IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

17/3/2010

CASE NO: 50146/09

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

17/03/2010
DATE
SIGNATURE

In the matter between

FIRST RAND BANK LIMITED **Plaintiff**

and

MSAWENKOSI ARTHUR DHLAMINI Defendant

JUDGMENT

MURPHY J

1. This is an application for summary judgment. The applicant has issued summons against the defendant for payment of the sum of R825 056,74, being the balance of monies due, owing and payable under a covering mortgage bond by reason of the alleged failure by the defendant to pay the bond instalments. The applicant further seeks an order declaring the mortgaged property executable for the amounts owing.

2. The defendant (respondent) has filed an intention to defend which led the applicant to bring the application for summary judgment in which it makes the standard averments that in its opinion the defendant has no *bona fide* defence to the action and appearance to defend has been entered solely for the purpose of delay.

3. In his affidavit, the respondent, an attorney, does not deny that he is in default in paying the monthly instalment under the bond. Instead he raises one crisp defence; namely that he did not receive notice in terms of section 129(1) of the National Credit Act 34 of 2005.

4. As the wording of the section will assume some importance later in this judgment it is necessary to set it out. It provides:

> If the consumer is in default under a credit agreement, the credit provider -
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before -

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.

5. Section 129(1) must be read with section 130(1), the relevant part of which provides:

> Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and -
>
> (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in .... section 129(1)...
>
> (b) in the case of a notice contemplated in section 129(1), the consumer has -
>
> (i) not responded to that notice; or
>
> (ii) responded to the notice by rejecting the credit provider's proposals ...

6. In terms of section 130(3) the court must be satisfied that there has been compliance with the procedures required by section 129.

7. The respondent admits that a section 129(1) notice was addressed to him and dispatched by registered post to his address. His own investigations show that the letter was received on 23 May 2009 at Tembisa North post office. For reasons which he has been unable to establish, no notification was sent to him to inform him that the registered letter was awaiting collection. Since the letter was not collected it was returned to sender, presumably the applicant.

8. There is no dispute that the applicant is a credit provider, the respondent a consumer, and their agreement a credit agreement. Consequently it is common cause that section 129(1) is applicable.

9. The respondent submits that because the section 129(1) notice never came to his attention there was no compliance with the provision and hence the summons issued is premature and that summary judgment may not be granted.

10. The agreement between the parties, a "Home Loan Agreement", provides in clause 4.34 thereof for *domicilia citandi et executandi*. It reads:

> "The parties elect the following address for all communications and services of notices in respect of any legal proceedings which may be instituted by virtue hereof."

The respondent elected his home address to which the registered letter was addressed.

11. The applicant's position is that provided it properly addressed and dispatched the notice by registered post to the respondent's chosen *domicilium* that is sufficient, and it is irrelevant whether the notice in fact came to the respondent's attention.

12. Neither counsel furnished me with heads of argument. They did not need to do so because, as they say, their respective positions have been argued, considered and determined in two possibly conflicting decisions of the Durban and Coast Local Division of the Kwa-Zulu Natal High Court. By way of a test case they seek a determination of which line of reasoning is to be preferred in this division. There is some doubt about whether the two decisions are in irreconcilable conflict, a matter to which I will turn presently, but the positions of the parties are indeed so and accordingly they require a definitive ruling.

13. In *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* (unreported 16103/08 3 April 2009) Wallis J rejected the contention that

the section 129(1) notice had to come to the attention of the consumer and held that a notice is delivered if it is sent by registered post to an address selected by the consumer, irrespective of whether it comes to the attention of the consumer. The learned judge's ruling was predicated upon what he understood by the word "delivered" in section 130(1)(a) of the Act. Seemingly in contrast, in *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D), Naidu AJ expressed the following view (at para 54):

> "[54] In my view the present Act, with regard to the notice contemplated in section 129(1)(a) thereof, represents a radical departure from its predecessor. Whereas the Credit Agreements Act 75 of 1980 merely requires the credit receiver (sic - should be "grantor") to post by prepaid registered mail and, in this way, "has notified the credit receiver" of default, the present Act in section 129(1)(a) creates an obligation on the credit provider (when it decides to take such a course) to draw the default to the notice of the consumer in writing. Section 129(1)(b) creates a bar against the credit provider legitimately commencing any legal proceedings to enforce the agreement before *providing notice* to the consumer as contemplated in section 129(1)(a). In terms of section 130(1)(a) a credit provider may only approach a court for an order to enforce a credit agreement if, inter alia, at least ten business days have elapsed since a credit provider *delivered a notice*, as contemplated in section 129(1)(a), to the consumer.

> [55] The words 'draw the default to the notice of the consumer', 'providing notice' and 'delivered a notice' in the context in which these appear in the previous paragraph to my mind cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires much more that the mere dispatching of the notice contemplated by section 129(1)(a) to the consumer in the manner prescribed in the Act and the regulations. The credit provider is required, in my view, to bring the default to the attention of the consumer in a way which provides an assurance to the court ..... that the default has indeed been drawn 'to the notice of the consumer'."

14. While the *dicta* of Naidu AJ are in stark contradiction to the ruling of Wallis J, the finding of Naidu AJ in that case was in fact not. For despite having said that the default had to be brought to the attention of the consumer, the learned acting judge immediately restricted the range of the principle by holding, in contradictory fashion, that where the consumer has chosen a *domicilium* then "the credit provider should ensure, if the notice is sent by mail, that the address to which the notice is posted is in every respect precisely the same." In other words, a properly and precisely addressed notice dispatched to the *domicilium* will be sufficient. Upto that point the two judgments are reconcilable. However, in argument before me counsel submitted that the decision of Naidu AJ, correctly interpreted, requires in addition to delivery that the notice and its contents actually come to the attention of the consumer as is evident from the learned acting judge's reliance upon the definition of "notice" in the *New Oxford Dictionary* to

mean "attention, observation" and the emphasis he placed upon the structure and design of the Act aimed at consumer protection, thus justifying a stricter interpretation.

15. The judgment of Wallis J in *Munien* makes no explicit mention of the earlier *Prochaska* decision. Nevertheless, the learned judge addresses its assumptions and policy basis head on. In the result we are left with two diametrically opposing views with significantly different consequences for credit providers and consumers in the credit market.

16. In *Munien* the applicant had entered into an instalment sale agreement in respect of a motor vehicle. After falling into arrears with his repayments summons was issued and served at his chosen *domicilium citandi et executandi*. Default judgment was entered against him. In the application before the court he sought an interdict restraining the first respondent from executing on the judgment pending the outcome of an application for rescission of judgment. In relation to the merits of his proposed rescission application the applicant maintained that the summons had not come to his notice because he no longer lived at his chosen *domicilium* and he had a good defence to the claim against him on the basis that the first respondent had not complied with the provisions of section 129(1)(a) of the National Credit Act. It was common cause that the first respondent had addressed a notice in terms of section 129(1)(a) to the applicant by

registered post at his chosen *domicilium*. When it received no response, it sent a letter of cancellation and then summons was issued.

17. The applicant argued, as in the present case, that the requirement in section 129(1)(a) that the credit provider must "draw the default to the notice of the consumer in writing " means that the notice must be received by the consumer or must come to the consumer's attention. Since it was common cause that such had not happened, the summons had been issued prematurely in terms of section 130.

18. Wallis J rejected the argument and dismissed the application for an interdict. As mentioned, he held that provided the credit provider delivered the notice in the manner chosen by the consumer in the agreement, it is irrelevant whether the notice in fact came to the attention of the consumer. In paragraph 22 of the judgment the learned judge observed:

> "As the consumer has the right to choose the manner in which notice is to be given it is for the consumer to ensure that the method chosen will be one that is reasonably certain to bring any notice to his or her attention."

19. The reasoning and finding of Wallis J was much influenced by his interpretation of the scope and application of section 65 of the National Credit Act. The section deals with the rights of a consumer to have documents delivered by prescribed methods. It reads:

"**65 Right to Receive Documents**

(1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.

(2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must

(a) make the document available to the consumer through one of more of the following mechanism -

(i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;

(ii) by fax;

(iii) by e-mail; or

(iv) by printable web-page; and

(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)."

20. After setting out the provisions of section 65, Wallis J postulated the following:

> "As the NCA does contain provisions dealing with the manner of delivery of documents one must have regard to these provisions in considering whether the notice required by section 129(1)(a) was, for the purposes of the NCA, delivered to the applicant."

21. He then examined whether the definition of "delivered" in regulation 1 of the National Credit Regulations published in GNR 489 in the Government Gazette of 31 May 2006 applied, with such being the manner of delivery prescribed in terms of section 65(1). For reasons which need not detain us, he concluded that it did. The essential difference between the method prescribed under section 65(2) and regulation 1 of the regulations is that the latter in addition to allowing for hand delivery, fax and email, requires postal delivery, unlike section 65(2)(a)(i), to be by registered mail not ordinary mail. He concluded in any event that the result would be the same whether section 65(2) or regulation 1 applied. As he saw it:

> "For the present the question is whether a notice under section 129(1)(a) is delivered if it is sent by registered post to an address selected by the consumer, irrespective of whether it is capable of being delivered at that address and whether it comes to the attention of the consumer."

As already mentioned, Wallis J answered that question in the affirmative "for the simple reason that this is what the definition of 'delivered' says. It says the document is delivered where it has been sent by one of the four possible methods to the proposed recipient."

22. With all due respect. it would seem to me that the learned judge asked the wrong question and insofar as section 65(2) might be applicable it does not give the answer suggested.

23. The correct question to ask when considering if there has been compliance with section 129(1)(a), in terms of the wording of the section, is not whether the notice has been "delivered" to the consumer, but is rather whether the credit provider has "drawn the default to the notice of the consumer in writing". The reasoning of Wallis J essentially equates the requirement of drawing "the default to the notice of the consumer in writing" with the concept of "delivery" defined in section 65(2) and regulation 1. The line of thought, to my mind, is flawed and unsustainable when regard is had to both the language and policy of the Act.

24. The learned judge's conflation of the requirement of drawing the default to the notice of the consumers in writing with the prescription of methods for delivering documents appears to be the result of his focusing upon the mention of the word "delivered" in section 130(1)(a). The latter provision provides that action may be instituted only if "at least 10 business days have elapsed since the credit provider *delivered* a notice to the consumer

as contemplated in section 129(1)". But it would seem to me to be wrong to elevate a procedural mechanism for determining the time period in which action may be commenced to a standard eclipsing the primary and substantive requirement enacted by the provision that the default must be brought *to the notice* of the consumer. Bringing something to a person's notice requires that it be brought to his or her attention. Delivering something means dispatching it in a manner ensuring that it will arrive at a physical or electronic address, irrespective of whether it comes to the notice of the addressee. I agree therefore with Naidu AJ in *Prochaska* that the requirement of drawing the default to the notice of the consumer in section 129(1)(a) and the prohibition in section 129(1)(b)(i) against commencing legal proceedings to enforce a credit agreement before "first providing notice to the consumer" cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires more than the mere dispatching of the notice to the consumer in the manner prescribed in the Act and regulations for delivery.

25. Section 65 itself does not provide for a presumption of service. It simply regulates the *right* of a consumer to have documents delivered in a certain manner. There is no presumption in section 65 such as that contained in section 7 of the Interpretation Act 33 of 1957 that if dispatch occurs by one of the methods, service is then rebuttably presumed to have been effected. On the other hand, section 168 of the Act does indeed provide

for a presumption of service, which is irrebuttable. It provides that *unless otherwise provided* in the Act, a notice, order or other document that, in terms of the Act, must be *served* on a person will have been properly served when it has been either *delivered* to that person, or sent by registered mail to that person's last known address. The term "*serve*" is not defined in the Act. In accordance with accepted legal parlance it means to deliver a document to a person in the legally required manner. The difference between the terms "deliver" and "serve" as used in the Act is that the latter includes the former but in addition allows for dispatch by registered post. Service in terms of the Act is the equivalent of "delivery" under the regulations. Considering the serious inroads that section 168 makes on procedural fairness, by enacting an irrebuttable presumption of service, the provision must be construed restrictively. In my opinion "serving a notice" should not be seen as the same as "drawing the default to the notice of the consumer in writing". Section 129(1)(a) requires communication going beyond and otherwise than by non-personal service. To make the point again: "drawing to the notice" is not the same as "serving a notice".

26. In other words, in my respectful opinion, Wallis J has erred by equating the requirement of bringing the default to the notice of the consumer with delivery. He has mistakenly elevated the right of a consumer to receive

documents by a certain method to an irrebuttable presumption of notice of the default arising on dispatch by one of the methods.

27. The learned judge's observation in paragraph 12 of his judgment that "it would have been relatively easy to formulate a rule that made it clear that the notice had to be received and come to the attention of the consumer", misses the fact that the legislature has indeed done so. The legislature, it must be assumed, consciously did not use either of the words "deliver" or "serve" in section 129(1)(a). It used the expression "draw the default to the notice of the consumer in writing". It speaks also of "providing notice". There are numerous provisions in the Act where the term "deliver" is in fact used - see section 96(1) and (2); 108; 110; 111; 118(3); 121(2)(a); and 168. In various other provisions different modalities of communication are envisaged, such as: "give written notice" (section 104(2)); "provide written directions" (section 106(6)); "provide a written statement" (section 110(4)); and "advise in writing" (section 62). There is no basis for holding that substantive requirements of this order will necessarily be met should "delivery" take place as contemplated in section 65 or regulation 1. Section 129(1)(a) does not require a letter to be "delivered" to the consumer, or a notice to be served, it requires that the consumer's default be brought to his or her notice (attention) in writing. While of necessity some form of delivery or service will be needed to draw notice to the

default, such alone is not enough. There must be delivery (or service) as well as notice or attention being drawn to the default.

28 What is more, and perhaps most importantly, an irrebuttable presumption of service or notice on mere dispatch would defeat the purpose of section 129(1)(a). The object of the provision, in keeping with the objects stipulated in section 3(h) and (i) of the Act, is to provide for a consistent and accessible system of consensual resolution of disputes arising from credit agreements, by means of a consistent and harmonized system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements. Section 129(1)(a) deliberately aims at tailoring default disputes to the more appropriate processes of counseling, mediation, conciliation and other forms of contextually sensitive dispute resolution. It hopes that by deploying more imaginative methods, less rigid than the adjudication methods of the ordinary courts, it will achieve the other statutory objectives of promoting equity and correcting imbalances in negotiating power between consumers and credit providers in the interests of avoiding consumer over-indebtedness and reckless credit granting. The mechanism of an irrebuttable presumption of notice on dispatch would take insufficient heed of those objectives, being, as it would be, more in line with the conventional or orthodox methods of litigation which the Act seeks to escape.

29. Thus, I disagree with the view expressed by Wallis J that the injunctions in section 3 should not operate to alter the meaning of the wording in the section (paragraph 14 of the judgment). The injunctions in section 3 are central to and critical in giving proper meaning to what is envisaged by section 129(1)(a). As Naidu AJ correctly pointed out, the Act is consciously structured and designed for the protection of the consumer. The directive principles in section 3 reflect the intention of the legislature to allow for a more contextual and purposive interpretation of the Act to give effect to the ethos of consumer protection, as opposed to the arid literalism that has characterised statutory interpretation in the past. In any event, the wording of section 129(1)(a) need not be altered, it points unambiguously to a requirement that the consumer must be made aware of the default and the possible alternatives for dispute resolution.

30. Wallis J raises the legitimate concern that the costs involved in credit providers having to ensure that notices actually reach the consumer would be substantial and these costs would then have to be borne by the particular consumer or consumers as a body (paragraph 14). So be it. The legislature, with the aim of discouraging reckless credit and consumer over-indebtedness, is clearly ready to up the cost of credit to achieve that purpose. But one ought not to lose sight of the interests at stake in the breach and possible cancellation of credit agreements. In many instances, if not most, the *merx* of the agreement will be a home or a

motor vehicle. The loss of either of these assets invariably will have a significant deleterious effect on the life of a consumer. That harm, one hopes, can be avoided through the prior application of alternative dispute resolution in particular cases. Proper notice involving personal service, in the view of the legislature, is an indispensable element in that process. On a prudential assessment, or a cost-benefit analysis, the legislature perceives any additional cost as worthwhile in the advancement of its purpose. If personal service is a legitimate requirement in divorce actions, there can be no objection in principle or policy to the extension of such a procedural pre-requisite to credit agreement disputes.

31. In the result, therefore, and for the reasons stated, I am of the opinion that compliance with section 129(1)(a) of the National Credit Act requires that notice of any default by the consumer be brought to his or her actual attention; and that failure on the part of the credit provider to do so will bar the institution of legal proceedings with the result that any action instituted before then will be premature.

32. When action has been instituted precipitately that may well be a *bona fide* defence sufficient to avoid summary judgment. However, in appropriate cases, the court should avoid dismissing the application on such grounds alone. Section 130(4)(b) provides that if it is determined that the credit provider has not complied with section 129(1)(a), and has instituted action

prematurely, the court may adjourn the matter and make an appropriate order setting out the steps the credit provider must complete before the matter may resume. The respondent in the present case has failed to put up a defence on the merits. It may be that if the processes contemplated in section 129 are followed without success, summary judgment should be granted. It would be unfair to the credit provider to deny it that possibility on the grounds of a procedural defect. Accordingly, the orders that follow are appropriate in a case such as this.

33. The following order is issued:

i) The application for summary judgment is postponed *sine die*.

ii) The applicant is directed to comply with sections 129 and 130 of the National Credit Act 34 of 2005.

iii) In the event of the circumstances contemplated in section 130(1) arising, the applicant may continue with the action for an order to enforce the credit agreement, if need be, by amending its particulars of claim and by setting down the application for summary judgment on 5 days notice to the respondent.

iv) Costs are reserved for determination by the court hearing the summary judgment application, or the action, as the case may be.

John Murphy

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 18 November 2009
For the Plaintiff: Adv FR van den Heever, Pretoria
Instructed By:Hack Stupel and Ross, Pretoria
For the Defendant: Adv Dockratt
Instructed By: MF Jassat Dhlamini Inc.