

IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 2672/2011  
Date Heard: 17 January 2012  
Date Delivered: 7 February 2012

In the matters between:

**ABSA BANK LIMITED**

Plaintiff

and

**KENNETH CHARLES BROWN**

First Defendant

**LILIAN HESTER BROWN**

Second Defendant

AND

Case No.: 2801/2011

**ABSA BANK LIMITED**

Plaintiff

and

**LUCINDA VAN DEVENTER**

First Defendant

**RALPH HUMAN**

Second Defendant

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## **JUDGMENT**

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**EKSTEEN J:**

[1] In each of these matters the plaintiff seeks judgment by default in respect of “the balance of the principal debt together with finance charges thereon, now due and payable ... in respect of monies loaned and advanced by the Plaintiff to the Defendant(s) ...” which monies were

secured in each case under a mortgage bond ("the bonds"). In addition the plaintiff seeks an order that the immovable property so bonded be declared executable. In case 2801/2011 the second defendant is cited as a surety in respect of part of the debt in the sum of R15 000.00.

[2] The said loan agreements are in each case subject to the provisions of the National Credit Act, 34 of 2005 (herein referred to "NCA"). In each case a simple summons was issued in which each defendant was cited as an adult person "who has chosen *domicilium citandi et executandi* for the purposes of this action" at the address stipulated in the citation.

[3] In case number 2672/2011 it is alleged that the defendant applied to be placed under debt review in terms of the NCA which debt review process was terminated by the plaintiff by giving notice in terms of section 86(10). In seeking to satisfy the requirements of the NCA the plaintiff has alleged as follows:

- '(a) The Defendant applied to be under Debt Review in terms of the National Credit Act ("NCA") which Debt Review process was terminated by the Plaintiff by giving notice in terms of Section 86(10) of the NCA to the Defendant, the Defendant's Debt Counsellor and the National Credit Regulator by Registered Post. Copies of the aforesaid Notices are attached hereto marked "C", "D" and "E".
- (b) In terms of the Section 86(10) notice the Defendant, Debt Counsellor and National Credit Regulator were

advised that:

- He/she was in arrears with payment in respect of the agreement for a period of more than 60 (sixty) business days.
- The Debt Review process has been terminated.
- He/she had the opportunity to contact the Plaintiff within 10 business days should he/she wish to raise a dispute.

(c) ...

(d) The Plaintiff's claim is not pending before a debt counsellor, alternative Dispute Resolution Agent, Consumer Court or Ombud with jurisdiction as envisaged in Section 130 of the National Credit Act and the Plaintiff is not aware of any debt review proceedings in regard to the Defendant's indebtedness, as envisaged in section 86 of the aforesaid Act.'

[4] In case number 2801/2011 the first defendant did not apply to be placed under debt review. In seeking to satisfy the requirements of the NCA the plaintiff alleges as follows:

- '4. **Prior to commencing these proceedings** and after the Defendant(s) had been in default of his/her/their obligations arising from the aforementioned agreement for a period exceeding twenty (20) business days the Plaintiff complied with the provisions of Section 129 and 130 of the National Credit Act subsequent to which the period referred to in Section 130(1)(a) elapsed without the Defendant(s) responding to the notice given to him/her/them as contemplated in the aforesaid Sections of the Act or surrendering the mortgaged property to the Plaintiff.

Copies of the Notices aforesaid are attached hereto marked "D" and "E".'

[5] In each case the notices annexed were sent per registered post to the addresses which are alleged in the summons to have been chosen in the bonds as the *domicilium citandi et executandi* (herein referred to as "*domicilium*") by each defendant "for purposes of this action" and which are alleged to be the physical addresses of the bonded properties. In each case the bond which secures the debt relied upon in the credit agreement is annexed in which the *domicilium* is stated to be at the property bonded. I shall revert to the bond below.

[6] Mr **Richards**, on behalf of the plaintiff argues that the foregoing constitutes due delivery as envisaged in the NCA of the section 129(1)(a) and section 86(10) notices respectively as required in section 129(1)(b). He accordingly submits that I should be satisfied that procedures required by section 129 have been complied with.

[7] The sole issue which arises for adjudication in this case is whether I can be satisfied, as required by section 130(3)(a) of the NCA that the procedures required by section 129 have been complied with. Section 130(3)(a) provides:

"(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 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"

### Application of NCA

[8] Section 2(1) of the NCA states that the NCA must be interpreted in the manner that gives effect to the purposes set out in section 3 thereof. The court is accordingly enjoined to adopt a purposive interpretation of the NCA.

[9] Section 3 of the NCA states that the purpose of the NCA is, *inter alia*, "to promote a fair, transparent, ... credit market industry, and to protect consumers" by pursuing various objectives set out in subsections 3(a) to (i). Broadly, I think, the purpose is twofold, firstly to create a credit market industry which will have the listed characteristics and secondly, to protect credit consumers who are, more often than not, in a grossly inferior negotiating position.

[10] Subsection 3(d) and (e) are of particular significance to the present debate. Subsection 3(d) and (e) provides that the purpose of the NCA is, *inter alia*, to protect the consumers by:

- “(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
- (e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-
  - (i) providing consumers with education about credit and consumer rights;
  - (ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
  - (iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux.”

[11] In pursuit of a fair and transparent credit industry the NCA confers in section 65 a right upon credit consumers to receive documents. Two sections of the Act are significant in respect of the manner in which this right is satisfied, section 65 and section 96.

[12] The material portion of section 65 provides:

“2(a) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must-

- a) make the document available to the consumer through one or more of the following mechanisms-
  - i) in person at the business

premises of the credit provider, or at another location designated by the consumer but at the consumer's expense, or by ordinary mail;

- ii) by fax;
  - iii) by email; or
  - iv) by printable web-page; and
- b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)."

[13] The delivery of a notice as envisaged in section 129(1)(a) or a notice in terms of section 86(10) of the NCA is a prerequisite for institution of action to enforce the provisions of any credit agreement. (See section 129(1)(b).)

[14] There is no prescribed manner in the Act for the delivery of section 129(1)(a) and 86(10) notices. (See **Rossouw and Another v Firstrand Bank Ltd** 2010 (6) SA 439 at 448 para [24] to 449 para [27].) Section 65(2) accordingly finds application.

[15] In order for there to be a valid notice in terms of either of these sections notice must be given in the manner chosen by the consumer from one of the options set out in section 65(2) of the NCA. (See **Rossouw** (*supra*) at 456I.)

[16] Section 96 of the NCA provides as follows:

(1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at-

- (a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or
- (b) the address most recently provided by the recipient in accordance with subsection (2).

(2) A party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an email address."

#### Manner of delivery

[17] In **Rossouw** (*supra*) the Supreme Court of Appeal (SCA) were called upon to consider what constitutes proper "delivery" as envisaged in section 65(2)(b). The SCA, in the judgment of Maya JA (which was a unanimous judgment of the Court) concluded:

"It is entirely fair in the circumstances to conclude from the legislature's express language in s 65(2) that it considered despatch of a notice in a manner chosen by the appellants in this matter sufficient for purposes of s 129(1)(a), and that actual receipt is the consumer's

responsibility.”

[18] It must accordingly be accepted that the despatch of notice or the sending thereof in the manner chosen by a consumer set out in section 65(2) would constitute proper “delivery” in terms of section 65(2)(b).

[19] This is so, Maya JA said at p. 450 para [32], because-

“[32] It appears to me that the legislature’s grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer’s shoulders. With every choice lies a responsibility, and it is after all within a consumer’s sole knowledge as to which means of communication will reasonably ensure delivery to him.”

[20] In a supplementary judgment in **Rossouw** (*supra*) (which was also a unanimous judgment of the Court) Cloete JA stated at 456I as follows:

“I emphasise that the Act in s 65(2)(b) obliges the bank to deliver the notice in the manner chosen by the consumer, from the options in para (a) of that section. The bank cannot reserve other options to itself.”

[21] What emerges from the foregoing and from the language of section 65(2) is that the consumer is entitled, as of right, to choose the

manner of delivery and the credit provider is compelled to give this choice to the credit consumer.

[22] In the circumstances I think that in order for a court to be satisfied, as required by section 130(3)(a) that the notices required to be provided in terms of section 129(1)(b) of the NCA have been delivered, it is necessary to allege in the summons, at least what manner of delivery, from those set out in s 65(2), the consumer has chosen and that the notice was delivered in that manner.

[23] In the supplementary judgment in **Rossouw** (*supra*) Cloete JA, with reference to the provisions of section 3(e) set out above, sounded this cautionary note at 457B-D:

“Unless credit providers inform consumers of their options in terms of s 65(2), the benefits of that section are likely to remain illusory rather than real. A consumer could hardly complain if the method of delivery of a document chosen by him or her proves ineffective. But for so long as credit providers employ standard form contracts which make provision for one possibility only – in the present matter, a notice sent by registered post to an address (which, in the absence of an address specified, will be the address of the mortgaged property) – the argument loses sight of reality. Credit providers should accordingly not complain if courts require compliance to the letter with both the Act and the terms of credit agreements, ... ”

[24] The bond documents annexed to the Particulars of Claim in each of these matters are identical and each of them provide for a *domicilium* only at the bonded property. No provision is made for any other choice. The bonds make no mention of the manner in which documents are to be delivered. In each matter the summons is silent in respect of the manner of delivery chosen by the defendants and the loan agreement is not annexed to the summons. Accordingly I do not know what manner of delivery was chosen nor whether that choice was complied with.

[25] In these circumstances I do not think that I can be satisfied, as I am required to be, that the provisions of section 129(1)(b)(i) has been complied with in respect of proper “delivery” of the notices. The summons in each matter lacks necessary averments relating to the choice of delivery exercised by the defendants. In this respect I think the summonses are excipiable (see ***Pottas and Others v Firstrand Bank Ltd & Others*** (unreported decision of Alkema J) ECPE case no. 613/09 delivered on 29 November 2011).

#### Section 96 address

[26] Where a consumer has chosen delivery by post then the notice should be delivered at the address determined in accordance with section 96 of the NCA. (Compare ***Rossouw*** (*supra*) at p. 449 para [29].) Leaving aside, for the moment, the provisions of section 96(2) of the NCA, section 96(1) requires the notice to be delivered at the “address ...

as set out in the agreement”.

[27] When regard is had to the structure of section 96 I think that the address referred to in section 96(1)(a) must be the address chosen by the defendant in the credit agreement (the mortgage loan agreement in the present matters) which is the foundation of the plaintiff’s cause of action. The summons in each of these matters does not disclose the address which the defendants chose in the mortgage loan agreements nor are the mortgage loan agreements annexed to the summons in either matter. Rather, the plaintiff has annexed the bond document in each case. In each case the bond document is identical and provides for a chosen *domicilium* in the following terms:

“Die Verbandgewer kies hiermee as sy adres vir die betekening van alle kennisgewings, mededelings of regsprosesstukke (*domicilium citandi et executandi*) vir alle doeleindes kragtens hierdie verband, die fisiese adres van die eiendom wat kragtens hierdie verband verbind is of, indien daar meer as een sodanige eiendom aldus verbind is, die fisiese adres van enige van sodanige eiendomme.”

[28] In the present matters the cause of action relied upon is “monies loaned and advanced” in terms of a credit agreement. Section 1 of the NCA draws a distinction between a “mortgage” and “mortgage agreement”. A “mortgage” is defined as meaning “a pledge of immovable property that serves as security for a mortgage agreement”. A “mortgage

agreement” is defined to mean “a credit agreement that is secured by a pledge of immovable property”. Perhaps the less said about the content of these definitions the better. Suffice it to say that I think the legislature sought to draw a distinction between the “mortgage loan agreement”, which is a credit agreement and a “bond document”, which constitutes the security for the loan advanced. In these circumstances it seems to me that the mortgage loan agreement as opposed to the bond agreement, founds the cause of action in each of these matters.

[29] The plaintiff clearly appreciated the distinction between the mortgage loan agreement and the bond document and, in the circumstances, an affidavit was filed in support of the application for default judgment by one Robert Alexander Herd, a Risk Mitigation Manager in the employ of the plaintiff. Herd records in the affidavit in each of these matters as follows:

“I confirm that the Plaintiff’s records reflect that the original Mortgage Loan Agreement to which this action pertains was destroyed in a fire and no copy thereof exists.

In the normal course of events the *domicilium* address chosen in the bond would correspond with the address nominated by the Mortgagors in the Mortgage Loan Agreement, however, in the event of there being a difference in such addresses, I respectfully submit that given that a Mortgage Loan Agreement is concluded prior to a Mortgagors signing the Power of Attorney to pass a Mortgage Bond, the chosen *domicilium* in the Mortgage Bond would constitute an election by the

Mortgagors in terms of Section 96(1)(b) read with Section 96(2) of the National Credit Act.”

[30] In recent times this court, like other courts, has experienced a flood of applications similar to the present for default judgment and summary judgment. Experience has shown that it is by no means an infrequent phenomenon for a different *domicilium* to be chosen in the loan agreement from that set out in the bond document. This, experience has taught, is particularly so where the bond agreement is in a standard form which provides simply for the *domicilium* to be at the bonded property. In the circumstances I do not think that an allegation that the chosen *domicilium* in the bond would “in the normal course” correspond with the address nominated by the mortgagor in the mortgage loan agreement can satisfy me that a notice in terms of section 129(1)(a) or 86(10) has been delivered to the address required in section 96.

[31] Section 96(2) affords the parties to a credit agreement the right to change the address at which notice is to be given. That occurs when one party to the agreement delivers to the other “a written notice of the new address” in one of the modes set out in subsection (2). I do not think that signing a power of attorney to register a bond constitutes a notice of this nature, particularly where, as in these matters, the bond document is a standard form document which does not provide any free and informed choice – it merely stipulates that the bonded property is the *domicilium*.

A notice of change of address as envisaged in section 96(2) must at least be one given with the intention to change the chosen address in the loan agreement and to substitute for it an address which must be set out in the notice.

[32] During argument I was referred to the SCA decision in **Rossouw** (*supra*) where reliance was indeed placed upon the address set out in the bond document. **Rossouw's** case was an appeal against the grant of summary judgment. Both the defendant and the plaintiff were represented in court and it is apparent from the report that the parties were in agreement that the terms of the loan agreement were correctly reflected in the bond document. There was no dispute in respect of the chosen address and the Supreme Court of Appeal was not called upon to determine the issue before me. I do not consider that the judgment in **Rossouw's** case was intended to constitute authority for the proposition that where a difference exists between the address chosen in the loan agreement to that chosen in the bond document that the bond document would suffice.

[33] In all the circumstances I do not think that I can be satisfied that the said notices were in fact "delivered: at the address set out in section 96.

[34] In each case the plaintiff claims that the original of the loan agreements have been destroyed in a fire and no copy exists. It therefore finds itself in breach of its obligations in terms of section 170 of the NCA. I do not think that this justifies non-compliance with the provisions of section 65 of the NCA. In **Rossouw** (*supra*) Cloete JA stated at p.456B:

“... a court must still be satisfied that a credit receiver has received the protection afforded by the Act.”

### Conclusion

[35] It follows that in each instance that the application for judgment by default falls to be dismissed, save against the surety in case no. 2801/2011.

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

1. In case no. 2672/2011:

The application for judgment by default is dismissed.

2. In case no. 2801/2011:

(a) The application for judgment by default is dismissed.

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**J W EKSTEEN**

**JUDGE OF THE HIGH COURT**

Appearances:

*For Plaintiffs:*      *Adv Richards* instructed by McWilliams & Elliott Inc, Port Elizabeth