IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 50216/13

DATE: 2014.09.16

NEDBANK LIMITED **APPLICANT**

V

LOTTER, JANINE **RESPONDENT**

JUDGMENT

MABUSE J:

[1] The Applicant in this matter is a general bank duly registered as such in terms of the Companies and Banks statutes of this country with its principal place of business situated at Braamfontein Office Park, 33 Hoofd Street, Braamfontein in Johannesburg. In terms of the provisions of the National Credit Act No. 34 of 1925 ("the Act"), the Applicant is a credit provider. The Respondent is an adult female married, according to the founding and opposing affidavits, out of community of property, who resides at [...] H[...] W[...], S[...] Extension, Randburg.

[2] By notice of motion issued on 16 August 2013 by the Registrar of this Court the Applicant claims from the Respondent, among others, payment of the sum of R1,499,838.43 and an order declaring the Respondent's immovable property, to wit, Erf […] S[...] Extention 7, Township Registration Division I.Q., the Province of Gauteng, measuring 1000m^2 held under Deed of Transfer Number T[...] mortgaged under mortgage bond number B[...] ("the Property"), specially executable for the said sum plus costs.

[3] The facts of this matter are largely not in dispute. It is not in dispute that on or about 8 June 2007 and at Johannesburg, the Applicant and the Respondent concluded a written agreement of loan in terms of which the Applicant, as the Credit Provider, loaned the Respondent, who borrowed from the Applicant a sum of

R1,134,000.00 on certain terms and conditions and upon the security of a mortgage bond; that the Respondent would, and undertook to, repay the said amount together with finance charges in regular monthly instalments; that the Respondent hypothecated the said property as security for her obligations under the Loan Agreement. It is furthermore not in dispute that the Respondent has failed to comply not only with the provisions of the mortgage bond read together with the Loan Agreement but also with the terms of a subsequent Distressed Restructure Agreement and another written agreement concluded with the Applicant. As at 26 June 2013 the Respondent was in arrears in the sum of R48, 892.37.

[4] The Respondent has admitted that she was in arrears with her monthly instalments as at 26 June 2013. In an effort to thwart the Applicant from obtaining the order it seeks, the Respondent has raised what she regards as three defences to the application, two in her answering affidavit and another one in her supplementary affidavit. I deal with those three defences singly hereunder.

[5] The first point that the Respondent raised against the application was that at the time when she bought the abovementioned immovable property she was employed at Marvi Products and her salary ranged between R25 000.00 and R30 000.00 per month. Her salary and her husband's earnings enabled them to pay the monthly instalment of R12 000.00. Marvi Products was liquidated in 2009. Painting contracts became even more difficult for her husband to procure.

[6] As a consequence of the demise of Marvi Products coupled with the fact that her husband found it extremely difficult to procure painting contracts, she went through difficult financial times. Despite these difficult financial times, she kept the Applicant informed of the developments around her financial stresses. Pursuant to her communication with the Applicant they came to a firm arrangement at the start of August 2013 that a revised payment plan would apply in respect of her Home Loan. They agreed that as from 30 August 2013 the Respondent would pay a monthly instalment of R16 000.00.

[7] The said arrangements were confirmed in writing. In a letter dated 1 August 2013 to the Respondent, the Applicant advised the Respondent that it had approved a twelve (12) months payment on her Home Loan Account, The Applicant indicated furthermore that the Respondent's monthly payment would be R16 000.00 for the following twelve months commencing on 1 August 2013. The Respondent was requested to confirm the payment dates and to indicate if she accepted the new arrangements. On the very same date the Respondent wrote back to the Applicant. In her letter she undertook to pay from 30 August 2013 when her husband would start a new contract. On the same date at 10h43, the Applicant indicated its acceptance of the new arrangements. It informed the Respondent that her first payment as at 30 August 2013 was accepted. It was indicated that: " *will load the arrangement of R16 000.00 on last day of every month and monthly payments on this account."*

[8] Despite the arrangements that had been agreed between the Applicant and the Respondent on 1 August 2013 Lo! and Behold! on 16 August 2013 the Sheriff of the Court served the Respondent with a copy of this application. This vexed the Respondent who then consulted with her attorneys. In turn on 9 September 2013 her attorneys wrote a letter to the Applicant's attorneys in which they objected, on behalf of the Respondent, to the service of a copy of the application on the Respondent only after the Applicant and the Respondent had made fresh arrangements for the refund of the loan. They also requested the Applicant to withdraw the application. In a replying affidavit deposed to by Reshim Singh, the Applicant's Manager of Home Loans and Legal Recoveries, it was stated on behalf of the Applicant that the Respondent was advised that the Applicant would continue with its action until the Respondent had made payment of the first R16 000.00 at the end of August 2013.

[9] Despite her undertaking to pay R16 000.00 at the end of August 2013 the Respondent only paid R5, 000.00 on 30 August 2013. She contended that she was forced to pay the said sum of R5 000.00 because the Applicant had commenced legal proceedings against her and she had to incur unnecessary and special legal costs that she paid to her attorneys. Payment of the sum of R5, 000.00 constituted breach of the arrangements of 1 August 2013. All that the Respondent could do and should have done in order to stave off the application, in my view, was to pay R16 000.00. The Respondent preferred seeking legal advice from her attorneys when paying her instalment of R16000.00 would have been reasonable. In the same way as she personally made arrangements with the Applicant on 1 August 2013, she could thereafter take the matter up with the Applicant. The letter dated 9 September 2013 from the Respondent's attorneys could not save the Respondent's fate. In my view the Applicant was entitled to proceed with the application. The Respondent has not raised a valid defence against the application.

[10] I now turn to the Respondent's second defence. The Respondent stated that her attorneys of record have informed her that these proceedings were instituted in accordance with the provisions of the Act and furthermore that the Applicant has failed to comply with the requirements of ss 127, 129, 130 and 131 of the Act. She claimed furthermore that she has been informed that the application was premature in that it was issued before the Applicant had complied with the provisions of s 129(1)(a)(b) of the Act. She contended that she never received the notice referred to in s 129 of the Act.

[11] A copy of a letter or notice in terms of s 129 was attached to the Applicant's application as Annexure "E". Despite the fact that the said notice was addressed to the Respondent at [...] H[...] Road West, S[...] Extension, Randburg, 2161, the Respondent claimed that she never received it. This was the address referred to in clause 18.1 of the Distressed Restructure Agreement. The said clause provided that a party giving notice as required by the agreement must deliver that notice to the other party at the address of the other party as set out in clause 4 of the said agreement or at the address most recently provided by the recipient in accordance

with in accordance with clause 18.2 of the agreement. In terms of clause 4 of the said agreement the address the Respondent had nominated as the address where she was prepared to receive notices, such as the notice in terms of s 129 of the Act, was the address referred above in this paragraph. In Kubyana v. Standard Bank of South Africa (3) S A 56 (CC)(“Kubyana"), the Court stated as follows at page 76:

> “*54 The Act prescribes the obligation that credit providers must discharge in order to bring s. 125 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged in turns proof that -*
>
> > *(a) the s. 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace record and the terms of the relevant Credit Agreement;*
> >
> > *(b) the Post Office issued a notification to the consumer that a recent item was available for her collection;*
> >
> > *(c) the Post Office notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which reference may be rebated by an indication to the contrary as set out in paragraph 52 above; and*
> >
> > *(d) a reasonable consumer would have collected the s. 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a-c) which of the inferences may again, be rebated by a contrary indication; an explanation of why in the circumstances the notice would not have come to the attention of a reasonable consumer.”*

[12] In the first place, a copy of the relevant notice is marked BY REGISTERED MAIL. At the foot of page 2 thereof there is a copy of the Certificate of Registered Letter which has a tracking number RD031656304ZA. The address on this document is the address nominated by the Respondent. The Domestic Item Tracking shows that Northriding Branch of the Post Office received the said registered item. On 15 July 2013 at 09h51 the said Post Office branch issued a first notification to the addressee that an item was lying at the Post Office for collection. That was sufficient. In my view the said notice complied with both Kubyana and Sebola and Another v Standard Bank of South Africa Ltd and Another 2012(5) SA 142 CC where it was stated that the requirement that a credit provider provide notice in terms of s 129(1) (a) to the consumer must be understood in conjunction with s 130 which requires delivery of the notice. The statute, though giving no clear meaning to *'delive?* requires that the creditor seeking to enforce the Credit Agreement aver and proof that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with the proof that the notice reached the appropriate Post

Office for delivery to the consumer, will, in absence of the contrary indication, constitute sufficient proof of delivery. In paragraph 28.4 of the application the deponent to the Applicant's founding affidavit alleged that the Applicant complied with the provisions of s 129 of the Act and that it was done prior to the institution of the legal proceedings. In addition, it was stated that the Respondent has failed to respond to the terms of the said notice. It was never the Respondent's case that the said notice did not reach her because it was forwarded to a wrong address nor did the Respondent deny that the said address was her address or nominated address. Accordingly the contention by the Respondent that the Applicant has commenced legal proceedings against her without complying with s. 129 of the Act is unmeritorious. In my view the Applicant has complied with the requirements of s. 129 of the Act.

[13] When the matter came before me on 19 August 2014, Mr. J J Roestorf, the Respondent's counsel, informed the Court, both in chambers and in Court that he had planned to challenge the application on one point only. The point or defence he raised had already been set out in the supplementary affidavit that the Respondent's attorneys had delivered on the Applicant's attorneys on 28 July 2014. The issue that the Respondent made out in the supplementary affidavit and onto which her counsel latched in the heads of argument in order to frustrate the application was that although the Respondent had at all material times believed that she was married out of community of property she has recently established that the antenuptial contract ("anc") which she and her husband had entered into was never registered. The consequence thereof was that their marriage was one in community of property with a joint estate. It was submitted furthermore by counsel for the Respondent that, although it was not registered, it was nevertheless enforceable *inter partes* but not binding on third parties. In this respect he referred me to the authority of Lagesse v Lagesse 1992(1) SA 173 (D & CLD). On the strength of that authority he submitted that the mortgage bond registered over the property and the Loan Agreement entered into by the Respondent were a nullity because her husband's consent had never been obtained at the time nor did he ratify the transactions. In a supplementary affidavit the Respondent contended that because she has now discovered that she is married in community of property and that her husband has never consented to the purchase of the property, the Loan Agreement and the registration of ownership of property in her names at the Deeds office and the registration of the mortgage bond must all be considered void *ab initio.*

[14] In his supplementary heads of argument, Mr. Mollentze, stated that the factual position was that the Respondent and her husband always wanted, and had planned, to enter into a marriage which excluded community of property. He then concluded that the Respondent and her husband have entered into a marriage out of community of property. Relying on the authority of Ex Parte Spinazze and Another **NNO 1983(4)** SA **751** T, he submitted that in so far as it concerned the Respondent and her husband, their marriage should be regarded as one out of community of property. He seemed to admit that the antenuptial contract which the Respondent alleged she and her husband had entered into has not been registered with the deeds office. He

submitted that under such circumstances and in particular in terms of s. 86 of the Deeds Registries Act, an unregistered antenuptial contract shall be of no force or effect as against a person who is not a party to it. In other words such an unregistered ante-nuptial contract only binds the parties and their successors and not the third parties. On his understanding this Court could then grant the application. This reasoning was, in my view, somewhat skewed.

[15] I now turn to considering the law as regards the unregistered ante-nuptial contracts or the absence thereof. This Court has now accepted it as a fact that, by reason of the fact that neither of the parties in these legal proceedings has placed a copy of such agreement before it, there is no antenuptial contract which the Respondent and her husband have entered into and furthermore that if there was any then such contract has not been registered with the Deeds Registry as required by the law. The problem with the Respondent's allegations is that her averments in her supplementary affidavit that she and her husband have concluded an ante-nuptial contract have not been supported by her husband. This Court has not been furnished with any reasons why the Respondent's husband's affidavit was not obtained or why her *averments were* not supported by her husband.

[16] In terms of s 86 of the Deeds Registries Act, an ante-nuptial contract must be notarially executed and registered in the Deeds Office within three months after the date of its execution or within such extended period as the Court may on application allow. An ante-nuptial contract which has not been property prepared before a notary or which, having been so properly executed, but has not been registered as required by the provisions of s 87, may be perfectly valid *inter partes* but not binding on third parties. What this means is that the marriage may be out of community of property as far as the spouses are concerned but in community of property as far as third parties are concerned.

See in this regard **Exparte Minister of Native Affairs in Re: Molefe v Molefe 1946 AD page 315 at 318** where Watermeyer CJ stated as follows:

> *"In the case of a legal marriage, where no question of domicile outside of the Union is involved, the proprietary rights of the spouses resulting therefrom must be governed by the common law of South Africa except in so far as specific provisions have been introduced by statute, which alter the common law. At common law a husband and wife can, as between themselves, by an antenuptial agreement, regulate their proprietary rights after marriage. Such an agreement is binding between the spouses, but it is of no effect in so far as persons not parties thereto are concerned, unless it is duly entered into and registered in accordance with the law governing ante-nuptial contracts. (See secs. 86 and 87 of Act 47 of 1937). if they do not regulate their proprietary rights by an antenuptial agreement, then community of property and community of profit and loss will come into existence between them and the husband will, by virtue of this marital power, exercise control over all the property of both*

spouses. ”

In dealing with the definition of the expression ‘ante-nuptial contract’, Stegmann J stated the following in Mathabathe v Mathabathe 1987(3) SA 45 WLD page 51 D-G:

> “*The expression ‘antenuptial contract’ used in a broader sense included not only the antenuptial contracts in that narrower category, but, as indicated in the above quoted passage of the judgment of Watermeyer CJ, also extended to informal contracts not complying with the formalities required by s. 87 of the Deed Registries Act 1937. The latter antenuptial contracts were of no concern to third parties. As far as third parties were concerned, a marriage between White persons domicile in South Africa, regulated only by an informal or unregistered antenuptial contract, was no different from the marriage in community of property and of profit and toss and from which the material power was not excluded. Third parties had to conduct their business with the spouses on that basis. Nevertheless, as between the parties, such an antenuptial contract was valid, effectual and enforceable to the extent that the rights of third parties were not affected. The fact that the contract was of no interest, concern, or relevance to third parties did not exclude it from the category of antenuptial contracts as more broadly defined. The existence of such informal antenuptial agreements is expressly recognised by the legislature s. 88 of the Deed Registries Act 1937. Its subject matter is: ‘Postnuptial execution of antenuptial agreementsIf an antenuptial agreement (in the broad sense) was arrived at between intending spouses, no matter how informally, the Court is empowered by the Legislature to authorise postnuptial execution thereof before a notary, and its registration."*

[17] In his book the South African Law of Husband and Wife, 5th Edition the learned author HR Hahlo states as follows at page 263:

> “*Since an informal antenuptial contract, though not valid as against third parties, is binding as between the parties, spouses who have before their marriage informally agreed that community should be excluded are married out of community of property as far as they themselves and their heirs are concerned.*
>
> *As far as creditors and other third parties are concerned, on the other hand, they are married in community of property*."

Accordingly, on the facts placed before me the marriage concluded by and between the Respondent and her husband is one in community of property and of profit and loss. It accordingly means that the applicant entered into transactions that constitute the subject matter of this application or of these legal proceedings in contravention to the provisions of s. 15(2) (a) and (b) of the Matrimonial Property Act.

[18] Section 15(9) of the Matrimonial Property Act provides as follows:

> "*When a spouse enters into a transaction with a person contrary to the provisions of (2) or (3) of this section, or an order under section 16(2), and-(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to such provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said (2) or (3), or white the power concerned of the spouse has not been suspended, as the case may be."*

This section is. in my view, related to the duty of care that a bank official who considers an application for a financial loan and a conveyancer who prepares a deed or mortgage bond or application must exercise. Section 15A (1) of the Deeds Registries Act provides that:

> *"A conveyancer who prepares a deed or other document for the purpose of registration or filing in the deeds registry, and who signs a prescribed certificate on such deed or document, accepts by virtue of such signing the responsibility, to the extent prescribed by regulation for the purpose of this section, for the accuracy of those facts mentioned in such deed or document or which are relevant in connection with the registration or filing thereof, which are prescribed by a regulation."* On the other hand the said section should be read with section 17(2)(a) and (c) of the Deed Registries Act. This section provides as follows:
>
> > *2. Every deed or any other documents lodged with a deeds registry for the execution, registration or record, shall,*
> >
> > > *a) state the full name and marital status of the person concerned;*
> > >
> > > *b) where the marriage concerned is governed by the law in force in the Republic or any part thereof, state whether the marriage was contracted in or out of community or whether the matrimonial property system is governed by customary law in terms of the Recognition of Customary Marriages Act, 1998;*
> > >
> > > *c) where the person concerned is married in community of property, state the full name of his spouse. "*

[19] The conveyancer or any person who prepares, an application, or document has a duty to establish that to the best of his knowledge and after making due enquiry an actual marriage has been solemnised. He also has to take care to establish that such a marriage is indeed a marriage out of community of property. Accordingly, it is very important for the preparer of a deed or an application or a document to obtain and file a certified copy of the marriage certificate and to have and peruse an antenuptial contract. It is also his duty

to make sure that such an antenuptial contract has been registered with the deeds registry. Accordingly the fact of marriage and that it is marriage out of community of property must be verified from the relevant documents e.g. a marriage certificate and antenuptial contract. The fact of due registration must be verified with the Deeds Registry. It appears that s. 15(9) (a) should not be read in isolation. Mr. Roestorf argued that the applicant, being a commercial bank, cannot rely on the provisions of s. 15(9) (a). It cannot be heard to say that it could not reasonably have known about the marital status of the Respondent. The applicant is a commercial bank and lends money to consumers and from time to time requires security in form of mortgage bonds.

[20] On the other hand and this in particular relates to the loan agreement, section 15(2) (f) of the Matrimonial Property Act provides that:

> "*2. Such a spouse shall not without the written consent of the other spouse -(f) enter, as a consumer, into a credit agreement to which the provisions of the National Credit Act 34 of 2005 apply, as a "consumer" and "credit agreement" are respectively defined in that Act: but this paragraph does not require the written consent of the spouse before incurring its successive charge under a credit facility, as defined in that Act. "*

In terms of section 8(1)(b) of the National Credit Act a mortgage bond is a credit agreement in as much as it is, in terms of section 8(4), a credit transaction. The agreement of loan referred to in the application is a credit agreement to the extent that it is a credit facility as set out in section 8(3) of the National Credit Act. As the provisions of this National Credit Act apply to both the agreement of loan and the mortgage bond, it follows therefore that the applicant was obliged, in terms of section 15(2)(f) of the Matrimonial Property Act, to obtain the written consent of the Respondent's husband. This agreement of loan was entered into against the provisions of s. 15(2) (f) of the Matrimonial Property Act.

[21] Mr. Roestorf referred me to the authority of Gounder v. Top Spec Investments (Pty) Ltd 2008(5) SA 151 (SCA) where in paragraph 18 the Court found that the validity of a loan agreement did not depend on the validity or otherwise of the agreement to register a mortgage bond. He submitted that what the Supreme Court of Appeal meant thereby was that such an agreement of loan was divisible and that it could survive irrespective of whether the agreement of registering a bond was found to have been concluded in contravention of section 15(2)(9). In that matter the question whether an agreement of loan amounted to a contravention of section 15(2)(f) was not pursued because the said contract of loan was found to have been concluded before 1 June 2006, the date on which section 15(2)(f) was substituted by section 172(2) of the NCA.

[22] Mr. Mollentze argued that the Respondent made no provision as to what should happen further in the

matter. It would appear, so he developed his argument, that the Respondent wanted to retain the property and remain in it while simultaneously she continued with her default in making payments. Mr. Roestorf contended that the loan agreement was a nullity and furthermore that the registration of the property contrary provisions of s. 15(2) rendered the mortgage bond void. There was no formal application before me for such orders. On the other hand Mr. Mollentze proposed that I should refer this matter to trial so that the issues involved in this application could be properly ventilated by way of oral evidence. He also proposed that I should put certain conditions with regard to referral of the matter to oral evidence.

[23] In my view the proposition made by Mr Mollentze was a plausible one. Issues regarding the alleged voidness and voidability of the transactions could serve as subjects for a debate before another forum on another day. The application itself cannot succeed but at the same time I would be loathe to dismiss it as asked by Mr Roestorf, It is only proper if the issue of costs relating to this application is determined at the same forum to which this matter will be referred.

Accordingly I make the following order:

1. The application is refused.

2. The application is referred to trial;

3. The notice of motion shall stand as combined summons;

4. The answering affidavit shall stand as the plea;

5. The replying affidavit shall stand as a replication;

6. Thereafter the rules applicable to the action shall apply;

7. The costs to date are reserved for determination by the trial court.

P.M:-MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant: Adv. Mollentze

Instructed by: Rossouws Leslie Inc;

Counsel for the Respondent: Adv. Roestorf

Instructed by: Blake Bester De Wet & Jordaan Inc;

Date Heard: 19 August 2014

Date of Judgment:16 September 2014