<u>FREE STATE HIGH COURT, BLOEMFONTEIN</u>
REPUBLIC OF SOUTH AFRICA

Case No. : 3568/2009

In the matter between:-

<u>FIRSTRAND BANK LIMITED</u> Plaintiff

and

<u>MR SAVVA CHRISTOFI</u> Defendant

<u>CORAM:</u> H.M. MUSI, JP

<u>HEARD ON:</u> 15 OCTOBER 2009

<u>DELIVERED ON:</u> 22 OCTOBER 2009

JUDGMENT

H.M. MUSI, JP

[1] On 16 October 2009 I made an order granting the defendant condonation for the late filing of his affidavit opposing the summary judgment application that the plaintiff had brought against him and further adjourning the matter *sine die* and setting out the steps that the plaintiff had to take before the matter could be resumed as is provided for in section 130(4)(b) of the National Credit Act, 34 of 2005, (the NCA). I

indicated that I would furnish the reasons therefor later. Such reasons now follow.

[2] The plaintiff sued the defendant for payment of the amount of R295 626.34 plus interest, being in respect of a debt owing by the defendant to the plaintiff and which was secured by a mortgage bond registered in favour of the plaintiff over Erf 187 Deneysville, district Heilbron, Free State. The plaintiff also seeks an order declaring Erf 187 Deneysville executable, plus costs of suit.

[3] The defendant filed a notice of intention to defend, whereupon the plaintiff brought an application for summary judgment in terms of rule 32. The defendant filed an affidavit opposing the summary judgment application, but such affidavit was out of time and the defendant had to apply for condonation. The application for condonation was launched pursuant to an order of 27 August 2009.

[4] There are therefore two applications before me, which are both opposed. They were argued together. I am referring to

the parties as plaintiff and defendant, for the sake of convenience.

[5] The requirements for the grant of condonation are well-known and I need not repeat them here. They are captured in the heads of argument filed by Mr. Johnson, for the defendant, at page 3. The defendant's opposing affidavit was filed only two days out of time. In my view, the defendant has given a reasonable explanation for the delay and there was no wilful default on his part. This much was conceded by Mr. Els for the plaintiff. The focus of argument was whether the defendant has disclosed in his condonation application that he has a *bona fide* defence to the plaintiff's claim.

[6] In his founding affidavit to the condonation application, the defendant refers to the defence he raised in his affidavit opposing the summary judgment application. Mr. Els suggested that this was not good enough, that the defendant should have set out the particulars of his defence in the founding affidavit. The answer to this is that the plaintiff was fully aware of the details of such defence and dealt with it in

full in his answering affidavit in an attempt to show that such defence was not *bona fide*. In particular, it annexed a document showing that the R15 000,00 that the defendant claimed he had paid and was not credited to his account, had in fact been credited. I hold that the defendant was entitled to incorporate the details of his defence by reference to his affidavit opposing the summary judgment.

[7] The question is whether the defence thus disclosed is *bona fide*. In this regard it will be noted that in the summary judgment application the plaintiff would have been unable to deal with the merits of the defendant's defence by virtue of the nature of such application where a replying affidavit is normally not allowed. However, in a condonation application the plaintiff is entitled to deal with such defence. See **SOUTH AFRICAN BREWERIES LTD v RYGERPARK PROPS (PTY) LTD AND OTHERS** 1992 (3) SA 829 (WLD) at 833 B – D.

[8] The defendant's defence is based on two grounds. The first ground is that he was not in arrears with his instalments at the time when the plaintiff commenced legal proceedings, in

that he paid an amount of R15 000,00 on 15 January 2009, which the plaintiff has not credited to his account. In my view, the plaintiff has shown that this amount was in fact credited and taken into account. This leg of defendant's defence falls off. The second ground was raised by Mr. Johnson during the course of oral argument when he contended that the plaintiff has failed to place the defendant *in mora* as provided for in the relevant credit agreement and that this rendered institution of legal proceedings premature. Mr. Els countered this by pointing out that such defence was not part of the defendant's papers. In my view, this puts to rest such defence. At any rate, a notice in terms of section 129(1) of the NCA, if validly delivered, would serve the same purpose.

[9] The third ground is that the plaintiff has failed to comply with the requirements of section 129(1) of the NCA. Quite clearly if no proper notice in terms of this section has been delivered to a consumer, that would be a complete bar to the institution of legal proceedings to enforce the terms of the credit agreement. See **ABSA BANK LTD v PROCHASKA t/a BIANCA CARA INTERIORS** 2009 (2) SA 512 (D&CLD) at

520 par. [35]; **MARIMUTHU MUNIEN v BMW FINANCIAL SERVICES (SA) (PTY) LIMITED AND ANOTHER**, Case no. 16103/2008, an unreported judgment of the KwaZulu-Natal High Court at p. 2 par. [2]. The defendant contends that he did not receive the notice, which was posted to an address other than his chosen *domicilium*.

[10] It will be noted that in the credit agreement, the defendant chose Erf no. 187, Deneysville, Heilbron, Free State, as his *domicilium citandi et executandi* whereas the notice in terms of section 129(1) was dispatched by registered post to No. 11 Kloof Road, Oriel, which is apparently in Johannesburg. Where a consumer has chosen a *domicilium* in the relevant credit agreement, the notice in terms of section 129(1) must be sent to such address. See **ABSA BANK LTD v PROCHASKA**, *supra*, at 524 I - 525 B. If the notice is sent to a different address, there would not be compliance with the requirements of the section unless it is proved that the consumer has actually received the notice. *In casu* the notice was sent to an address that was not chosen by the defendant and he alleges that he did not receive it. I conclude that the provisions of section 129(1) have not been

complied with. On that basis alone the institution of legal proceedings against the defendant was premature and this constitutes a *bona fide* defence.

[11] I therefore granted the application for condonation of the defendant's late filing of his affidavit opposing the summary judgment and naturally the costs had to follow the cause.

[12] Counsel were both agreed that should I find that there has not been compliance with section 129(1) I could make an order in terms of section 130(4)(b) of the NCA. That section provides that where the court finds that there has not been compliance with the requirements of section 129, it must adjourn the matter and make an appropriate order setting out the steps that the credit provider must complete before the matter can be resumed. In other words, the proceedings must be suspended pending completion of the steps that the credit provider has been ordered to complete.

H.M. MUSI, JP

0n behalf of plaintiff:	Adv. J. Els Instructed by: Rossouws Attorneys BLOEMFONTEIN
On behalf of defendant:	Adv. J.M.C. Johnson Instructed by: Harry Goss Attorneys c/o Claude Reid Inc. BLOEMFONTEIN

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