

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO: EL1863/2023

In the matter between

**STANDARD BANK OF SOUTH
AFRICA LIMITED**

Plaintiff

and

BATANDWA TUNGATA

Defendant

JUDGMENT IN RESPECT OF

SUMMARY JUDGMENT APPLICATION

HARTLE J

[1] At the crux of a summary judgment application is a dispute between the parties concerning whether the plaintiff properly complied with the provisions of section 129 read with section 130 of the National Credit Act No. 34 of 2005 (“NCA”)¹ in respect of the default notice relied upon by it as the jurisdictional basis to have approached this court to enforce the defendant’s credit agreement with it.

[2] The defendant asserts in opposition to the plaintiff’s application for summary judgment that after receipt of the default notice relied upon by the plaintiff, he

¹ The objective of a notice is to advise the consumer of his default under a credit agreement and to give him/her an opportunity to consider what steps to take thereanent. It provides protection to credit consumers by requiring that a notice of default be given BEFORE enforcing the credit agreement in a court.

entered into a payment plan or agreement in terms of which he agreed to settle the outstanding arrears referenced in the section 129 notice within a period of six months, effective from 6 November 2023, “*until the arrears would be settled*” (“*the settlement plan*”).

[3] The settlement plan was self-evidently concluded after the dispatch of the default notice to him by email on 6 October 2023. There is no question that he received the notice or indeed that he responded to it in a manner which section 129 envisages by its ambit, read together with section 130 of the NCA.

[4] In the defendant’s submission it was an implied term of the settlement plan that the further exercise of his statutory rights emanating from section 129 would be “*suspended*” until either breach of such settlement plan or performance in terms thereof.

[5] The settlement plan notwithstanding, the plaintiff purported to cancel the instalment sale agreement on 6 November 2023 and instituted summons against the defendant, basing its entitlement to enforce the original credit agreement on the allegation that the 6 October 2023 default notice sent to him constituted compliance with the provisions of section 129 and that it had further complied with the provisions of section 130 of the NCA thereanent.

[6] In its particulars of claim the plaintiff states in clear terms that the default notice dated 6 October 2023 is the notice that it relies upon to contend that it has complied with the requisite provisions of section 129 (1), as read with section 130, of the NCA.

[7] It also alleges in paragraph 25 of its particulars of claim, co-incidentally in line with the defendant’s opposition - except that it claims he did not furnish its attorneys with his *written payment arrangement*, that:

“Prior to proceeding with legal action, the Plaintiff’s attorneys informed the Defendant of the arrears on 06 OCTOBER 2023 and afforded Defendant 6 months to settle the arrears and also requested Defendant to furnish the

Plaintiff's attorneys with his written payment arrangements which Defendant has failed to do."

[8] What the plaintiff also asserts in the particulars of claim (at paragraph 24.4), in contradiction to the averment in paragraph 25, is that the defendant has "*not responded to the Default Notice by contacting the Plaintiff's attorneys*".

[9] In the founding affidavit filed in support of the summary judgment application it appears that the plaintiff's attorneys belatedly, in an email dated 1 February 2024, confirmed the settlement plan in essence, but requested from the defendant's attorneys his "*written payment proposal in settlement of the arrears within five business days*", alternatively directed him to file his plea. Evidently the "*shameless and bogus Plea*" (sic), in which the defendant asserts that the plaintiff failed to properly comply with the provisions of section 129 of the NCA, was the impetus for the present application.

[10] Despite the fact that the defendant has self-evidently not complied with his settlement plan, the question still arises whether the prior notice given under the provisions of section 129 (1) is adequate for purposes of the present summary judgment application.

[11] In *Dwenga v First National Bank & Others*,² although in a different context where the arrears foreshadowed by the default notice had in fact been brought up to date by the time of the issue of the summons (here the defendant suggests that a lump sum was to have been paid and that that payment is yet to materialize), I ruled that the notice in *Dwenga* no longer had any efficacy and that a fresh notice had to have been issued in order for the plaintiff to have complied with the provisions of section 129 of the NCA.³ I illustrated further, with reference to *Starita (aka Van Jaarsveld) v ABSA Bank Ltd & another*,⁴ that there is no time period specified in the

² EL 298/11, ECD 29811) [2011] ZAECELLC 13 (20 November 2011).

³ At page 33.

⁴ 2010 (3) SA 443 (GSJ) at paragraph [10].

NCA for the continued validity of a section 129 notice, nor can one be implied. Its ongoing validity depends on the facts of each case.

[12] In this instance the defendant contends that the default notice "*lapsed*" and that there ought to have been a further notice in terms of section 129 issued to him once there was a breach of the agreed upon plan.

[13] Whilst I am less inclined to accept the defendant's argument that the settlement plan following upon receipt of the notice novated the original credit agreement, there is indeed merit in the submission made on his behalf that the peculiar situation that pertained here (reinforced by the vague and confusing manner in which the plaintiff has alleged compliance with the requisite provision of section 129, read with section 130, of the NCA), required a re-issue of a default notice, not in respect of his evident breach of the settlement plan, but adverting to the defendant's being in default under the credit agreement and inviting him once again to exercise the rights that avail him under section 129.

[14] I take the defendant's submission that the plaintiff's allegation in the particulars of claim that at the time of the issue of the summons he had not responded to the default notice by contacting the plaintiff's attorneys was simply not correct. Instead he had explored a non-litigious way to purge his default, even if he failed to honour that plan.

[15] In the result I am inclined to agree with Mr. Meyers' submission on his behalf that the issue of the summons was premature in this instance, in relation to the section 129 notice relied upon, and that there was not proper compliance with the provisions of section 130 of the NCA thereanent, which precludes legal enforcement of a debt before the provisions of section 130 can be said to have been met.

[16] In this instance section 130 (4) of the NCA provides the appropriate remedy.

[17] In the result, I issue the following order:

1. The application for summary judgment is dismissed.

2. The defendant is granted leave to defend the action.
3. The action proceedings in this matter are stayed until ten (10) business days after the plaintiff, in due compliance with the provisions of section 129 and 130 of the National Credit Act, No. 34 of 2005, has served a notice as contemplated in section 129 (1)(a) of the NCA.
4. The costs of the application are in the cause.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 16 May 2024
DATE OF JUDGMENT : 17 May 2024

Appearances:

For the plaintiff: Ms. S Mashiya instructed by Squires Inc., East London (ref. Mr. Kerr).

For the defendant: Mr. E Meyers instructed by Makhanya Attorneys, East London (ref. Mr. Makhanya).