

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

Case No: 341/2014

In the matter between:-

NEDBANK LTD

Plaintiff

and

SIMCHA PROPERTIES 12 CC
ZAGEY: STEPHAN
SCHNEIDER: AUBREY

1st Defendant
2nd Defendant
3rd Defendant

JUDGEMENT: MOENG, AJ

HEARD ON: 30 JANUARY 2015

DELIVERED ON: 5 FEBRUARY 2015

- [1] This is an exception against the plaintiff's particulars of claim in that same lacks the necessary averments to sustain an action. The exception is premised on the grounds that: (a) there was no, alternatively defective compliance with the provisions of section 129 (1) of the National Credit Act (NCA), in that the s 129 notice was not properly delivered to the first defendant and; (b) the plaintiff failed to plead the material terms of the suretyship agreement upon which the cause of action against the second and third defendants is based. I

will for ease of reference refer to the parties as they are referred to in the main action.

- [2] On 29 January 2014 plaintiff issued summons against the defendants for payment of the sum of R 3 210 841.68. Plaintiff alleges that it entered into a loan agreement with the first defendant and pursuant to such agreement, a mortgage bond was registered in its favour. The second and third defendants bound themselves as sureties and co-principal debtors with the first defendant in favour of the plaintiff for due payment of all amounts. It is further averred that first defendant chose 384 Featherstone Estate Heilbron as its *domicilium citandi et executandi* for all purposes arising out of the loan agreement as read with the mortgage bond. Plaintiff asserts that it complied with all its obligations in terms of the agreement but first defendant fell into arrears with its monthly repayments and by reason of such default, the full balance owing was due and payable.
- [3] Plaintiff further claims that the agreement is a credit agreement as defined in the NCA and that it complied with the provisions of section 129(1)(a) of the Act in that on 2 December 2013, it delivered a notice in terms of the Act by registered post to the chosen *domicilium citandi et executandi* of the defendants. The notice was delivered to the relevant post office responsible for the delivering of post to the respective addresses. Plaintiff asserts that the post office would, in the normal course, have secured delivery of the registered item by way of a “notification slip” informing the defendants that a registered article was available for collection.

- [4] In its notice of exception, first defendant contends that clause 16 of the loan agreement provides that the *domicilium* selected by the mortgagor in the mortgage bond would serve as the mortgagor's selected *domicilium* for all purposes arising out of the loan agreement, whereas clause 11 of the Sectional Covering Mortgage Bond, provides that the mortgagor chooses the mortgaged section as its *domicilium*. The mortgaged section is described as "S2 being part of a common property, comprising the land and the scheme known as FEATHERSTONE ESTATE indicated on Sectional Plan no. SS 124/2003 in respect of the land and building or buildings situated at the farm VAALDAM SETTLEMENT NO. 1777, DISTRICT HEILBRON, PROVINCE FREE STATE ..."
- [5] The notice of exception further states that the "Domestic Item Tracking" sheet relating to the delivery of the s 129 letter to the first defendant's *domicilium citandi et executandi* indicates that the "...postal item has Returned Back to Sender", proof that same was not received by the first defendant. In conclusion, the notice provides that the plaintiff failed to plead the material terms of the suretyship agreement upon which the cause of action against the second and third defendants is based. Mr Els, counsel for defendants, argued that the notice was sent to 384 Featherstone Estate Heilbron which was not the first defendant's chosen *domicilium citandi et executandi* and that the track and trace report does not indicate that a notification was sent to the first defendant.
- [6] An Excipient has the duty to persuade the Court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed. Compare Theunissen en Andere v

Transvaalse Lewendehawe Koöp Bpk 1988 (2) SA 493 (A) at 500E. A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a generous interpretation. (See **First National Bank Southern Africa v Perry NO and Others** 2001 (3) SA 960 (SCA). The court should not look at a pleading “*with a magnifying glass of too high power*” (See **Kahn v Stuart and Others** 1942 CPD 386 at 391) and the pleadings must be read as a whole and no paragraph should be read in isolation. (**Southernport Developments (Pty) Ltd v Transnet Ltd** 2003 (5) SA 665 (W) at 669)

- [7] In **McKenzie v Farmers' Co-operative Meat Industries Ltd** 1922 AD 16 at 23 the following definition of 'cause of action' was accepted by the Appellate Division:

“ . . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

- [8] In order to ensure that a summons is not excipiable on the ground that it does not disclose a cause of action, the plaintiff must allege the *facta probanda*, (the facts which must be proved in order to disclose a cause of action) and not the *facta probantia*, (the facts or evidence which proves the *facta probanda*).

- [9] In **Beets v Swanepoel** [2010] JOL 26422 (NC), Majiedt AJP (as he then was) upheld an exception where the plaintiff failed to allege compliance with the provisions of section 129 of the NCA. He concluded at para 19 that:

“A plaintiff must, in my view, aver compliance with these sections in the summons or particulars of claim to disclose a cause of action where the suit is based on a credit agreement to which the Act applies. It is a material averment, the absence whereof would render the pleading excipiable. Without the requisite notice, a claim cannot be enforced. Section 129(1)(b) is clear and unambiguous that proceedings cannot be commenced unless the requisite notice has been given.” (My emphasis)

In **Rossouw and Another v FirstRand Bank Ltd** 2010 (6) SA 439 (SCA), Maya JA held that a summons must contain allegations of the manner in which the s 129(1)(a) notice was delivered, so as to place the court in a position to determine whether there was delivery in terms of the NCA, i.e. that the alleged delivery was amongst the alternatives specified in s 56(2)(a) of the Act.

- [10] The NCA further provides for specific orders that a court considering a credit agreement in respect of which non-compliance with certain provisions of the Act is alleged, must in some instances make. These powers are contained in s 130(4)(b), which provides as follows:

“[I]n 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 130(a), or has approached the court in circumstances contemplated in subsection (3)(c) 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.”

It therefore appears that in case of non-compliance with s 129(1)(a), the matter will have to be dealt with in accordance with s 130(4)(b) and that the court has no discretion to deal with it in a manner other than that provided for in the that section.

- [11] Plaintiff alleges that first defendant chose 384 Featherstone Estate Heilbron as its *domicilium citandi et executandi* for all purposes arising out of the loan agreement as read with the mortgage bond, whereas first defendant in turn alleges, in its notice of exception, that the chosen *domicilium* is S2 Featherstone Estate as indicated on Sectional Plan no. SS 124/2003 situated at the farm Vaaldam settlement no. 1777, district Heilbron. The mortgage bond evidently does not contain a physical or postal address for purposes of postage but contains the description of the property as required for the Deeds Registry. Clause 1.1.6 of the loan agreement between the parties conversely describes the same property as 384 Featherstone Estate Heilbron. There can therefore be no doubt that the s 129 notice was addressed to the correct address and any argument to the contrary is misplaced.

- [12] It is trite that from the nature of exception proceedings, the court must assume that the facts alleged in the relevant pleading are correct. The excipient should therefore satisfy the court that even with such an assumption, the pleading does not disclose a cause of action. One will therefore have to accept, as pleaded in the particulars of claim, that: (a) plaintiff delivered a notice in terms of the Act by registered post to the chosen *domicilium citandi et executandi* of the defendants; (b) The notice was delivered to the relevant post office responsible for the delivering of post to the respective addresses and; (c) The post office would, in the normal course, have secured delivery of the registered item by way of a “notification slip” informing the defendants that a registered article was available for collection. It will then be for the defendant to disprove such allegations by way of acceptable evidence. No evidence is presented in exception proceedings.
- [13] All that is required of a pleader where the NCA is applicable, is to allege compliance with the provisions of section 129 of the Act and the manner in which the s 129(1)(a) notice was delivered. Such allegations would suffice as the *facta probanda* to sustain a cause of action. As correctly pointed out by Mr Louw, counsel for plaintiff, whether the notice was dispatched to the defendants by the relevant post office and whether it came to the attention of the recipients would require evidence to substantiate same. Evidence of effective notice will consequently be part of the *facta probantia* and not the *facta probanda*.

- [14] As stated in **Beets v Swanepoel** *supra*, the lack of an averment of compliance with s 129(1)(a) renders the particulars of claim excipiable. However, where compliance with s 129(1)(a) is alleged but it is disputed by the defendant because the notice was sent to an incorrect address, or it was not sent to the addressee by the post office as averred in *casu*, the exception procedure is not the appropriate remedy to address such non-compliance as the pleading itself is not defective. (See **Van Heerden & Boraine** 2011 SA Merc LJ 59 – ‘The conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act’).
- [15] Mr Els argued that an order as contemplated in s 130(4)(b) should be made and the plaintiff be ordered to complete the necessary steps before the matter may be resumed. It is of importance to note that, in its particulars of claim, plaintiff alleges that the notice was delivered to the relevant post office responsible for the delivering of post to the respective addresses and that the post office would, in the normal course, have secured delivery of the registered item by way of a “notification slip” to the recipient. First defendant in turn states in its notice of exception that the Domestic Item Tracking sheet indicates that the postal item has returned back to sender, proof that same was not received.
- [16] As was stated in **Sebola and Another v Standard Bank of South Africa Ltd and Another** 2012 (5) SA 142 (CC) and **Kubyana v Standard Bank of South Africa Ltd** 2014 (3) SA 56 (CC), there is no general requirement that the notice be brought to the consumer's

subjective attention by the credit provider, or that personal service on the consumer is necessary for valid delivery under the Act. It is however required of the credit provider to provide proof that the notice was delivered to the correct post office. As indicated in **Sebola** *supra*, “it may reasonably be assumed . . . that notification of the arrival of the section 129 notice at the Post Office reached the consumer and that a reasonable consumer would have ensured retrieval of the item”. If the credit provider has complied with the requirements set out above, it will be up to the consumer to show that the notice did not come to his attention and the reasons why it did not. Mhlantla AJ stated in **Kubyana** *supra* at 72 A-B that:

“The ultimate question is whether delivery as envisaged in the Act has been effected. In each case, this must be determined by evidence.”

- [17] From the facts in *casu*, plaintiff has made the necessary averments in the summons in compliance with s 129. First defendant will therefore have to lead evidence for the court to determine whether the notice came to his attention or not and it is only after such evidence, should the court be satisfied that the provisions of s 129 has not been complied with, that an order in terms of s 130(4)(b) will be made. I will therefore, in the absence of evidence to the contrary, not be able to conclude that the credit provider has not complied with the relevant provisions of the Act, as envisaged by s 130(4)(b). The first ground of exception is therefore without merit.

[18] The second ground that the plaintiff failed to plead the material terms of the suretyship agreement upon which the cause of action against the second and third defendants is based, is likewise not well taken. Plaintiff pleaded that the second and third defendants bound themselves as sureties and co-principal debtors with the first defendant in favour of the plaintiff on 24/07/2006 at Midrand for due payment of all amounts. The said suretyship agreement was attached to the particulars of claim with its contents incorporated therein.

[19] The attached agreement at first glance complies with the provisions of the General Law Amendment Act 50 of 1956 and sets out a valid contract of suretyship in that it is embodied in a written document signed by the sureties. The document sets out the identity of the creditor, the sureties, and the principal debtor. It further contains the nature and amount of the principal debt and the indebtedness of the principal debtor. The *causa* of their indebtedness can be gleaned from the agreement as well as the amount that is due. Mr Els was at pains to explain in what respect this ground of exception should succeed. These averments disclose a cause of action.

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

1. The exception is dismissed with costs.

L.B.J. MOENG, AJ

On behalf of Excipient/Defendant: Adv. J. Els
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of Respondent /Plaintiff: Adv. M.C. Louw
Instructed by:
Hill McHardy & Herbst
BLOEMFONTEIN