

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 37848/21

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 9 June 2022

E van der Schyff
E van der Schyff

In the matter between:

INVESTEC BANK LIMITED

EXCIPIENT

and

Z J GUMBI

FIRST RESPONDENT

C GUMBI

SECOND RESPONDENT

IN RE:

Z J GUMBI

FIRST PLAINTIFF

C GUMBI

SECOND PLAINTIFF

and

INVESTEC BANK LIMITED

FIRST DEFENDANT

MUSHAVHI MPHAPLHULI TRADING
& PROJECTS (PTY) LTD

SECOND DEFENDANT

JUDGMENT

Van der Schyff J

Introduction and facts

- [1] The plaintiffs, the respondents in this exception, issued summons against the first defendant, the excipient. In order to deal with this exception, it is necessary to have regard to the full extent of the plaintiffs' particulars of claim.
- [2] In the particulars of claim the plaintiffs' set out the following facts:
- i. On 3 February 2016 the plaintiffs and the defendant entered into a home loan agreement;
 - ii. The material terms of the agreement were that the first defendant would lend the plaintiffs an amount of R3 024 079.44 (the principal debt), which amount the plaintiffs would use to purchase a property (the Midstream-property). As security for the principal debt the plaintiffs would register a first covering mortgage bond over the property. The total amount repayable would be the sum of R6 836 462.40. This amount would be repayable in 240 monthly instalments. Should the plaintiffs fail to pay any amount timeously in terms of the agreement, the plaintiffs would be in default. In the event of default, and if the National Credit Act (the NCA) applies, the first defendant may notify the plaintiffs and propose that they refer the agreement to a debt counsellor, dispute resolution agent, consumer court or Ombud with jurisdiction, with the intent that the first defendant and the plaintiffs resolve and agree on a plan to bring the payments under the agreement up to date – clause 8.1.17.1. Subject to the NCA the first defendant may commence legal proceedings to enforce the home loan agreement after at least 10 business days have elapsed since the first defendant provided the notice referred to. If the first defendant complied with clause 8.1.17.1 the first defendant has the right to demand that the plaintiffs pay all of their indebtedness under the agreement;

- iii. On 24 August 2017 the first defendant sent a 'Notice of default' to the plaintiffs;
- iv. This notice was sent to the plaintiffs in terms of clause 8.1.17.1 of the agreement and section 129(1)(a) of the NCA;
- v. The notice of default stated that the arrears amount owing by the plaintiffs to the first defendant was R54 990.89 and that the Total Amount due and payable was R3 048 087.00;
- vi. In the notice, the first defendant demanded that the plaintiffs pay the full arrears plus interest thereto, within 10 days of delivery of the letter. It was further stated in the notice that if the arrears were not paid within the 10-day period, the plaintiffs would be in default of the terms and conditions of the credit agreement and the first defendant would be entitled to terminate the agreement with immediate effect, immediately claim the total amount outstanding under the credit agreement, foreclose the mortgage bond and levy execution against the mortgaged property.
- vii. In the event that the plaintiffs did not respond to the notice of default, it was stated that the defendant "was entitled to approach a court for an order to enforce the credit agreement, including an order for the payment of the total amount, owing by you' (emphasis added in particulars of claim);
- viii. On 11 November 2017 the first defendant issued summons against the plaintiffs in terms of which the first defendant claimed payment of the amount of R3 088 489,26 and an order declaring the property executable. The first defendant stated that it had complied with its obligations under the home loan agreement;
- ix. The first defendant stated in the particulars of claim that the total amount outstanding on the loan agreement that was due and payable amounted to R3 088 489.26, and that the arrear amount of R54 990,98 escalated to R 111 927.59 since 24 August 2017;
- x. The first defendant applied for default judgment against the plaintiffs on 15 November 2018, and default judgment was granted by Fabricius J on 22 November 2018;
- xi. On 7 November 2019 the property was sold at a public auction for an amount of R2 500 000.00. Since October 2018 the plaintiffs paid the first defendant

the amounts set out in an annexure to the particulars, amounting to R 591 500.00.

[3] The plaintiffs aver in the particulars of claim that:

- i. The purported notice of default did not comply with clause 8.1.17.1 of the home loan agreement because it purported to accelerate the indebtedness before the plaintiffs were in default;
- ii. The combined summons did not bring a claim to enforce the home loan agreement as contemplated in clause 8.1.17.2 of the agreement;
- iii. The claim for the accelerated amount did not comply with clause 8.1.18.3 of the home loan agreement because the first defendant failed to send the demand required by the said clause;
- iv. As a result, the legal proceedings instituted by the first defendant against the plaintiffs did not comply with the home loan agreement;
- v. When the first defendant, as a registered credit provider and commercial bank, instituted legal proceedings it was obligated to do so in a manner that is lawful, reasonable and fair and without causing financial harm to the plaintiffs;
- vi. The first defendant knew, or reasonably ought to have known that-
 - a. The purported notice of default did not comply with s 129(1)(a) of the NCA in that it accelerated the indebtedness before the plaintiffs were for purposes of s 129(1)(a) in default,
 - b. The notice of default could not in law accelerate the whole indebtedness until the plaintiffs were first notified of the default, and then having failed to rectify the default;
 - c. The acceleration of the indebtedness through the notice amounted to coercion or undue influence or pressure or duress or harassment or unfair tactics in connection with the demand for payment which is prohibited by s 40(1)(d) of the Consumer Protection Act;
 - d. The notice did not grant the court jurisdiction to deal with the first defendant's purported claim for R3 088 489.26 against the plaintiffs;
 - e. The first defendant had to institute legal action to enforce the home loan agreement as required by s 130(1)(b) of the NCA;

- f. The default judgment granted against the plaintiffs, in view of the fact that the court did not have jurisdiction, is null and void;
 - g. The payments made by the plaintiffs on 1 Oct 2018 and 6 Nov 2018 remedied the default notified by the first defendant in accordance with the provisions of s 129(3) of the NCA;
 - h. The payments made by the plaintiffs on 1 October 2018, 6 November 2018, 4 December 2018 and 4 January 2019 remedied the default of R111 929.59;
 - i. There was no basis in fact or law for the first defendant to sell the property to the second defendant on 7 November 2019.
- vii. The first defendant owed the plaintiffs the following legal duties:
- a. To institute a claim for payment of the accelerated indebtedness only after sending a demand to the plaintiffs to pay the accelerated indebtedness as required by law;
 - b. To accelerate the indebtedness only after the plaintiffs were in default;
 - c. To respect the plaintiffs right to property and housing;
 - d. To send a notice of default that complied with s 129(1)(a) of the NCA;
 - e. Not to proceed with legal action against the plaintiffs once the plaintiffs remedied the default they were notified of in terms of s 129(1)(a) of the NCA;
 - f. To bring legal action to enforce the home loan agreement as contemplated in s 130(1)(b)(i) of the NCA;
 - g. To refrain from requesting default judgment against the plaintiffs once the plaintiffs had remedied the default contemplated in s 129(3) of the NCA;
 - h. To refrain from selling the property at a sale in execution once the plaintiffs remedied the default as contemplated by s 129(3) of the NCA;
 - i. To refrain from demanding payment or instituting legal proceedings by using undue influence, pressure, duress or harassment, or unfair tactics as prohibited by section 40(1)(d) of the CPA.
- viii. In light of these legal duties the first defendant had to take reasonable steps to avoid the possibility of the plaintiffs suffering damages. Such reasonable steps include:

- a. Sending the plaintiffs, a notice of default that complied with s 129(1)(a) of the NCA;
 - b. Instituting legal action as contemplated by s 130(1)(b) of the NCA;
 - c. Instituting legal proceedings for the accelerated amount only when a prior demand was sent to the plaintiffs, as required by law;
 - d. Not requesting default judgment from the court, thereafter selling the plaintiff's property in a sale of execution in view of the plaintiff's having remedied the default.
- ix. The first defendant failed to discharge its legal duties towards the plaintiffs or to take reasonable steps to prevent the damages to the plaintiff from occurring.
- x. The first defendant was negligent in one or more of the following ways:
 - a. It failed to issue a notice of default which complied with s 129(1)(a) of the NCA;
 - b. It failed to institute legal proceedings contemplated in s 130(1)(b)(i) of the NCA in that it instituted legal proceedings for payment of the whole accelerated amount;
 - c. It instituted legal proceedings against the plaintiffs for the accelerated indebtedness without the prior demand required by law;
 - d. It obtained judgment against the plaintiffs for an amount that it was not entitled to in view of the first defendant's failure to send the prior demand;
 - e. It sold the plaintiff's property in a sale of execution pursuant to a court order that was granted by a court which did not have jurisdiction to grant such an order;
 - f. It failed to refrain from demanding payment or institution legal proceedings by using undue influence, pressure, duress, harassment or unfair tactics;
 - g. In view of the fact that the first defendant obtained a court order that it should not have obtained, it violated the plaintiff's rights to property and housing
- xi. The first defendant breached its legal duties towards the plaintiffs and in so doing acted negligently, causing the plaintiffs to suffer damages.

- xii. As a result of the first defendant's wrongful conduct the plaintiffs suffered damages as follows:
 - a. Payment of legal fees in the amount of R150 000.00;
 - b. Compensation for damages to the plaintiff's credit record in the amount of R200 000.00;
 - c. Compensation for interference with the plaintiff's property rights in the amount of R3 088 489.26;
 - d. Compensation for emotional distress in the amount of R500 000.00;
 - e. Compensation as exemplary damages in the amount of R1 500 000.00.
- xiii. The plaintiffs pray for judgment against the first defendant for:
 - a. A declaratory order that in the absence of a compliant notice of default and/or demand required in clause 8.1.18.3 of the home loan agreement and / or a demand to accelerate the debt as required by law, the court did not have jurisdiction to entertain the action instituted by the first defendant against the plaintiffs in terms of the combined summons issued on 21 November 2017 under case number 79466/2017;
 - b. A declaratory order that the order granted by the court on 22 November 2018 under case number 79466/207 is null and void;
 - c. Payment of the amount of R5 438 489.126
 - d. Interest and costs.

[4] After receipt of the summons, the first defendant filed a 'notice of exception and opportunity to remove cause of complaint in terms of Rule 23(1)'. The first defendant stated that the reason why the plaintiff's particulars of claim do not make out a case for damages based on purported delictual liability is that no element of unlawfulness is established in terms of the pleading, and no cause of action exists, *alternatively*, the particulars of claim are vague and embarrassing as it is not commensurate with the terms of the home loan agreement.

[5] The plaintiffs' assertion that the particulars of claim did not comply with the home loan agreement and that the court consequently did not have jurisdiction to entertain

the action instituted by the first defendant is incorrect in law and not in accordance with the terms of the underlying home loan agreement, for the following reasons:

- a. Default in terms of the home loan agreement occur when the plaintiffs fail to pay any amount payable in terms of the agreement timeously and in full or where the plaintiffs breach any term or condition of the agreement (clauses 8.1 and 8.11);
- b. In such event the total amount payable by the plaintiffs to the first defendant in terms of the agreement shall without any action by either party be immediately due and payable (clause 1.14) subject to the plaintiffs' right to reinstate the agreement in accordance with s 129(3) of the NCA (clause 8.1.16 read with clauses 8.1.1 and 8.1.12);
- c. In such instance, and where the NCA applies, as in this case, the first defendant may notify the plaintiffs and propose that the agreement be referred to a debt councillor, dispute resolution agent, consumer court or ombud with jurisdiction (clause 8.1.17) with the intent that the first defendant and plaintiffs resolve any dispute under the agreement or develop and agree to a plan to bring the payments under the agreement up to date; and subject to the NCA, may commence legal proceedings to enforce the agreement after (i) at least 10 business days have elapsed since the first defendant provided the notice referred to in 8.1.17.1 and (ii) the plaintiffs have been in default for more than 20 business days; and (iii) first defendant has met any further requirements set out in s 130 of the NCA;
- d. In the event that first defendant has complied with 8.1.17.1, as it did in this instance, the first defendant has the right without prejudice to any other rights available to it, to terminate the agreement with immediate effect or to enforce compliance with the agreement and claim such reasonable damages as it may have suffered as a result of the default as well as collection costs, administration costs and other reasonable amounts incurred by the first defendant on the plaintiffs behalf as contemplated in the agreement;
- e. Default was already established when the plaintiffs failed to pay the relevant instalments in terms of the agreement timeously and in full

and the total amount became payable immediately subject only to the plaintiffs' right to reinstate the agreement in accordance with s 129(3) and the right to commence legal proceedings in this regard was further subject to a notice in terms of clause 8.1.17.1 and 8.1.17.2;

- f. The first defendant complied with the requirement of the said notice in terms of s 129 of the NCA. No further demand was required in law in accordance with the underlying home loan agreement before proceeding with legal action. Plaintiffs' reliance on clause 8.1.18.3 of the agreement is incorrect. Clause 8.1.18.3 relates to a scenario where the first defendant elects to demand that the plaintiffs not only pay all of their indebtedness under the particular home loan agreement, but also the indebtedness under any other agreement it may have with the first defendant.
- g. The plaintiffs' particulars of claim and assertion to the effect that the absence of a further demand in terms of clause 8.1.18.3 of the home loan agreement has the effect that the court did not have jurisdiction to entertain the action or that the claim was unlawful, is not in accordance with the underlying agreement and is incorrect in law;

Discussion

- [6] The plaintiffs assert that the exception is only directed at the declaratory relief sought in prayer 1 and not at the plaintiff's cause of action, and for that reason the exception must fail. This submission is not supported by either the Rule 23(1) notice or the exception itself. Although the first defendant structured the notice and the exception in such a manner that it commences with a reference to the declaratory relief sought, it is evident that the first defendant bases its exception on the averment that the particulars of claim does not disclose a cause of action. The excipient contends that the plaintiff's particulars of claim do not establish unlawfulness, an essential requirement for delictual liability.
- [7] Plaintiffs' counsel submitted that the first defendant action was unlawful in that it not only claimed the arrear amount from the plaintiffs in the notice of default, but also

the total indebtedness in terms of the home loan agreement (the Total amount). Counsel submitted that there is no provision in clause 8.1.17.1 of the home loan agreement or s 129(1) of the NCA which entitled the first defendant to notify the plaintiffs of the Total Amount. This notification was also premature since the 10-day period mentioned in the notice had not expired.

- [8] As for the contention that the court lacked the necessary jurisdiction to deal with the matter if there was no compliant notice of default, counsel submitted that the contract itself required a default notice by the Bank to institute a claim based on the agreement and without such default notice there is no claim based on contract. In addition, the submission continued, parliament, through s 129(1)(a) of the NCA requires that if a consumer is in default the notice of default must be sent to the consumer. It is not for the first defendant to decide that the debt is automatically accelerated without the s 129(1)(a) notice having been sent. Section 129(1)(a) of the NCA does not allow the notification of the Total Amount, it allows for the notification of the default. For this reason, the court never had the jurisdiction to entertain the first defendant's claim due to its lack of jurisdiction. Counsel reiterated that a court does not have jurisdiction to hear a matter if legislation that governs such matter has not been complied with.

Discussion

- [9] In considering an exception, the court is bound to consider the particulars of claim together with the annexures thereto in determining whether the particulars of claim disclose a cause of action.

(i) Fabricius -order

- [10] It should be noted from the onset that annexure D to the plaintiffs' particulars of claim, the order granted by Fabricius J on 22 November 2018, (the Fabricius-order) reflects that the order was granted by agreement between the parties. To my mind, this is the end of the matter. On this basis alone, the particulars of claim do not disclose a cause of action.

(ii) Notice of default and s 129(1)(a) notice

- [11] Clause 8 of the home loan agreement is titled 'Default'. Clause 8.1 read with clause 8.1.16 provides that should the borrower (the plaintiffs) fail to pay any amount payable in terms of the agreement timeously and in full the Total Amount shall, without any further action by either party, be immediately due and payable *subject to the borrower's right to reinstate the agreement in accordance with section 129(3) of the NCA*. [My emphasis].
- [12] Clause 8.1.17 provides for a default notice in terms of s 129 of the NCA. Clause 8.1.18 provides that where the first defendant complied with 8.1.17, the first defendant has the right, without prejudice to any other rights which may be available to it to, amongst others, terminate the agreement, demand that the borrower pay all its indebtedness under the home loan agreement and any other agreement it may have with the first defendant, and such indebtedness shall upon demand become immediately due and payable irrespective of the terms or conditions that may be applicable to such indebtedness (clause 8.1.18.3). The demand in terms of clause 8.1.18.3 is only applicable to scenario's where the first defendant decided to demand that a borrower pay all its indebtedness under the home loan agreement together with any other agreement(s) it may have with the first defendant. Clause 8.1.18 does not find application in the current claim, and it did not find application in the claim instituted under case number 79466/2017 that culminated in the Fabricius J order.
- [13] The notice of default that is attached to the particulars of claim as annexure B reflects that the first defendant informed the plaintiffs that:
- i. The notice is in terms of s 129(1) and (3) of the NCA;
 - ii. The plaintiffs have committed a breach of the terms and conditions of the credit agreement as a result of a failure to make the payment which was due;
 - iii. The first defendant demand payment of the arrears plus interest thereon at the default interest rate applicable under the credit agreement from the date of the letter to date of payment, calculated daily and compounded monthly, within 10 days of the date of delivery of the letter;

- iv. Should plaintiffs fail to pay the arrears, together with interest thereon, within the 10-day period, they would be in default of the terms and conditions of the credit agreement which will entitle the first defendant to:
 - a. terminate the credit agreement with immediate effect;
 - b. claim immediate payment of the total amount outstanding, together with interest thereon, under the credit agreement; and
 - c. foreclose on the mortgage bond and levy execution against the mortgaged property
- v. Section 26(1) of the Constitution accords everyone the right to have access to adequate housing and called upon the plaintiffs to notify the first defendant if any order for execution would infringe on the said right, and place supporting information to that effect before a court in due course;
- vi. The first defendant has suspended any existing credit facility under the credit agreement in terms of s 123, but the credit agreement remains in effect to the extent necessary until the borrowers paid the amounts lawfully charged;
- vii. They are entitled to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, the consumer court or ombud with jurisdiction in order to resolve any dispute under the credit agreement or to develop a plan to bring the arrears up to date;
- viii. They are entitled before cancellation of the credit agreement, subject to the NCA, to pay all overdue amounts, together with default charges permitted under the NCA, and any reasonable costs incurred by the first defendant in enforcing the credit agreement;
- ix. The first defendant is entitled to approach a court for an order to enforce the credit agreement, including an order for the payment of the total amount owing if they have been in default for at least 20 business days, and at least 10 days have lapsed from the date of delivery of the notice to them and they have not responded to this notice, or rejected the above proposal.

[14] The notice of default dated 24 August 2017 constitute a legally compliant notice of default. The notice reflects the arrears as well as the total amount owing but is clear on the fact that the plaintiffs would only be called upon to pay the total amount owing

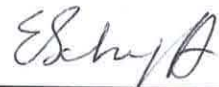
in terms of the home loan agreement if the arrears, together with interest thereon were not paid within the 10-day period.

- [15] On the face of it, the content of the annexures attached to the plaintiffs' particulars of claim do not support the averments made in the plaintiffs' particulars of claim. This renders the particulars of claim vague and embarrassing. I am also of the view that the particulars of claims it currently stands, read with the annexures annexed thereto, do not disclose a cause of action.

ORDER

In the result, the following order is granted:

- 1. The exception is upheld;**
- 2. The plaintiffs are afforded 10 days to give notice of their intention to amend their particulars of claim, failure of which the first defendant is authorised to set the matter down, on notice to the plaintiffs, in the unopposed motion court for dismissal of the plaintiff's claim;**
- 3. The plaintiffs are ordered to pay the costs of the exception**



E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the excipient:	Adv. W. J. Roost
Instructed by:	Adams & Adams
For the respondent:	Adv P W Makhambeni
With:	Adv. P Mbana
Instructed by:	S A Maninjwa Attorneys
Date of the hearing:	16 May 2022
Date of judgment:	9 June 2022