

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable
Case no: **4330/2024**

In the matter between:

NEDBANK LIMITED

Applicant

[Registration number: **1951/000009/06**]

and

WIID GROUP OF COMPANIES (PTY) LTD

First Respondent

[Registration number: **2015/169237/07**]

SANDRA WIID

Second Respondent

[Identity number: **6[...]**]

GEORGE INUS WIID

Third Respondent

[Identity number: **0[...]**]

MARTINUS JACOBUS WIID

Fourth Respondent

[Identity number: **9[...]**]

Coram: De Kock AJ

Heard: 13 March 2025

Delivered: 18 March 2025. This judgment was handed down in court electronically by circulation to the parties' representatives by email and released to SAFLII.

Summary: Non-compliance with s 129(1)(a) of the National Credit Act does not constitute a *bona fide* defence for summary judgment purposes – It is not necessary to attach a copy of the registration certificate with the National Credit Regulator to the pleadings.

ORDER

Summary judgment is granted against the first to third defendants jointly and severally, the one to pay, the other to be absolved, in the following terms:

1. payment of the amount of R2 012 975.04;
2. payment of interest on the aforesaid amount at the rate of 22.25% per annum compounded daily and capitalised monthly from 14 June 2024 to date of final payment, both days inclusive;
3. payment of costs of the suit on an attorney and client scale including costs of counsel on scale B.

JUDGMENT

De Kock AJ

Introduction:

[1] The plaintiff seeks summary judgment against the first to third defendants (the defendants) jointly and severally, the one paying the other to be absolved for payment of R2 012 975.04 plus interest thereon at the rate of 22.25% per annum compounded daily and capitalised monthly from 14 June 2024 to date of payment both days inclusive and costs as between attorney and client.

Averments contained in the pleadings and affidavits.

[2] The plaintiff's claim is based on the following averments as contained in the particulars of claim:

- a) On 19 May 2022 the plaintiff and XPharm (Pty) Ltd concluded an agreement in terms of which the plaintiff made an overdraft facility of R2 000 000.00 available to XPharm (Pty) Ltd;
- b) XPharm (Pty) Ltd breached the terms and conditions of the agreement by failing to pay the amount due to the plaintiff under the overdraft facility despite demand by the plaintiff;

- c) XPharm (Pty) Ltd is indebted to the plaintiff in the amount of R2 012 975.14 together with interest thereon. A copy of the plaintiff's certificate of balance confirming the aforesaid indebtedness is annexed to the particulars of claim.
- d) The first, second and third defendants signed suretyships in favour of the plaintiff in terms of which the said defendants bound themselves, jointly and severally, as surety and co-principal debtors *in solidum* for the repayment on demand of all amounts which XPharm (Pty) Ltd may owe to the plaintiff;
- e) As a result of the indebtedness of XPharm (Pty) Ltd and in terms of the suretyships, the first, second and third defendants are indebted to the plaintiff in the amount claimed.
- f) The plaintiff has complied with the provisions of s 129 read with s 130 of the National Credit Act 34 of 2005.
- g) The plaintiff complied with s 129 read together with s 130 of the National Credit Act by dispatching a notice which complies with s 129 of the National Credit Act to the defendants. Copies of the notice together with proof of dispatch by pre-paid registered post are annexed to the particulars of claim.
- h) The notice in terms of s 129 of the National Credit Act was delivered to the relevant post office and that post office would, in the normal course, have secured delivery of a registered item notification slip, informing the defendants that a registered article was available for collection. A copy of the track-and-trace reports confirming same is annexed to the particulars of claim.

[3] The following defences are raised in the plea:

- a) No valid proof of registration as credit provider is contained in the annexures to the particulars of claim as same lapsed on 31 July 2024 prior to the issuing of the summons against the defendants.
- b) The plaintiff's respective certificates of balance are incorrect and does not reflect the actual balance owed to the plaintiff by the defendants in that the agreed upon rate of interest was the prime lending rate and not 22.25% as averred by the plaintiff. The amount claimed by the plaintiff in the particulars of claim and set forth in the s 129 notice of the National Credit Act is defective.
- c) The defendants did not receive the s 129 and s 130 notices and the plaintiff's

summons is consequently premature.

[4] The following averments are contained in the affidavit in support of the application for summary judgment:

- a) The plaintiff is registered as a credit provider and the most recent certificate and confirmation of registration are annexed to the affidavit.
- b) In terms of the agreement annexed as annexure "POC 3" to the particulars of claim, the default interest rate which the plaintiff is entitled to charge is equal to the South African Reserve Bank repurchase rate plus 14% and the default interest rate charged by the plaintiff therefore amounted to 22.5% per annum.
- c) The plaintiff complied with his obligations in terms of s 129 and s 130 of the National Credit Act.
- d) The denials contained in the particulars of claim constitutes bare denials which do not raise any issues for trial.

[5] The following averments are made in the defendants opposing affidavit:

- a) The defendants noted that the plaintiff is a credit provider and that the recent certificate of registration is annexed but stated that the plaintiff may not rectify or amplify defects in his particulars of claim in summary judgment proceedings and should have amended its particulars of claim, alternatively should have replied to the defendants' plea;
- b) The first and second defendants did not receive the notices in terms of s 129 and s 130 of the National Credit Act and stated that it suffices to say that the postal services are not what they used to be.
- c) The plea does not constitute a bare denial.
- d) The defences raised by the defendants are *bona fide*.
- e) The averments pertaining to interest as set out in the plaintiff's affidavit in support of the application for summary judgment should have been pleaded in the plaintiff's particulars of claim alternatively in the reply.

The law:

[6] In *South African Securitization Program (RF) Ltd v Cell Secure Monitoring and Response (Pty) Ltd and another*¹ the court stated that:

[33] I am mindful that a *bona fide* defence is assessed upon a consideration of the extent to which the nature and grounds of the defence and the material facts relied upon have been canvassed. *Bona fides* do not mean that the defendant has to satisfy the court that his version is believed to be true. All the defendant is required to do is to swear to a defence valid in law, in a manner which is not seriously unconvincing. Put differently, he should show that there is a reasonable possibility that the defence he advances may succeed on trial.

[34] I am further mindful that at this stage of the proceedings the court is not required to decide the disputed issues or determine whether or not there is a balance of probabilities in favour of another. The court merely considers whether the facts alleged by the defendant constitute a good defence in law and whether the defence appears to be *bona fide*.'

[7] The Supreme Court of Appeal in *NPGS Protection and Security Services CC v Firstrand Bank Ltd*² warned:

'The ever-increasing perception that bald averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite general principles developed over many decades by our courts.'³

[8] In *Maharaj v Barclays National Bank Ltd*⁴ it was held:

'All that the court enquires into is:

(a) Whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded and;

¹ *South African Securitization Program (RF) Ltd v Cell Secure Monitoring and Response (Pty) Ltd and another* [2022] ZAGPPHC 925.

² *NPGS Protection and Security Services CC v Firstrand Bank Ltd* [2019] ZASCA 94, 2020 (1) SA 494 (SCA), 2019 (3) All SA 391 (SCA).

³ *Ibid* para 14.

⁴ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

(b) Whether on the facts so disclosed the defendant appears to have as to either the whole or part of the claim a defence which is *bona fide* and good in law.’⁵

[9] Similarly, it was held in *Breitenbach v FIAT SA (Edms) Bpk*⁶ that:

‘Another provision of the subrule which causes difficulty, is the requirement that in the defendant’s affidavit the nature and grounds of his defence and the material facts relied upon therefore are to be disclosed ‘fully’. A literal reading of that requirement would impose upon a defendant a duty of setting out in his affidavit the full details of all the evidence which he proposes to rely upon in resisting the plaintiff’s claim in a trial. It is inconceivable, however, that the draftsman of the rule intended to place that burden upon the defendant. I respectfully agree subject to one addition with the suggestion by Miller J in *Shepstone v Shepstone 1974 (2) SA 462 (N) at pp. 466 – 467* that the word ‘fully’ should not be given its literal meaning in rule 32(3) and that no more is called for than that the statement of the material facts be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at trial, would constitute a defence to the plaintiff’s claim.’⁷

[10] In *Tumileng Trading CC v National Security and Fire (Pty) Ltd*⁸ (*Tumileng*) it was stated that:

‘[22] What the amended rule does seem to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a bona fide defence. This is because the plaintiff’s supporting affidavit now falls to be made in the context of the deponent’s knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a ‘formulaic’ supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for the purposes of delay.’

⁵ Ibid at 426.

⁶ *Breitenbach v FIAT SA (Edms) Bpk* 1976 (2) SA 226 (T)

⁷ Ibid at 228C.

⁸ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* [2020] ZAWCHC 28; 2020 (6) SA 624 (WCC).

[11] In *Rossouw v Firstrand Bank Ltd*⁹ it was held that uniform rule 32(4) limits a plaintiff's evidence in summary judgment proceedings to the affidavit supporting the notice of application. In *Firstrand Bank Ltd v Bhika and Another*¹⁰ the following was stated:

'[11] In any event the defendants failed to plead any material facts to substantiate this defence, other than one premised on a lack of certificate/s having been attached to the pleadings. *Ex facie* the registration certificates presented to me, the plaintiff was (and remains) duly registered. The defendants also complain that new material should not be introduced by the plaintiff. I do not consider proof of registration as new material. The allegation is positively averred in both the particulars of claim and the affidavit in support of summary judgment. The certificate served only to verify what has already been alleged. There can be no prejudice to the defendants.'

[12] It is not necessary to attach a copy of the registration certificate with the National Credit Regulator to the pleadings.¹¹

[13] In *Kubyana v Standard Bank of SA Ltd*¹² (*Kubyana*) it is stated as follows:

'[53] Once a credit provider has produced the track-and-trace report indicating that the s 129 notice was sent to the correct branch of the post office and has shown that notification was sent to the consumer by the post office, that credit provider would generally have shown that it has discharged its obligations under the act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reach the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice and it makes sense for the consumer to bear this burden or rebutting the inference of delivery, for the information regarding the reasonableness of a conduct generally lie solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the s 129 notice did not

⁹ *Rossouw v First Rand Bank Ltd* [2010] ZASCA 130; 2010 (6) SA 439 (SCA).

¹⁰ *First Rand Bank Ltd v Bhika and Another* [2025] ZAECQBHC 5.

¹¹ LTC Harms *Amler's Precedents of Pleadings* 9 ed at 139.

¹² *Kubyana v Standard Bank of SA Ltd* [2014] ZACC 1; 2014 (4) BCLR 400.

reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour.'¹³

[14] In *Standard Bank of South Africa Ltd v Rockhill and Another*¹⁴ it was held:

'[17] . . . Whilst non-compliance with s 129(1)(a) is an impediment to commencing any legal proceedings to enforce a credit agreement, it does not constitute a *bona fide* defence of the nature envisaged by rule 32(3)(b). Once it is established at trial stage that the plaintiff has not complied with s 129(1)(a), the trial will be adjourned and an order made setting out the steps the plaintiff must complete before the trial is resumed. The fact that s 130(4)(b) envisages the resumption of the proceedings following the court having made an appropriate order, illustrates that non-compliance with s 129(1)(a) does not constitute a *bona fide* defence for summary judgment purposes.'

Analysis:

[15] The citation of the plaintiff as per the particulars of claim reads as follows:

'The plaintiff is Nedbank Limited, registration number: 1951/000009/06, a company with limited liability duly registered and incorporated in terms of the laws of the Republic of South Africa, which conducts business as a retail bank, authorized financial services provider and registered credit provider with registration number: NCRCP 16 . . .'

[16] In the citation, the plaintiff has alleged registration with the National Credit Regulator. The annexing to the particulars of claim of a copy of the recent registration certificate, is not material and necessary to the allegation of such registration. It is my considered view that the necessary facts pertaining to the registration of the plaintiff as credit provider was pleaded.

[17] In the affidavit in support of the application for summary judgment, the deponent confirmed that the plaintiff is a registered credit provider and annexed the plaintiff's credit provider certificate for the period of 1 August 2024 to 31 July 2025. The defendant stated in its opposing affidavit that the plaintiff should have amended

¹³ Ibid para 53.

¹⁴ *Standard Bank of South Africa Ltd v Rockhill and Another* [2010] ZAGPJHC 10; 2010 (5) SA 252 (GSJ).

its particulars of claim, alternatively should have replied to the defendant's plea in this regard. I agree with the reasoning in *Bhika supra* that the certificate only verify what has already been pleaded.

[18] The certificate of registration annexed to the affidavit in support of the summary judgment affidavit do not amount to new evidence which would be inadmissible under rule 32(4).

[19] As regards to the defendants' denial that they received the s 129 notice, the defendants failed to set out any factual basis in their plea for the conclusion that they did not receive the notice. In this regard the plea constitutes no more than a bare denial. The defendant in its opposing affidavit merely averred that the postal services are not what they used to be. I am not persuaded that the aforesaid disproves delivery.

[20] In my view there was compliance with s 129 and s 130 of the National Credit Act and the plaintiff complied with its obligations in terms of the National Credit Act in a manner consistent with the approach of the Constitutional Court in *Kubanya*. In any event, the alleged non-compliance with s 129 of which I am not persuaded could only have served as a dilatory measure and would not have constituted a *bona fide* defence for purposes of summary judgment.

[21] The defendants submitted that the plaintiff's certificates of balance are incorrect as it does not reflect the actual balance owed in that the defendants submitted that the agreed upon interest rate was the prime-lending rate and not 22.5% and consequently the amount claimed in the particulars of claim and s 129 notice are incorrect.

[22] The deponent to the affidavit in support of the summary judgment application stated that at the time when the certificates of balance were signed by him, the repo rate was equal to 8.25% per annum and the default interest rate charged by the plaintiff therefore amounted to 22.25% per annum being the repo rate plus 14% per annum. The defendants in their opposing affidavit noted the latter and stated that the

facts should have been pleaded in the plaintiff's particulars of claim, alternatively in their plea.

[23] It is trite that if the respondents' affidavit in reply to the applicant's affidavit fails to admit or deny or confess or avoid the allegations in the applicant's affidavit, the court will for purposes of the application, accept the applicant's allegations as correct. In my considered view the defendants admitted that the interest rate is 22.5%. The defendants' defence is therefore not that the interest rate is incorrect, but that the plaintiff should have pleaded the calculation of the interest in its particulars of claim. The latter does not constitute a *bona fide* defence as intended by rule 32. In any event, the plaintiff in line with the reasoning in *Tumileng*, was allowed to expand on the calculation of the claimed interest rate in the affidavit in support of summary judgement. It is further common cause that the nature and amount of the borrower's obligation and the applicable interest rate will be determined and proved by a certificate signed by a manager of the plaintiff and that unless the contrary is proven, the certificate will on the production thereof be binding and the *prima facie* proof of the content thereof and of the fact that the amount is due and payable. I am not persuaded that the defendants have set forth facts which if proved at trial will indicate that the interest rate as contained in the certificate of balance is not the correct interest rate. To grant leave to defend on this basis would frustrate the very purpose of summary judgment proceedings.

[24] I agree with the plaintiff that the remainder of the plea and the opposing affidavit contains bare denials. Considering the trite principles governing summary judgment proceedings and the defences raised by the defendants, I am not convinced that the defences raised by the defendant constitutes *bona fide* and triable defences.

[25] The usual order is that costs follow the result. In my view no grounds exist to deviate from the usual order.

Orders:

[26] In the result, the following order is made:

Summary judgment is granted against the first to third defendants jointly and severally, the one to pay, the other to be absolved, in the following terms:

1. payment of the amount of R2 012 975.04;
2. payment of interest on the aforesaid amount at the rate of 22.25% per annum compounded daily and capitalised monthly from 14 June 2024 to date of final payment, both days inclusive;
3. payment of costs of the suit on an attorney and client scale including costs of counsel on scale B.

De Kock, AJ

Appearances

For the plaintiff:

J Els

Instructed by:

EG Cooper Majiedt Inc.

For the defendant:

P DU P Greyling

Instructed by:

Bredenkamp Attorneys