

[1]

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

12/8/2010

CASE NUMBER: 22942/2010

In the matter between:

NEDBANK LIMITED

and

NAMASHISHI DORIAN MOKHONOANA

PLAINTIFF

DEFENDANT

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED. ✓

12/08/2010
DATE

[Signature]
SIGNATURE

JUDGMENT

- [1] The plaintiff sued the defendant for payment of R541 924.24, interest and costs as well as for an order declaring the immovable property known as Portion 130 of Erf 3257 Dawn Park Extension 37 Township, Registration

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Division I.R. Province of Gauteng, in extent 292m² held under deed of transfer T5982/2008 executable.

[2] The defendant entered appearance to defend and the plaintiff applied for summary judgment. The sole point that I have to decide is whether the plaintiff had complied with section 130(1)(a) of the National Credit Act, Act 34 of 2005 (hereinafter referred to as "*the Act*").

[3] Section 129(1)(a) and (b) of the Act provides as follows:

"(1) If the consumer is in default under a credit agreement, the creditor 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 or enforce the agreement before-

(i) First providing notice to the consumer as contemplated in paragraph (a) and

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

[4] Section 130(1)(a) and (b) provide as follows:

"(1) Subject to sub-section (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 the credit

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agreement for at least twenty business days and-

- (a) *At least ten business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9) or section 129(1) as the case may be;*
- (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"*

[5] The facts relevant to the determination of this issue are as follows:

[5.1] On 13 April 2010 the plaintiff dispatched a notice in terms of section 129(1) of the Act to the defendant by registered post.

[5.2] On 21 April 2010 the summons was issued against the defendant.

[5.3] On 28 April 2010 the summons was served on the defendant.

[5.4] On 11 May 2010 the defendant entered appearance to defend.

[5.5] On 31 May 2010 the plaintiff applied for summary judgment.

[5.6] On 4 June 2010 the defendant applied for debt review.

[6] The process of enforcement of a credit agreement by legal action as

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contemplated in sections 129(1) and 130(1) begins with the delivery of a notice in which the consumer's attention is drawn to the fact that he or she is in default and proposing that the consumer refers the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with the intent that the parties may resolve any dispute or develop and agree on a plan to bring the payments under the agreement up to date.

[7] I am mindful of the current debate which arose pursuant to the judgments of Wallace J (in Munien v BMW Finance Services 2010 (1) SA 594 (KZDHC) in which it was found that the sending and not receipt of the section 129 notice amounts to delivery thereof), and the judgment of Murphy J in First Rand Bank Limited v Dlamini 2010 (4) SA 551 (GNP) where his Lordship required receipt of the notice, to satisfy the requirement of delivery – a debate, it is hoped, will soon be authoritatively decided by the Supreme Court of Appeal.

[8] On the strength of the Munien-judgment, with which I agreed in First Rand Bank Limited T/A Fnb Homeloans v Benjamin Rossouw And Sandra Wilson- Rossouw (unreported), Ms Fitzroy who appeared for the plaintiff submitted that, since ten days had elapsed between posting and service of the summons on the defendant, the plaintiff is entitled to an order enforcing the credit agreement.

[5]

[9] Ms Coetzee who appeared for the defendant submitted that legal proceedings are commenced for purposes of section 129(1)(b) by the issue of summons and not the service thereof.

[10] I am therefore called upon to decide what meaning should be ascribed to the words: "*commence any legal proceedings to enforce the agreement*" in section 129(1)(a) and "*approach a court for an order enforcing...*" in section 130(2). I shall assume, without deciding, that the same meaning should be given to both and that the proceedings envisaged in both provisions are the same.

[11] Some support for the defendant's case is to be found in Herbstein & Van Winsen **The Civil Practice of the High Courts of South Africa** (5th Ed) Vol 1, p503 who has the following to say:

"The issue of a summons, not the service of it, ordinarily constitutes commencement of proceedings. The issue of a summons is the initiation of an action ... It prevents the plaintiff from issuing another summons on the same subject matter against the same defendant in the same or another court. If the plaintiff does so the defendant can plead lis pendens, i.e. that there is pending litigation on the same subject matter between the same parties. The issue of summons is sufficient for this purpose."

[12] The learned authors do not refer to direct authority for the proposition, and I was unable to find any.

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[13] Ms Fitzroy however contended with reference to Steinberg v Cosmopolitan Bank of Chicago Limited 1973 (3) SA 885 (RA), Dada v Dada 1977 (2) SA 287 (T) p288 C – E, Mills v Starwell Finance Corporation Limited 1981 (3) SA 84 (N) p9 D – G and a thesis by Hermie Coetzee Impact of the National Credit Act on Civil Procedural Aspects Relating to Debt Enforcement (Chapter 6) that service of summons rather than the issue thereof should be determinative.

[14] I agree with the latter submission. Commencement of legal proceedings has a distinct and far-reaching effect on the rights of a consumer. In terms of section 86(2) of the Act a consumer is precluded from applying to a debt counsellor to have him or her declared over-indebted after the commencement of legal proceedings. Legal uncertainty will abound if the consumer's ability to apply for debt review is determined by the date of issue of the summons of which he or she may not be aware (as opposed to the date of service thereof). I therefore find as a matter of law that legal proceedings for purposes of section 129(1)(b) of the Act is commenced not by the issue of a summons but by the service thereof.

[15] Once it is established that 10 business days have elapsed between delivery of the section 129(1) letter and service of the summons, the process cannot be faulted and the plaintiff is entitled to its judgment.

[7]

[16] I consequently grant summary judgment against the defendant, in favour of the plaintiff for:

[16.1] Payment of R541 924,24;

[16.2] Interest on the aforesaid amount at the rate of 8,90% per annum from 2 April 2010 to date of payment;

[16.3] An order declaring the following property specially executable:
Portion 130 of Erf 3257, Dawn Park Extension 37 Township,
Registration Division IR, Province of Gauteng, in extent 292
square meters, held under deed of transfer T5982/2008;

[16.4] Costs on the scale as between attorney and client.



P. ELLIS
ACTING JUDGE OF THE HIGH COURT
DATE HEARD: 6 AUGUST 2010
DATE OF JUDGMENT: 12 AUGUST 2010

FOR THE PLAINTIFF: ADV K FITZROY
INSTRUCTED BY: VAN DER MERWE DU TOIT INC.

FOR THE DEFENDANT: ADV L COETZEE
INSTRUCTED BY: MORRIS POCKROY ATTORNEY