HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

9/6/2016 .....
DATE

.....
SIGNATURE

Case no. 8802/16

9/6/2016

In the matter between:

STANDARD BANK OF SOUTH AFRICA **Plaintiff**

and

K.M. ABDOOLA t/a MERCHANT MEDIA AND FILM **Defendant**

JUDGMENT

RABIE, J

1. Tthe plaintiff instituted action against the defendant for payment of R 243 754, 37 plus interest and costs. The defendant entered appearance to defend the plaintiff's action whereupon the plaintiff applied for summary judgement. The defendant opposed the application for summary judgement.

2. The defendant raised a number of defences relating to, inter alia, the authority of the deponent to the plaintiff's founding affidavit; the question whether the summons were issued prematurely; the adequacy of the allegations contained in the particulars of claim; and the allegation that the overdraft facility would not have exceeded R50 000,00. I have considered all these defences and came to the conclusion that they are all without any substance. Due to my finding in respect of one other defence to which I refer to below, it is not necessary to refer further to the aforesaid defences.

3. The defence I need to refer to relates to the question whether the plaintiff was entitled, in terms of the agreement between the parties, to institute action in the circumstances that prevailed. The salient background facts are as follows.

4. The agreement between the parties which governed their relationship was a Business Current Account which the defendant opened with the plaintiff on 23 February 2012. The defendant conducted this account by way of withdrawing funds and depositing funds into the account. The defendant was entitled to overdraw the account but remained obliged to repay the monies so lent and advanced to it by the plaintiff immediately upon demand.

5. As at 11 January 2016 the defendant was indebted to the plaintiff in the amount of R 243 754, 37 together with further interest at the rate of 16% per annum calculated daily and compounded monthly in arrears as from 25 December 2015.

6. The agreement between the parties and upon which the plaintiff relied was attached to the particulars of claim. Paragraph 4 of the agreement deals with the issue of "default". Paragraph 4.2 provides that if the defendant is in default, a

written notice of such default may be given to the defendant. Paragraph 4.3 of the agreement provides as follows:

"4.3 We may commence with legal proceedings if we have given you notice as referred to in clause 4.2 above and you have been in default under this Agreement for at least 20 (twenty) Business Days and at least 10 (ten) Business Days have elapsed since we delivered the notice contemplated in clause 4.2 above and in the case of a notice, you have not responded to that notice or have respondent to the notice by rejecting our proposal." (My underlining)

7. In the particulars of claim the plaintiff pleaded, and this was common cause, that the agreement fell within the ambit of the National Credit Act ("the Act"). The plaintiff pleaded that it complied with the provisions of section 129 of the Act by dispatching the required notice to the defendant demanding payment of the aforesaid amount within 10 days of date of posting of the notice. It was common cause that the notice was posted on 15 January 2016 and that the defendant received the notice on 27 January 2016. The summons were served on the defendant on 15 February 2016 and thus after the expiry of the aforesaid 10 days.

8. The defence of the defendant is based on her denial that she failed to respond to the plaintiff's notice and or responded to the notice by rejecting any proposal. It is this issue which I have to decide.

9. The response upon which the defendant relied was in the form of an e-mail dated 29 January 2016, which was some two days after receipt of the section 129 notice. The e-mail was written by the defendant's son on her behalf and

addressed to the attorneys of record of the plaintiff. Although all the aspects mentioned in the letter are not relevant, it is necessary to refer thereto in full. It reads as follows:

"Dear Sir

I confirm that I represent my 78-year-old mother Ms KB Abdoola and have been assisting her due to her recent illnesses.

I also confirm that I have received the letter dated 27/01/2016 and called you on 28/01/2016.

During this discussion, I had advised you that my Mum, was extremely ill, and would have to be hospitalised. I also proposed that without going into the merits of whether in fact my mother owes the bank this amount or not, my family and I were willing to assist our mother by paying the correct and mutually agreed amount off in monthly instalments. I further advised that the Bank had removed several unauthorised withdrawals from my mother's personal not linked to this account in question.

I had therefore requested a detailed statement of account to date outlining all amounts that the bank received, which will the assist my family and I in making an offer to you in settlement.

We agreed that these proposals will be agreed to with you client and we would be reverted to.

You informed me that you will revert to me via email as to whether your client will be amenable to certain proposals.

I await your email so that I can discuss it with my family.

E. Patel" (sic)

10. the question to be answered is whether the aforesaid response by the defendant was an adequate response as envisaged in paragraph 4.3 of the agreement

mentioned above which would have prevented the commencement of legal proceedings. According to paragraph 4.3 legal proceedings may be commenced with if, in the first place, the defendant had not responded to the notice. In casu the defendant had responded to the notice and consequently the second part of the provision needs to be addressed. That is the part that states that legal proceedings may be commenced with if the defendant had responded to the notice but had done so "by rejecting our proposal". The question is therefore, firstly, whether the aforesaid e-mail on behalf of the defendant constitutes a rejection of the plaintiff's proposal and, secondly, whether anything else should have delayed the commencement of proceedings.

11. In order to answer these questions, the section 129 notice of the plaintiff has to be considered. In the third and fourth paragraphs of this notice the following is stated:

"Unless payment of the outstanding amount of R 243 754, 37 is made within 10 business days from date of delivery hereof, the agreement will be cancelled and the full amount owing will be immediately due and payable. The outstanding amount will further incur interest which interest shall be calculated monthly in arrears, as well as the monthly costs associated with the account from date of arrears to date of payment, both days inclusive. Should you require any assistance to resolve the arrears please contact us on [*telephone number*].

You may refer the agreement to a debt counsellor (unless you are a juristic person), alternative dispute resolution agent consumer court or bank ombudsman, with the intent that we should resolve any dispute under the agreement or develop and agree to a plan to bring the payments under the agreement up-to-date. However, we should highlight the fact that you will be unable to access further credit whilst under debt review and will be listed on the credit bureau."

12. The fourth paragraph of the agreement (quoted above) to a large degree follows the wording of the provisions of section 129 (1) (a) and section 130(1) of the Act. Having regard to section 129 (1) (a) the invitation to the defendant, as set out in the notice, to refer the agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud, clearly constitute a "proposal" as envisaged in paragraph 4.3 of the agreement and section 130 (1) (b) of the Act.

13. On behalf of the plaintiff it was submitted that since the defendant failed to refer the agreement to any of the above institutions, the defendant thus rejected the plaintiff's proposal and consequently the plaintiff was entitled to commence legal proceedings.

14. Although the defendant did not accept the proposal by referring the matter to any of the institutions, the matter does not end there. Firstly, the section 129 notice itself, in the third paragraph, invited the defendant to contact the plaintiff's attorneys by telephone should she require any assistance to resolve the arrears. This was done on the day after receipt of the notice. According to the e-mail of the next day, 29 January 2016, the difficulties experienced by the son of the defendant who was assisting her were discussed with the attorney and information was requested. Secondly, and this appears from the last three paragraphs of the e-mail, it was agreed with the plaintiff's attorney that, at the very least, the attorney or the plaintiff would revert to the defendant or her son regarding the matter and with a view of the defendant making an offer in settlement of the account.

15. According to the aforesaid e-mail, which was the only evidence in this regard before this court, the defendant would clearly have been brought under the

impression that the plaintiff would not proceed with legal proceedings unless and until the plaintiff or its attorney had reverted to the defendant or her son. By the same token it would in the circumstances not have been necessary for the defendant to accept the formal proposal in the notice namely of referring the agreement to any of the institutions mentioned in the notice and the Act. The defendant was clearly entitled to wait for the response by or on behalf of the plaintiff and could not have anticipated service of the summons upon her prior to such a response.

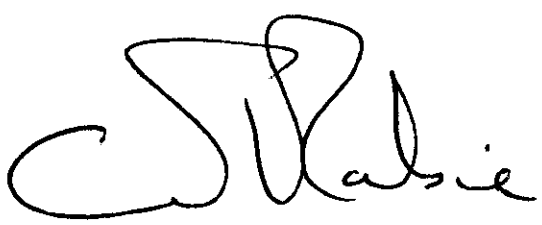
16. In these circumstances I am of the view that I should exercise my discretion against the granting of summary judgement against the defendant.

17. As far as costs are concerned, the usual order for costs should be made.

18. In the result the following order is made:

    1. Leave is granted to the defendant to defend the action.

    2. The costs of the application shall be costs in the cause.



C.P. RABIE

JUDGE OF THE HIGH COURT