IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: **YES**

Date: ***1st SEPTEMBER 2016*** Signature: _____

01/09/2016.

CASE NO: 2015/64021

In the matter between:

THE STANDARD BANK OF SA LIMITED	Plaintiff
and	
COSKEY: NORVAL LINLEY N O	First Defendant
COSKEY: MERLE N O	Second Defendant
THE BEST TRUST CO (JHB) (PTY) LTD N O	Third Defendant
COSKEY: NORVAL LINLEY	Fourth Defendant
COSKEY: ALWYN QUANGUY	Fifth Defendant

JUDGMENT

ADAMS AJ:

[1]. This is an application by the plaintiff for summary judgment against the first to fifth defendants. The first to third defendants are cited in their capacities *nomine officio* as trustees for the time being of the KKC Residence Trust *('the Trust')*. The fourth and fifth defendants, who are cited in their personal capacities, bound themselves as Sureties to the plaintiff for any debts by the Trust.

[2]. The action against the defendants is founded on a written mortgage loan agreement, a mortgage bond and a deed of suretyship. The written *Home Loan Agreement* was entered into between the parties on the 21st of September 2008, and pursuant to the said agreement the plaintiff lent and advanced to the Trust the principal sum of R1,570,700.00, and the *'total cost of the agreement'* amounted to R4,657,989.60, inclusive of interest payable over the period of the duration of the loan, related and other charges. The initial term of the loan was 240 months, therefore 20 years, and the initial monthly repayments were R19,347.54 per month. Furthermore, on the 21st of September 2008, the fourth and fifth defendants signed a written Suretyship in terms whereof they bound themselves as sureties for the payment to the plaintiff when due of all the present and future debts of the Trust.

[3]. Summons was issued against and served on all of the defendants on the 24th August 2015. Subsequently the plaintiff filed an application for default judgment against all of the defendants, which application was finally heard on the 23rd of March 2016, after having been removed from the motion court roll on the 1st of December 2015. On the 23rd of March 2016 the Trust was represented by the first defendant, who appeared in person and who made submissions on behalf of all of the defendants against the granting of the default judgment. On that date the Court (Van Nieuwenhuizen J) ordered the 1st, 2nd, 3rd and 4th defendants to file a notice of intention to defend, which they did by serving the said notice on the offices of the plaintiff's attorneys of record on the 13th April 2016. It appears from the papers before me that the 5th defendant never entered an appearance to defend, and the plaintiff can therefore not proceed with the application for summary judgment against him.

[4]. As regards the first to fourth defendants, they are represented in the Summary Judgment proceedings by the first defendant, who also appeared in person at the hearing of the said application on the 26th August 2016. These defendants are opposing the application for summary judgment on the basis that service of the summons on them was defective and therefore of no force and effect. They also complain about the fact that, according to them, there had not been compliance with the provisions of section 129 of the National Credit Act no 34 of 2005 *('the Act')* in that the section 129 notice omitted to inform them of their right to seek debt review. For the rest, the first to fourth defendants contend that they should

be given an opportunity to have their debt restructured to fit in with their present financial situation. They also allude to the fact that the plaintiff had made itself guilty of reckless lending, as defined in the Act, in that the Trust was over – indebted when it was granted the loan.

[5]. As indicated above the plaintiff's claim is based in the main on a written *Home Loan Agreement*, which was granted against security of a *Continuing Covering Mortgage Bond* which was registered over the property of the Trust in favour of the plaintiff. Although the plaintiff in the summons prayed for an Order declaring the mortgaged property of the Trust specially executable, I was informed by Counsel on behalf of the plaintiff at the hearing of the application for summary judgment that the plaintiff was not pursuing that order at this stage as the plaintiff needed to place updated facts before the Court relating to the amounts due. It is therefore not necessary for me presently to have regard to the considerations provided for in Uniform Rule 46(1)(a). The only issue which I need to consider is whether the plaintiff is entitled to a monetary judgment against the first to fourth defendants for the amount presently outstanding on the home loan.

[6]. At the time of the issue of the summons, the Trust was in breach of the said agreement in that it was in arrears with the monthly payments as and at the 1st June 2015 in the total amount of R392,215.20, with the total debt due being R2,256,239.42.

[7]. Although the Trust has since the issue of the summons been maintaining regular payment of monthly instalments, the situation has not improved mainly because of the amount of the arrears, which meant that by the time the application for summary judgment was heard the principal indebtedness had in fact increased.

[8]. According to the Sheriff's returns of service, the summons was served on all of the defendants at their *domicillium citandi et executandi* by handing copies thereof to the housekeeper.

[9]. Notice of service of the summons clearly came to the attention of all of the defendants, because they initially opposed the application for default judgment against them and subsequently entered notice of appearance to defend.

'IRREGULARITY' – SERVICE OF THE SUMMONS

[10]. No prejudice to the defendants appears to have resulted from the alleged defective service.

[11]. I associate myself entirely with the following remarks by the court in the matter of *Viljoen v Federated Trust Ltd,* 1971 (1) SA 750 (O):

> *'The Rules of Court, which constitute the procedural machinery of the Courts, are intended to expedite the business of the Courts.*

Consequently they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible'.

[12]. In the present matter the defendants suffer no prejudice. The service of the summons was effective: They received the summons and the particulars of claim and were able to enter an appearance to defend. The fact that the defendants entered an appearance to defend is indicative of the fact that they received and have knowledge of the summons and were able to defend it. The inference to be drawn from this is that the service was effective.

[13]. In the premises, I am of the view that the defence of the defendants based on the alleged defective service of the summons is not sustainable and stands to be rejected.

NON – COMPLIANCE WITH THE NATIONAL CREDIT ACT

[14]. The defendants also allege that the provisions of the National Credit Act have not been complied with in that the section 129 did not make reference to the fact that the defendants could refer the matter to a Debt Counsellor.

[15]. The National Credit Act is not applicable in this matter for the simple reason that the credit agreement in question is a *'large agreement'* as defined in section 9(4) of the Act in that it is a mortgage agreement and, in addition, because the principal debt is for an amount in excess of R1,500,000.00, which is higher than the threshold established in terms of section 7(1)(b), that being R250,000.00, and the agreement was concluded with the Trust, being a juristic person as defined in the Act, as the consumer.

[16]. In any event, in the matter of *S A Taxi Development Finance v Phalafala,* (an unreported GSJ Judgment of Van Eeden J, in which the following principle was laid down:

> *'Non – receipt of the notice prior to receiving the summons is not a defence dilatory or otherwise, to the plaintiff's claim in this matter. The subsequent receipt of the notice at the time of the service of the summons and the defendant's reaction thereto, entitle the plaintiff to approach the court for an order to enforce the credit agreement. No purpose would be served to give him the notice for a second time – it would be placing form above substance to require a further notice to be sent to the defendant. It is accordingly unnecessary to adjourn the matter or to make an order in terms of s 130(4)(b), since the defendant actually received the notice and since the time periods of S 130(1) and (1)(a) have actually expired. I consequently find that the fact that the defendant did not receive the notice prior to the service*

of the summons 'does not render the notice invalid and the issue of the summons premature'.

[17]. Therefore, the defendants' second point *in limine* also stands to be dismissed.

[18]. Still on the application of the National Credit Act, the defendants claim that they should not be held liable in terms of the agreement as the plaintiff was guilty of *'reckless lending'.* As I have indicated above, the National Credit Act does not find application in this matter for the reasons already mentioned. Even more so are the provisions of the Act relating to *'reckless credit – granting'* and *'over – indebtedness',* as section 78(1) provides that Part D of Chapter 4 *('Over-indebtedness and reckless credit')* does not apply to a credit agreement in respect of which the consumer is a juristic person.

[19]. I am nevertheless not persuaded that the defendants have made out a defence based on *'reckless lending'.*

[20]. None of the requirements relative to a defence based on *'reckless lending'* as set out in *S A Securitisation v Mbatha,* 2011 (1) SA 310 (GSJ), were set out by the defendants. In fact, the defendants failed to place before me any information which would have enabled me to find that there was reckless lending. The sum total of the 'evidence' by the defendants that

the plaintiff made itself guilty of reckless lending was an allegation in their opposing papers to that effect coupled with a claim that the Trust in recent times had not been able to meet its obligations in terms of the Home Loan Agreement. Therefore, so the argument goes on behalf of the defendants, this demonstrates that there was reckless credit granting by the plaintiff when the loan was granted during 2008. This contention is not tenable.

[21]. In the premises, I am of the view all of the defences of the first to fourth defendants on the merits of the plaintiff's claim should fail. This means that the first to fourth defendants have not satisfied the Court by affidavit, as they were required to do in terms of Uniform Rule 32(3)(b), that they have a *bona fide* defence to the plaintiff's action. I am of the view that the defendants do not have a *bona fide* defence to the plaintiff's claim, and summary judgment should therefore be granted against them as prayed for by the plaintiff.

ORDER

Accordingly, I make the following order:

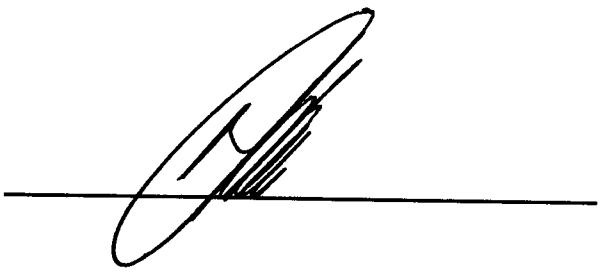
Summary Judgment is granted in favour of the plaintiff against the first to fourth defendants, jointly and severally, the one paying the other to be absolved, as follows:

1. Payment of the sum of R2,256,239.42;

2. Interest on the aforesaid amount of R2,256,239.42 at the rate of 9.25% per annum, interest calculated daily and compounded monthly in arrears from 1 June 2015 to date of final payment, both days inclusive;

3. Cost of suit on the scale as between attorney and client.

4. As far as the plaintiff's claim to have the immovable property of the trust declared specially executable, I grant the first to fourth defendants leave to defend, with the cost of the application for summary judgment to be in the cause of the main action.



L ADAMS
Acting Judge of the High Court
Gauteng Division, Pretoria

HEARD ON:	26th August 2016
JUDGMENT DATE:	1st September 2016
FOR THE PLAINTIFF:	Adv
INSTRUCTED BY:	Strydom Britz Mohulatsi Inc
FOR THE DEFENDANTS:	1st Defendant (in person)
INSTRUCTED BY:	1st Defendant (in person)