



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/ NO
Of Interest to other Judges:	YES/ NO
Circulate to Magistrates:	YES/ NO

Case no: A304/2017

In the matter between:

WILHELMUS HENDRIKUS VAN ZYL N.O.

1st Appellant

AMABILE VAN ZYL

2nd Appellant

WILHELMUS HENDRIKUS VAN ZYL

3rd Appellant

AMABILE VAN ZYL N.O.

4th Appellant

and

STANDARD BANK OF SOUTH AFRICA LTD

Respondent

CORAM: REINDERS, J *et* LOUBSER, J *et* MOROBANE, AJ

HEARD ON: 25 MARCH 2019

JUDGMENT BY: MOROBANE, AJ

DELIVERED ON: 28 MARCH 2019

- [1] This is an appeal against the judgment of the late Judge Moloi in case numbers 913/2017, 1212/2017 and 1213/2017 as consolidated. On 22 September 2017 leave to appeal was granted by Pike, AJ. The record was filed late and the appellants applied for condonation and reinstatement of the appeal. Such orders were granted and the merits of the appeal were argued. In the aforesaid matters, the appellants were the respondents and the respondent the applicant. For convenience sake the parties will be referred to as appellants and respondent throughout.
- [2] The appellants listed 11 grounds upon which they rely in their notice of appeal filed on 20 October 2017 as follows:
- 2.1 The learned judge erred in case 913/2017 by finding that the appellants cannot rely on the Rule 30 Notice to stay the proceedings due to them taking a further step by filing an Answering Affidavit.
- 2.2 The learned judge should have considered the appellants' contention that the answering affidavit was provisionally filed and as an alternative, without waiving their rights in terms of rule 30, that the appellants were still entitled to pray for condonation for the late filing thereof at the hearing of that application.
- 2.3 The judge should have found that the proceedings in the case number 913/2017 be suspended pending the finalisation of the appellants' rule 30 application.

- 2.4 The learned judge failed to consider the appellants' point in limine in case number 913/2017, that the application does not comply with the prescribed form of the rules of Court, thereby effectively dismissing the appellant's rule 30 application.
- 2.5 The learned judge erred in respect of all three case numbers in finding that there was due compliance with section 129 of the National Credit Act.
- 2.6 The learned judge should have found that the appellants did respond to the said section 129 notices and thereby chose to refer the dispute to an alternative dispute resolution agent.
- 2.7 The learned judge erred in finding that the plaintiff was entitled to proceed with legal action after expiry of the 10 days from the date of delivery of the notice despite the fact that the plaintiff belatedly received confirmation of the appellants' response, and that the option to refer the matters to an alternative dispute resolution agent precluded the plaintiff to proceed with legal action at that time.
- 2.8 The learned judge should have found that the legal proceedings were premature and the Court should have suspended the legal proceedings.
- 2.9 The learned judge erred in finding that the appellants did not deal with their defence on the merits and that they were

duty bound to fully disclose the detail of the dispute under circumstances where appellants have already referred the dispute to an alternative dispute resolution agent for adjudication.

2.10 The learned judge should have found that the dispute as to the calculation of interest and the resultant dispute as to the outstanding balances should have been resolved before the alternative dispute resolution agent as envisaged by section 129 of the NCA.

2.11 Any other grounds not foreseen at this stage that may be argued on the date of appeal.

[3] The abovementioned grounds of appeal are summarised into three as follows:

3.1 In case number 913/2017 the learned judge erred in finding that the appellants cannot rely on their Uniform Rule 30 notice for suspension of the proceedings pending the finalisation of their rule 30 application.¹ In addressing the Rule 30 defence, Moloi J found that the notice fell away since it was filed out of time. It is clear from the record that no application for condonation for the late filing of the Rule 30 notice was done. The latter point puts an end to the argument on the rule 30 notice and thus need not be dealt with further. Even if the Rule 30 notice were to be considered

¹ Notice of Appeal, paras 1, 2, 3 and 4

in the absence of a condonation application, the appellants took a further step by filing an answering affidavit. Uniform Rule 30(2)(a) provides that where an irregular step has been taken, the other party may apply to court to set it aside only if the applicant has not taken a further step in the cause with the knowledge of the irregularity. Under the circumstance the Rule 30 notice would have fallen away in any event. In my view, the court *a quo* did not err in any way in its finding.

3.2 In all three matters the learned judge erred in finding that the appellants did not deal with the defence to the merits.² The appellants feel aggrieved by the learned judge's finding that they failed to deal with the merits. In **Standard Bank of South Africa Ltd v RTS Techniques & Planning (Pty) Ltd**³ the court held that, apart from the prescribed procedure in Uniform Rule 6(5)(d), it was the established practice that a respondent should file affidavits on the merits, irrespective of whether a preliminary point is to be argued. I have perused the respective affidavits and could not find any defence on the merits in all three matters. I agree with the learned judge's holding that the appellants had no defence against the respondent's claims and "clutches at every straw and hay in an attempt to avoid liability".

3.3 In all three matters the learned judge erred in finding that there was due compliance with section 129 of the National

² Notice of Appeal para 9

³ *Standard Bank of SA Ltd v RTS Techniques & Planning (Pty) Ltd* 1992 (1) SA 432 (T) at 442A

Credit Act 34 of 2005.⁴ The appellants alleged that all three matters were referred to an alternative dispute resolution agent and, as such, the respondent was precluded from proceeding with the legal action at that time.

- [4] The learned judge addressed the requirements and purpose of the notice in terms of section 129, among others proof of delivery thereof. In all three matters delivery was proven by the track and trace report of the post office as being 25 January 2017. The first notification to the appellants was sent on 25 January 2017. The appellants were afforded 10 working days to take steps to resolve any dispute or bring payments up to date. By the time the respondent filed a notice of motion to enforce its claims on 22 February 2017, the 10 days had long lapsed. On a mathematical calculation, the 10 working days from 25 January 2017 would have been up to 8 February 2017.
- [5] The learned judge correctly applied **Kubyana v Standard Bank of SA Ltd**⁵ that in order to bring a section 129 notice to the attention of consumers, proof of delivery is satisfied by written confirmation by the postal services of the delivery to the correct branch of the Post Office. Among other obligations, the credit provider must prove that the post office issued a notification to the consumer that a registered item was available for his collection and such notification reached him.
- [6] The learned judge dealt with the appellants' argument that they referred the matters to the National Credit Regulator ("NCR") to

⁴ Notice of Appeal paras 5, 6, 7, 8 and 10

⁵ *Kubyana v Standard Bank of SA Ltd* 2014 (3) SA 56 (CC) at para 54

appoint or nominate an alternative dispute resolution agent and thus the proceedings were premature. He referred to an email by the appellants' attorneys dated 10 February 2017 addressed to a Mr Ryan Lepart of the NCR stating "we ... shall be pleased if you could urgently provide us with a list of alternative dispute regulators". The learned judge remarked that on the day of the hearing on 4 May 2017 there was no indication from the appellants that the matters were ever referred to an alternative dispute resolution agent or other instances mentioned in the section 129 notice. I agree with the learned judge's finding that the letter to the National Credit Regulator is by no means a "*referral*" as per section 129 read with section 130 of the NCA.

[7] The court *a quo* held that the referral had already lapsed when the proceedings were instituted. As a result, the respondent was entitled to institute the proceedings, there being no defence raised, and was entitled to judgment as well. I agree with the holding of the learned judge and cannot find that he erred in any way in this regard.

[8] It follows therefore that the appeal cannot succeed.

[9] I would make the following order:

1. The appeal is dismissed with costs.

V.M. MOROBANE, AJ

I concur, and it is so ordered.

C. REINDERS, J

I concur.

P. LOUBSER, J

On behalf of the appellants: Adv JG Janse van Rensburg
Instructed by:
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On behalf of the respondent: Adv CLH Harms
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