Case no:24661/09

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

In the matter between:

FIRSTRAND BANK LIMITED Plaintiff

and

THULANI CYRIL NGCOBO 1st Defendant

HLAMALANI THEMBEKILE NGCOBO 2nd Defendant

JUDGMENT

Judgment reserved: 09/09/09

Judgment handed down: 11/09/09

LEGODI J,

[1] This is an application for summary judgment in terms whereof, the plaintiff seeks the granting of a summary judgment against the defendant as follows:

1. "Payment of R 1 649 273.43

2. Payment of interest on the amount of R1 649 273.43 at the agreed rate of 11.00% per annum from 1st April 2009 to date of payment both days inclusive

3. An order declaring Erf 795, Summerset Extension 20 Township,

Registration Division: J R Province of Gauteng, Measuring 461 Square metres, Held by DEED OF TRANSFER: TS 2311/05 executable

4. Costs of suit

5. Further and or alternative relief".

[2] As a background, the plaintiff has sued the defendants on the basis of a mortgage bond registered on the 29 April 2005 in favour of the plaintiff for the amount of R 1 510 455.43

[3] In terms of clause 20 of the mortgage bond, any proceedings which may be instituted by virtue hereof, and of the service of any notice, domicilium citandi et executandi was chosen by the Mortgagor at the property mortgaged as the place of service.

[4] In terms of clause 21.1 any notice given by the bank, in terms of the bond, may at the option of the plaintiff be addressed to the Mortgagor at the domicilium referred to in clause 20 or to the Mortgagor's last postal address recorded with the plaintiff and may be served by registered post. Such notices are in terms of clause 21.2 deemed to have been received by the Mortgagor three days after posting.

[5] Clause 27.1 is a somewhat non variation clause and it provides that nothing at variance with the terms hereof shall be binding unless reduced to writing and signed by or on behalf of the Mortgagor and the bank.

[6] The defendants having been served with the application for summary judgment, filed an opposing affidavit unassisted by an attorney or counsel. In a nutshell, the defence raised by the defendants is the defectiveness of the notice in terms of section 129 of the National Credit Agreement Act. The defendants contend that, the notice that was given in terms of section 129 was never received by them and secondly, that the communications and interactions with the plaintiff has all along been by way of emails and therefore, notice in terms of section 129 would have been expected to be by

email.

[7] These averments by the defendants are based on the following backgrounds:

7.1 On the 12 February 2008, the plaintiff sent an e-mail to the first defendant in terms of which one Laura Sharp introduced herself as the Premier Banker in the Premier Banking Section of the plaintiff. In this e-mail, amongst others it is stated as follows:

"FNB Premier Banking offers you efficient, personalised financial services via Premier Banking and I would like to use this opportunity to re-iterate that I am now your 'single point of contact' to the Bank. Should you have any queries require assistance with any of your FNB accounts, please do not hesitate to contact me and your requests will be expedited with the utmost efficiency professionalism ".

7.2 On the 18 February 2009, the first defendant sent an email to the plaintiff in which he stated as follows:

"Please be advised that my employment has been terminated without any plausible reason and due process. As a result I have not been paid my January 2009 salary. The matter is currently at the CCMA and is due for arbitration on 17 March 2009. I still intend meeting my contractual obligation. What is happening was not foreseen.

Over the past few week, I have received telephone calls and sms from staff at FNB Home loans. I have indeed tried to explain my case. I am also prepared to meet anyone anytime at the bank to discuss my case.

Should you require any additional information please call me at [....]".

7.3 On the 19 February 2009, the plaintiff responded through an email as follows:

"We acknowledged receipt of your email. We have referred your account to our dent remedy programme for them to try and assist you".

7.4 Subsequent to the communication of the 19 February 2009, the plaintiff on the 11 March 2009 caused a registered letter of demand to be addressed to the defendants, using the address referred to in the Bond agreement as the domicilium citandi.

7.5 On the 23 April 2009, the plaintiff issued summons against the defendants. The summons were served on the 26 June 2009. The defendants immediately thereafter, entered an appearance to defend.

7.6 In addition to the appearance to defend, the first defendant emailed another letter to the plaintiff in which he protested as follows:

"I am really shocked to receive summons with regard to action being instituted by you wherein you claim, inter alia, payment of R1 649 273.43 as at 7 April 2009 and/or an order declaring our property executed for the same amount

Most of the assertions in your summons are indeed false. Despite several requests on my part to secure a meeting with you (save for one meeting with one of your officials in March 2009) to discuss my financial situation you have failed to discuss any measure with me and to consider any proposal in order to rectify the challenges that I am currently facing. I am really disappointed. However, I intend defending the matter up to the highest level. There was really no need to issue summons at this stage without any discussion and any prior warning.

Please call me at [….]should you want to discuss any further details or meet me.

7.7 On the 8 July 2009, the plaintiff launched the present application for summary judgment.

[8] In paragraphs 10 and 11 of the opposing affidavit, the defendants state as follows: "10

The last official email communication from the Plaintiff was thus on 19 February 2009. No further email communication was received by us from the Plaintiff after that date, except by short messages services (sms). That has been ongoing until 2 June 2009.09.

11.

The last official meeting we had with the Plaintiff represented by RONALD of FNB HOMELOANS (27 Diagonal Street, FNB Towers, 6th Floor, Johannesburg) was on 3 March 2009. The Plaintiff was to set up a further meeting, in compliance with Section 129 of the National Credit Act, Act

NO.34 of 2005, to develop and agree on a plan to bring all the payments under the credit agreements up to date.
That did not happen until we received Summons on 1 June 2009".

[9] Further in paragraphs 14 and 15 of the opposing affidavit, the defendants state as follows:
"14
This Honourable Court will be shown that the Defendants never received the registered letters indicated in the Plaintiff's annexure. There has always been a tacit agreement between the Plaintiff and the Defendants to communicate using mainly emails due to the notorious facts in the Republic of South Africa that both the Post Office and the Department of Home Affairs are malfunctioning. Important documents are always lost by these entities.
15.
We therefore submit that the Plaintiff has not duly complied with Section 129 of the National Credit Act, No. 34 of 2005 as certified by SANNETTE VON MoHLMAN. We further submit that the Plaintiff in the process of circumventing the provisions of the said Act, respectively: Sections; 3(b), 3(d), 3(e), 3(h) and 3(i) as well as Section 65. There is also probability that the Plaintiff, by not considering in a holistic manner the whole credit agreement between the Plaintiff and the Defendants, is avoiding falling foul of Section 80, 83 and 85 respectively, of the said Act".

[10] Counsel for the plaintiff however, took a robust view that the issue whether or not the defendants received the letter of notice in terms of section 129, is irrelevant. For as long the plaintiff in the instant case has complied with clause 21.1 of the bond agreement, the defendants cannot be heard to raise as a defence that they did not receive the notice. This submission was made on the basis of the unreported judgment of Wallis J in the matter of Mavimatha Munien v BMW Financial Services SA (PTY) LTD and Another delivered on 3 April 2009 in Kwazulu-Natal Local Division under case number 16103/08 and the other unreported judgment of Potterill AJ delivered on the 16 September 2008 in this division under case number case

number 32712/08 in the matter Nedbank Limited v Andre Philuppus Lucus. For the reason that will follow, I do not find it necessary to comment on the correctness or otherwise of these judgments to which I was referred. It suffices to say, the facts of the present case make it unnecessary to deal with the conclusions reached in the two matters referred to in this paragraph.

[11] Reliance on these cases in my view, fails to take into account the facts of the present case and the essence of the defence raised.

[12] As I deal with the facts of the present case, I am mindful of the fact that I am dealing here with an application for summary judgment. I will therefore have regard to the fact that the first defendant is not required to satisfy the court that his allegations are believed by him to be true. It will be sufficient if the defendants avers to a defence valid in law, in a manner which is not inherently or seriously unconvincing. (See Breitenbach v Fiat SA (Edms) Bpk 1976(2) SA 226(T), Marsh v Standard Bank of SA Ltd 2000 (4) SA 947 (W) at 954 E-F). Or to put it differently, if his affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial (See Citibank NA South African Branch v Paul No 2003 (4) SA 180(T) at 200J-201A). The defendants are not at this stage required to persuade the court of the correctness of the facts stated by them or, where the facts are disputed that there is a preponderance of probabilities in their favour. The court hereby considers whether the facts alleged by the defendants constitute a good defence in law and whether that defence appears to be bona fide. (See Maharaj v Borclays National Bank Ltd 1976(1) SA 418 (A) at 426).

[13] Now coming back to the facts of the present case, the email communications appear to have been prompted by the 12 February 2008 email. Clear from the quotation referred to earlier in this regard that this was used as a notice to the defendants regarding the introduction of Laura Sharp as a premier banker for the defendants. At the risk of repeating

myself, the defendants were informed "Should you have any queries, requires assistance with any of your FNB accounts, please do not hesitate to contact me and your request will be expedited with the utmost efficiency professionalism". Even most importantly, the defendants were informed by email that Ms Laura Sharp was the only "single point of contact" with the bank for the defendants.

[14] The email of the 12 February 2008, should also be seen in the light of the subsequent emails that flew in the face of the parties, and in particular between the defendants and Ms Sharp. For example, on 30 January 2009, she emailed a letter to the first defendant in which she stated as follows:
"I gave placed a stop payment on your home loan debit order for this months payment only as requested. The stop payment will expire on the 19/2/2009 in order for the r debit order to be processed as normal on the 1/3/2009. Please advise if this is in order. Please advise if you will manually rectify the home loan payment when you do receive your salary payment".

[15] Clear from this email that the defendants must have experienced a problem with the loan payment and an arrangement was made for payment as it appears in the email. This was not communicated as envisaged in clause 21.1 of the bond agreement quoted earlier in this judgment.

[16] Similarly, the defendants as indicated earlier in this judgment, were communicating by emails with the plaintiff via Ms Sharp. The response to the email of the 18 February 2009 addressed to the plaintiff is very important. In this email the plaintiff was specifically informed of the dilemma the defendants were confronted with. The first defendant has just lost his employment. The response thereto was again through an email displaying a willingness on the part of the plaintiff to assist the defendants. The response contained in the email of the 19 February 2009 was quoted earlier.

[17] The 'dent remedy programme' referred to in the email of the 19 February 2009 does not seem to have reverted to the defendants to try and

assist the defendants as promised by Ms Sharp.

[18] On the 3 March 2009, the plaintiff is alleged to have agreed to set up a further meeting in compliance with section 129. This was promised in the meeting held between the defendants and the plaintiff through Ms Sharp on the 3 March 2009.

[19] It therefore looks like at all material times hereto the defendants wished to resolve their financial difficulties in terms of section 129. If all what the defendants are alleging are to be proved correct, it would be a good defence and that can persuade the trial court to firstly find that, the plaintiff waived its right to invoke clause 21.1 of the Bond agreement and the plaintiff could be found to have been under obligation to give notice in the manner in which the plaintiff has been communicating with the defendants since 12 February 2008, that is, by way of email.

[20] Clause 21.2 should also be seen in context. Firstly, whilst a presumption is created that within 3 days of posting, the defendants must have refused the notice, this is been challenged by the defendants, for example, as stated in paragraph 14 of the opposing affidavit. Paragraph 14 of the opposing affidavit was quoted earlier in this judgment. The trial court might find that such a presumption has been sufficiently rebutted by credible evidence.

[21] However, as I said earlier, counsel for the plaintiff took a somewhat robust view that whether or not the defendants received a notice was irrelevant. Very easy and simple to make this submission. However, the facts of the present case do not make it so easy.

[22] Section 129 creates certain rights for a consumer. On the other hand it creates certain obligations on a credit provider. Those rights are to refer a credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombudsman with jurisdiction with the intention 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. These rights could not be asserted to unless a consumer is made aware of them. A credit provider is under obligation to bring it to the attention of a consumer, that unless he or she exercises to assert the rights in terms of section 129, the credit provider would be entitled to commence legal proceedings against consumer for defaulting.

[23] What the defendants are saying is that, had they received notice in terms of section 129, they would have elected to exercise their rights in terms of section 129, like it has been their intention to do so.

[24] It looks like what the defendants are saying, is firstly, that they were made to believe to their prejudice that communication or giving of notices was by emails. Secondly, they were made to believe that in the meeting of the 3 March 2009, the plaintiff will set up a further meeting in compliance with section 129. If all of this is properly alleged and proved in evidence, it could preclude the plaintiff from alleging that it was entitled to give the notice in terms of Clause 21.1.

[25] Consequently an order is hereby made as follows:
25.1 An application for summary judgment is dismissed.
25.2 The defendants are hereby granted leave to defend the action.
25.3 The costs of the application to be costs in the cause.

M F Legodi Judge of the High Court

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The Defendants (in person)

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