NOT REPORTABLE

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

23/9/2010

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
23 Sept
~~4 AUGUST~~ 2010

CASE NO: 36569/2009

23/9/2010

In the matter between:

FIRST RAND BANK LIMITED (formerly known as FIRST NATIONAL BANK OF SOUTH AFRICA LTD)	Plaintiff
and	
JOHANNES DAVID KRIEL	First Defendant
INGE KRIEL	Second Defendant

J U D G M E N T

<u>MAKGOKA, J</u>:

[1] This is an opposed application for summary judgment. The plaintiff issued summons against the first and second defendants for payment of the sum of R202 797.17 being the balance of monies allegedly due, owing and payable under a covering mortgage bond by reason of the alleged failure by the defendants to pay the bond instalments. The plaintiff further seeks an order declaring the mortgaged property executable, as well as costs on an attorney and client scale.

[2] The agreement between the parties is subject to the provisions of the National Credit Act, 34 of 2005 ("the Act"). In their affidavits opposing summary judgment, the defendants raised three defences. First, that the summons is excipiable, in that in terms of section 130 (2) of the Act, a creditor cannot claim a shortfall on a mortgage loan agreement and may only ask for the property to be declared executable. Second, that the defendants never received the notice in terms of section 129 of the Act. Third, that the credit advanced to the defendants constituted reckless credit as contemplated in sections 80 and 81 of the Act.

[3] The advent of the Act has brought with it a new dimension of opposition to summary judgment applications. Whereas opposition was in the past based on substantive defences, in many cases that come before this court, where the Act is applicable, the defences are mostly procedural and technical in nature. The present application is no exception.

[4] I deem it convenient to deal first with the second point raised by the defendants, namely non-receipt of the section 129 notice. The said section, read

with section 130 of the Act, entail that if the debtor is in default, the creditor "may" draw the debtor's notice in writing thereto and propose that the debtor makes arrangement for settlement of the outstanding debt, or refer the agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombudsman. The creditor may not enforce the credit agreement unless at least 10 business days had lapsed since the creditor had delivered the said notice and the debtor had remained in default for at least 20 business days.

[5] The question whether actual receipt of the said notice is required or whether proof of dispatch by the credit provider is sufficient for the purposes of the Act, is subject of divergent and conflicting decisions in this court, Gauteng South (Johannesburg), and Kwazulu - Natal, (Durban).

[6] See *Munien v BMW Financial Services SA (Pty) Ltd and Another* 2010 (1) SA 549 (KZD) at 555A; *The Standard Bank of South Africa Ltd v Rockhill and Van Heerden* Case No. 56251/09 (GSJ) at par 3, delivered on 11 March 2010; *First National Bank Ltd v Rossouw* Case No. 30624 (GNP) at pars 10 and 11, delivered on 6 August 2009; *Starita v ABSA Bank Ltd* Case No. 745 (GSJ) delivered on 26 March 2010, where it was held that the actual receipt of the relevant section 129 by the consumer is not a pre- requisite for compliance with the Act.

[7] However, in *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) and *Firstrand Bank Ltd v Dlhamini* Case No. 50146/2009 (GNP) delivered on 17 March 2010, the contrary was decided, namely that the actual

receipt of the section 129 notice by the consumer, was a pre- requisite for compliance with the Act.

[8] I was informed from the Bar during the hearing hereof that the judgment of Ellis AJ in *First National Bank v Rossouw*, has been taken on appeal. For the present purposes however, I prefer the reasoning of the courts in the former cases.

[10] With regard to the first point in *limine*, the plaintiff has attached to the summons, as proof of transmission, a post office list of registered letters. The list reflects the plaintiff as a sender to six recipients, amongst whom, the defendants. The document also makes provision for signature by the accepting officer of the relevant post office. The document is unsigned by such an accepting officer. There is also made provision for the date stamp of the post office from which the registered letters would be posted. There is no such stamp. As a result, I was not satisfied, *ex facie* the document, about the transmission of the section 129 notice.

[11] Given the view I take (that the plaintiff has not established transmission of the section 129 notice) I do not deem it necessary to deal at this stage with the other points raised by the defendants. The application for summary judgment should be postponed to afford the plaintiff an opportunity to comply with the provisions of section 129 of the Act, to the extent I have found this not to have been done. Costs should be reserved.

[12] I therefore make the following order:

1 The application for summary judgment is postponed *sine die.*

2 The plaintiff is directed to comply with sections 129 and 130 of the National Credit Act 34 of 2005.

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

T M MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING	:	**19 MAY 2010**
JUDGMENT DELIVERED	:	23 Sept **~~4 AUGUST~~ 2010**
FOR THE PLAINTIFF	:	**ADV F R VAN DEN HEEVER**
INSTRUCTED BY	:	***HACK STUPEL & ROSS*, PRETORIA**
FOR THE DEFENDANT	:	**ADV M HUGO**
INSTRUCTED BY	:	***LOMBARDS ATTORNEYS*, PRETORIA**