IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO. 14/14936

Before the Honourable Vermeulen AJ

In the matter between:

FIRSTRAND BANK LIMITED T/A WESBANK PLAINTIFF

And

WHITTINGTON, LEONARD DEFENDANT

JUDGMENT

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[1] The plaintiff provided finance to the defendant in order to enable the latter to purchase a motor vehicle in terms of an instalment sale agreement (“the *agreement*”). The agreement constitutes a “*credit agreement*” within the purview of the National Credit Act, No.34 0f 2005 (“*the Act*”) and the agreement is accordingly subject to its provisions.

[2] It is common cause that the defendant fell in arrears with the repayments in terms of the agreement and that the plaintiff’s attorneys, on 10 March 2014, addressed

a notice in terms of section 129(1) of the Act to the defendant, which notice was sent per registered post to the address corresponding with the address which the defendant had appointed as an address *citandi et executandi* for purposes of the agreement at the time of the execution thereof. In accordance with the provisions of the Act, the notice informs the defendant of his default in terms of the agreement and calls upon him to refer the agreement to a debt councillor, or to alternative dispute resolution, to a consumer court or to an ombud so as to resolve any dispute in terms of the agreement or to agree on a plan to bring the payments up to date.

[3] When no response was forthcoming, the plaintiff issued summons against the defendant on 24 April 2014, in which the plaintiff, having cancelled the agreement, claims the return of the motor vehicle sold in terms of the agreement and further relief related thereto.

[4] The defendant filed a notice of intention to defend the action, whereupon the defendant applied for summary judgment against the defendant, in which application the plaintiff refers to the fact that notice in terms of section 129(1) of the Act had been given and discloses a *"track and trace"* print-out obtained from the Post Office which indicates that the notice as aforesaid had been sent to the post-office the name whereof corresponds with the adress as stated in the notice.

[5] The defendant filed an affidavit resisting summary judgment, in which he gives a full account of the litany of financial difficulties which befell him as a result of his retrenchment during 2012, and which eventually led to his defaulting on his payment obligations in terms of the agreement. His account in this regard, though regrettable, is

hardly unusual and would not ordinarily afford a cognisable basis upon which the plaintiff could be denied its ordinary contractual remedies consequent upon the defendant's breach of the agreement. However, that which is somewhat out of the ordinary in the present matter, is the diligence with which the defendant would appear to have sought to avert some of the financial consequences of the adversity which came his way. When he was retrenched, for instance, he states that he approached the plaintiff, long before he actually fell into arrears with his payments in terms of the agreement, forewarning the plaintiff of the potential problem following his retrenchment and prevailing upon the plaintiff to grant him what he refers to in his affidavit as *"a period of amnesty",* pending the payment to him of an amount due to him by way of retrenchment insurance which payment he, at the time, thought was imminent.

[6] The defendant states further in this regard that on 4 September 2013, he sent an email to the plaintiff to record in writing the discussion he had with an employee of the plaintiff in regard to the aforegoing. The email reads as follows:

> *"Dear Gugu,*
>
> *Following our telephone conversation I would just like to confirm the following:*
>
> *1. I, Leonard Whittington, (ID 8508025045083, Wesbank Acc nr-85186660922) have been retrenched from employment on 13-08-2012.*
>
> *2. I have a retrenchment policy with Frank.net and I have been informed that they have a 3 month waiting period for claims to be processed, so I ask that (should I not be able to meet my payment obligations within the next 3 months) you defer payment. Please confirm that you agree to this, as per our telephone conversation yesterday (03-10-2012).*
>
> *3. I will keep in touch with you and keep you informed of any changes in my financial situation. I will also inform you when Fank.net starts paying out, if I haven't found emplyment in the interim.*
>
> *Thank you, Gugu, so much for your understanding in this matter, it is such a pleasure dealing with an institution that goes the extra mile and who sees their customers as humans and not just another number. Your motto of "How can we help you"truly proves to be true!"*

[7] There was no response by the plaintiff to the aforesaid email from the defendant.

[8] The defendant, who found it impossible to obtain employment in Gauteng, migrated to the Western Cape in an increasingly desperate quest for better prospects, but the latter province proved to be equally unyielding as far as job opportunities were concerned. He, nevertheless, succeeded in keeping up with his repayments on the vehicle.

[9] On 30 November 2012, he telephoned the plaintiff's call centre in Capetown and informed an employee of the plaintiff of the *status quo* as it then was, to the effect that the insurance pay-out which he foreshadowed in the first discussion with the plaintiff during September had not materialised as yet but that he would keep the plaintiff apprised of developments in this regard.

[10] On 5 February 2013, the defendant again telephoned Gugu, the employee of the plaintiff in Johannesburg with whom he had the discussion in September 2012, in order to inform her of his intended move to the Cape. He followed this up with an email to Gugu, in which he recorded the following: (I quote the material part of the email only)

> *"Dear Gugu*
>
> *Following our telephone conversation I would just like to confirm the following:*
>
> *I haven't as yet been able to find new employment. I was hoping that with the start of the new year I would be quick to find a new job, but it doesn't seem that way.*

> *I will be relocating to the Western Cape, as there is an opportunity of finding employment there. I am not sure where exactly I will be staying as yet, I would like to request that you change my address on file to my mother's home address, they have stayed here since 2005 and own the property:*
>
> *Plot 42 Stephanopark*
>
> *Vanderbijlpark*
>
> *1911"*

[11] Again, his email as aforesaid did not meet with a response from the plaintiff.

[12] During May 2013, the defendant took up a position in Uvongo, KwaZulu Natal, where he moved into the holiday home of a friend on the basis that he repairs,renovates and looks after the property against payment to him of 22.5% of the rental income of the property as from the end of January next year.

[13] As it happened, for reasons that need not be canvassed here, the insurance pay-out which was eventually made was a fraction of the insured amount and, as such, was not sufficient to enable the defendant to make any payment towards the arrears which had by then accrued.

[14] The defendant, furthermore, denies that the notice in terms of section 129(1) of the Act came to his attention.

[15] Against the aforegoing background, Ms Malan, who appeared on behalf of the defendant, submitted that the defendant's email of 4 September 2012 constitutes an amendment of the agreement, to the effect that the plaintiff must by its terms be taken to have consented to an indefinite deferment of the defendants obligation to make regular monthly repayments in terms of the agreement. In her heads of argument, Ms Malan submitted further that, although there is a non-variation clause in the agreement,

the plaintiff must by its conduct in failing to take any action for a period of two and a half years be taken to have accepted the variation of the agreement.

[16] I am unable to accede to this submission. Even assuming that the non-variation clause *in casu* may be said to permit a variation of the agreement on the basis contended for, which strikes me as quite a generous assumption in the defendant's favour, the question remains what the actual exigible content of the alleged variation was. Until when was the defendant's obligation to pay suspended? If the resumption of his obligation to pay was subject to some or the other contingency, as it must necessarily have been, what was the nature thereof and what would happen if the contingency failed to materialise? The email is silent about all these matters, which is in itself fatal for the proposed variation. Despite the valiant efforts on the part of Ms Malan to imbue the suggested variation with definite and specific content, I remain unpersuaded, with respect, that she succeeded in doing so. In my view, the content of the email concerned, on the ordinary grammatical meaning of the words employed therein, is simply not amenable to an interpretation in terms of which the indefinite suspension of the defendant's obligations in terms of the agreement was permitted thereby.

[17] Ms Malan further contended that the provisions of section 129(1) of the Act were not complied with, in that the address appearing in the notice, 429 Scrooby Street, Ruimsig 1732, is an incomplete address if regard is had to the address appearing on the summons, as amended. From a perusal of the summons it would appear that the defendant's address, as it originally appeared on the front page thereof, had been amended to read: *"429 Santa Maria, Scrooby Street, Willowbrooke Estate,*

*Ruimsig",*which is the full and correct address, according to the submission of Ms Malan. When the Sheriff attempted to serve the summons shortly after its issue in April 2014, the address was, no doubt, also stated as 429 Scrooby Street, Ruimsig, which would explain why it was impossible to effect service of the summons in April. Only when the aforesaid amendment to the address was effected, as indicated above, could service be effected, which finally occurred during August this year. It was finally contended that, in the light of the aforegoing circumstances, there is substance to the defendant's denial that he received the requisite notice. Ms Malan relied in support of the aforegoing submissions on the decision by the Constitutional Court in *Sebola v Standard Bank and Others* 2012 (5) SA 142 CC.

[18] Ms Kruger, who appeared for the plaintiff, sought to counter this submission by contending that the plaintiff had done all that was required of it to bring the notice to the attention of the defendant and that he was bound by the address as stated in the agreement, whether that address had been correctly recorded or not. She further relied on the decision of this court in *SA Taxi Development Finance (Pty) Ltd v Phalafala (Case No. 1512/2013*) by my brother, van Eeden AJ., in support of the submission that, whatever defects may be said to attach to the original notice, the fact is that the notice was attached to the summons and the defendant has indubitably had knowledge of the notice and its content at least since service of summons on him. On this basis, van Eeden AJ held that the defendant in that matter *"…was thus fully apprised of his rights".* He continued by holding that the defendant had had the opportunity to do what the notice invited him to do since receipt of the summons. He pointed out that, on the facts of that matter, the defendant was not asking for directions in terms of s

130(4)(b)(ii), nor did he give any indication of prejudice or of what he would have done had he received the notice prior to the summons. On the aforegoing basis the court granted summary judgment despite the lack of due notice in terms of section 129(1) of the Act to the defendant before the issue of summons.

[19] In the present matter, the notice in terms of section 129(1) of the Act was also attached to the summons. On the basis of the approach in the Phalafala-decision, I am accordingly at large to grant summary judgment, notwithstanding any possible defect in the notice in terms of s 129(1), provided I am satisfied that the defendant would not be prejudiced.

[20] I am of the respectful view, however, that the reasoning underpinning the *Phalafala*-decision is clearly wrong and I accordingly decline to follow this decision. In my view, sight was lost of the purpose of sections 129 and 130 in the *Phalafala*-decision and this, in turn, led the learned judge into error in adopting the stated approach .

[21] In para 59 of the *Sebola*-decision, Cameron J pointed out that the significance of section 129 manifests itself in the consumer-friendly and court-avoidance procedures which are innovatively introduced by its provisions. I would add, with great deference, that an additional consideration that may have a bearing on the sweep of these and many other provisions of the Act, is that they are informed by the substantial inequality of bargaining and litigating power which usually exists between a credit provider and the overwhelming majority of consumers. See in this regard section 3(e) of the Act. In my respectful view, the approach of van Eeden AJ in the

Phalafala-decision stems from an under-emphasis of and necessarily results in an under-valuation of both the objects of sections 129 and 130 as articulated by Cameron J in the *Sebola*-decision.

[22] The fact that section 129 is animated throughout by the idea of avoiding litigation as far as possible is self-evident from its very provisions. Section 129(1)(a), by its provisions, enable the parties to avail themselves of a number of different dispute resolution mechanisms, in the event of a default by a consumer under a credit agreement, whereas section 129(1)(b), in peremptory terms, forbids the commencement of legal proceedings by the credit provider before <u>first</u> providing notice to the consumer as contemplated in paragraph (a). In other words, the notice in terms of section 129(1) of the Act has as its avowed objective, the avoidance of litigation. Proscribing the commencement of legal proceedings to enforce the agreement before such notice is given is a legislative device, the employment whereof is central to the attainment of this objective. To permit a credit provider to give the requisite notice *pari passu* with the very summons which the notice is supposed to forestall is, quite simply, illogical. By the time summons has been issued, the notice has lost its entire *raison d'être* and the very purpose of the section is subverted absent an insistence that the notice should precede the issue of summons.

[23] The right granted by virtue of the provisions of section 129(1) has a procedural as well as substantive dimension. Whilst the substantive dimension of the section is self-evident, the procedural dimension may be less so; the two are, at all events, intimately intertwined. This much is evident from the provisions of section 129(3), in terms of which a consumer in default is entitled, at any time before the cancellation of

the agreement, to re-instate the agreement by purging the default. If compliance with section 129(1) becomes optional, this may well detract from the incentive on the part of the credit provider to actively pursue the alternative dispute resolution mechanisms as provided for in terms of section 129(1)(a) of the Act. Conversely, as pointed out in para. 60 of the *Sebola*-decision, *supra*, access to debt counselling and extra-judicial resolution will undoubtedly have their most potent impact when the guillotine is about to fall, so to speak. The latest decision by the Constitutional Court in *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 CC, in para. 22 thereof, also places emphasis on the importance, in the context of the scope and ambit of sections 129 and 130, of the consensual resolution of credit agreement disputes. To permit the credit provider to issue summons without compliance with section 129(1) of the Act will, in my view, not facilitate the ideal of the consensual resolution of disputes; on the contrary, it will likely materially hinder its attainment.

[24] I further invite attention to the use of the word *" must"* in section 130(4)(b) of the Act, in terms of which the court is required in peremptory terms to adjourn the matter in the event of a finding that the credit provider has not complied with the provisions of, *inter alia*, section 129 of the Act. The use of the word *"must" prima facie* implies a peremptory intention on the part of the legislature. The same considerations apply in regard to the provisions of section 130(3)(a) of the Act.

[25] The cumulative effect of the considerations referred to above compel the conclusion, in my view, that it is incumbent upon me to adjourn the matter and to grant an order in terms of sections 130(4)(b)(i) and (ii) of the Act in the event of a finding that the requisite notice in terms of section 129(1) of the Act did not precede the issue

of summons. The plaintiff must, as a matter of principle, establish and prove that the notice in terms of section 129(1) of the Act was delivered to the defendant. This is done by the credit provider alleging and establishing that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered item was ready for collection.

[26] Where the defendant disputes receipt of the notice, as is the case in the present matter, and the objective facts indicate that the address to which the notice was sent was not a functional one, which in my view is indicated by the relevant facts, it follows that the defendant's denial of receipt of the notice is probably true, in which case the matter must be adjourned in terms of section 130(4)(b) of the Act

[28] I have already referred to the defendant's denial that he received the section 129(1) notice. He stated that he does not know why this is the case, save to suggest that the Postal Strike may be to blame for this fact. It is not explained in the affidavit who lives at the address in Ruimsig, but in my view, none of the aforegoing is of any relevance in the light of the content of the email referred to in paragraph 10 above, in which the defendant gave unequivocal notice to the plaintiff to change his address to the Vanderbijlpark address stated in the email concerned. This notice complies with the provisions of clauses 17.1 to 17.3 of the agreement, which provide as follows:

> *"17.1 You agree that the postal/email address that you have provided on the Quotation/Cost of Credit is the address where we must send all post and other communication to you and that such communications will be binding on you.*
>
> *17.2 You agree that the physical address that you have provided on the Quotation/Cost of Credit is the address that you have selected where we must send all legal notices to you.*

> *17.3 You must let us know, in writing, by hand or registered mail, of any change of your addresses or your email address, telephone or cellular phone numbers. If you fail to give notice of a change of address, we may use the last address we have for you."*

[29] That which is postulated in terms of clause 17.3 is precisely what the defendant did when he informed the plaintiff, on 5 February 2013, by way of the email of even date, that the address which the plaintiff had of him on file should be changed to the address as stated in the said email. It would appear that the plaintiff's servants may well not have acted upon the notice contained in the defendant's email of 5 February 2014 by updating the plaintiff's records with the defendant's new address as provided by him. The same conclusion is arrived at via the provisions of section 168 of the Act, which provide that, unless otherwise provided for in terms of the Act, a notice, order or other document that, in terms of this Act, must be served in terms of this Act, will have been properly served if it has been either- (a) delivered to that person; or, (b) <u>sent by registered mail to that person's last known address</u>.

[30] The ineluctable result of the aforegoing is that the notice in terms of section 129(1) of the Act was ineffective, since the address as stated in the Quotation/ Cost of Credit, whether that address was complete or not, had been changed pursuant to the terms of the agreement, and the plaintiff's records had not been updated accordingly.

[31] The result of the plaintiff's failure to comply with the provisions of section 129(1) of the Act is that I am precluded by the provisions of section 130(3)(a) of the Act to determine the matter and must, in stead, adjourn the matter and make an appropriate order setting out the steps the plaintiff must complete before the matter may be resumed.

I accordingly make the following order:

A The matter is adjourned *sine die*.

B The plaintiff is ordered to comply with the provisions of section 129(1)(a) of the National Credit Act, No. 34 of 2005, ("*the NCA*") by providing notice to the defendant in terms of the aforesaid provision, at the address of his attorneys of record, or such other address as he may appoint within the meaning of clause 17.3 of the agreement, and section 168 of the NCA. Before the matter may be resumed.

C The plaintiff shall pay the defendant's costs of the application for summary judgment as well as the notice of intention to defend.

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Vermeulen AJ

Date of Hearing: 09 December 2014

Date of Judgment: 11 December 2014

For the Plaintiff:

Adv. Karin Meyer, instructed by:
Smit Jones & Pratt
2nd Floor Building C
Sunnyside Office Park
4 Carse O' Gowrie Road
Parktown
PO Box 8
Johannesburg

Tel: (011) 532 1500
Fax: (011) 532 1512
Ref. Mr. Smit/AM/FIR33/1428

<u>For the Defendant:</u>

Adv. C Malan; instructed by:
CA Mather Inc.
No. 7 Dunwest
427 Dunwest Ave.
Ferndale
C/O Mary Jardim
No. 6 Young Ave
Houghton Estate
Johannesburg
REF: KS Whittington_Wesbank
Tel: (011) 791 1766
Fax: 086 688 8537 (Direct)
Email: kjrs@isat.co.za