IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 4561/2008

In the case between:-

NEDBANK LIMITED Applicant/Plaintiff

and

LORRAINE SUTHERLAND Respondent/Defendant

HEARD ON: 11 SEPTEMBER 2008

JUDGMENT BY: MABESELE, AJ

DELIVERED ON: 18 SEPTEMBER 2008

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[1] This is an opposed application for summary judgement in the amount of R2 547 646,08, together with interest at the rate of 14.40% per annum, from the 1st of June 2008 until date of final payment.

[2] The plaintiff seeks an order also, declaring the immovable property, as described in prayer 3(a) and (b) in the summary judgement application, to be executable.

[3] The defendant raised two issues *in limine*. First, that proper service of the summons was not effected in terms of the Rules. Second, the action is premature and contrary to the provisions of the National Credit Act, (Act 34 of 2005), ("the Act"). Mr. Pohl, who appeared on behalf of the respondent, abandoned the first point.

[4] Section 129 of the Act, which the defendant relies on, reads as follows:

> **"129 Required procedures before debt enforcement**
>
> (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) ....., may not commence any legal proceedings to enforce the agreement before-
>
> (i) first providing notice to the consumer, ...; and

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

[5] The plaintiff avers that it complied with the provisions of the Act.

[6] In its particulars of claim, the plaintiff avers, in paragraph 10, as follows:

> "Eiser het behoorlik voldoen aan al die relevante bepalinge van die Nasionale Kredietwet, Wet 34 van 2005."

[7] Mr. Snellenburg, who appeared on behalf of the plaintiff, referred to a certificate annexed to the papers as proof of delivery of a notice to the defendant.

[8] The certificate contains the following:

> "I, Nonhlanhla Siluma (Foreclosure Manager) certify that:
>
> 1. I am employed by the Nedbank Limited (the Bank). As part of my duties I attended to the affairs of L. Sutherland, (the client) account number 8944201400101, in terms of

a credit agreement Homeloan (the agreement) with the Bank.

2. The client has been in default for 20 (TWENTY) business days or more in regards to his obligations under the agreement.

3. A notice in terms of section 129(1) of the National Credit Act No. 34 of 2005 (the Act) was delivered to the client on 03/05/2008. At least 10 (TEN) business days have elapsed since the Bank delivered the notice to the client (the notice).

4. The client has not responded to the notice/The client has responded to the notice by rejecting the Bank's proposals.

5. To the best of my knowledge there is no matter arising under the agreement that is pending before the National Credit Tribunal (the Tribunal) which could result in an order affecting the issues to be determined by the court.

6. The Bank has not approached the court in this matter:

   6.1 during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or a bank ombudsman;

   6.2 despite the client having:

      6.2.1 surrendered any property to the Bank in terms of section 127 of the Act and before the property has been sold;

6.2.2 agreed to a proposal made in terms of the section 129 notice and acted in good faith in fulfilment of the agreement;

6.2.3 complied with an agreed plan as contemplated in section 129(1)(a); or

6.2.4 brought the payments under the agreement up to date as contemplated in section 129(1)(a) of the Act.

7. No dispute exist in respect of entries made as contemplated in section 111 of the Act, alternatively if a dispute existed the Bank complied with section 111(2)(b)(i). The Bank explained/reversed the entry. Such dispute is not under alternative resolution procedures or before the Tribunal.

8. I respectfully submit that the Bank is entitled to approach the court for an order to enforce the agreement."

[9] The defendant denies that a notice was delivered to her. She explains that there is no postal service to the unit in the sectional title complex and that no persons would have been allowed entrance to her unit.

[10] Mr. Pohl argued, *inter alia*, that the plaintiff did not state the manner in which it delivered the required notice. He

argued that failure by the plaintiff to state how a notice was delivered, shows clearly that same was not delivered.

[11] In terms of section 65 of the Act, a notice may be delivered either in person or by fax, or email, among others.

[12] The defendant's explanation that a notice could not have been delivered to her due to the difficulties which are being experienced in entering the entrance to her unit, has no merit. The Act does not require that the 129(1) notice must come to the notice of the defendant or that the defendant must actually receive such notice. What is required is that notice must be given to the defendant. Be that as it may, the plaintiff must still comply with the provisions of the Act for summary judgement to be granted.

[13] The argument raised by Mr. Pohl insofar as it relates to the plaintiff's failure to comply with the provisions of section 65 of the Act, has no merit. The Act clearly requires compliance with the provisions of section 129(1) only, before a debt is enforced. In any case, the defendant did not raise non-

compliance with the provisions of section 65 as a *bona fide* defence.

[14] Section 130 of the Act prescribes the circumstances under which a credit provider may approach the court for an order to enforce a credit agreement.

[15] Sub-section (1) of section 130 provides as follows:

> "(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) .....
>
> (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;"

[16] In paragraph 4 of the aforementioned certificate, Ms Nonhlanhla Siluma, who is employed as Foreclosure Manager by the plaintiff, said:

> "The client has not responded to the notice/The client has responded to the notice by rejecting the Bank's proposals."

[17] Paragraph 4 of the certificate is clearly ambiguous. It states that a client has not responded to a notice or has responded by rejecting the Bank's proposals.

[18] Mr. Snellenburg conceded that Ms Siluma did not make herself clear.

[19] Mr. Pohl pointed out that the court may not assist the plaintiff by breathing life into a poorly presented case. He submitted that the court should consider itself bound by the terms in which the plaintiff has elected to formulate its claim.

[20] In the matter of **GULF STEEL (PTY) LTD v RACK-RITE BOP (PTY) LTD AND ANOTHER** 1998 (1) SA 679 (O) at 683H/I – 684B, Gihwala AJ said:

> "In view of the nature of the remedy the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and the defendants have failed to set up a *bona fide* defence as required in terms of the Rules of this Court. There are accordingly two basic requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the Court to be satisfied that the plaintiff's claim has been clearly established and its pleadings are technically in order. Even if a defendant fails to put up any defence or puts up a defence which does not meet the standard required of a defendant to resist summary judgment, summary judgment should nevertheless be refused if the plaintiff's claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with the Rules of Court."

(See also **NORTHERN CAPE SCRAP & METALS (EDMS) BPK v UPINGTON RADIATORS & MOTOR GRAVEYARD (EDMS) BPK** 1974 (3) SA 788 (NC).)

[21] In paragraph 10 of the particulars of claim, the plaintiff avers that it complied with all the relevant requirements of the Act. The plaintiff then referred to a certificate annexed to the papers in support of its averment. However, when regard is had to paragraph 4 of the certificate, it is clear that the statement in that paragraph is ambiguous. Therefore, it cannot be said with certainty that the defendant responded to a notice or not.

[22] Mr. Snellenburg's attempt to clarify this ambiguity did not help the plaintiff in curing a defect in the certificate.

[23] In the matter of **MOWSCHENSON AND MOWSCHENSON v MERCANTILE ACCEPTANCE CORPORATION OF SA LTD** 1959 (3) SA 362 (W), Marais J, said at 366E – F that:

> "The proper approach appears to me to be the one which keeps the important fact in view that the remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial. It closes the doors of the Court to the defendant. (See the case of *Symon & Co., supra*). That can only be done if there is no doubt but that the plaintiff has an unanswerable case. If it is reasonably possible

> that the plaintiff's application is defective or that the defendant has a good defence, the issue must, in my view, be decided in favour of the defendant.”

[24] As I have stated earlier, paragraph 4 of the certificate is ambiguous and thus rendering the plaintiff’s application defective. In my view, the plaintiff commenced legal proceedings to enforce the agreement before properly meeting the requirements set out in section 130 of the Act. As a result, the plaintiff did not comply with the provisions of section 129(1)(b) of the Act. Therefore, summary judgement should be refused.

[25] Mr. Snellenburg asked that costs should stand over. Mr. Pohl left the issue of costs in the hands of the court.

[26] I have considered carefully the argument raised by Mr. Snellenburg regarding costs and I deem it appropriate that costs be determined at the trial.

[27] In the premises, the following order is made:

(a) Summary judgement is refused.

(b) Leave is granted to the defendant to defend the action.

(c) The costs shall be determined at the trial.

M.M. MABESELE, AJ

On behalf of plaintiff:	Adv. N. Snellenburg Instructed by: Hill, McHardy & Herbst Inc. BLOEMFONTEIN
On behalf of defendant:	Adv. L. Pohl Instructed by: Webbers BLOEMFONTEIN

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