Case no: 24143/09

11/9/2009

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

2009/09/11 DATE SIGNATURE

In the matter between:

ABSA BANK LIMITED Plaintiff

and

CLYDE BURLS JOHNSON Defendant

JUDGMENT

Judgment reserved: 09/09/09
Judgment handed down: 11/09/09

LEGODI J,

In this matter, the plaintiff is asking for summary judgment against the defendant as follows:

1. *Confirmation of cancellation of the agreement concluded between the plaintiff and defendant,*

2. *Repossession of the goods to wit 2004 NISSAN ALMERA 1.6,*

3. That damages be postponed sine die,

4. Costs of R650 plus sheriff's fees,

5. *Interest calculated on damages at the rate of 11,900% per annum as from date of summons to date of payment calculated on the outstanding balance from time to time postponed sine die".*

This application was subsequent to service of the summons on the defendant. On the 10 July 2009, the defendant entered an appearance to defend.

However, the defendant never filed opposing affidavit to the application for summary judgment.

The plaintiff then brought the application for summary judgment on an unopposed basis.

I raised the issue with counsel for the plaintiff as to whether the plaintiff's notice in terms of section 129 of the National Credit Act strictly complied with the provisions of section?

For the sake of clarity and completeness, I find it necessary to deal in detail with the provisions of section 129 and 130 of the Credit Agreement Act.

129. ***Required procedures before debt enforcement.-***

(1) If the consumer is in default under 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(1), as the case may be; and
(ii) meeting any further requirements set out in section 130

*130. **Debt procedures in a Court.**-(1) Subject to subsection (2), a credit provider may approach 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 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 12((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) not responded to the notice by rejecting the
credit provider's proposals; and

(c) 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.

Clear from what has been quoted above that, a credit provider will not be entitled in terms of paragraph (b)(i) of section 129(1) to commence any legal proceedings to enforce the agreement before first providing notice to the consumer, as contemplated in paragraph (a) of section 129(1) and meeting any further requirements set out in section 130.

The issue that worried me was whether the letter of 19 July 2008 addressed to the consumer, that is, the defendant, complied with the provisions of section 129 (1)(a).

The relevant portion of the letter reads as follows:

"In terms of the National Credit Act you may approach any of the following institutions or persons to assist you in thismatter: a) Debt Counsellor,
b) Consumer Court or Ombud with jurisdiction"

What is stated above requires an interpretation of section 129(1)(a) to establish the intended objectives of the Legislature.

The notice in terms of section 129 as I see it is intended to do the following:

(1) to draw the default to the attention of the consumer,

(2) to propose to the consumer to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction,

(3) to draw the consumer's attention that such a referral is with the intention that the parties, that is, the plaintiff and defendant resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.

In my view, the section 129 has come a long way in discouraging the credit providers to resort to cancellation of the credit agreement and to resorting to destructive steps of summarily taking away that might be precious to the consumer, for example, threat of loss of a house without having been given the opportunity to negotiate an arrangement to bring the account up to date.

In two respects, I am not satisfied that there has been a full compliance with the requirements of the notice. However, I should not be understood to be making a final determination in this regard.

Firstly, portion of the letter of the notice quoted earlier in this judgment, makes no reference to alternative dispute resolution agent as an option to which the credit agreement might be referred. I do not see this omission as a minor omission. It could be that a consumer may never have heard of debt counsellor, consumer court or ombudsman, but it could be that an alternative dispute resolution agent is well known to a consumer and its objectives.

An omission to mention this, cannot be said to be something without a prejudice to a consumer or of no effect to the non-compliance with section 129(1).

Secondly, the whole idea of referral should clearly be spelled out to a consumer. You do not make a referral without a purpose. It is not each and every consumer that is told to go to debt counsellor, consumer court or ombudsman that will know the purpose thereof.

It was therefore the intention of the Legislature that the consumer's attention should be drawn to the fact that he or she is entitled to seek a resolution of the dispute by developing or agreeing on a plan to bring the payments under the credit agreement up to date.

Having not been satisfied that there has been a compliance with the provisions of section 129, the application for a summary judgment is destined to be dismissed.

The defendant is not before me. The effect of the dismissal of the application for summary judgment would mean that the defendant should be granted leave to defend the action even though he did not appear in court to oppose the application for summary judgment.

The appearance to defend which has already been filed should stand as such as if it has been noted on the date of this judgment.

Both parties would therefore be entitled to take such procedural steps regarding conclusion of exchange of the pleadings as envisaged in the rules.

Consequently an order is hereby made as follows:

(1) Application for summary judgment is hereby dismissed,

(2) The defendant is hereby granted leave to defend and the appearance to defend filed on the 10 July 2009 takes effect from the date of this order for the exchange of pleadings and purpose of calculation of the dies.

(3) The costs of the application to be costs in the cause.

M F LEGODI
JUDGE OF THE HIGH COURT

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