

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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES ☐ NO.

(3) REVISED. ☐

31/05/2010

DATE

SIGNATURE

Case No: 30992/09
Date heard: 26/05/2010
Date of judgment: 31/05/2010

In the matter between:

Nedbank Ltd

PLAINTIFF

and

Johannes Alwyn Hogan
Anna Johanna Hogan

FIRST DEFENDANT
SECOND DEFENDANT

JUDGMENT

DU PLESSIS J:

The plaintiff, a bank, claims from the defendants the amount of R169 600.85 plus interest and costs. It also claims an order declaring certain immovable property executable for the said sum and costs. It is common cause that the claim arose from money that the plaintiff on three occasions lent to the defendants and that, as security for the loans, the defendants registered mortgage bonds over the immovable property. It is not in issue that the loans,

and thus the plaintiff's claims, are subject to the provisions of the **National Credit Act, 34 of 2005** ("the Act")

The defendants have entered an appearance to defend the action and have filed a plea. The plaintiff has taken exception to the plea, contending that it does not disclose a defence.

In the plea the defendants admit that they owe the money. They only raise defences based on the requirements of the Act.

First, the defendants deny the plaintiff's allegation that, before the issue of summons, it had "delivered a notice as contemplated by Section 129(1)(a) of the Act to the Defendants". In addition, the defendants plead that the section 129-notice did not "meet the prescribed requirements as determined in section 129" of the Act. Mr van den Heever for the plaintiff conceded, rightly, that in this respect the plea discloses a defence and that, to that extent, the exception cannot succeed.

Mr Van den Heever, however, contended that the further defence raised is not good in law and falls to be struck out. It is to that defence that I now turn.

In its declaration the plaintiff alleges that it did not approach the court "during the time that the matter was before a debt counsellor". (This is a reference to section 130(3)(c)(i) of the Act.)

The defendants deny the allegation. They further plead that they "applied for debt counselling on 28 May 2009 and consulted with a debt counsellor on 1 June 2009 in accordance with" the Act (See section 86(1)). They also plead that there is a pending debt review application before the magistrates' court (Section 86(7)(c) and 87 of the Act).

For the plaintiff it was contended that by reason of the provisions of section 86(2) of the Act, the defence that the plaintiff approached the court whilst the matter is before a debt counsellor, is not sustainable.

In terms of section 86(1) of the Act a "consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted." Section 130(3)(c)(i) provides as follows: "Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied ... that the credit provider has not approached the court ... during the time that the matter was before a debt counsellor".

The plaintiff contends that the matter is not before a debt counsellor because, in terms of section 86(2) an application for debt review under section 86 "may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement."

The plaintiff's contention must be decided in the following factual context. This being an exception, the defendants' allegation that they have applied for debt review must be taken as correct in the sense that a proper application in terms of section 86(1) was made on 28 May 2009. It is common cause that the plaintiff's summons was issued on 25 May 2009, before the defendants' application for debt review. It is also common cause that the summons was served on 28 May 2009, on the very day that the defendants made the application for debt review. Mr Van den Heever conceded, correctly, that it must be assumed for purposes of the exception that the application for debt review was made before service of the summons.

The crisp question in this case is this: When does a credit provider (plaintiff) "proceed to take the steps contemplated in section 129 to enforce that agreement"?

In the matter of **Nedbank Ltd v Motaung** (TPD, case no **22445 / 07**) I held that by delivering a section 129-notice, a credit provider proceeds to take the steps contemplated in section 86(2). I have, on reflection, doubt about the correctness of that judgment. In this case neither party contended that the date of the delivery of the section 129-notice is the relevant date. Suffices it to say that, without argument, I am not at the exception stage prepared to hold that that my previous judgment is correct and must be followed.

In this case the only arguments were, for the plaintiff that the relevant date is the date of **issue** of summons and, for the defendants, that the relevant date is the date of **service** of the summons. I shall now consider those arguments.

In **Starita v ABSA Bank Ltd** (South Gauteng case no **745/09**, para. 12) Gautschi AJ held that the "proper construction of section 86(2) is that the steps taken under section 129 as referred to in section 86(2) are the steps taken after the notice has been given, starting with the issue of summons. (The underlining is mine). In paragraph 13 of the judgment, the learned judge motivates the underlined portion by holding that "section 86(2) must ... be read objectively". If the credit provider had in fact taken the steps referred to, the learned judge reasoned, the prohibition of section 86(2) commences. The learned judge concluded that knowledge on the part of the consumer that the steps had been taken is irrelevant.

With respect, the learned judge may have overlooked the following:

Section 86(2) prohibits the consumer from making an application in terms of section 86 if the credit provider has already, at the time of the application, "proceeded to take the steps contemplated in section 129 to enforce that agreement". There is room for the view that section 86(2) must refer to steps that the consumer is aware of. If the section is not so construed, it would mean that, between the date of the issue of summons and the date of service thereof the consumer would be subject to a prohibition that he is unaware of. I find it unnecessary to make a final finding. The interpretation of the Act is still the subject of many varied views and judgments. It is in this case unnecessary and undesirable to make a final decision at the exception stage. The defendants have raised a good defence. In view thereof, the matter must in any event proceed to trial. The defence against which the plaintiff still objects will not occasion further costs of substance.

Although I am inclined to the view that the exception should not be allowed, I found it unnecessary in this case finally to determine the legal question that the exception raised. The exception, however, cannot be said to have been without substance. The fair order in the circumstances would be to allow the costs of the exception to follow the ultimate result of the case.

The following order is made:

1. The exception is dismissed.

2. The costs of the exception shall be costs in the cause.

A handwritten signature in black ink, appearing to be 'B.R. du Plessis', with a stylized flourish at the end.

B.R. du Plessis

Judge of the High Court

On behalf of the Plaintiff:

Hack Stupel & Ross
2nd Floor
Standard Bank Building
Pretoria

Adv: F.R. Van Den Heever

On behalf of the Defendant:

Spruyt Incorporate
Suite 110, Infotech Building
1090 Arcadia Street
Hatfield

Adv: L.A. East