

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

Case No: 1142/08
Date Heard: 2/09/10
Date Delivered: 13/12/10

In the matter between

NEDBANK LIMITED

Plaintiff

and

CLIFFORD NEIL BARNARD

Defendant

JUDGMENT

REVELAS J

[1] This is an application in terms of Rule 30 of the Uniform Rules of Court, for an order declaring certain paragraphs of the respondent's plea to be irregular proceedings and to have them struck out, and to grant the respondent leave to amend his plea, and cost of suit.

[2] The applicant, as plaintiff, instituted an action against the respondent, as defendant for payment of the amount of R1 399 079.99 together with interest thereon at the rate of 14% per annum from 15 May 2008 to date of payment, and an order declaring certain immovable property executable, together with the costs of suit.

[3] For purposes of convenience in this application, I will refer to

the parties as they appear in the pleadings.

[4] The plaintiff (a bank) and the defendant entered into agreement of loan on 11 October 2005. The loan advanced by the plaintiff to the defendant was for an amount of R850 000.00, repayable in monthly instalments. The outstanding balance was to bear interest at the rate of 1% below the plaintiff's mortgage bond rate, as varied from time to time.

[5] The loan was secured by the registration of a mortgage bond over the defendant's property. The loan agreement concluded between the parties provided that in the event of the defendant being in breach of any of the conditions of its terms, the plaintiff would be entitled to claim payment of all amounts owing to it, with interest thereon.

[6] On 3 December 2007, the plaintiff, who is also a credit provider as envisaged in the National Credit Act 34 of 2005 ("the Act") addressed a notice to the defendant, who had fallen into arrears with his November 2007 and December 2007 instalments (the total amount in arrears being R36 094.36), that should the arrears not be paid within 10 days, the full amount owing, plus interest thereon at the rate of 13% (Prime – 11%), would be payable. The full amount owing at that stage (according to the plaintiff) was R1 373 391.92. The interest would be calculated on the daily balance and monthly capitalization as from 4 December 2007, to date of payment, both days inclusive.

[7] In the same notice the defendant was advised, as envisaged by Section 129 of the Act, to refer the matter to a debt counsellor, alternatively a dispute resolution agent consumer court, or a bank ombudsman, with a view to resolving any dispute under the

agreement or developing and agreeing to a plan to bring the payments under the agreement up to date.

[8] The defendant remained in default. Six months later, on 4 June 2008 the Bank issued summons, claiming of the amount of R1 399 079.99 plus interest thereon and an order in terms whereof the bonded property be declared executable. When the defendant entered his appearance to defend the action, the plaintiff brought an application for summary judgment which was dismissed by Eksteen J on 1 September 2009 and the defendant was granted leave to defend the action.

[9] In his affidavit opposing the application for summary judgment, the defendant stated that during December 2007, realizing his default (he received the notice on 3 December 2007), he made a payment of R24 000.00 to the plaintiff. The next amount he paid was R18 000.00 on 3 April 2008, and R20 000.00 on 5 May 2008 (R42 000.00 for the two months).

[10] After summons being served on him on 5 June 2008, he said he made enquiries at the plaintiff as to the state of his arrears would be as at 30 June 2005. A Mr Burger of the plaintiff's legal department advised him that he would be in arrears in the amount of R54 000.00 on that date (end of June 2008). Consequently, to extinguish his arrears, he made a payment of R70 000.00 to the plaintiff on 30 June 2008.

[11] Subsequent thereto, the defendant stated, he made the following eight payments starting on 2 August 2009, ending on 1 July 2009:

2 August 2008

R18 000.00

17 September 2008	R20 000.00
6 December 2008	R18 500.00
2 January 2009	R18 940.00
4 February 2009	R18 000.00
17 March 2009	R13 004.00
3 June 2009	R12 800.00
1 July 2009	R12 800.00

[12] Annexed to his affidavit was a "loan statement" issued by the plaintiff on 30 April 2009 for the month of April 2009 which reflects that no amounts were overdue. The defendant contended he had paid all overdue amounts, and any amounts which the Bank held him liable for, such as default charges or enforcing the agreement.

[13] On 25 March 2009, the Bank notified the defendant that the interest rate applicable to his loan had been reduced from 13% to 12%. The monthly instalment has therefore been reduced from R14 626.94 to R13 642.90.

[14] When the default judgment application was argued, the plaintiff submitted that in terms of the calculations based on 13% interest, the monthly instalments would be R146 000.00 up to 1 April 2009. Therefore, the defendant, if the aforesaid payments (as reflected in the annexure) remained in arrears at all times save in September 2008, when his account would have been in credit by an amount of approximately R2000.00.

[15] Because the fluctuations in the interest rate which may have eventuated between December 2007 and April 2009 were unknown, and because there was at least one month in which the defendant was in credit, and further, the loan statement reflected that in April 2009 there were no monies due. Eksteen J declined to dismiss the

defendant's figures and, the alleged extent of his indebtedness.

[16] The defendant relied on Section 129(3) of the Act, arguing that he had reinstated the loan agreement by making payment after receipt of the notice, to extinguish his arrears. The plaintiff did not cancel the agreement.

[17] Section 129(3) provides that a consumer (such as the defendant) may;

“(a) at any time before the credit provider has cancelled the agreement, reinstate a credit agreement that is in default by paying to the credit provide all amounts that are overdue, together with the credit providers permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement”.

[18] The plaintiff argued that if a defendant wished to rely on the aforesaid section and reinstate the loan agreement as it was before the entire amount owing was called up by the bank, it must firstly approach his credit provider (the bank) and ascertain the exact extent of his indebtedness, default charges and the costs associated with the enforcement of the agreement. Secondly, the plaintiff submitted, such a defendant must advise the credit provider of his intention to reinstate the agreement by paying the amounts so due.

[19] Eksteen J was not persuaded that reinstatement of the loan had to preceded by some consultation process not envisaged in Section 129(3) and held that on his interpretation, a consumer may indeed unilaterally reinstate the agreement by paying all overdue amounts, including all charges referred to in Section 129(3) of the Act. *In casu*, the plaintiff was not in a position to enumerate all the charges up to 13 June 2008. The defendant argued that those

charges were covered, because on 30 June 2008, he paid R26 000.00 in excess of what Mr Burger of the Bank said his arrears totalled at that date.

[20] Section 126(3) of the Act provides that a payment made by a consumer is applied to satisfy amounts owing in the following order: Firstly the interest charges due, secondly the unpaid fees or charges and then thirdly, the principal debt. If the payments were applied in the aforesaid manner, the loan statement issued by the Bank to the plaintiff in April 2009, was an indication that no arrears existed at that point. Eksteen J held that if the loan statement were proved to be correct, then the defendant, it would appear, had not fallen into arrears again.

The Defendant's Plea

[21] Defendant pleaded as follows:

The defendant admitted the debt in terms of the agreement, the bond registration and also the breach of the agreement of loan, in that he failed to punctually pay the instalments which he was obliged to pay on the due date.

[22] However, the defendant denied that the certificate of balance relied on by the plaintiff, accurately reflected his indebtedness to the plaintiff.

[23] In paragraphs 5.1 and 5.2 of his plea, the defendant dealt as follows with the plaintiff's notice to him in terms of Section 129 of the Act (annexure "D"):

"5.1 Save to admit that annexure "D" to the Plaintiff's Particulars of Claim is a

notice addressed to the Defendant in terms of the provisions of Section 129 of the National Credit Act, the Defendant denies that annexure "D" complies with the requirements of Section 129 of the National Credit Act and puts the plaintiff to the proof thereof.

- 5.2 The Defendant specifically pleads that the contents of annexure "D" to the Plaintiff's Particulars of Claim is vague and embarrassing".

[24] The plaintiff averred in paragraph 14 of its particulars of claim that despite the passage of time referred to in Section 130 of the Act, the defendant has failed to take any of the steps referred to in that section of the Act. The defendant pleaded as follows thereto in paragraph 7 of his plea:

"7.1 The Defendant denies the contents hereof and puts the plaintiff to the proof thereof.

7.2 The Defendant specifically pleads that in response to annexure "D" the Defendant made the following payments:

7.2.1 R24 000.00 on 28 December 2007.

7.2.2 R18 000.00 on 3 April 2008.

7.3 The aforesaid payments were in excess of the amount due to the Plaintiff in respect of the November 2007 and December 2007 instalments.

7.4 The Defendant further pleads that on or about 30 June 2008, a duly authorized representative of the Plaintiff, a certain Mr Peet Burger, upon the Defendant's request advised the Defendant telephonically that the arrear amount due by him to the plaintiff was approximately an amount of R54 000.00.

7.5 Upon being so informed on 30 June 2008, the Defendant paid an amount of R70 000.00 to the Plaintiff in excess of the arrear amount due to the Plaintiff.

7.6 In making the payment of R70 000.00, the Defendant specifically pleads

that the agreement concluded between the parties was re-instated in terms of the provisions of Section 129(3)(a) of the National Credit Act.

7.7 In the alternative, and in the event that this Honourable Court finds that the payment of the amount of R70 000.00 made by the Defendant did not have the effect of reinstating the agreement concluded as provided for in terms of the provisions of Section 129(3) of the National Credit Act the defendant specifically pleads that:

7.7.1 That the Plaintiff is estoppel from relying on its allegations of the Defendant's indebtedness to it for the following reasons:

7.7.1.1 On 30 June 2008 the Plaintiff's duly authorized representative, Mr Peet Burger, telephonically informed and advised the Defendant that the outstanding balance due and payable to the Plaintiff was approximately R54 000.00.

7.7.1.2 The Defendant accepted as correct this representation and acted thereon when Mr Burger informed the Defendant of the outstanding balance due and payable to the plaintiff.

7.7.1.3 In doing so, the Defendant accepted as correct the representation made by the said Mr Burger and, relying on it, to his prejudice, proceeded to make payment of the sum of R70 000.00 on 30 June 2008".

[25] On 23 March 2010 the plaintiff filed its notice in terms of Rule 30, objecting to the contents of the defendant's plea. The plaintiff objected to paragraph 5.1 of the defendant's plea in that the defendant admitted that annexure "D" to the plaintiff's particulars of claim is a notice addressed to him in terms of the provisions of Section 129 of the National Credit Act, but denied that the notice complied with Section 129 of the Act, and has failed to set forth facts as it was obliged to do, to support his conclusion of law.

[26] The plaintiff also objected to the absence of facts in the defendant's plea to support his contention that the notice is vague

and embarrassing, (sub-paragraph 5.2) and further objected to the absence of facts to support the averment that he acted to his prejudice in paying the amount of R70 000.00 (sub-paragraph 7.7.1.3).

[27] The defendant, in response to the plaintiff's notice in terms of Rule 30(1), filed a notice of its intention to amend its plea. The amendment was to the effect of adding further paragraphs to paragraph 5 of the plea. The additional paragraphs read as follows:

"5.3 The defendant specifically pleads that the Plaintiff's Section 129 Notice dated the 3rd December 2007 was defective, vague and embarrassing in the following respects:

5.3.1 The amount of R36 094.36, being the alleged total arrears due by the Defendant does not accord with the actual instalments due in respect of November and December 2007.

5.3.2 The Section 129 Notice did not record and bring to the Defendants attention that his failure, if any to bring all his arrears up to date would expose him to the risks of future summary legal action, without further notice for the duration of the credit.

5.3.3 The Plaintiff instituted action against the Defendant on the 4th June 2008, approximately 6 months after addressing the Section 129 Notice of the Defendant during which period, more specifically between 28th December and 5th March 2008, the Defendant made payments to the Plaintiff in the sum of R62 000.00 which amount exceeded the total arrears referred to in the Plaintiff's Section 129 Notice.

5.3.4 The Section 129 Notice does not state that it serves as a notice in perpetuity in respect of any future possible default by the Defendant.

5.3.5 Defendant pleads further that when the action was instituted by the Plaintiff, the total arrears reflected in the Section 129 Notice had been paid in full by the Defendant.

5.4 The Defendant pleads further that the action instituted herein should an adjournment in terms of Section 130(4)(b)(ii) of the Act that this Honourable Court should make an appropriate order setting out the steps the Plaintiff must take and complete before this action may resumed as contemplated in Section 130(4)(b)(ii) of the Act”.

Discussion

Sub-Paragraph 5.1 of the Defendant’s Plea

[28] Section 129(1)(a) of the Act provides that, if a consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer (such as the defendant) in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternatively a 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 in the agreement up to date.

[29] All the aforesaid the plaintiff said it did in its notice dated 3 December 2007. Therefore it argues, it is incumbent on the defendant to specifically plead the basis upon which he alleges that the notice does not comply with the provisions of Section 129 of the Act.

[30] The plaintiff submitted that the defendant’s plea in paragraph 5.1, is essentially one of confession and avoidance (admitting that the notice was one in terms of Section 129 of the Act, but denying its compliance with the Act) and therefore, the defendant is obliged as envisaged in Rule 22(2) of the Uniform Rules of Court, to plead

the basis of his purported avoidance of a reliance by the plaintiff on Section 129 of the Act, so that it could be appraised of what case it had to meet on this point raised. In my view, this submission has merit in that on the face of it, the letter in question complies with the Act. Sub-paragraph 5.1 of the defendant's plea ought to be struck out.

Sub-Paragraph 5.2 of the defendant's plea

[31] In this sub-paragraph the defendant's complaint against the notice in question is that the amounts given as arrear amounts are inaccurate, in that there was strictly speaking no arrears at that time, or the figures were inaccurate. Even if the averment in the particulars of claim is factually incorrect, it is not vague and embarrassing. Neither in my view, is the absence of a warning that if the defendant's arrears are not repaid, it would expose him to the risk of future summary legal action, vague and embarrassing.

[32] If the defendant paid an amount in excess of the total arrears between the date of notice and the summons being issued six months later, that does not render the summons vague and embarrassing either, and an inaccurate amount in the notice does not render it defective in terms of the Act. The obvious plea is therefore that he was not in arrears. That creates a factual dispute which can only be addressed by evidence and not purely legal argument.

[33] Sub-paragraph 5.2 ought to be struck out as well. The fact that the figures in the notice are in dispute does not render the notice itself vague and embarrassing particularly in the absence of specific references as to which part of the notice falls within the description of vague and embarrassing.

Sub-Paragraph 7.7.1.3 of the defendant's plea

[34] In pleading that he suffered prejudice in making payment of the sum of R70 000.00 in the circumstances referred to in sub-paragraph 7.7, the defendant once again fell foul of Rules 18(4) and Rule 22(2) of the rules of Court, because he does not put forward the material facts upon which he relies and which would enable the plaintiff to understand the issues as defined and identified in the pleadings.

[35] The bald allegation by the defendant that he suffered prejudice also requires amplification. This is not a case where there is an obvious prejudice. The defendant owes the plaintiff bank money. If he makes a payment, albeit in excess of his usual monthly instalment, or enough to lift him out of his arrears with a bit extra for the future, more particularity is required to appreciate the prejudice he alleges.

The Amendment to the Plea

[36] The following is an exercise in establishing whether the amendments to the plea removed the plaintiff's complaints.

[37] The defendant contended that R36 094.36, the alleged amount of his arrears as stated in annexure "D" (the Section 129 notice) does not accord with the actual instalments due in respect of November and December 2007 (sub-paragraph 5.3.2).

[38] Mention has already been made that inaccurate figures in a notice issued in terms of Section 129(3) of the Act does not render it vague and embarrassing. Section 129 of the Act in any event

does not require a credit provider to specify the amount of any default, but merely to draw it to the attention of the consumer (debtor).

[39] The fact that the Section 129 notice did not record and bring to the defendant's attention that his failure to bring his arrears up to date would expose him to the risk of future summary action (sub-paragraph 5.3.2) could never render the notice vague and embarrassing. It is not even a requirement of Section 129 that such information be included in such a notice.

[40] The defendant's allegation that he made payments for six months after the notice in question was served on him, which payments in total exceeded his total arrears (5.3.3) has no bearing on the notice itself and furthermore does not render the notice vague and embarrassing .

[41] The omission in the notice to mention that the notice was one for perpetuity is not required by Section 129 of the Act. By contending that its omission renders the notice "vague and embarrassing" (sub-paragraph 5.3.4) is rather opportunistic.

[42] In my view, the amendments did not cure the defects in the plea as set out above.

[43] The defendant relying on *inter alia*, *Erasmus Superior Court Practice (B 1-191 [service 34, 2009]*, and *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) 1967(2) 491 (E)*), submitted that Rule 30 is applicable only to irregularities of form and not substance. The defendant further submitted that the plaintiff ought to have raised an exception, instead of objecting in terms of Rule 30, as its objection are of substance and not of form. Alternatively, it should

have applied to strike out the offending paragraphs. The plaintiff indeed sought an order to strike out these paragraphs from the defendant's plea.

[44] In support of its opposition to the plaintiff's application in terms of Rule 30, the defendant referred me to a passage in *Beck's Theory and Principles of Pleading in Civil Action* Sixth Edition at page 139:

"Where the legal validity of a defence raised in a plea is challenged, the proper way of doing so is by way of exception in terms of Rule 23(1), [as opposed to use of Rule 30] and a motion to strike out is misconceived".

[45] This passage does not assist me much in my determination of the issues raised with regard to the defendant's plea in the present matter. The objections raised in the plea (non-compliance with legislation and estoppel by misrepresentation), are of a legal nature, whereas the determination of most of the questions depend on the determination of facts such as what amounts were owing at certain times.

[46] *Harms*, in his work *Civil Procedure in the Supreme Court* [issue 24] at B30.3 (B-195), points out that Rule 18(12) and 22(5) deem a failure to comply with the provisions relating to pleadings, to be irregular step within the meaning of Rule 30(1), and remarked that "the fact that the pleading is also excipiable does not disentitle a party from relying on Rule 30, either solely, or in the alternative".

[47] Accordingly, the plaintiff is entitled to relief in terms of Rule 30 of the Uniform Rules of Court, even though the defendant's plea may be excipiable as well. Striking out the offending paragraphs is

the proper relief to be granted.

[48] No case has been made out for a punitive costs order against the defendant.

[49] I make the following order:

1. Paragraphs 5.1, 5.2 and 7.7.1.3 are hereby struck out.
2. The defendant is granted leave to amend his pleadings within fifteen days of this notice being served on his attorney of record.
3. The defendant is to pay the costs of this application on a scale as between party and party.

E REVELAS
Judge of the High Court

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