Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

Saakno: / Case number:	**2138 / 2010**
	2139 / 2010
	2141 / 2010
	2142 / 2010
Datum verhoor: / Date heard:	**09 / 09 / 2011**
Datum gelewer: / Date delivered:	**30 / 09 / 2011**

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED T/A
STANDARD VEHICLE & ASSET FINANCE Applicant

and

JCR BELANGE CC First Respondent
PHILIP RUDOLF RABIE Second Respondent

Coram: Hughes-Madondo AJ

JUDGMENT

HUGHES-MADONDO AJ

[1] The applicant sought summary judgment against the respondents in four separate actions. In view of the fact that the claims were similar in their nature against the respondents, all four applications were dealt with simultaneously. All four applications

proceeded as opposed.

[2] In the summons the applicant sought the following relief, jointly and severally, against the respondents:

2.1 a specified amount of money as set out in the agreements upon which the actions were based;

2.2 interest at a zero rate; and

2.3 costs on a scale as between attorney and client plus VAT thereon;

ALTERNATIVELY:

2.4 confirmation of termination of the agreement;

2.5 return of the goods;

2.6 damages to be proved in terms of the provisions of each agreement;

2.7 interest in terms of the provisions of each agreement; and

2.8 costs on the scale as between attorney and client plus VAT thereupon.

[3] In these summary judgment proceedings the applicant sought the relief as claimed in the summons and costs of the applications.

[4] It is trite that in terms of Rule 32 of the Rules of court a court might grant summary judgment in respect of claims based on a liquid document, for a liquidated amount, for delivery of specified movable property and for ejectment together with interest and costs.

[5] The respondent when opposing an application for summary judgment is required to satisfy the court that he or she has a '*bona fide*' defence to the action. In the respondent's papers it must disclose fully the nature and grounds of its defence and the material facts that it relies upon. See **MAHARAJ V BARCLAYS NATIONAL BANK Ltd**, 1976 (1) SA 418 (A) AT 426. In essence the set of facts set out must be such that if proven at trial they would constitute a defence to the claim of the plaintiff. See **BREITENBACH V FIAT SA (EDMS) Bpk**, 1975 (2) SA 226 (T) at 228B-D and D-E; **TESVEN CC AND ANOTHER V SA BANK OF ATHENS**, 2000 (1) SA 268 (SCA).

[6] If the defendant fails to set out a bona fide defence or to raise a triable and arguable issue and the plaintiff can establish its case clearly, then summary judgment should be granted. On the other hand if the plaintiff has an unanswerable case and it's reasonably possible that the defendant has a good defence, then the defendant must be granted leave to defend. See **MARSH AND ANOTHER V STANDARD BANK**, 2000 (4) SA 947 (W) at 949-950.

[7] During June 2007, the applicant entered into four credit transaction instalment agreements (the "agreements") with the first respondent. The claims against the second respondent are in relation to the four suretyship agreements signed by the second respondent in favour of the applicant in respect of the agreements with the first respondent.

[8] The respondents in their opposition to the summary judgment application raised a number of defences. The issue that I am required to decide is whether or not the defences raised by the respondents are sufficient to resist summary judgment and are they defences envisaged in terms of Rule 32(3)(a).

[9] I will not deal with all the defences raised as there are many. However in respect of the first respondent, there exists one defence of substance. The first respondent alleges that the actions instituted by the applicant are premature, in that the applicant failed to comply with the provisions of the National Credit Act No. 34 of 2005 (the "NCA").

[10] The failure on the part of the applicant to comply with the NCA lies squarely within in the ambit of section 129 of the NCA.

[11] Section 129 of the NCA reads as follows:

"129(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] The giving of notice in terms of Section 129(1)(a) has been held to be peremptory. This is in keeping with the Act in order to strike a balance between the interest of the credit grantor and the credit receiver. The Act requires that the notice in terms of Section 129 be delivered to the address nominated. It however does not require that the credit grantor prove receipt of such notice. See **ROSSOUW V FIRST RAND BANK Ltd**, 2010 (6) SA 439 (SCA).

[13] The agreements between the first respondent and the applicant amount to credit agreements. In terms of section 129 the applicant is obliged to "*draw the default to the notice*" of the first respondent before

commencing with any legal proceedings to enforce the agreement.

[14] The first respondent does not deny that it failed to pay the instalments as stipulated in the agreements and it was therefore in default. As *stated the first respondent dis*putes that the applicant notified it of the default before proceeding with the various actions.

[15] On an examination of the summons in respect of case no. 2138/10 and case no.2139/10, the address reflected thereupon is "*14 Krog Street, Kuruman, Northern Cape". However* on perusal of the section 129 notices sent to the first respondent, the address reflected is "*Krogstreet 14, Kurunran, Pretoria, 8460*" and "*Krog Str 14 Kuruman 8460*" respectively.

[16] In the circumstances clearly the applicant had not brought the default to the first respondents notice and as such had *failed to comply with section 129. During the co*urse of the applicant argument before this court it correctly conceded this point. The obvious r*esult being that the actions instituted* agains*t the first respondent a*re therefore premature.

[17] As regards the suretyship agreement between the applicant and the second respondent, clause 16.1 thereof states:

"I/We choose the address set out under my/our identity number/registration number below to which documents in any legal proceedings against me/us, including notices of attachment of movable or immovable property, may be served".

[18] The suretyship agreements concluded between the second respondent and the applicant, stipulated the address for the service of all notices and legal documents as "Krogstraat 14 Kuruman".

[19] The applicant did send a notification of demand to the second respondent, however this was sent to "333 Grosvenor St, Hatfield, Pretoria, 0002". This was not the chosen *domicillium o*f the second respondent as reflected above.

[20] Thus the action proceedings instituted by the applicant in case no. 2138/10 and 2139/10, are premature against the second respondent as he did not receive any notification of demand from the applicant at his

chosen *domicillium*.

[21] In case no. 2141/10 and 2142/10 the actions against the first and second respondent are also based on credit instalment agreements and suretyship agreements respectively.

[22] In these cases, there were no section 129 notices sent to the first respondent neither were there notifications of demand in terms of clause 16 of the suretyship agreement sent to the second respondent. Here too the actions in these cases are also premature.

[23] Accordingly the failure to notify the first respondent in terms of section 129 and failure to give notice in terms of clause 16 of the suretyship agreement has the result of the respondents defence succeeding.

[24] In the circumstances I find that the applicant has failed to make out a case in terms of Rule 32 in that the action proceeding against the respondents were premature from the outset and as a result the respondent was *bona fide* in its defence in law.

a) **In the result summary judgment is refused in each of the following matters: CASE NO. 2138/10; CASE NO. 2139/10; CASE NO. 2141/10; AND CASE NO. 2142/10.**

b) **The defendants are granted leave to defend.**

c) **Costs of the summary judgment applications are left over for determination of the trial court.**

W HUGHES-MADONDO

ACTING JUDGE

Northern Cape High Court, Kimberley

(i)

On behalf of Applicant:	**Adv. A.G. van Tonder** o.i.o Du Toit Attorneys
On behalf of Respondent:	**Adv. S.L. Erasmus** o.i.o Van de Wall & Partners