IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 18036/2011

DATE: 23 APRIL 2012

In the matter between:

NEDBANK LIMITED Applicant

and

CHARLES A CHARTERS Respondent

J U D G M E N T

BOZALEK, J:

This is an opposed application for summary judgment in which the applicant's claim set out in a simple summons is based on a mortgage loan agreement and a mortgage bond. The applicant claims payment of the balance of the principal debt together with finance charges as determined in an annexed certificate of indebtedness, interest thereon, an order declaring the mortgaged property executable and costs. In its summons the plaintiff/applicant alleges that there was compliance with various provisions of the National Credit Act ("NCA") including Section 86(10) in terms whereof it gave

notice to the defendant/respondent of its termination of a debt review process which he had initiated. The covering mortgage bond was annexed to the summons but not the mortgage loan agreement.

In his opposing affidavit the defendant raised a number of technical defences as well as an application, conditional upon these failing, for the reinstatement of the debt review proceedings in terms of Section 86(11) of the NCA. The defendant denied that the monies claimed by the plaintiff were due, payable or that the debt review process had been validly terminated. His opposing affidavit is a Cookes tour of technical points designed to derail the summary judgment application but it is necessary to deal with only the following points:

1. the allegation that there was no proper proof of posting of the notice of termination of the debt review process sent by the plaintiff to the defendant.

2. the allegation that proper notice of this termination was not given to the plaintiff's debt counsellor.

3. and finally, the allegation that the plaintiff's summons was defective and/or excipiable by reason of its failure to

annex the mortgage loan agreement.

I shall deal with this last point first. It was not mentioned in the defendant's opposing affidavit but since it is purely a legal point I consider that the plaintiff is entitled to raise it only in argument. In the as yet unreported judgment in the matter of ABSA Bank Limited v Studdard and Another (Case 2011/24206) South Gauteng High Court, Wepener, J was required to determine whether it was necessary for a plaintiff seeking default judgment on the basis of a simple summons, when claiming a money judgment and asking for a movable property to be declared executable, to attach the written agreement of loan to the summons. The Court conducted a thorough review of the authorities, including the recent judgment of this Court in Standard Bank of South Africa Limited v Hunky Dory Investments 194 (Pty) Limited and Another (1) 2010 SA 627 (C) at 630 C. It held, relying on the judgment of the full bench decision of this Court in Volkskas Bank Limited v Wilkinson and three similar cases 1992 (2) SA 338 (C) that:

> "The cases requiring the attachment of the written document where it forms a link in the chain of the cause of action or is the foundation of the plaintiff's cause of action are correct and should be followed. As is the case

in this division the practice in the Western Cape High Court is salutary one and I find no reason why I should not follow what the full bench said in Wilkinson regarding the attachment of the written contract where it forms a link in the chain of the cause of action or the cause of action is found thereon..."

In the absence of the mortgage loan agreement, the Court found that the plaintiff could not succeed on the papers as they stood and postponed the applications for default judgment. On behalf of the plaintiff, Mr Tee, sought to rely on the judgment in Hunky Dory as permitting the use of a simple summons without attaching the mortgage loan agreement. However, a reading thereof indicates that this point was not considered in that matter. The mortgage loan agreement is the underlying *causa* for the relief sought by the plaintiff and given the importance of the service and notice provisions under the National Credit Act it would indeed appear to be a salutary practice for such a document to be annexed to the simple summons.

As regards the allegations that the notice of termination was not sent to the defendant or his debt counsellor in accordance with the provisions of the NCA, the defendant is also able to muster authority in the form of two SCA cases, i.e. Rossouw v

First Rand Bank 2010 (6) SA 639 (SCA) and Collett v First Rand Bank 2011 (4) SA 508 (SCA). In its simple summons the plaintiff pleaded that it delivered its notice in terms of Section 86(10) of the Act on the 3 August 2011 to the plaintiff by prepaid registered post to a specified address in Kuils River and to the debt counsellor at a specified address by email. Although purporting to do so it annexed no proof of an email having been sent to the debt counsellor. It did attach a copy of the notice in terms of Section 86(10) terminating the debt review plus a list of registered letters issued by the post office indicating that a registered letter was sent to the plaintiff on that date i.e. 3 August 2011.

The post office form used makes provision for the signatures of the client and an accepting officer and a notation of how many letters were posted. These signatures and details were not completed on the form however. Rossouw's case dealt inter alia with how notice in terms of Section 29(1)(a) of the Act was to be effected and proved. The court held that the summons must contain allegations of the manner in which the notice was delivered so as to place a court in a position to determine whether there was delivery in terms of the Act.

In paragraph 37, the court per Maya, J A discussed the effect of a form such as was used in the present matter to prove

service by registered post and which form suffered from the same defects. Paragraph 37 reads:

> "Even if this were not so the documents could not have assisted the bank's case. On its face, it lists the names and addresses of the appellants amongst the addressees to which registered letters are to be sent. But it further requires confirmation of the number of letters to be posted, the signature of the client sending the letter or letters, the signature of the 'accepting officer', presumably the post office official processing the transaction and the date of the transaction. None of these entries were made. These omissions, which the bank did not explain, materially affect the documents reliability. As it stands it does not confirm that a registered letter was actually sent to the appellants. Even if it did, without the date it is not possible to link it to the sending of the relevant notice, particularly in view of the fact that an earlier one was previously sent in 2008."

Mr Tee argued that these observations were obiter in that the court did not allow the admission of the document in the summary judgment proceedings. This indeed appears to be the case. He sought also to distinguish Rossouw's case from

the present case where the plaintiff fully pleaded compliance with the Act, i.e. that it sent a registered letter containing notice of termination on a specified date.

For the purposes of summary judgment however, in particular where the defendant denies receipt of the notice, I consider that the courts will continue to require *prima facie* proof of delivery. As regards the delivery of the notice of termination to the debt counsellor, by the date thereof, 3 August 2011, the application for debt review had in terms of Section 87 of the Act, been lodged in the Kuils River magistrate's Court and the debt counsellor as an applicant therein was represented by attorneys. This state of affairs prompted the defendant to allege that the notice of termination should have been served on the debt counsellor's attorneys of record and not merely emailed to her in order for there to be compliance with Section 86(10).

The right of a creditor to terminate debt review proceedings was dealt with in Collett's case. Although the court was not required to deal with the question of precisely how such notice is to be affected, it did state as follows at page 517c-d:

> "The hearing continues and if several credit agreements are being reviewed continues in respect of the others.

Although notice of termination of the debt review is not required to be given to the magistrate's court, but only to the consumer debt counsellor and National Credit Regulator, the proceedings are governed by the rules of the magistrate's courts which makes adequate provision for the service of process and notices."

Although an obiter *dictum*, this is a strong indication to my mind that notice to the debt counsellor at least must be given in accordance with the relevant rules of court, not merely by way of an email to his/her/its personal email address. This would accord with logic since it would minimise the chances of an order being made by the court restructuring the debt obligations to a creditor who has terminated the debt review proceedings in respect of the particular debtor and debt.

I make no specific finding to this effect however, since it is not necessary for me to do so in these proceedings and I have not had the benefit of full argument on this question. The same applies to the questions of whether a mortgage loan agreement should be attached to a summons and whether the plaintiff has done sufficient to indicate compliance with the NCA in regard to the delivery of the notice of termination upon the defendant himself. I express no firm view on any of these questions; my observations should not be elevated to the level of an

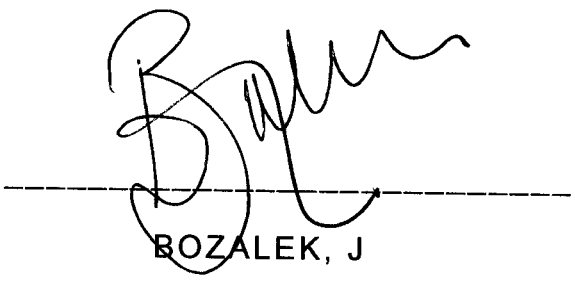
authoritative finding or view. However, the combined effect of these three points raised on behalf of the defendant is, I consider, sufficient to ward off summary judgment. Whether these points will survive examination at the trial, assuming that they are not cured beforehand, is a moot point.

In the circumstances, I propose to order that the question of cost stand over for determination by the trial court. In the result the following order is made:

1. The application for summary judgment is refused.

2. The defendant is granted leave to defend the action.

3. Cost will stand over for determination by the trial court.



BOZALEK, J