IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 23028/2010

DATE: 15/9/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

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

(3) REVISED.

9/9/2010
DATE

SIGNATURE

IN THE MATTER BETWEEN

NEDBANK LIMITED	APPLICANT/PLAINTIFF
AND	
MSAWENKOSI ARTHUR DHLAMINI	RESPONDENT/DEFENDANT

JUDGMENT

KOLLAPEN, AJ

[1] This is an application for summary judgment in which the applicant seeks an order in the following terms:

(a) payment of the sum of R519 099,52;

(b) interest on the above amount at 8.95% per annum from 2 March 2010 to date of payment;

(c) an order declaring the property known as Portion 133 of Erf 3257 Dawn Park Extension 37 executable;

(d) cost of suit.

[2] The cause of action is based on monies allegedly due in terms of a loan agreement entered into between the parties and regulated by mortgage bond. It is common cause that the National Credit Act 34 of 2005 applies to the agreement concluded between the parties.

[3] The applicant, prior to issuing summons in this matter, caused a letter styled a "notice of default in terms of section 129(1) of the National Credit Act 34 of 2005", to be sent to the respondent's chosen *domicilium citandi et executandi* at Portion 133 of Erf 3257 Dawn Park Extension 37. The letter was dispatched by registered post.

[4] The respondent has defended the action instituted by the applicant and opposes the application for summary judgment.

[5] In his affidavit resisting summary judgment he denies that he received the notice in terms of section 129(1) and while not disputing that the notice was dispatched to the *domicilium citandi et executandi*, avers that he does not reside at that

property having bought it for purposes of investment and further alleging "there was no way I could have received the section 129(1) notice".

[6] He accordingly contends that the applicant did not, as was required by section 129(1), "draw the default to the notice of the consumer" and that accordingly the issue of summons was premature.

[7] He places reliance in this regard on a judgment by MURPHY, J in the matter of *First Rand Bank Ltd v M A Dlamini* case no 50146/09, North Gauteng High Court where it was found that the notice required by section 129(1) of the National Credit Act had to be brought to the "actual attention" of the consumer, and if this required personal service then such was a legitimate requirement regard being had to the ethos of the Act.

[8] The respondent, however, urged the court to follow the *dicta* of GAUTSCHI, AJ in the matter of *M M Starita v Absa Bank Ltd & Another* case no 742/2009, South Gauteng High Court to the effect "that the section 129(1) notice need not be actually received by the consumer. It was sufficient that it was sent by registered post to the *domicilium* address."

[9] The preamble to the National Credit Act suggests that it was enacted with the following objectives:

(a) "to promote a fair and .... market place for access to consumer credit ..."

(b) "to provide for debt re-organisation in cases of over-indebtedness".

[10] It is clear that section 129(1) notice the Act contemplates seeks to ensure not only that the consumer's attention is drawn to the default but also that the consumer's attention is drawn to the possibility of debt counseling, an alternate dispute resolution process, the consumer court and similar structures. It would appear that the objective is geared towards a resolution of the dispute if this is possible that may involve debt re-organisation.

[11] The fact that section 129(1)(b) creates a bar to the commencement of legal proceedings until the requirements of the notice required in terms of section 129(1)(a) have been met, suggests that the words "draw the default to the notice of the consumer" certainly contemplates knowledge on the part of the consumer both as to the default as well as to the options relevant to debt counseling and alternate dispute resolution. The latter process can only be advanced if the consumer has knowledge of them as options and the form and delivery of the notice contemplated in section 129(1) becomes important.

[12] I do not understand the parties to be in disagreement that this is what the law requires. The disagreement relates to the modality that is to be used to achieve the objectives of the section.

[13] The respondent's contention is that it would be costly and time consuming to ensure that the section 129(1) notice is brought to the actual attention of the consumer. This may have merit but seen against the broader scheme of the Act and the provisions of section 129(1) in particular, it would render the benefit to the consumer academic if compliance was a purely technical matter or a matter of form rather than one of substance.

[14] If one had to accept the respondent's contention that notice by registered post to the *domicilium* was sufficient the consequence would be that a letter dispatched to a vacant erf which was the chosen *domicilium* would be regarded as sufficient on the part of the credit provider to comply with the substantive requirements of section 129(1) namely to "draw the default to the notice of the consumer". This would have the absurd result that a credit provider who knowingly dispatches a notice to an address where it will not be received can claim compliance with the Act. Such an outcome clearly militates against the objectives of the Act.

[15] I am accordingly in agreement with the stance of MURPHY, J that section 129(1) requires that the notice of default and the options open to the consumer must be brought to the consumer's actual attention.

[16] Given that the notice of default did not reach the respondent I am of the view that the respondent should have the benefit of the protection provided by the section.

[17] In this matter the consumer was not resident at the chosen *domicilium citande et executandi* but had failed to provide the applicant with a new address as his chosen *domicilium*. This failure clearly makes it difficult for the applicant to then comply with its section 129(1) obligations.

[18] I am accordingly of the view that in the light of the non-compliance with the requirements of section 129(1), I am enjoined to act in terms of section 130(4)(b) of the Act which requires that the matter be adjourned and appropriate directions be given on the steps the credit provider must complete before the matter may be resumed.

[19] I accordingly make the following order:

1. The application for summary judgment is postponed *sine die*.
2. The respondent is directed to provide his current residential and working address to the applicant in writing within seven days of this order.
3. The applicant is directed to comply with section 129 and section 130 of the National Credit Act.
4. 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 five days notice to the respondent.

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

. KOLLAPEN
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON:
FOR THE APPELLANT:
INSTRUCTED BY:
FOR THE RESPONDENT:
INSTRUCTED BY: