



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

CASE NO: 9704/10

In the matter between:

FIRSTRAND BANK LIMITED

Plaintiff

and

**DESMOND NORMAN SCHILDER
GLYNNIS ANNE SCHILDER**

First Defendant
Second Defendant

JUDGMENT : 30 JULY 2012

GAMBLE, J:

[1] On 13 May 2010 the Plaintiff ("the Bank") issued summons against the two debtors in this matter who were then jointly described as ("the Defendants"). The cause of action was the repayment of the sum of R933 619.55, together with interests and costs, being monies lent and advanced by the Bank to them under a written agreement of loan, which loan was secured by a mortgage bond over the property which they jointly owned. The parties are married to each other in community of property.

[2] The debtors entered an appearance to defend the claim and the Bank applied for summary judgment, which was opposed by the debtors.

[3] The matter was enrolled in the motion court on various occasions over the following twenty months or so, and seems to have been the subject of various agreed postponements.

[4] When application was made for summary judgment in June 2010 the citation of the debtors jointly as Defendants was altered (without a notice in terms of Rule 28) so that Desmond Norman Schilder was thereafter described as the First Defendant and Glynnis Anne Schilder as the Second Defendant. Neither party objected to this non-compliance with the rules, and the matter thereafter proceeded against the two Defendants so cited.

[5] After an agreed postponement of the matter for an indefinite period on 7 July 2011, the Bank re-enrolled the matter for hearing on 9 May 2012. At this hearing Ms. Liebenberg, counsel for the Bank moved for summary judgment while Mr. Joubert, attorney for the debtors, argued two procedural points. Firstly, it was said that the notice issued by the Bank in terms of Section 86(10) of the National Credit Act, No. 34 of 2005 ("the NCA"), in terms whereof the Bank terminated the debtors' debt review, was not properly served in that there was only delivery by registered post to Ms. Schilder, the Second Defendant. Secondly, and only in the event of the Court finding that there was proper termination in terms of Section 86(10), the Court was asked to exercise its power under Section 86(11) of the NCA and to order that the debt review process be re-instated.

[6] If a debtor is under debt review, a creditor may **not** commence legal proceedings against the debtor until it has complied with the provisions of Section 129(1)(b) of the NCA. In the instant case this required the Bank to provide notice to the debtors in terms of Section 86(10) of the NCA. This notice is compulsory ¹, and without it the summons may not be issued ².

[7] It is common cause that the Section 86(10) notice in this case was sent only to the Second Defendant, albeit at the parties' residential address, which was their chosen *domicilium citandi et executandi*. In the affidavit opposing summary judgment Mr. Schilder takes the point that there was non-compliance with Section 86(10), but does not amplify the allegation in any detail. In argument, however, Mr. Joubert argued that there should have been service of the Section 86(10) notices on both the Defendants.

[8] I am of the view that there is some substance in this argument. Ms. Lieberberg argued that the point was formulaic and that it is inconceivable that the notice did not come to the attention of Mr. Schilder, given the fact that he and the Second Defendant resided in the same house. That argument may hold water after all the evidence has been heard at the trial of this matter.

[9] However, in light of the decisions in Zammit v Standard Bank of South Africa Limited ³ and Subramanian v Standard Bank Limited ⁴, I consider that the

¹ Sebola and another v Standard Bank of SA Limited and others [2012] ZACC11

² Section 88(3) of the NCA

³ [2011] ZAKZDHC 84

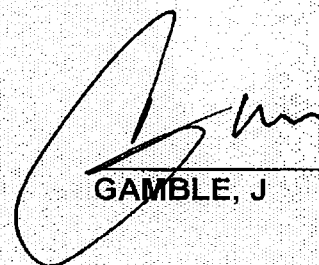
⁴ [2012] ZAKZPHC 12

Defendants may be successful on this point at the trial of this matter. Such success could, of course, vitiate the entire proceedings.

[10] In light of the *dictum* of Navsa JA in Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) at 11G-12D, I am wary of “*shutting out*” the Defendants at this stage in circumstances where the initiating of the proceedings may be found to be fatally defective. In such circumstances it would not be appropriate to grant summary judgment.

[11] Accordingly I make the following order:

- A. The application for summary judgment is refused.
- B. The Defendants are given leave to defend the matter.
- C. The costs of the summary judgment application will stand over for determination at the trial.



GAMBLE, J