IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 55443/10

In the matter between:

14/10/2011

FIRST RAND BANK LIMITED t/a FNB HOME LOANS **APPLICANT**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
2011/10/14
DATE
SIGNATURE

And

MAKHOBA ZIPHOZONKE **RESPONDENT**

JUDGMENT

MAVUNDLA, J.

[1] This is an opposed application for summary judgment against the respondent for:

1.1 payment in the amount of R1,355,684. 05

1.2 interest at the rate 8.00 % per annum, compounded daily and capitalized monthly in terms of the Mortgage Bond, with effect from the 2nd of September 2010 to 9th September 2010 and at 7.50% from 10th September 2010 to date of payment both dates inclusive;

1.3 An order declaring the ERF 532 NOORDHANG EXTENSION 42 TOWNSHIP, REGISTRATION DIVISION IQ, THE PROVINCE OF GAUTENG, MEASURING 511 (FIVE HUNDERED AND ELEVEN) SQUARE MERES AND HELD UNDER DEED OF TRANSFER T 43932/2006 executable for the said sum.

1.4 Cost of suit on the scale as between attorney and client.

[2] The applicant's claim against the respondent arises from moneys lent and advanced by the applicant to the respondent, which are secured by a covering bond registered against the immovable property of the respondent mentioned in paragraph 1 herein above. The agreement was entered into on or about 6 August 2009 and was attached to the summons as annexure

"A". The Mortgage Bond securing the debts was attached to the papers as annexure "B".

[3] The respondent, in opposing the application for summary judgment filed an affidavit in which he takes a point *in limine* that:

(a) whereas its claim is based on a loan & Mortgage Bond agreement which is a liquid document, the applicant failed to attach any such Loan Agreement.

(b) the applicant failed in his action to address the applicability of the NCA or its compliance therewith.

(c) the applicant's cause of action is fatally defective and the application should be dismissed.

[4] The respondent, in respect of the merits, contended that the applicant was neither allowed to terminate his debt review in terms of section 86(10) of the NCA nor was such termination valid because the purported notice of termination was sent to 21 Nouvelle, 113 Bellairs Drive North Riding, 2169 which was not the chosen domicilium citandi et executandi address 6

Andiamo, Hyperion Street, Noordhang Extension 42 Randburg, Gauteng.

[5] The respondent further contended that he applied for debt review on or about 2 January 2008 in terms of s86 of the NCA at the offices of Ms Elizabth Mokgata, a registered Debt Counsellor. His debt review application was never referred to the magistrate's court in terms of s87 of NCA. He further contends that he was not aware that his debt review application should have been referred to the Magistrate's court and his debt counsellor never informed him thereof. He further contends that he is *bona fide* with his debt review and will refer the debt review to the Magistrate's Court in terms of s87.

[6] The respondent further contended that in terms of s86(10) the applicant should have sent a notice to him, the debt counsellor and the National Credit Regulator. The applicant failed to annex any such notice as proof of delivery to the National Credit Regulator.

AD POINT IN LIMINE

[7] With regard to the first point taken, namely that the applicant failed to attach the Loan Agreement and Bond, which are the liquid documents upon which the claim is founded, I need refer to the matter of *Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd and Others*[1] where it was held that: "For there to be verification of a cause of action within the meaning of Rule of Court 32 (2), there must be made to appear a complete cause of action. Rule of Court 32 (2) contemplates that to the summons, in a case where summary judgment may be applied for, there need not be annexed a liquid document on which the claim is founded, because in the Rule it is provided that, if the claim is founded on a liquid document a copy of that document shall be annexed to the affidavit made in support for the application for summary judgment."

[8] To the summons is attached annexure "A", which is the relevant Mortgage Bond. Annexure "B" attached to the summons is the Certificate of Balance reflecting the outstanding balance and interest.

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[1] 1967 (1) SA 466 (D. & C.L. D.) at 466B-C, 469C-E.

[9] The affidavit in support of the summary judgment application was deposed to by Ms Sanette Von Mohlman, who described herself as the Operations Manager Arrears-Legal of Home Loans of the applicant in whose employ she is. She has stated, *inter alia*, that she is familiar with the books of account of the applicant and its financial affairs particularly of the details of this action and accordingly swears positively to the facts of the matter, verify the cause of action against the defendant in the amount claimed in the summons. She has also stated that: "I confirm that the amount claimed from the Defendant, is the amount of R1,33 684. 05 (say One Million Three Hundred and Fifty Five Thousand Six Hundred and Eighty Four Rand and Five Cents). As proof of this amount, I invite the attention to the Plaintiff's Summons and more particularly ("Prayer 2 thereof), the Certificate of outstanding balance which is annexed thereto marked Annexure "B"".

[10] Although annexure "B" was not attached to the affidavit in support of the summary judgment application, however, the fact that it has been referred to in the said affidavit, is in my view

sufficient to meet the requirement Rule 32(2). There is therefore no substance in the point taken in this regard.

[11] With regard to the point *in limine* that the applicant has not addressed in its summons, whether it has complied with the provisions of the NCA, and that therefore summary judgment should be refused for this reason, I deem it appropriate to cite in detail what Epstein AJ said in the matter of Standard Bank of SA v Rockhill[2] :

"[16] The remaining issue is whether the non-compliance by the plaintiff with its obligation in terms of s 129 of the NCA affords the defendants a defence to the application for summary judgment, entitling them to be granted leave to defend. In *Standard Bank of South Africa Ltd v Van Vuuren* 2009 (5) SA 557 (T) the court found that a defendant in an application for summary judgement had raised a *bona fide* defence when it was established that there was no proper compliance with s 129. The defendant in that case was granted leave to defend. However, the court did not deal with the provisions of ss130 (3) and 130(4) of the NCA. The relevant portions of these sections read as follows:

'130 Debt procedures in Court

[2] 2010 (5) SA 252 at 257H-258G.

(3) 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 if the court is satisfied that—

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

(b)...

(4) In any proceedings contemplated in this section, if the court determines that—

(a) ...

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection 3(a)... the court must—

(i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed...'

"[17].... Whilst non-compliance with s 129(1)(a) is an impediment to commencing any legal proceedings to enforce a credit agreement, it does not constitute a *bona fide* defence of the nature envisaged by rule 32(3)(b). Once it is established at trial stage that the plaintiff has not complied with s129(1)(a), the trial will be adjourned and an order made setting out the steps the plaintiff must complete before the trial is resumed. The fact that s130(4)(b) envisages the resumption of the proceedings following the court having made an appropriate order, illustrates that non-compliance with s129(1)(a) does not constitute a *bona fide* defence for summary judgment purposes.

[18] In the circumstances, I must respectfully disagree with the finding in *Standard Bank of South Africa Ltd v Van Vuuren* 2009 (5) SA 557 (T), namely that a defendant who establishes non-compliance with s129(1)(a) of the NCA has established a defence and is entitled to leave to defend. The court's hands are tied and it must act in accordance with s130(4)(a)."

[12] In the *Standard Bank of South Africa Ltd v Van Vuuren (supra)* the Court held that s129 is mandatory. In *Nedbank v Credit Regulator*[3] (SCA) it was held that: "Section 129(b)(i) makes it clear that the notice in terms of s 129(1)(a) is a necessary 'step' before legal proceedings may be commenced. It follows that by giving the notice envisaged by s129(1)(a) the credit provider 'has proceeded to take steps contemplated in section 129 to enforce that agreement'.

[3] 2011 (3) SA 581.

[12] The non-compliance with s129(1)(a) does not vitiate the legal proceedings commenced by the credit provider, otherwise, the legislator would not have included s130(4)(b); *vide* paragraph [11] *supra*. I am in agreement with the reasoning and conclusion reached in the Standard Bank of SA v Rockhill *(supra)* that non-compliance with s129(1) does not constitute a *bona fide* defence in the context of rule 32(3)(b).

[13] The Court in *Standard Bank of SA v Rockhill (supra)* proceeded to postpone *sine die* the summary judgment application and, inter *alia*, afforded the applicant an opportunity to serve a notice as contemplated in s129 and 130. Section 130(4)(b) used the word "must", which is prescriptive. Consequently, I must follow suite and postpone *sine die* the proceedings to allow the applicant to serve the relevant notice on the defendant.

[14] I am further of the view that, it is not necessary to decide on the defences raised by the respondent against the merits. I am further of the view that the costs occasioned by the adjournment of the matter must be borne by the applicant.

[15] In the result I make the following order:

1. That the application for summary judgment is adjourned *sine die*;
2. That the applicant is afforded an opportunity to provide a notice to the respondents as envisaged in s129 and 130 of the NCA. If such notice is sent by registered mail to the respondent's last known postal address or such address as furnished by the respondent, it shall be deemed to have been delivered to the respondent 14 days after posting by the applicant.
3. The applicant may set down the application for summary judgement on notice to the respondents and their attorneys of record not less than 10 (ten) days after the notice in terms of s129 has been delivered;
4. Save for the direction herein given to the sending of the notice in terms of s129,the respondents' rights in terms of the NCA remain unaffected;
5. That the respondent is granted leave to supplement its opposing affidavit.

6. That the applicant is directed to pay the respondents' wasted costs occasioned by the adjournment of the application for summary judgment.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

DATE OF HEARING	: **30/08/2011**
DATE OF JUDGMENT	: **14/10/2011**
APPLICANT'S ATT	: **ADV B D STEVENS**
APPLICANT'S ADV	: **ADVJ H MOLLENTZE**
RESPONDENT'S ATT	: **CAWOOD ATT**
RESPONDENT'S ADV	: **ADV L K VAN DER MERWE**