

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: A103/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED
.21 January 2025

In the matter between:

FIRSTRAND BANK LIMITED

APPLICANT

And

LLEWELLYN GEORGE REINEKE

1ST RESPONENT

ILANA REINEKE

2nd RESPONDENT

JUDGMENT

MOTHA J

[1] Serving before us is an appeal whose grounds have been succinctly distilled and crystalized into three distinct complaints, namely: first, that the court *a quo* erred in finding that the appellant' application was defective; second, the court *a quo* erred in finding that the appellant had not complied with the National Credit Act, 34 of 2005 (NCA), and finally, costs.

The parties

- [2] The appellant is Firststrand Bank Limited, a registered commercial bank incorporated in terms of the banking and company laws of the Republic of South Africa and a registered credit provider in terms of section 40 of the national Credit Act 34 of 2005 (NCA).
- [3] The first and second respondents are Llewellyn George Reinecke, an adult male, and Ilana Reinecke, an adult female.

A Summation of the facts

- [4] The appellant and the respondents concluded a written single facility regular amortizing agreement under account number 6[...].
- [5] As security for the indebtedness arising from the agreement, the first respondent registered a first covering mortgage bond in favor of the appellant over the immovable property known as:
- (i) Section No. 33 as shown and more fully described on Sectional Plan No. SS 18/1997, in the scheme known as Castle Gardens in respect of the land and building or buildings situated at E[...] Ext [...] Township Local Authority: City of Tshwane Metropolitan Municipality, measuring 55 (fifty-five) square metres; and
 - (ii) An undivided share in the common property in the Scheme apportioned to the said section in accordance with the participation quota as endorsed on the said Sectional Plan held by deed of transfer number ST92321/ 2006 subject to such conditions as set out in the aforesaid deed for an amount of R800,000 (Eight Hundred Thousand Rand).
- [6] As security for the indebtedness arising from the agreement the first and second respondents also registered a first and second continuing covering mortgage bond in favour of the appellant over the immovable property known as
- A unit consisting of-

- (i) Section No. 1 as shown in more fully described on Sectional Plan NO. SS 196/1981, in the Scheme known as Atrium in respect of the land and building or buildings situated at Erf 4[...] C[...] P[...] Township Local Authority City of Tshwane Metropolitan Municipality measuring 172 (One Hundred and Seventy-Two) square metres; and
- (ii) An undivided share in the common property in the scheme apportioned to the third section in accordance with the participation quota as endorsed on the 3rd sectional plan held by deed of transfer number St. 623102021 subject to such conditions as set out in the aforesaid deed for the amount of R920,000 and R1,146,000.

[7] Following the respondents' default in complying with the terms of the parties' agreement, the appellant launched this application to claim the payment of the amount due and further relief.

Issues

[8] As already hinted in the prologue there are three issues to this appeal. The first objection, that the appellant's application is defective, rotates around two axes, namely: the alleged defective Notice of Motion (NOM) and the role of a Certificate of Balance (COB).

[9] With regards to the NOM, the gist of the complaint is that the appellant used the incorrect form of Notice of Motion by using the usual, long form Notice of Motion prescribed by Rule 6, namely: Form 2 (a) instead of Form 2A, as prescribed by Rule 46A. Ignoring Rule 46A, the argument goes, the appellant did not state the date on which the application was to be heard nor informed the respondents that if they intended to oppose the application or make submissions to the court, they had to do so on affidavit within 10 days of service of the application and appear in court on the date on which the application is to be heard. Thus, the applicant contravened Rule 6(5)(b)(iii), which reads:

“set forth a day, not less than 10 days after service thereof on the respondent, on or before before which such respondent is required to notify the applicant,

in writing, whether respondent intends to oppose such application, and shall further state that if no such notification is given the application would be set down for hearing on a stated day, not being less than 10 days after service on the respondent of the said notice.”

[10] The application was subsequently opposed, and the unopposed date fell by the way-side. A notice of set down was served on the respondents. Since both parties were before court, having filed all their affidavits, and the matter was fully ventilated, we are of the opinion that this issue need not detain us, otherwise, that would be tantamount to elevating form over substance. Whilst mindful of the importance of Rule 27(3), especially the need to bring a condonation application, in view of the circumstances of this matter and on this point alone, we concluded that it was a misdirection to dismiss the matter. We hasten to add that, lest we get misunderstood, there are occasions when this issue would be decisive, especially in unopposed eviction matters, as aptly captured in the matters of *Meme-Akpta v Unlawful Occupiers of 44 Nugget Street* (handed down on 26 June 2022) and *Mashaba v Judicial Commission of Inquiry into Allegations of the State Capture, Corruption and Fraud in The Public Sector, including Organs of State and Others*.¹ This, however, is not such a case. We are of the view that the court *a quo* misdirected itself in this regard.

[11] As far as the COB is concerned, the respondents submitted that a COB was not evidence nor conclusive proof of indebtedness, and referred the court to the matter of *Thrupp Investments Holdings (Pty) Ltd v Goldrick*² where the court held:

“As regards the effect of the absence of a certificate of balance-clause in the suretyship counsel for the appellant submitted that a proper interpretation of the certificate of indebtedness-clause contained in the lease agreement leads one to conclude that the production of such a certificate in fact established the liability of the lessee for the amount certified, which in turn was sufficient to

¹ (1426/21) ZAGPPHC 586 (16 August 2022)

² (A5027/05) ZAGPPHC23;2008(2)SA 253(W) March 2007

constitute prima facie proof of the liability of the sureties. The argument in my view is flawed in its premise. A certificate-clause, it has been held in a number of cases, is designed to facilitate proof of the amount of liability (See *Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others* 1989 (3) SA 750 (T); *Bank of Lisbon International Ltd v Venter en 'n Ander* 1990 (4) SA 463 (A) at 478 E). The certificate therefore is merely an evidentiary tool provided for in an agreement by one contracting party to the other to facilitate proof of the amount of indebtedness. It does not in itself establish liability.”

[12] On the other hand, the appellant submitted that a COB is conclusive proof of indebtedness and relied on the matter of *Berlesell (Edms) Bpk v Lahaer Development Corporation BK en Andere*³ which held that a COB is conclusive proof of the amount of indebtedness and that the defendant had to rebut that evidence.

[13] Essentially, the parties’ point of divergence is that the appellant is of the view that a COB is conclusive proof of indebtedness, and it is on the respondent to rebut that evidence. On the contrary, the respondent submitted that COB is not conclusive but simply prima facie proof of indebtedness and respondents bear no onus of proving the incorrectness of the amount claimed by proving what the correct amount is. Having raised their common law right to dispute the claim using *exception errore calculi*, which they said the Minister precluded, amongst others, its waiver from in credit agreements, the respondent submitted that the onus was on the appellant to prove the correctness of the claimed amount.

[14] Counsel for the appellant submitted that the court reversed the onus onto the bank to prove the amount set out in the COB. The court corrected him that it was a rebuttal not an onus. This misnomer seems to have permeated the papers of the appellant and became prominent during the hearing. Hence, the court *a quo* wrote:

³ 1998(3)SA220(CPD)

“According to the respondents, they denied that they were in arrears of the amount claimed as they did not know whether the amount is claimed as arrears is correct because they did not receive statements of account for a long period, which they mentioned specifically in their Answering papers. And due to them (Respondents) not admitting the amount, these allegations cannot be deemed to have been admitted. According to the Respondents, the Applicant attempted to counter their latter argument by arguing, in the Replying papers, that its COB is conclusive (absolute) proof of their indebtedness, and that the onus is on them (Respondents) to prove that the claim amounts are incorrect”

[15] We agree that this conclusion is misguided and therefore not sustainable. Counsel for the appellant double down on the submission that it was on the respondents to provide statements and proof of payment. He submitted that there was no evidence before the court placing COB in dispute or that they did not receive statements. This submission is incorrect, the respondents pertinently raised the issue of statement at paragraph 35 of the answering affidavit. They submitted that: “We have not received a statement from Applicant since 2019 and are not in a position to admit or deny that the amount being claimed is correct.” Furthermore, at paragraph 50 of the answering affidavit, they submitted that payment was made in May 2020, and the recent payment was on 19 July 2022.

[16] To us, it appears that the amount claimed was put into question and cannot find fault with the court *a quo*’s conclusion. To simply say statements were sent monthly is not enough, and paragraph 21 of the replying affidavit is most worrying. In answer to the request for statements, the respondent is told that: “it is not enough to ask for statements but rather there must be a basis alleged as to why such statements are necessary.” Finally, counsel for the appellant’s submission that there was no allegation that they did not receive statements is totally oblivious of what is stated in the answering affidavit. At paragraph 33 of the answering affidavit, the respondents stated in no uncertain terms that they do not accept the amount claimed and asked for the total breakdown of the arrears claimed.

[17] The second complaint is about the lack of compliance with the NCA. The appellant dispatched a s129(1)(a) notice dated 06 September 2021. This letter stated that the respondent's account was on the said date in excess in the amount of R 2 145 475, 28 and the appellant demanded payment of the full outstanding amount in terms of the agreement in the amount of R 2 151 664 - 94. Twice in the founding affidavit and again in the replying affidavit, the appellant stated that at 31 March 2021 the arrears in respect of the agreement were R267 583.54. The respondents argued that the s 129(1)(a) NCA notice reflected an incorrect arrears amount, thus contravening the provisions of the NCA. To add insult to injury, the appellant's letter of demand, dated 5 October 2020, recorded that the arrears on the loan facility was R70 412.48. It was impossible that eleven months later, the respondents owed R 2 145 475-28, which is a far cry from the R70 412.48. Even if we are wrong on the COB, the failure to comply with the NCA is so egregious that on this point alone the matter should have been dismissed.

[18] Perhaps, it is the correct time to examine this notice. The NCA s 129 (1) reads:

“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) 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(10), as the case may be; and
 - (ii) meeting any further requirements set out in section 130.”

[19] Unpacking this section, the court in the matter of *Amardien and Others v Registrar of Deeds and Others*⁴ posed the following question:

“Does section 129(1) require a credit provider to state the amount that is owed?”

Simply put, what are the ingredients of a section 129(1) notice? Is it mandatory to include the amount of arrears in the notice?”⁵

[20] In reply to its rhetorical question, the court said:

“Section 129(1) of the NCA refers to a situation where the consumer is “in default”. Section 129(1)(a) and (b) explain the obligations that the creditors must fulfil before moving to enforce their debt. The text explicitly refers to “the default” that must be drawn to the notice of the consumer by the creditor – and not just the fact that the consumer is “in default”. Read in conjunction with section 130(4) which provides an opportunity to the debtor to remedy the default, section 129(1) should be interpreted to include the amount so that the debtor knows how much to pay to avoid cancellation. The same applies to the notice under section 19 of the ALA. In addition, in order to “provid[e] consumers with adequate disclosure of standardised information in order to make informed choices” they must be informed of the extent of their arrears in the section 129 NCA notice so as to decide how to move forward regarding the management of their debt.

It is thus a necessary requirement to specify the amount and nature of the default in the section 129 NCA notice. As section 129(1) specifically requires the credit provider to “draw the default to the attention of the consumer” it is clear that this will only be met if the amount of arrears is specified in the notice, since the consumer’s attention will not have been drawn to the amount of the default otherwise. If the basis of the default is that the debtor has fallen into arrears, it must follow axiomatically that “drawing the default to the attention of the consumer” entails that the consumer should be advised of the

⁴ 2019 (2) BCLR 193 (CC); 2019 (3) SA 341 (CC) (28 November 2018)

⁵ Supra para 50 to 51.

amount in arrears. It is only when this has been done that it can be said that notice of the “default” has been drawn to the attention of the consumer.

If the consumer is not advised of the arrear amount she will be left none the wiser. The referral by the consumer of the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction presupposes that the consumer has been apprised of the facts to enable her to, amongst others, develop and agree on a plan to bring the payments under the agreement up to date. One may rhetorically ask: how is the consumer to agree on a plan to bring payments under the agreement up to date if she is not notified of the amount in arrears?”⁶

[21] Counsel for the appellant offered no further submissions when the court pointed out to him that the appellant was in court because of the default on monthly payments, and s 129 NCA notice of necessity needed to draw the attention of the respondents to those arrears. He submitted that the court should consider utilizing section 130(4)(b) of the NCA, as envisaged in the matter of *Standard Bank of SA v Rockhill*.

[22] Considering the binding authorities, such as *Amardien, First National Bank Ltd v Lenyanyabedi*⁷ and *West Bank (a division of Firstrand Bank Ltd v*

⁶ Supra para 60 to 63

⁷ [C57115/2009][2022] ZAGPPHC 324 (18 May 2022) Para 21

“careful reading of the papers herein revealed that the applicant might have misconstrued what defense was raised for in respect of the non-compliance of section 129(1)(a). All what the respondent raised is that the notice in terms of section 129(1)(a) was defective as it claimed the full outstanding amount without drawing the default to the attention of the respondents in writing. It is apparent that section 129(1)(a) send to the respondent is defective thus contravening the provisions of the national Credit Act as it plays an important role in the applicants cause of action.

[22] in *Standard Bank of SA v Rockhill* 2010 (5) SA 2528 paragraph 17 the court stated that non-compliance with section 129(1)(a) is an impediment to commencing any legal proceedings to enforce a credit agreement, it does not constitute a defence in terms of rule 32 (3) (b). One section 129(1)(a) established at a trial stage, the proceedings had to be adjourned and the plaintiff be ordered to complete the steps in compliance with section 129(1)(a).

[24] According to *Standard Bank of SA v Rockhill* Section 130 (4)(b) of the NCA envisages a resumption of the proceedings after the court has ordered that the plaintiff be given an opportunity to comply and the data to remedy the default and as such non-compliance with section 129 (1) (a) cannot be deemed to constitute defence in summary judgment application.

[24] Despite the court's decision aforementioned that non-compliance with section 129 (1)(a) does not constitute a defence in summary judgment application the court in *Blue Chip 2 (Pty)Ltd v Cedrick Dean Ryneveldt and Others* 499/2015 SCA paragraph three set the following: “in particular where a statute provided that before an action can be commenced or a claim enforced against a debtor, a notice be given then the giving of that notice is essential to the successful pursuit of the claim and proving that it was given as part of the cause of action.”

*Ralushe*⁸, we are of the view that the court *a quo* correctly found that s 129 NCA notice was not complied with, which must reflect the correct arrears amount, together with a breakdown of that amount. Additionally, s 130(1)(b) of the NCA was also violated. This section reads:

“130. (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 129(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) responded to the notice by rejecting the credit provider’s proposals; and...”

[23] Looking at this section, Jafta J in *Nkata v FNB*⁹ stated:

“Furthermore, this section [129] makes reference to section 130 which governs the institution of litigation for enforcing credit agreements. Section 29 (1) lays down the conditions which must be met before the credit provider may institute litigation. In peremptory terms, the section declares the legal proceedings to enforce the agreement may not commence before-

(a) first providing the notice to the consumer; and

(b) meeting further requirements set out in section 130

[175] in that event, the court could not have granted default judgment because it would not have been competent for it to do so, in light of the peremptory language of section 130 (3). That section proclaims that a court may

⁸ (1149/2018) [2021] ZAECHGHC 78, 2022 (2) SA 626 (ECG)(31 August 2021) At para 47 “With great respect, for the reasons already set out, non-compliance with section 129 is not cured by attaching proof of purported compliance with section 129 to a summons, an application for default judgment, or for summary judgment. With respect, the flaws in that reasoning are the following:

[47.1] I have already addressed the limit to statutory interpretation, in that the judiciary should not step into the legislative terrain. I have to add, with respect, that decisions of the Constitutional Court and the SCA must be applied by the lower courts. It is not a matter of substance over form to find that non-compliance with section 129 cannot simply be overlooked and that the court does not have such discretion.”

⁹ 2016 (4) SA 257 (C C)

determine a matter to which the act applies only if the court is satisfied that there was compliance with section 129. Thus, the exercise of the court's competence of jurisdiction is deferred until compliance is achieved.”¹⁰

[24] It is trite that the court of appeal cannot disturb the decision of the court of first instance in respect of costs unless there is a misdirection. We cannot find a misdirection in the decision of the court a quo. Regarding the issue of costs, the court of appeal would be well advised to take heed of the caution in latin: *fistina lente*. The court a quo exercised its true discretion when it decided on the issue of costs. In the result, the appeal stands to be dismissed with costs

Order

The appeal is dismissed with costs on scale C

M. P. MOTHA
JUDGE OF THE HIGH COURT, PRETORIA

I concur

N. JANSE VAN NIEWENHUIZEN
JUDGE OF THE HIGH COURT, PRETORIA

I concur
R. FRANCIS-SUBBIAH
JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 07 October 2024

Date of judgement: 21 January 2025

¹⁰ Supra para 172

APPEARANCES:

For the Applicant Adv. B. D. Stevens instructed by Delberg Attorneys

For the respondents In person