**IN THE HIGH COURT OF SOUTH AFRICA**

**NORTH GAUTENG, PRETORIA**

**REPORTABLE**

**OF INTEREST TO OTHER JUDGES**

**CASE NO: 100/2016**

**DATE: 1 APRIL 2016**

In the matter between:

ABSA BANK

Plaintiff

And

NICOLAS JOHANNES JOUBERT First Defendant

ANDRE JOUBERT Second Defendant

**JUDGMENT**

**COLLIS AJ**

**INTRODUCTION**

[1] The Plaintiff issued Summons against the First and Second Defendants suing them jointly for:

a) Payment of the amount of R718 980, 86;

b) Interest on the amount of R718 980, 86 at the rate of 9.50% per annum from 4

August 2015 to date of payment, the said interest to be calculated and capitalised monthly;

c) An order declaring the property known as: Portion 13 of Erf [..... M. T.], Registration Division J.R, Gauteng Province measuring 1018 (One Thousand and Eighteen) square metres and held by Defendants in terms of Deed of transfer NR T95498/1998 ("the immovable property") specially executable;

d) Costs as between Attorney and Client to be taxed;

e) Further and or alternative relief;

f) That the Plaintiff/Registrar be authorised to issue a writ of execution against the immovable property referred to in prayer (c) above, to give effect to the order granted in terms of prayer (c) above.

[2] Pursuant to the Summons being served on the Defendants they entered an appearance to defend the action whereupon the Plaintiff applied for summary judgment within the ambit of Rule 32 of the Rules of Court.

**BACKGROUND**

[3] The Plaintiff as per the Summons pleads that, it together with the Defendants entered into loan agreements and mortgage bond agreement. In terms of the agreements, bank facilities were granted by the Plaintiff to the Defendants, in terms whereof monies were from time to time lent and advanced by the Plaintiff to the Defendants.

[4] The Defendants in terms of Mortgage Bond NR's B768051/1998 and B7703/2003 mortgaged the property known as Portion 13 of Erf [..... M. T.], Registration Division J.R. Gauteng Province, to the Plaintiff as continuing covering security for each and every sum, in which the Defendants may from time to time become indebted to the Plaintiff, from any cause

whatsoever.

[5] The agreements further provide that the outstanding amount shall be due and payable on demand. The Plaintiff alleges that notwithstanding proper demand for payment, the Defendants have failed to make payment of the amount claimed by the Plaintiff, therefore the amount and interest have become due and payable.

[6] With reference to the agreements, the Plaintiff pleads that on 28 August 2009 a fire broke out at the premises of Docufile a company that handles document management for ABSA. The Plaintiff believes that the mortgage loan agreements were probably destroyed in the abovementioned fire. The Plaintiff further confirms that it is currently not in possession of the mortgage loan agreements and that to its knowledge no copies of the loan agreements in respect of the covering bonds exist.

[7] Rule 32(3)(b) sets out, that a Defendant shall on affidavit 'disclose' fully the nature and the grounds of the defence and the material facts relied upon therefore. [1]The nature of his defence relates to the character or kind of defence and the grounds refers to the facts upon which the defence is based. Thus in order to meet the requirements laid down in the sub-rule there must be a sufficiently full disclosure of the material facts to persuade the court that what the Defendant has alleged, if it is proved at trial, will constitute a defence to the Plaintiff's claim.

[8] A court has a discretion in granting summary judgement and that discretion should be exercised based on the material facts and the allegations presented by the Defendants to the court. If the Defendants fail to take the court into their confidence, the court should exercise that discretion against the Defendants.[2]

**THE DEFENCES**

[9] The Defendants, in resisting the summary judgement application, filed affidavits which disclosed the following defences:

9.1 a denial that any written agreements were ever concluded between the parties;

9.2 a denial that monies were payable on demand, in view of the nature of the account namely a private cheque account which was used as an investment account having been concluded between the parties;

9.3 the Defendants deny that a demand as alleged by the Plaintiff was made;

9.4 they further deny that the section 129 notice is valid and that the Plaintiff is entitled to take legal action against the Defendants in terms of the National Credit Act; and

9.5 lastly they contend that failure by the Plaintiff to attach the mortgage loan agreements is to their prejudice.

[10] In addition to the defences set out above the Defendants had also raised two further *points in limine* but both these points were abandoned at the hearing of the application.

**ISSUES TO BE DECIDED**

[11] During argument it became apparent that this court was called upon to decide three aspects, namely:

a) having regard to the terms of the agreements (which have been destroyed), what did the parties agree regarding how a demand would be made?

b) whether a proper demand was in fact made by the Plaintiff? and

c) whether the Plaintiff has complied with the provisions of section 129 of the

National Credit Act[3]?

**What did the parties agree regarding how a demand would be made?**

[12] Paragraph 4 of the Summons reads as follows[4] :

> 'The agreements referred to above, inter alia, provides that the outstanding amount will be due and payable on demand Defendants have notwithstanding proper demand for payment, *failed to make payment of the amount claimed to Plaintiff wherefore the amount and interest as set out in paragraph 2 above have become due and payable.* '

[13] The Plaintiff alleges that no copies of the mortgage loan agreements are available as it was destroyed in a fire at the premises of Docufile. As for the Mortgage Bond agreements annexed to the Summons as annexures "B" and "C", paragraph 6 thereof provides as follows:

> 'TERUGBETALING
>
> Die Verbandgewer moet alle bedrae wat deur hom aan die bank verskuldig is en wat kragtens hierdie verband verseker is, ooreenkomstig die bepalings van sodanige skrifte/ike ooreenkoms of ooreenkomste as wat tussen die Verbandgewer en die Bank aangegaan is of wat van tyd tot tyd hierna aangegaan mag word terugbetaal.'

[14] On the Defendants' version the First Defendant was granted overdraft facilities in terms of which this account would be serviced by making deposits into the account as and when Plaintiff would require payments to be made[5].

[15] In paragraph 7.4.3 of the opposing affidavit, the first Defendant sets out all payments made in servicing the account. These payments were made in response to telephonic requests from employees of the Plaintiff. In this regard the first Defendant refers the court to annexure "NJI" to his opposing affidavit, setting out a payment history for 2015.

[16] The Defendants contend that they were required to service the account by making

payment, upon demand for payment by the Plaintiff. They further contend that the underlying agreements do not contain acceleration clauses for the payment of the full outstanding amount.[6] Absent from the affidavits filed by the Defendants is a denial that the agreements in their possession, that is if they are in possession of any; do not contain such a term. If this indeed had been the position it begs the question why the Defendants would omit to present their copies of the underlying mortgage loan agreements before this court to depict the omission of such a clause.

[17] In addition to what has been set out above, it would make no business sense for a financial institution such as the Plaintiff to demand the full outstanding amount from clients who have been servicing, on the Defendants' version, their overdraft account religiously.

[18] As a consequence I cannot conclude otherwise than that the agreement reached between the parties, in respect of the servicing of the account, was that it was to take place as and when a demand for payment was made by the Plaintiff to the Defendant.

**Whether a proper demand was in fact made by the Plaintiff?**

[19] The Plaintiff as per paragraph 4 of the Summons, alleges that despite a proper demand for payment the Defendants have failed to make payment of the amount claimed by the Plaintiff. In paragraph 5 of the Summons the Plaintiff further pleads that on 3 September 2015 and 14 December 2015 respectively, it dispatched by registered mail to the Defendants, notices in terms of Section 129 (1) (a) of the National Credit Act.

[20] The Defendants do not deny receipt of the Section 129 notices. What they contend is that the Plaintiff did not dispatch any demand prior to dispatching the 129 notices. They however, fail to indicate why a prior written demand for payment was required before the 129 notice could be dispatched. They do not allege that the underlying agreements provide for same nor do they allege that upon receipt of the section 129 notices what steps were taken by them to

ascertain the amount by which their account had been in default. In the absence thereof this contention by the Defendants on this part at best can be described as scatchy and bold and at the very least opportunistic.

[21] *Ex facie* annexures "D" and "E", to the Summons, it is stipulated in paragraph 3 thereof that the Defendants were in default under the credit agreement, due to their failure to make payments of the outstanding amount on demand.

**Whether the Plaintiff has complied with the provisions of Section 129 of the National Credit Act?**

[22] Section 129 of the National Credit Act provides as follows:-

> *'(1) 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 or alternative despite 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.... '*

[23] As mentioned in paragraph 21 *supra,* the respective section 129 notices were annexed to the Summons as annexure "D" and "E". Upon closer inspection of these annexures they fail to mention the amount by which the Defendants were in default. This is precisely the point taken by the Defendants in paragraph 7.5.2. of the opposing affidavit. Therein they contend that a demand for payment of the full outstanding amount cannot take place if the consumer was not afforded an opportunity to bring the arear payments up to date. It follows that they ought to have been informed as to what were those arrear amounts.

[24] The mere dealing with the default and the proposal component in the section 129(1)(a)

notices is not sufficient. The purpose of the notice is to ensure compliance by the credit provider with the procedure prescribed in section 129(1)(a), as part of the required procedure before debt enforcement. If a consumer who receives a section 129(1)(a) notice fails to react to it the credit provider is entitled, subject to meeting any further requirements set out in section 130, to proceed with debt enforcement.

[25] The failure on the part of the Plaintiff to inform the consumers/Defendants of the amount by which the credit agreement was in default, deprived them of an opportunity to adequately take steps as envisaged in section 129. It is for this reason that I cannot conclude that the Plaintiff has complied with the provisions of Section 129.

**ORDER**

[26] In the result the following order is made:

26.1 The application for summary judgement is postponed *sine die;*

26.2 The Plaintiff shall, within 10 court days hereof, dispatch a further section 129(I)(a) notice to the consumers (Defendants), which should contain the following additional warnings, namely:

a) 'Informing the Defendants of the fact that an action has already been instituted against the consumers, the relevant case number and the fact that a summary judgement application has been postponed *sine die;*

b) The details of the current arrear amount; and

c) The fact that the consumers rights in terms of the National Credit Act, and specifically the rights contemplated in section 129(1)(a) remain unaffected by the action that has already been instituted.'

26.3 Costs reserved.

**C J COLLIS**

**Acting Judge of the High Court**

Appearances as follows:

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|---|---|
| Counsel for Plaintiff: | Adv. R J Groenewald |
| Instructed by: | Van Zyl le Roux Inc. |
| Counsel for Defendants: | Adv. J Viljoen |
| Instructed by: | N J Van Rensburg Attorneys |

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| Date of Hearing: | 11 March 2016 |
| Date of Judgment: | 01 April 2016 |

[1] See in this regard PCL Consulting (Ply) Ltd t/a Phillips Consulting SA v Tressa Trading 119 (Ply) Ltd

[2] Breytenbach v Fiat SA (Edms) Bpk. 1979 (2) SA 226 (T) at 229 F.

[3] Act 34 of 2005

[4] See in this regard Index page 4

[5] See first Defendant's opposing affidavit page 42 para 4.3

[6] See opposing affidavit by First Defendant page 42 paragraph 4.3