

IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 34793/2009<sup>2008</sup>

DATE: 9/9/2010

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

07/09/2010 \_\_\_\_\_

DATE SIGNATURE

IN THE MATTER BETWEEN

AFRICAN BANK LIMITED

APPLICANT

AND

ADDITIONAL MAGISTRATE MYAMBO N.O.

1<sup>ST</sup> RESPONDENT

KHUMISO ABEDNEGO SEKETEMA

2<sup>ND</sup> RESPONDENT

THE NATIONAL CREDIT REGULATOR

3<sup>RD</sup> RESPONDENT

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JUDGMENT

POSWA, J

[1] This is a minority judgment, the majority judgment having been written by my brother, DU PLESSIS, J, with which judgment my brother MAKGOKA, J concurs. Having been partially responsible for a large number of changes made by DU PLESSIS, J to his original draft, I find myself in agreement with much of what appears in his judgment. The extent to which I disagree with his judgment is set out in my comments, which follow hereafter.

Comments

[2] My first comment is with regard to what has become a minor issue, viz., DU PLESSIS, J's reference to "*some doubt as to whether this court has the jurisdiction to entertain the applicant's proposed declaratory relief*". The need to discuss this aspect was obviated by the third respondent's counter-claim. I, otherwise, had and still remain with an open mind as to whether or not the court has jurisdiction in such circumstances.

[3] The Act, in s 3, clearly outlines three purposes, viz., as I prefer to number them:

- (a) "*to promote and advance the social and economic welfare of South Africans*";
- (b) "*to promote a **fair, transparent**, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry*" (emphasis added); and
- (c) "***To protect consumers***" (emphasis added).

Mindful as I am that the three purposes are of equal status, as they are set out in the Act, I have deliberately emphasised the words in subparagraphs (b) and (c), respectively. I lay great emphasis in the fairness and transparency of the credit market industry and the protection of consumers.

[4] It is, in my view, not altogether without some justification that the learned magistrate concluded that the section 58-procedure (of the Magistrates' Courts' Act) is contrary to the purposes of the NCA. This procedure permits the creditor to come before the clerk of the court, with a consent document prepared between the creditor and the debtor, which debtor is not present before the clerk of the court. The clerk of the court has to assume that all went well before the consent document was arrived at. Without the set of orders made in the majority judgment, the consumer was, in my view, unprotected

from potential abuse of the section 58 procedure. It should be borne in mind that the interests of the creditors, on the one hand, and those of consumers/debtors, on the other hand, are potentially in conflict. Due to, in particular, the creditors' financial power and their capacity to come together and discuss a general approach with regard to their interests and status, they are in a position to ensure that they, to the exclusion of the consumers, are the beneficiaries of the section 58 procedure. Consequently, procedures such as the letter to be written in terms of the provisions of sections 129 and 130 of the Act, should be strictly monitored to ensure that they do not become subversive of two of the purposes of the NCA, the ones I categorised as (b) and (c), respectively.

- [5] Clerks of the court and magistrates who do receive consent applications, being referred to them by clerks of the court, should not, in my view, assume, from the fact that there is already in existence an agreement preceding a section 129-letter, that the agreement itself was arrived at fairly. As I have already pointed out, the majority judgment has, in my view, placed a number of safeguards in this regard, with which I am in agreement. As I shall later endeavour to demonstrate, when dealing with some orders made in the majority judgment, there are respects in which, in my view, the safeguards are inadequate.

#### Orders

- [6] Seeing that I am in agreement with most of the orders made in the majority judgment, I shall confine my comments to those aspects which I think ought to be added or in respect whereof I am in disagreement. It is a matter of great concern to me that the

intervention of the magistrate depends entirely on the decision of the clerk of the court, in the sense that it is only after the clerk of the court has deemed it fit to refer the application for consent judgment to him or her that a magistrate can intervene.

- [7] In referring to the "*threefold discretion*" that a clerk of the court has in respect of the section 58 procedure, the majority judgment states, at p16:

*"If the papers are formally in order but the clerk of the court has reason to question the plaintiff's entitlement to judgment, the clerk of the court must refer the matter to the court in terms of rule 12(7).*

*This interpretation of section 58 ensures that the court retains a measure of oversight over a procedure whereby clerks of the court grant judgments so to speak in the court's name."*

Whilst I agree with the sentiment, further significance in this interpretation lies, in my view, in the fact that clerks of the court shall not be constrained to grant judgment where the papers are formally in order and that the court will, thus, not be easily by-passed and thus denied a measure of control, which ought to include ascertaining that the protection afforded the consumer, by the Act, the Act is not compromised.

- [8] I am concerned that a number of clerks of the court may not refer matters to the magistrate simply because they are overwhelmed by the process, or too busy to give it the attention it requires or, as unfortunately sometimes happens, are not mindful of how significant a part they play in ensuring that the provisions of the Act, especially with regard to the element of fairness and protection of the consumer/debtor, are complied with by the creditors.

[9] In the circumstances, I would qualify the sentence in the majority judgment: "*they can grant judgment if the papers are formally in order*" (emphasis added), by adding the phrase, after "*in order*": "*and the clerks of the court have no reason to question the plaintiff's entitlement to the judgment*". The addition of this phrase would, in my view, highlight, in the mind of the clerk of the court, that formal qualification of the application for consent judgment is no deterrent to the clerk of the court's referral to the magistrate.

[10] In this regard, what the majority judgment views as a mere "*note of caution*" (on page 18) is, in my view, likely to heighten scepticism on the part of clerks of the court and to cause them to be slow to refer to magistrates, even where they ought to, for fear that such referrals may be seen as not being "a balance approach".

[11] The full excerpt from the majority judgment, in this regard reads as follows:

*"A note of caution is necessary: Clerks of the court must follow a balance approach and they should not simply refer all requests for judgment based on credit agreements to the court. Consumers and credit providers are entitled to the use of the cost effective section 58-procedure."*

Whilst there is nothing wrong with the words contained in the excerpt, I am, as I have already stated, apprehensive that this warning may create consequences intended by the majority judgment, in the manner I have already stated. There is no risk, in my view, of a high scale referral of applications for consent judgment, by clerks of the court, to magistrates, if suggestions made in this minority judgment were adopted.

[12] In prayer 1.4, the third respondent requests the following order:

*"Clerks of the court may refer the request for judgments in terms of section 58 of the court in terms of rule 12(7) of the Magistrates' Courts' Rules."*

In view of the number of instances provided in the majority judgment, in respect whereof the clerk of the court must refer the request for judgment by consent to the magistrate, I am of the view that it would be inappropriate to merely order that clerks of the court "may" refer the request for judgments to the magistrates. There are instances where the clerks of the court *must* refer the request to the magistrates. In the circumstances, the following order should, in my view, be made in respect of prayer 1.4:

*"Clerks of the court may, and in certain circumstances must, refer a request for judgment in terms of section 58 to the court, in accordance with the provisions of Rule 12(7) of the Magistrates' Courts' Rules."*

[13] The majority judgment appropriately sums up the third respondent's prayer, in 1.3, as follows:

*"In order to obtain judgment in terms of section 58, where the cause of action arose from a credit agreement in terms of the NCA, the plaintiff must:*

- a. comply with the provisions of section 58 (prayer 1.3.1);*
  - b. allege in the request for judgment that the requirements of s 129 and 130 of the NCA have been met (prayer 1.3.3);*
  - c. attach a copy of the section 129 letter of demand to the application.*
- (Prayer 1.3.2)"*

The majority judgment sets out, in full, the provisions of s 130(3) of the NCA. Save for s 130(3) (a), it is not necessary to repeat those provisions in this judgment.

[14] Subsection 130(3) (a) reads as follows:

*"(3) Despite any provisions 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-*

*'(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with."*

Referring to all the subsections of section 130(3), the majority judgment states, *inter alia*, the following:

*"It follows that a credit provider must allege in the summons or in the letter of demand that each one of the requirements of section 130(3) have (sic) been met. In order for the consent to be informed, a blanket allegation that 'each requirement of section 130(3) has been met' will be insufficient. In the particulars of claim each requirement must be dealt with separately. If that is not done, the consumer cannot be taken to have admitted the facts."*

[15] Save to the extent that this refers to s 130(3) (a) of the NCA, I am in full agreement with the sentiments expressed in the majority judgment in this regard. Concerning the latter subsection, I am of the view that what the plaintiff needs to do is to state, where that is the case, that the provisions of sections 127, 129 and 131 do not apply and, briefly, state why that is the case. If the plaintiff does not state why the provisions of one or more of

these sections do not apply, the clerk of the court must refer the application to the magistrate.

- [16] In the circumstances, I would modify the order made in the majority judgment, in respect of prayers 1.3.1, 1.3.3 and 1.3.2, respectively, on p27 of that judgment, as follows:

*"It is declared that, in order to obtain judgment in terms of section 58 of the Magistrates' Courts' Act, where the original cause of action was a credit agreement under the National Credit Act, a plaintiff must comply with the provisions of section 58 of the Magistrates' Courts' Act and attach to the request for judgment (Form 5B) a true copy of the section 129-notice contemplated in the National Credit Act and allege in the summons or letter of demand, as the case may be, that each one of sections 127, 129 or 131 of the National Credit Act has been complied with. Except in the case of section 130(3)(a), it is not sufficient to make a general allegation that 'sections 127, 129 and 130 of the National Credit Act have been complied with'. In instances where the provisions of sections 127, 129 or 131 do not apply, the plaintiff should state so in the summons or letter of demand, as the case may be, and briefly state why the said provisions do not apply."*

I deal later in the judgment, with the contents of a section-129 notice, when discussing prayer 1.5.2.2.6.

- [17] The third respondent prays, in paragraph 1.5.2.2.4 as follows:

*"Clerks of the court and magistrates may interrogate the application for judgment as to the computation of the admitted debt."*

In this regard, I am of the view that the following order should be made:

*"A clerk of the court who, on the information before him or her, has reason to believe that the outstanding debt under a credit agreement has, despite the consumer's consent to the judgment, not been computed in accordance with the National Credit Act, must refer the application for consent judgment to the court, whereafter the magistrate may interrogate the application with regard to computation of the admitted debt."*

[18] In paragraph 1.5.2.2.5, the third respondent seeks the following order:

*"Clerks of the court and magistrates may interrogate the application for judgment so as to establish that affordability calculations had been performed before the loan agreement had been entered into."*

In respect of this prayer, the majority judgment states the following:

*"I have already dealt with reckless credit and over-indebtedness. In my view a further order in that regard will be confusing and it is unnecessary." (p38)*

[19] Whilst I agree with the sentiments expressed in the majority judgment, with regard to prayer 1.5.2.2.1 (concerning clerks of the court and magistrates, as the case may be, being entitled to interrogate the application for judgment in order to determine whether or not the credit in question is not an instance of the granting of reckless credit), it does not appear to me that the majority judgment makes a clear order in

respect of that prayer. (pp29-32) There would, therefore, in my view, be no confusion caused if an order were to be made in respect of prayer 1.5.2.2.5.

[20] In any event, I am of the view that this is an important order to make. In many instances where applications for summary judgment and applications for default judgment are made, it often appears that the credits in question are instances of the granting of reckless credit. If clerks of the court are ordered to refer to the court all applications for consent judgment in respect whereof, on the information before the clerk of the court, there is no indication that affordability calculations were performed by the court, credit providers will, in my view, act cautiously, in an endeavour to avoid delays in their applications, by providing sufficient information to indicate that affordability calculations have been performed.

[21] It is appropriate, in my view, to make the following order in this regard:

*"A clerk of the court to whom, on the information before him or her, it does not appear that affordability calculations had been performed before the loan agreement was entered into, must refer the application for consent judgment to the court, which may interrogate the application in that regard."*

[22] In prayer 1.5.2.2.6, the third respondent seeks the following order:

*"Clerks of the court and magistrates may interrogate the application for judgment so as to establish that the debtor failed to respond to the plaintiff's letter of demand issued in terms of section 129 of the National Credit Act or that the debtor rejected a proposal made therein."*

[23] With regard to this prayer (1.5.2.2.6), the majority judgment states the following, in three paragraphs on page 39 thereof:

*"If a consumer who has seen the allegations in the summons or the letter of demand and who has received meaningful section 129-notice consents to judgment, he or she is, ordinarily, taken to have admitted the allegations. In such cases the clerk of the court will ordinarily grant judgment if the request is in order.*

*There may be cases in which the clerk of the court, despite compliance with the above requirements, has reason to believe that, for instance, the consumer did not fully understand his or her rights. In such cases the clerk of the court cannot refuse judgment because the application will on the face of it be in order. The clerk of the court with such reasonable doubt must refer the application to the court. The court can then interrogate the application.*

*Credit providers could avoid unnecessary referrals to the court by presenting to the consumer for signature a consent that contains a paragraph that addresses the provisions of section 129(1)(a) and section 130(1). What I have in mind is the paragraph along the following lines:*

*'I have received the attached notice in terms of section 129(1)(a) of the National Credit Act. I understand the credit providers' proposals but I prefer to consent to judgment as set out herein.'*"

- [24] In referring to the fact that s 64(1) (b) of the NCA states that the s 129 notice must be in "plain language", the majority judgment states the following:

*"Whether the [section-129] notice is in plain language is, having regard to section 64(2), a question of fact that depends on the circumstances of each case, including the 'class of persons' that the consumer is part of. In a nutshell, the notice must be meaningful, understandable and in plain language."*

- [25] Although I am in full agreement with the sentiments expressed in the above excerpt, I am of the view that the "class of persons" referred to in the section includes the official languages provided in the Constitution of the Republic of South Africa ("the Constitution"). It is common knowledge that credit agreements are reached in only one or the other of two official languages, English and Afrikaans. The "average literacy skills" referred to in s 64(2) of the Act, are, for many if not most of the people involved with credit agreements, "literacy skills" in only one or the other of the remaining (African) official languages. No matter what "plain language", other than his or her official language or an official language of his or her choice, is used, such debtor cannot, in my view, "be expected to understand the content, significance, and importance of the document without undue effort", in the manner contemplated in s 64(2) of the Act.

- [26] It follows, therefore, that it is essential, in order to comply with the requirement in s 64(1) of the Act – viz., that a "plain language" be used – that, in respect of a person whose official language is other than English or Afrikaans, such person be offered a section 129-notice in the official language of such person's choice.

[27] The clerk of the court's task, in these circumstances, would be made easier, in my view, where there is a requirement that the section 129-notice be in an official language of the debtor's choice and that it be indicated in the notice itself that the debtor was offered the opportunity of reading the notice in an official language of his/her/its own choice. Absence of such an indication in the section 129-notice will automatically entitle the clerk of the court to refer the application to the court. I would, therefore, suggest that the letter that the majority judgment has in mind be varied as follows:

*"I have received the attached notice in terms of section 129(1)(a) of the National Credit Act, in an official language of my choice. I understand the credit provider's proposals but I prefer to consent to judgment as set out herein."*

The words in bold are the ones added to the majority judgment's suggested letter.

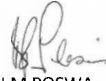
[28] I would, therefore, make the following order, in respect of prayer 1.5.2.2.6:

*"Clerks of the court and magistrates may interrogate the application for judgment so as to establish that the debtor, having been offered opportunity to read the section 129-notice or to have it read to him, her or it, in the language of his, her or its own choice, failed to respond to the plaintiff's letter of demand issued in terms of section 129 of the National Credit Act or that the debtor rejected a proposal made therein."*

#### CONCLUSION

[29] Save to the extent that there is conflict between it and what has been set out in my judgment, I am, in general, in agreement with the sentiments expressed in the "Summary" contained in the majority judgment.

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for J N M POSWA

JUDGE OF THE NORTH GAUTENG HIGH COURT

Attorneys for the applicant: SMITH-SMITH ATTORNEYS  
Dirma Building  
26 Long Street  
KEMPTON PARK  
1620

Counsel for Applicant: ADV P F LOUW SC

Attorney for first and second respondents: No appearance

Attorney for third respondent: MOTHLE JOOMA SABDIA INC  
First floor, Duncan Manor  
Cnr Duncan and Brooks Streets  
Brooklyn  
PRETORIA

Counsel for third respondent: ADV P G ROBINSION SC