

[1]

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 30624/09

In the application between:

FIRST NATIONAL BANK LTD

PLAINTIFF

and

BENJAMIN ROSSOUW

1ST DEFENDANT

SANDRA WILSON ROSSOUW

2ND DEFENDANT

JUDGMENT WHENEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED: /	
06/08/09	
DATE	SIGNATURE

JUDGMENT

- [1] The plaintiff, First National Bank, lent and advanced the sum of R1.5 million to the defendants, married out of community of property, against the security of a first mortgage bond, no. B83807/06 registered over Erf 2259, Wierda Park Extension 2.

[2]

- [2] In the summons the plaintiff avers that the defendants failed to maintain regular instalments as a result of which the outstanding amount of R1.117 180.64 became due and payable.

- [3] Pursuant to the defendants entering appearance to defend the plaintiff brought an application for summary judgment. The defendants chose to file an affidavit in terms of Rule 32(3)(b) in an attempt to satisfy the court that they have a *bona fide* defence to the plaintiff's claim.

- [4] "Satisfy" does not mean "prove": what the rule requires is that the defendants in their opposing affidavits set up facts which, if proved at the trial, would constitute an answer to the plaintiff's claim.

- [5] In the opposing affidavit of the first defendant, which was confirmed by the second defendant, the defendants firstly raised the argument that the plaintiff's summons is vague and embarrassing, in that in terms of section 130(2) of the National Credit Act, Act 34 of 2005, hereinafter referred to as the "NCA", "a creditor cannot claim a shortfall on a mortgage loan agreement and may only ask for the property to be (declared) executable". Section 130 of the National Credit Act provides as follows:

"(1) Subject to subsection (2), a credit provider may approach

[3]

the court for an order to enforce a credit agreement only if, at that time the consumer is in default and has been in default under that credit agreement for at least 20 business days and –

(a) At least ten business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9) or section 129(1), as the case may be.

(b) In the case of a notice contemplated in section 129(1) the consumer has-

(i) Not responded to that notice; or

(ii) Responded to the notice by rejecting the credit provider's proposals; and

(iii) In the case of an instalment agreement, secured loan or lease the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

[4]

(2) *In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if-*

(a) *all relevant property has been sold pursuant to-*

(i) *an attachment order; or*

(ii) *surrender of property in terms of section 127;*
and

(iii) *the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement."*

(My emphasis added)

[6] It was argued by Mr van Heerden who appeared on behalf of the defendants that the omission from section 130(2) of any reference to a mortgage or mortgage loan indicates that the legislature intended that the maximum judgment that may be granted against a person on default of a mortgage loan is the value of the property so mortgaged. He argued that the only order that I may give is an order that the property be declared executable.

[7] I disagree with Mr Van Heerden's submission. Whilst it is undoubtedly correct that section 130(2) does not apply to mortgage loans, but only to

[5]

the pledge or cession of movables, that plaintiff's claim falls squarely within the confines of section 130(1), which is not in any way limited by section 130(1), at least not in so far as mortgage loans are concerned.

- [8] The second point raised by the defendants is that they did not receive the notice provided for in section 129. Section 129(1) provides as follows:

"If the consumer is in default under the 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 councillor alternatively 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*

[6]

(ii) Meeting any further requirements set out in section 130."

[9] In terms of section 130(1) of the NCA the credit provider may only approach the court for an order to enforce a credit agreement if the consumer has been in default for at least 20 business days and at least 10 business days have elapsed "... since the credit provider delivered a notice to the consumer as contemplated ... in section 129(1)..." and the consumer has responded to that notice.

[10] Wallis J in Munien v BMW Financial Services (SA) (Pty) Ltd & Another [2009] ZAKZDHC 6, held that:

"Although the Act does not contain a definition of 'deliver' the Minister has determined in regulation 1 of the National Credit Regulation published in Government Notice R489 in the Government Gazette of 31 May 2006 that, 'deliver' takes place when the notice is sent by registered post. My conclusion therefore is that the Minister has prescribed the manner of delivering documents to a consumer in terms of the Act and that the method of delivery must be in accordance with the provisions of the definition of 'delivered' in the regulations rather than in terms of section 65(2) although as I will explain later I do not think that the result would alter if the latter section applied. For the present

[7]

the question is whether a notice under section 129(1)(a) is delivered if it is sent by registered post to an address selected by the consumer irrespective of whether it is capable of being delivered at that address and whether it comes to the attention of the consumer. In my view that question must be answered in the affirmative for the simple reason that this is what the definition of 'delivered' says. It says that a document is delivered where it has been sent by one of four possible methods to the proposed recipient."

[11] I find myself in respectful agreement with the judgment of Wallis J.

[12] In addition to the aforesaid I need to draw attention to clause 21.1 to 21.3 of the agreement between the parties which read as follows:

"21.1 Any notice given by the bank in terms of this bond may at the bank's option be addressed to the mortgagor at the domicile referred to in clause 20 or to the mortgagor's last postal address recorded with the bank and may be served by registered post.

21.2 Notices so posted shall be deemed to be received by the mortgagor three days after posting.

21.3 A certificate signed on behalf of the bank stating that a notice has

[8]

been given shall be sufficient and satisfactory proof thereof and the authority of the signatory and the validity of the signature need not be proved."

[13] Such a certificate was attached to the summons as annexure "B" and confirmed under oath by the plaintiff in the affidavit supporting summary judgment.

[14] If I am wrong in my acceptance of the correctness of the judgment of Wallis J referred to above, the parties in the agreement itself agreed upon a method of communication and proof thereof which was complied with.

[15] I therefore find that there is no substance in this defence either.

[16] Thirdly the defendants aver that they have paid an amount of R101 950.00 towards the arrears and contend that the outstanding balance should then be only R1,005-052.00. They contend that they are only R12 850.00 in arrears. The defendants do not state that, in addition to these payments they also paid the regular bond instalments since 1 May 2009.

[17] On their own version the defendants did not purge their default and the plaintiff was entitled to proceed to issue the summons and enforce payment.

[9]

[18] At this stage I wish to add that, by agreement between counsel, a fresh certificate of balance among other documents was handed up. By the very nature of these proceedings I cannot and did not have regard to any such documents.

[19] The defendants also stated that they had invoked debt counselling, and were presented by the debt counsellor with a payment plan, whereupon they cancelled the debt counselling process. Since this process has not been completed, it does not stand in the way of the plaintiff exacting its rights in terms of the bond.

[20] Lastly, the defendants rely on section 26 of the Constitution. They say that they have two children and have a right to adequate housing. That is all. Firstly, it must be emphasized that section 26 of the Constitution does not stipulate or protect a "right to adequate housing", but a "right to access

to housing". (See: Government of the Republic of South Africa v

Grootboom 2001(1) SA 46 (CC) para 97.) All that section 26(3) of the

Constitution requires is that all relevant circumstances must be considered. In Brisley v Dotsky 2002(4) SA 1 (SCA) at para [41] and

[42] the majority held that the personal socio-economic circumstances of the inhabitant do not constitute legally relevant circumstances, sufficient

to refuse an eviction order to the owner, and *semble* to refuse the relief

sought by the plaintiff herein. I am bound by that decision.

[10]

[21] I am therefore of the view that the defendants have not succeeded in satisfying me that they have a defence against the plaintiff's claim which is valid in law.

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

"Summary judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved for:

- 1 *Payment of the amount of R1.117 180.65;*
- 2 *Interest on the aforesaid amount at the rate of 10.1% per annum from 1 May 2009 to date of payment, both dates inclusive;*
- 3 *An order declaring Erf 2259 Wierda Park Extension 2 Township Registration Division J.R., Gauteng Province measuring 1022m² and being the mortgaged property, the street address of which is 44 Uvongo Street, Wierda Park X.2, Centurion, Gauteng Province, executable for the aforesaid sum;*
- 4 *Costs of suit on the scale as between attorney and client."*



P. ELLIS
ACTING JUDGE OF THE HIGH COURT

[11]

Counsel for the Plaintiff:	A P Ellis
Attorneys for the Plaintiff:	Solomon & Nicolson
Counsel for the Defendants:	DJ van Heerden
Attorneys for the Defendants:	Lombards Attorneys