburg.

[2] The Defendant is Sonja Alfrede Charlotte Hardijzer an adult female with identity number: 6[...] with chosen domicilium citandi et executandi at **Unit [...], I[...]'S A[...], [...] R[...] STREET, C[...],EXTENSION 31.**

Background of the Case

[3] On the 27th of August 2007, the Plaintiff duly represented by an authorised representative and the Defendant entered into a written Home Loan Agreement.

[4] The relevant material express terms of the loan agreement were:

4.1 The Plaintiff would lend to the Defendant, and the Defendant would borrow from the Plaintiff, the amount of R611 400.00 *("the loan")* upon security of a Mortgage Bond to be registered over Section NO: 21 in the scheme known as **I[...] A[...] C[...] EXTENSION 31 TOWNSHIP, LOCAL AUTHORITY CITY OF TSHWANE METROPOLITAN MUNICIPALITY** *("the property'):*

4.2 The loan and all other amounts owing to the Plaintiff would bear finance charges at a variable rate of *1.75%* below the Plaintiff's Home Loan Mortgage Base Rate of *13.00%* per annum, from time to time, the initial finance charge rate being *11.25%* per annum;

4.3 The loan, together with finance charges, would be repaid by the Defendant in 240 monthly instalments, the initial instalment being **R6 415.15;**

4.4 In the event of Defendant being in default of her obligations in terms of the loan agreement, the Plaintiff shall be entitled to raise default administrations charges;

4.5 The Defendant will be in default of this agreement if she does not rectify the said default within 10 (ten) days from the delivery of written notice from the bank to do so.

4.5.1 If the Defendant fails to pay any amount due in terms of this agreement or any other amount due to the bank in respect of any other liability of whatsoever nature to the bank on due date; or

4.5.2 Commits a breach of any other provision of this agreement whether such breach is

material or not; or

4.5.3 If the amount owing by the Defendant to the Plaintiff exceeds the capital amount;

4.6 If the Defendant does or omits to do or allows anything to be done which may, in any way, prejudice the Bank's rights or security under this agreement or by which the Bank may suffer loss or damage, the Defendant will be in default of this agreement immediately upon the prohibited event or action or omission taking place which, without derogating from the generality of the clause, shall include the Defendant committing an act which is an act of insolvency within the meaning of Section 8 of the Insolvency Act 24 of 1936.

[5] On the 9th of November 2007 a Mortgage Bond *("the bond")* was registered over the property for the sum of R734 400.00.

[6] The bond was registered as security for payment of:

6.1 The loan;

6.2 All finance charges;

6.3 The costs of preserving and realising the property, fire insurance premiums and costs of notice;

6.4 all such other amounts, costs and charges which may be claimable from the Defendant up to an amount not exceeding the capital and the sum of R123 000.00.

[7] The Defendant has been in default of her obligations in terms of the facility agreement for at least 20(twenty) business days.

[8] As a result of the Defendant's default of her obligations in terms of the agreement, the Plaintiff delivered notice in terms of Section 129(1) (a) of the National Credit Act to the Defendant by registered post on or about the 29th July 2008. It is not in dispute that the Plaintiff failed to comply with the provision of this section. I shall later elaborate on the above section.

[9] The Defendant failed to respond to the notices notwithstanding the lapse of ten business days since delivery of the notice and the plaintiff elected to enforce the credit agreement in terms of section 130 of the National Credit Act.

[10] On or about 2 September 2008, the Defendant elected to place herself under debt review as contemplated in terms of 86 of the National Credit Act.

[11] On or about 17 August 2012 being more than sixty days after the Defendant had placed herself under debt review, the plaintiff terminated the debt review process in terms of section 86(10) by giving notice to terminate the review to:

11.1 The Defendant;

11.2 The debt Counsellor

11.3 The National Credit Regulator

[12] It was submitted by the Plaintiff that by failing to rectify her default within ten days from delivery of section 129 notices the Defendant fell into default on the loan agreement alternatively:

12.1 Prejudiced the bank's rights by applying for debt review and/or

12.2 Because she committed an act of insolvency in terms of Section 8(g) of the Insolvency Act:

12.2.1 Notifying his creditors, including the plaintiff, in writing that she was unable to pay her debts; and

12.2.2 By offering to make arrangement with her creditors to be released wholly or partially from her debts

[13] <u>Governing Law</u> *<u>Section 129</u>*

Section 129(1) (a) and (b) of the National Credit Act provides that: if the consumer is in default under a credit agreement, the credit provider-

(a) May draw 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 subsection 130(2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (aO, or in section 86(10), as the case may be;

(ii) meeting any further requirements set out in section 130.

[14] Our courts have emphasized that compliance with Section 129(1) (b) (i) and 130(1) (b) of the NCA is peremptory and an essential part of a credit provider's cause of action in litigation proceedings.

See Rossouw and Another v First National Bank 2010(6) SA 439 (SCA)

African Bank v Myambo NO and Others 2010(6) SA 298 (GNP) at 311A-D

In so far as relevant, s 129(1) (a) provides that if a consumer is in default, the credit provider may (interpreted by the SCA as must in ***Nedbank Ltd &others v National Credit Regulator & another 2011 (3) SA 581 (SCA)*** draw the default to the notice of the consumer in writing and alert the consumer to the various options available to her under the NCA. Section 129(1) (b) provides that a credit provider may not commence any legal proceedings to enforce the credit agreement before first providing the s 129(1) (a) notice or other notices required in terms of specific provisions of the NCA.

[15] In this matter the Plaintiff's summons was issued on 13 October 2008 and served on the Defendant on 16 October 2008. In order to establish compliance with section 129 above, a Plaintiff whose cause of action is based upon a NCA matter should alleged that:

> 15. 1 The NCA notice was delivered to the relevant post office; and
>
> 15.2 The Post Office would, in the normal course, have secured delivery of a registered item notification slip, informing the Defendant that a registered article was available for collection.

[16] It was submitted by the Defendant that the Plaintiff's Declaration does not contain the averments stated in paragraph 15.1 and 15.2 making the Plaintiff's Declaration not to disclose a cause of action.

[17] It was further submitted by the Defendant that according to Rule 18(4) of the Uniform Rules of Court and as reiterated by the Supreme Court of Appeal in the *Knox D'Arcy AG v Land and Agricultural Development Bank of SA [2013] ZASCA 93 at paragraph 35* the object of pleadings are to clearly and concisely state the facts upon which a pleader relies for his or her claim or defence. A litigant will as a general rule be confined limited to the averments contained in the pleadings.

See also Moaki v Reckitt and Colman (Africa) Ltd 1968 SA 98(A) at 102A Durbach v Fairway Hotel Ltd 1949(3) SA 1081 (SR) at 1082

Imprefed (Pty) Ltd v National Transport Commission [1993] ZASCA 1993(3) SA 94 (A) at 107 C-H

[18] The Plaintiff's notification in terms of section 129(1) of the NCA dated July 2008 was apparently dispatched to **Houtkapperweg 42, Rooihuiskraal, 0157** and Defendant specifically denied delivery of

section 129(1) notice at the chosen *domicilium citandi et executandi.* The Defendant pleaded that the Plaintiff has failed to comply with the provision of section 129(1) and that the Plaintiff's cause of action is lacking and that the Plaintiff will not be entitled to judgment. Non-compliance is not denied by the Plaintiff and as such I agree with the Defendant's submission that the Plaintiff has failed to comply with a peremptory provision of section 129.

[19] In ***Sebola and Another v Standard Bank of South Africa Ltd and Another*** **2012(5) SA 142 (CC)** the Constitutional Court held that, a credit provider's summons should contain sufficient allegations to satisfy a court that there had been compliance with the provisions of the NCA. Justice Cameron specifically held that, a credit provider's summons should allege that the section **129** 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.

[20] In the matter of ***Allan Michael Pottas & 2 Others v Firstrand Bank and 5 Others unreported case number 613/09 ECP t****he* Honourable Justice Alkema, with specific reference to the Rossouw judgment (supra) concluded that a summons should disclose sufficient allegations to show that there had been compliance with the NCA and that summons that does not contained sufficient allegations to show that there had been compliance with the NCA will not disclose a cause of action.

[21] As I have already mentioned above that the Plaintiff does not dispute that the relevant notice in terms of section 129(1) (a) was sent to the wrong address. I accept the defendant's submission that such failure by the Plaintiff to comply with the provision of section 129 has rendered his summons to fail to disclose a cause of action.

Section 86(10)

[22] As I have already stated above in (paragraph 11) the Plaintiff gave notice to terminate the debt review process by the Defendant in the prescribed manner on 17 August 2012. As this was done after the issuing of summons, this to me serves no purpose because the Plaintiff had already failed to comply with peremptory provision of NCA in order for it to establish a cause of action.

[23] In ***Mahomed v Hadgee 1952(1) SA 410 (A) at 418*** the Supreme Court of Appeal correctly held that a Plaintiff's cause of action should subsist at the time of the issuing summons.

[24] In ***Dinath v Breedt 1966(3) SA 712 (T) at 715G*** Colman J stated that.

> " a *party who has no cause of action at the time of issue of his summons cannot rely upon subsequent events to remedy the defect, and should not be allowed, by amendments, to introduce into his*

pleadings references to such subsequent events."

[25] The Supreme Court of Appeal specifically held in ***Rossouw and Another v Firstrand Bank Ltd (supra)*** that compliance with section 129(1)(a) of the NCA is a critical cog in a credit provider's cause of action and failure to comply therewith will automatically prohibit a credit provider from enforcing a claim(at 451 E-G)

[26] ***Whether or not the application for debt review in terms of the NCA is equivalent to an act of insolvency in terms of Section 8 of the Insolvency Act?***

The Plaintiff submitted that the Defendant's act of applying for debt review and making a debt restructuring proposal to him constituted an act of insolvency and/or an act which prejudiced the bank's right thereby placing the Defendant automatically ***in mor****a* in terms of clause 4.27 of the loan agreement.

[27] The relevant portion of the Insolvency Act which the Plaintiff is relying on is found under the provision of Section 8(e) and (g) which read as follows:

A debtor commits an act of insolvency:

(e) If he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;

(f).....

(g) gives notice in writing to any one of his creditors that he is unable to pay of its debts;

[28] Before I proceed with this legal question it will be paramount to define the term 'debtor' in terms of the Insolvency Act in order to establish whether such definition applies to a Defendant who is in an agreement in terms of the NCA.

Sections 2 of the Act defines a debtor as follows:

'debtor', in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies;

[29] In considering this question one should bear in mind that the National Credit Act provides for a unique procedure, namely debt review and the consequent rearrangement of debts, and that this well-intentioned legislative initiative will be frustrated if sequestration may ***ipso iure*** follow upon an application for debt

review.

[30] The court in ***Nedbank Ltd v Maxwell unreported case, no 18027/2010 (GSJ)*** rejected the argument that an application for debt review constitutes notice from a debtor that he is unable to pay his debts and that he commits an act of insolvency in the process. The opposite was decided in a case which I was referred to by the Plaintiff in ***First Rand Bank Ltd v Evans*** **2011 (4) SA 597 (KZD)** with which I disagree with as this decision has a negative impact on a consumer's rights to apply for debt review because by doing so he or she exposes herself or himself to insolvency proceedings.

This to me could never have been in the contemplation of the legislature. The basis of the National Credit Act is to rehabilitate a debtor and put him/her in a position where she can deal with her debts on her own whereas the Insolvency Act is aimed at the management of an insolvent estate to minimise the prejudice suffered by the creditors. An insolvent individual may also become rehabilitated in the long term but the NCA aims to put a debtor on his feet in a much shorter period.

[31] Bhikha AJ in ***Nedbank Limited v Heather Ann Maxwell: Case No. 18027/2010 (SGJ), Delivered 28/08/2010,*** Unreported, at para 11 and part of para 14 stated that:

> 31.1 "*[11] Clearly, in taking advantage of a debt review process, and further the intention encapsulated in the application to a court for the debt restructuring should not prejudice or in my mind impute an inability or unwillingness to pay. In fact the contrary intention is evidenced by this process - the debtor indicated her clear and unequivocal intention to pay in accordance with the manner and over the period as ordered. This order is a result of a judicial process wherein all relevant parties had an opportunity to participate. The applicant refused to participate, which is its right and has appealed against the judgment, as it obviously is unhappy with the outcome. Again this is its entitlement. "*
>
> *31.2"[14] If this submission [adverse to the debt restructuring proposal] is accepted the very purpose of the NCA is defeated. The consequences of the debt restructuring order is to rearrange the existing rights and obligations after due process, and accordingly as long as the respondent meets her obligations and pays her debt, in instalments, the restructured debt is not due nor is it payable. Even the accrued future instalments are not due; hence the claim is not liquidated. "*

[32] The ***Evans*** judgment is, in my view not authority for the general proposition that the mere fact of an application for debt review in terms of the NCA constitutes compliance with the provisions of section 8(g) of the Insolvency Act.

[33] The above question was also dealt with in the matter of ***First Rand Bank Ltd v Janse Van Rensburg***

[2012] 2 All SA 186 (ECP), in which Goosen J held:

> *(a) An application by a consumer to a debt counsellor to be placed under debt review does not constitute a deed of insolvency in terms of section 8(g) of the Insolvency Act 24 of 1936*
>
> *(b) That an application for debt review in terms of section 86 of the National Credit Act does not involve notice given by a debtor to a creditor in which the debtor claim and inability to pay debts.*
>
> *(c) That the notice of inability to pay a debt envisaged by section 8(g) of the Insolvency Act must be given deliberately and with the intention of giving such notice.*
>
> *(d) The notice must be such that upon its recipient creditor can reasonably conclude that the debtor is unable to pay his or her debts.*[1]*1f the words of the notification do not convey an unequivocal statement of inability a debtor's obligation, the fact that the creditor may have construed the notice in that manner does not render the notice one in terms of Section 8(g) of the Insolvency Act.*
>
> *(e) That section 8(g) of the Insolvency Act specifically requires a written notice by a debtor to a creditor of an inability to pay his or her debts.*

[34] Contrary to the submission by plaintiff I have come to the conclusion that it would be incorrect for a plaintiff who is notified that a defendant has successfully applied for the institution of a debt review process to interpret that as an act of insolvency.

[35] The Plaintiff asked this court to consider making an order in terms of making an order in terms of the provisions of Section 130(4) which read as follows:

> "*In any proceedings contemplated in this section, if the court determines that*
>
> *(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 steps the credit provider must complete before the matter may be resumed. "*

[36] Section 130 of the NCA regulates debt procedures in a court. Subsection 3 provides that a court may determine a matter only if it is satisfied that, in the case of proceedings to which s 129 (amongst others)

applies, has not been complied with. But subsection 4 then allows for compliance to be effected after the proceedings have commenced.

[37] Section 130(4) is unusual in that it requires a court to pause (adjourn) the proceedings so that the service provider gives the consumer the benefit of notice as to his or her options- a notice that should ordinarily be given before summons is issued and served. It is the consumer who might be prejudiced were he or she not to be given those options. Thus the proceedings have a life, as Cameron J has said, and are not void, despite the absence of a section 129 notice. The very fact that a court must make an order as to how the proceedings are to be continued gives the validity to the summons rather that its nullity.

[38] In ***Sebola*** (supra), Cameron J said (paras 52 and 53):

> "*In my view the notice requirements in section 129 cannot be understood in isolation from section 130. This emerges from three considerations.*
>
> *First, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while s 129(1) (b) appears to prohibit the commencement of legal proceedings altogether (may not commence), s130 makes it clear that where action is instituted without prior notice, the action is not void. Far from it. The proceedings have life, but a court 'must' adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming* the matter. The bar on proceedings is thus not absolute, but only dilatory."

[39] The purpose of s 130 is to ensure that any shortcoming in the pre-summons enforcement procedures is made good: that is for the benefit of the consumer. She is entitled to the opportunity, before the debt can be recovered, to embark on the processes envisaged by the NCA- to seek debt counselling or alternative dispute resolution, for instance, even to make payment. The Plaintiff terminated the debt review made by the Defendant despite its failure to comply with section 129 and serving of summons prematurely.

[40] This court will not be doing justice to the Defendant if it can allow the Plaintiff who materially failed to comply with peremptory provisions, of section 129 to rely on section 130(4) (b) to ask this court to adjourn the matter and make an order setting out the steps that the Plaintiff must complete before the matter may be resumed. There can be no such order *in casu* as the debt review process has already taken place. Such an order would be academic, a nullity and of no force and effect.

[41] The Plaintiff should have been aware before issuing summons in 2008 that the compliance with Section 129(1) (a) of the National Credit Act is a critical cog in his cause of action and such failure to comply therewith will automatically prohibit the plaintiff from enforcing a claim. The summons was prematurely

issued before compliance with the provisions of section 129(1) (a) of the NCA leaving this court with no other option but to dismiss the Plaintiff's claim with costs.

[42] The NCA constitutes legislation which imposes conditions on the institution of action for the recovery of a debt. Non-compliance with section 129(1) of the NCA, which is peremptory (not open to appeal or challenge: *South African Concise Oxford Dictionary- page 865)* shall render service of the summons ineffective.

[43] In the result, I make the following order:

1. The Plaintiff's action is dismissed with costs.

S.A.M. BAQWA

(JUDGE OF THE HIGH COURT)

Counsel for the plaintiff: Adv R.W Wilson

Instructed by: Glover Incorporated

Counsel for the defendant: Adv B. J Burger

Instructed by: Greef and Van Wyk Attorneys

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1 *Ibid paragraph 28 3rg sentence*