



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 number: 1506/2017

In the matter between:

NGAKA DAVID KHOKHO

Applicant

and

NEDBANK LIMITED (DIVISION OF MFC)

Respondent

CORAM: **MHLAMBI J,**

HEARD ON: 25 JUNE 2018

DELIVERED ON: 28 JUNE 2018

MHLAMBI, J

Introduction

[1] This is an application for leave to appeal against the order for summary judgment which was granted on 10 August 2017. The application is opposed.

[2] The grounds of appeal are stated as follows:

“1. The Honourable Court erred in not finding that the Respondent, by serving Section 129 Notice dated the 18th February 2017 upon the Applicant, followed by the summons dated 28 March 2017, contravened the provisions of Section 129(1) of the National Credit Act, 34 of 2005.

The Honourable Court ought to have find that, at the time the Respondent served the Section 129 Notice dated 18th February 2017 upon the Applicant, the Section 129 Notice dated 8th December 2016 to was not withdrawn by the Respondent.

2. The Honourable Court erred in not finding that the National Credit Act makes provision that, while the dispute was under consideration by the Ombudsman with jurisdiction, the Respondent was prohibited from instituting legal action against the Applicant.

3. The Honourable Court misdirected itself in finding that the Applicant referred its dispute to the wrong Ombudsman for short term insurance.

The Honourable Court, despite been notified by the Applicant that the Ombudsman for short term insurance, on behalf of the Applicant, referred the said dispute to the correct Ombudsman for Banking and

the Ombudsman for Banking acknowledge receipt thereof and the Respondent was made aware of that aspect. The Honourable Court ignored this crucial aspect.

4. *The Honourable Court erred in not finding that the defense raised by the Applicant amounted to a triable issue which warranted to be determined by the trial court.*

The Honourable Court ought to have find that, at the time the Respondent served the second Section 129 (1) notice dated 18th February 2017 upon the Applicant, the dispute regarding Section 129 (1) notice dated 8yh December 2016 was already under consideration by the Ombudsman for Banking and furthermore, proof of payment attached to the Applicant answering affidavit amounted to a bona fide defence.

The Honourable Court ought to have find further that at the time the Respondent issued Section 129 notice dated 8 December 2016, the Applicant was not in arrears of the amount as reflected in the said notice. The Applicant was in advance with his payments.

5. *The Honourable Court misdirected itself by allowing the Respondent to file its replying affidavit (referred to as the Respondent's response to the Applicant's Supplementary answering affidavit) and further allowing the Respondent to refer to the said document during arguments. This is very bad law.*

The Honourable Court, despite having made it clear to the Respondent that it will not consider the said document when delivering its judgment, allowed the Respondent to refer to the said replying affidavit during its argument.

The Honourable Court ought to have out rightly rejected the Respondent's replying affidavit and further barred the Respondent

from referring to the said document, mereso Rule 32 of Uniform Rules of this Honourable Court does not allowed the Respondent to file further affidavits in support of its application for summary judgment.

6. *The Honourable Court erred in upholding the irregular judgment application brought before it by the Respondent”.*

[3] The applicant filed heads of argument on 21 June 2018 and the order or *ex tempore* judgment was assailed on the following grounds:

“Introduction

1. *On the 10th of August 2017, The Respondent brought an application for summary judgment against the Applicant.*
2. *In its ex tempore judgment, the honourable court granted summary judgment against the Applicant advancing the following reasons:*
 - 2.1 *that the Applicant referred his dispute to the wrong forum, (Ombudsman for Short term insurance), instead of the Ombudsman for Banking. Therefore the dispute was before the Ombudsman who had no jurisdiction.*
 - 2.2 *Secondly, the Honourable Court indicated that the Applicant does not have a defence to succeed in the trial.*
3. *It is on the basis of the aforementioned ex tempore judgment that the Applicant filed his application for leave to appeal, same was filed on the 10th day of AUGUST 2017 and grounds are outlined therein.”*

Background

- [4] The respondent, as the plaintiff in the summons, and the applicant, as the defendant in the summons, concluded a written instalment sale agreement on or about 15 October 2013 in terms of which the plaintiff sold a 2013 Jaguar XF 2.0 i4 for Luxury motor vehicle to the defendant. The total purchase price of the goods including VAT, stamp duty and finance charges was R 857 494.80. The defendant was responsible to pay the aforesaid amount by means of 71 instalments of R11 909.65 each, the first instalment having been payable on 01 December 2013, subsequent instalments on the first day of each succeeding month and one final instalment of R 11 909.65 on 01 November 2019. The parties shall be referred to as in convention.
- [5] When the defendant failed to comply with the provisions of the agreement to make punctual payments, the defendant instituted action against the defendant by issuing a summons on 31 August 2016. Default judgment was granted against the defendant on 23 September 2016 but the court rescinded the judgment on 08 December 2016 on the basis that the summons was premature as it *“was clearly issued one (1) day too early”*¹. A fresh summons was issued on 23 March 2017.
- [6] A notice of intention to defend was entered and filed on 04 April 2017, followed by an application for summary judgment which was set down for hearing on 11 May 2017. On that day it was

¹Ngaka David Khokho v Nedbank Limited (of which MFC is a division) Case No: 4715/2016) [2016] ZAFSHC (8 December 2016)

removed from the roll and enrolled for 8 June 2017. On 8 June 2017 the defendant filed a supplementary answering affidavit and by agreement the court granted an order postponing the matter to 10 August 2017; the respondent/defendant to file a condonation application in respect of the late filing of his supplementary affidavit and the costs of that application were reserved for later determination.

- [7] On 28 July 2017, when a notice of withdrawal of the defendant's supplementary answering affidavit was filed, the plaintiff also filed its affidavit to the respondent's supplementary answering affidavit. On 26 May 2017 the defendant filed a plea and a special plea. He also filed a notice in terms of Rule 30A on 31 July 2017 alleging that the applicant had committed an irregular step in the proceedings by filing a replying affidavit to the defendant's supplementary answering affidavit.

The answering affidavit

- [8] The answering affidavit resisting the summary judgment application was divided into three headings, namely, the noncompliance with the National Credit Act 34 of 2005 ("NCA"), the irregularity of the plaintiff's application for summary judgment and the punitive costs order *de bonis propriis*. The resistance under the first heading is aimed at the two section 129 notices issued in terms of the NCA dated 8 December 2016 and 18 February 2017 respectively, in that when the latter was delivered, the former had not been withdrawn by the plaintiff and the defendant had, as at 14 February 2017, directed a dispute to the

office of the Ombudsman for Short- term insurance in regard to the arrear amount stated in the notice of 8 December 2016; which was allegedly cleared on 3 and 4 October 2016. Consequently, the summons issued on 28 March 2017 under case number 1506/2017 was irregular as it was based on the irregular notice dated 18 February 2017. Despite the correspondence of 17 April 2017 addressed to the plaintiffs' attorneys notifying them of the irregularity of the notice and the summons, the plaintiff proceeded on 19 April 2017 to apply for summary judgment.

- [9] As at 8 December 2016, the defendant was not in arrears of the amount stated in such notice as an amount of R 47 000.00² was paid on 3 and 4 October 2016 and the defendant therefore disputed being indebted to the plaintiff in the amount stated in summons as well as in the supporting affidavit to the application for summary judgment. Furthermore, the matter was referred to the Ombudsman for consideration³.

The plaintiff's contentions

- [10] The plaintiff submitted that the defendant resisted the application for summary judgment on the grounds that:

- “(i) There was a dispute of fact over his indebtedness and
(ii) his alleged indebtedness under the credit agreement was the subject matter of a pending dispute with the Ombudsman for Short- term insurance.”⁴*

² Answering affidavit paragraph 16

³ Answering affidavit paragraph 17

⁴ Plaintiff's heads of argument paragraph 4

[11] It was argued on behalf of the plaintiff that the Ombudsman for short term insurance did not have jurisdiction to entertain the defendant's complaint. Clause 14.1 of the credit agreement drew to the defendant's attention the right to refer the matter to the Ombudsman for banking services⁵. The defendant's complaint to the Ombudsman for short term insurance was dated 14 February 2017 and it was in reaction to the plaintiff's notice in terms of section 129 of the NCA to the defendant on 8 December 2016. The 10 day period provided for in section 130 (1) (a) of the NCA had long since lapsed and the defendant's contention that the summons was premature was without merit⁶.

[11] Despite his dispute that he was not indebted to the plaintiff in the amount stated in the section 129 notice and the summons, the defendant failed to state that he was not indebted to the plaintiff at all or to disclose to the court the extent of his indebtedness. Despite the contents of paragraph 7.2 of the particulars of claim wherein it is alleged that the last payment received from the defendant was on 27 October 2016 in the amount of R 12 684.79 and that no further payments had been received from him ever since and that he was in arrears with at least 5 months' instalments, the defendant failed to mention that any payments were made subsequent to October 2016⁷. Furthermore, the defendant failed to attack the certificate of balance which he agreed would impose on him the onus to satisfy the court that the amount mentioned therein was incorrect. It was submitted that the

⁵ Plaintiff's heads of argument paragraph 11

⁶ Plaintiff's heads of argument paragraph 12

⁷ Plaintiff's heads of argument paragraph 19

defences put up by the defendant fell dismally short of constituting a *bona fide* defence.

Applicable law

Section 129 (1) of the NCA provides that:

- “(1) If the consumer is in default under a credit agreement, the credit provider-*
- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative 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 under the agreement up to date; and*
 - (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-*
 - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and*
 - (ii) meeting any further requirements set out in section 130.*

[12] Section 130 (3) (c) of the NCA provides that:

- “(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).....*
 - (b)*
 - (c) that the credit provider has not approached the court-*

- (i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction;”*

Section 134 (1) (a) (i) (ii)

“(1) As an alternative to filing a complaint with the National Credit Regulator in terms of section 136, a person may refer a matter that could be the subject of such a complaint as follows:

- (a) If the credit provider concerned is a financial institution as defined in the Financial Services Ombud Schemes Act, 2004 (Act No. 37 of 2004), the matter-*
 - (i) may be referred only to the ombud with jurisdiction to resolve a complaint or settle a matter involving that credit provider, as determined in accordance with sections 13 and 14 of that Act; and*
 - (ii) must be procedurally resolved as if it were a complaint in terms of that Act;*

Uniform Rule 32 (3) (b) provides that:

Upon the hearing of an application for summary judgment the defendant may-

- (a)*
- (b) Satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.”*

[13] The opposing affidavit must disclose fully the nature and grounds of and the material facts relied upon by the defendant for his defence. The purpose of the affidavit is to satisfy the court that the defendant has a *bona fide* defence and whether the affidavit does so “fully” is determined by that consideration.⁸ Summary judgment is therefore granted on the supposition that the plaintiff’s claim is unimpeachable because the defendant has no proper defence.⁹ It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.¹⁰

The Defence

[14] It is evident that the defendant wanted to hold the time still and captive to 8 December 2016 and built his castle of a defence around that date. It is clear that his interpretation of the NCA is incorrect. Mr Khokho, on behalf of the defendant, referred me to **Absa v Mkhize & another**¹¹ in support of his submission that the subsequent section 129 notices were irregular. However, this decision did not support the submissions made. It is incomprehensible why the defendant referred his complaint to the ombud without jurisdiction when it was clearly brought to his attention on more than one occasion to whom he should address his complaint in the event of a dispute or an attempt towards a resolution. Besides, when he referred the matter to the ombud

⁸ Civil Procedure in the Superior Courts, Author: Derek Harms

⁹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)

¹⁰ *Joob Joob Investments (Pty) Ltd v Stocks Mavudla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 31

¹¹ 2013 JDR 2187 (SCA)- Now reported at 2014 (5) SA 16 (SCA)

for insurance on 14 February 2017, the ten day period within which he had to react, had lapsed and the credit provider's right to enforce the credit agreement had been triggered¹². Furthermore, it is incorrect that as at 18 February 2017 the complaint was before the ombud with jurisdiction for purposes of section 130 of the NCA; and no proof of acknowledgment of receipt of the complaint by the said ombud was provided. The reliance by the defendant on the non-compliance of the provisions of the NCA by the plaintiff was untenable and did not constitute a defence.

- [15] Save to refer to the payments made during 3 and 4 October 2016 to "*clear the arrears*"¹³, no allegation is made in the papers that since that time and up to the issue of the summons, additional payments were made to liquidate the debt. What the defendant presents in his papers is a bare denial of his indebtedness. What is as clear as a pole above water, is the defendant's inclination to concentrate on irrelevant collateral issues instead of addressing the real issues. He was afforded the opportunity to supplement his papers or defence but failed to do so. On the day of the hearing of the summary judgment application, he filed a supplementary answering affidavit which caused the matter to be postponed, only to be withdrawn at a later stage. In my view, the defendant's conduct throughout the litigation process was of a delaying nature and dragged out the process unnecessarily.

¹² Changing Tides 17 (Pty) Ltd N.O. v PJ Delport Case No: 44741/2014 GNP

¹³Annexure "NDK 3" on page 3 of answering affidavit

Conclusion

[16] If a court hearing an application for summary judgment is satisfied that a defendant has no bona fide defence to a plaintiff's claim and grants summary judgment as a consequence, it should be slow thereafter to grant leave to appeal, lest it undermine the very purpose of the procedure¹⁴. In the *ex tempore* judgment that is being appealed against, it was mentioned¹⁵ that the respondent's counsel "*conceded that indeed, there are no sufficient grounds on which this application should not be granted.*" In the circumstances, I am of the opinion that the appeal would have no reasonable prospect of success and the application for leave to appeal should therefore fail.

Costs

[17] In the result, costs should follow the event.

[18] I therefore make the following order:

Order

The application for leave to appeal is dismissed with costs.

¹⁴ Majola v Nitro Securitisation 2012 (1) SA 226 (SCA) at 232 para 25.

¹⁵ lines 8-12 of the judgment

MHLAMBI, J

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