IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 22109/2009

In the matter between:

FIRSTRAND BANK LIMITED	Plaintiff
And	
DOUGLAS THEKO LIBUKE	Defendant
And	
FIRSTRAND FINANCE COMPANY LIMITED	Third Party

JUDGMENT DELIVERED ON 18 FEBRUARY 2015

BOQWANA, J

Introduction

[1] The plaintiff launched action proceedings against the defendant on 20 October 2009, in which it claimed payment of the sum of R280 156.60 based on a mortgage bond no. B72356/2008 registered over immovable property, Erf 3186, Eerste River, Cape Town ('the property'), plus interest of 13.8% per annum, on the said amount, calculated from 1 September 2009. It also sought an order declaring the immovable property executable for the said sums. The respective claims were commenced by way of simple summons. The defendant filed a notice to defend the action.

[2] The plaintiff brought a summary judgment application which was refused on 28 January 2010.The plaintiff then delivered a declaration dated 23 March 2010.

[3] Following a joinder application brought by the defendant, a third party, FirstRand Finance Company ('FFC'/'third party'), was joined into the action proceedings. The relief sought by the defendant against the third party was said to be constitutional, statutory and in terms of the common law. The relief is however hard to follow as it ranges from an award for compensation or damages in respect of the amount claimed by the plaintiff; indemnification of the defendant by the third party in the event of the court finding against him; a finding that the third party has contravened the National Credit Act[1] ('NCA'); suspension of the plaintiff's claim whilst directing the plaintiff to comply with the NCA; a directive to the third party to re-arrange mortgage loan instalments in a fair, just and equitable manner to enable the defendant to pay the loan agreement, without charging interest on it; a declaratory order that a cedent cannot sue on a ceded debt and a setting aside of summons *ab initio*.

[4] At the commencement of the trial a considerable amount of time was spent on argument about documents that were not discovered timeously and/or which were disputed for various reasons. Objections about the status of the documents mainly came from the defendant's counsel, Ms Dzai. The nature of the objections was on many occasions not very clear. To the extent that parties had not had time to look at the documents prior to the trial, I offered them an opportunity to peruse the documents which were discovered late. Ms Dzai indicated that she wished to proceed and would deal with each document as and when it was introduced on behalf of the plaintiff.

[5] The plaintiff called Johan Adam van Der Spuy ('van der Spuy') and Pieter Henning ('Henning') as its witnesses, and the Defendant testified in his own defence. The matter was adjourned to allow Ms Dzai, who appeared for the defendant, time to decide whether she would be calling any further witnesses. I was informed that no further witnesses would be called by the defendant and that

[1] Act No. 34 of 2005

the third party would not be calling any witnesses as well. The matter was accordingly set down for the hearing of the closing argument.

Common cause facts

[6] It is common cause: that the defendant concluded a loan agreement with FFC on 29 September 2008; that the plaintiff is a registered credit provider in terms of the NCA; that FFC lent and advanced a sum of R263 990.00 to the defendant; that the initial monthly instalment would be R2 797.72; that the defendant passed a continuing covering mortgage bond number B72356/08 over the property as security in favour of FFC on 19 December 2008; that instalments have not been paid in respect of the loan agreement since May 2009 and that the defendant received a section 129 (1) notice in terms of the NCA.

Issues in dispute

[7] The first issue is whether the plaintiff has the necessary *locus standi* to sue the defendant in these proceedings. The defendant has denied in his plea that the plaintiff is a public company duly registered in terms of the Banks Act no. 94 of 1990 ('Banks Act') and carrying on business as FNB Home Loans. He also denied the regional office address of the plaintiff.

[8] The second issue placed in dispute is a cession of the loan agreement and the mortgage bond by FFC to the plaintiff. It is also alleged by the defendant in the third party notice that the summons did not disclose the cause of action as the cession is not alleged therein and therefore should be set aside *ab initio*.

[9] The third issue raised by the defendant is that the plaintiff and/or third party were in breach of the NCA.

[10] Fourthly, the court is called upon to determine whether the defendant was in breach of the agreement he concluded with FFC and accordingly is liable to pay the plaintiff's claim. The defendant claims that in terms of the loan agreement he had insurance cover that entitled him to have his instalments paid whilst he was unemployed.

Evidence

Plaintiff's case

[11] Van der Spuy testified that he was employed by the FFC as a manager: collections, from September 2007 until 27 July 2009 when FFC was sold to the plaintiff. He is now employed by FirstRand Bank Housing Finance, a division of the plaintiff, in Centurion, Pretoria in the same position he held under FFC. His position entails collection of outstanding debt and taking of necessary action against debtors who do not pay or repay outstanding debt.

[12] He testified that the plaintiff is a registered bank in terms of the Banks Act. Its name was changed from First National Bank of Southern Africa Limited to FirstRand Bank Limited with effect from 1 July 1999 by way of a special resolution. The registration number of the plaintiff is 1929/001225/06 and the plaintiff is a registered credit provider with registration number NCRCP20.

[13] Van der Spuy testified further that a covering bond was registered over the immovable property of the defendant in favour of the FFC.

[14] With reference to cession of a bond document signed and dated 13 July 2009, Van der Spuy testified that the rights, title and interest of FFC in and to the mortgage bond B72356/2008 (which is that of the defendant) were ceded unto and in favour of the plaintiff by FFC.

[15] Upon being referred to the covering page of the covering mortgage bond document on page 56 of exhibit A, Van der Spuy testified that the document had a stamp that read: '*For endorsements, see page 4'*and the relevant page 4 referred to on that covering page appeared on page 57 of exhibit A. This document was signed by the Deeds Office Cape Town's Registrar, with BC number 033202/09 and had a date stamp of 31 July 2009. (Ms Dzai disputed that said page 4 related to the covering mortgage bond document).

[16] Van der Spuy testified further that the plaintiff and FFC entered into a business sale agreement on 27 July 2009, which was effective from 1 March 2009.

FFC sold the business through its FNB Housing Finance division. He referred to clause 2.1.6 of the interpretation section of the agreement which read as follows:

> '2.1.6 "Business" means the business which, as at the Effective Date, is conducted by the Seller through its division "FNB Housing Finance" and which ~
>
> 2.1.1.6 consists of the lending of money to members of the public against the security of mortgage bonds registered over residential properties'; and
>
> 2.1.6.2 includes the Subject Mortgages, the Current Assets and the Seller's rights under the Outstanding Applications, the Outstanding Loan Agreementsand (subject to clause 10) the Rental Agreements'

[17] He testified further that the defendant failed to comply with the terms of the loan agreement. The defendant's last bond payment was in May 2009 and he has made no payment since then. With regard to the issue of insurance policies, Van der Spuy testified that the defendant accepted three different types of insurance covers. The first one is the homeowner insurance, in terms of which property is insured against damage. The second is the life credit policy, taken against the life of the lender, which cover is payable should he pass away or get disabled during the lifetime of the bond. The third one is loan cover which applies when the debtor is not in a position to repay the instalments anymore, and he is retrenched in terms of the retrenchment rules, in which circumstances the bank could lodge a claim against the insurance company and the insurance company will then pay six months instalments on behalf of the debtor. In terms of the second part of the loan cover, should the debtor fail to redeem his debt and the property ends up being sold, the cover will reduce the loss up to the amount of the cover and the shortfall would be written off by the bank. The three insurance covers were included in the defendant's monthly instalments as evidenced by the Smart Bond statement sent to the defendant by the plaintiff on 28 February 2009. Payment for these was recovered by the bank by means of a debit order against the defendant's bank account. The plaintiff continued to pay the insurance premiums on behalf of the defendant, even when he stopped paying his monthly instalments.

[18] He maintained that the defendant would have received a copy of the loan agreement, the bond deed and the insurance applications from the bond registration attorney. According to Van der Spuy, the defendant alleged that he was summarily dismissed. That means he would not be covered by the loan insurance cover as he was not retrenched. The only benefit he would have had was if the house was sold in execution and there was a shortfall.

[19] In cross-examination, Van der Spuy confirmed that the registration number for FFC is 1987/005437/06 and the NCR registered number is NCRCP3377. He also agreed that registration number NCRCP 20 belonged to the plaintiff and not to FFC. He denied that FFC traded as FNB Housing Finance because the sale agreement clearly stated that FFC sold a portion of its business to the plaintiff. He maintained that FNB Housing Finance was sold to the plaintiff. He conceded that he did not have personal knowledge about whether the documents dealing with insurance policies were given to the defendant, but according to him, they would have been provided to the defendant at the time of signing the loan agreement with the conveyancers, as it is procedure. It was put to him that the loan cover quotation document was not signed and had no author. In response to that he testified that the document was system generated and had no specific author who signed it.

[20] The second witness for the plaintiff, Henning, testified that he has been an attorney since 1984 and a conveyancer since 1986. He conducted a Deeds Office search in the Deeds Office in Cape Town, to establish whether bond number B072356/08 is in actual fact the bond registered in the records of the Deeds Office. The procedure at the Deeds Office is that after a document had been registered it will go through a procedure of microfilming. During his search, on the microfilm he found the specific bond B072356/08registered, being original pages 2 and 3 which correspond with pages 56, 58 and 59 of exhibit A. There was an endorsement on the bond in the Deeds Office which corresponds with page 57 of exhibit A, with reference number BC033202/9. In explaining various stamps appearing on page 56 of exhibit A, Henning testified that after the registration of

the bond on the microfilm, there would be data capturing and verification. The bond in question was registered on 19 December 2008 and data was captured on 06 January 2009. The name on the stamp was that of a person capturing the data. The data would have been verified by another person on 07 January 2009. He testified further that a microfilm number is allocated to each specific bond. The microfilm number of the bond in question bond is 200900790493.

Defendant's case

[21] The defendant testified that he has been residing in the property since December 2008. He received the notice in terms of section 129(1) of the NCA dated 12 August 2009. The letter said if he had queries on his home loan he could speak to Morgan Dube ('Dube'). He then went to the branch of FNB at Cape Gate. He asked to speak to the relevant person. He was advised at the bank that issues like these had to be dealt with by specific people who would then direct him to the person mentioned in the letter. He went to an office where he was given a phone on which he spoke to Dube. He told Dube about the letter he wrote to FNB 'Joburg', before he received the section 129 (1) notice, telling them that he had lost his job and was trying to make 'some kind of insurance claim' with them. The letter he was referring to was one letter dated 04 June 2009 which stated the following:

> 'Dear Sir/ Madam
>
> I would like to inform you that on the 25thMay 2009 my employer (WERDA CONTAINER CARRIERS) held a meeting in contravention of section's (sic) 7, 10, 15 and 16 of the Basic Conditions of Employment act 75 of 1997, where it informed all the employees that we were going to work for a whole month in Durban and that it will not pay us overtime and if any of us don't agree with its demands, we can therefore leave our jobs and find work elsewhere.
>
> I therefore accepted my employer's summarily (sic) dismissal and on 01 June 2009, I instituted a civil claim for breach of contract, action iniuriarum and cancellation of the employment contract on the bases that no reasonable person under the same circumstances as mine would be expected to uphold the unreasonable and unlawful demands of my employer with the Western Cape High Court, in the matter between

DOUGLAS THEKO LIBUKE and WERDA CONTAINER CARRIERS, Case No: 10969/09.

I am currently looking for another job and should it happen at the end of this month that I haven't found a new job and I am unable to pay my monthly bond repayments I would kindly appreciate if the insurance on the Bonded Property Stand No: 3186 SILWOOD HEIGHTS would pay my instalments for a reasonable period until I can find a job.

I thank you in advance for the consideration of this letter

Yours truly,

D T LIBUKE'(Own emphasis)

[22] He testified that he had previously faxed this letter to Dube from FNB Cape Gate on 09 June 2009 and did not receive any response. He sent the same letter again on 13 August 2009 after he received the section 129(1) notice, when Dube asked him to send it again. There was no response to his letter, until he was issued with summons.

[23] He found it very strange that money was deducted from his salary in respect of loan cover premiums, life insurance and home owners insurance and when he needed assistance from the insurance company during his tribulations, he received none.

[24] In cross-examination he confirmed that he did not dispute that he entered into a loan agreement with FFC. He also did not dispute that a mortgage bond was registered over his property. He agreed that he had not made payments in respect of his mortgage loan agreement since May 2009. He testified that after he left his employment on 26 May 2009, he had several 'piece jobs', doing loads as a truck driver, which he could not regard as 'actual employment'. He did not receive regular monthly income from these 'odd jobs'. The income he received was lower than the balance that he owed. He could therefore not make the payments. He testified that he also had to eat, pay for his children's school fees and he was not sure whether he had to pay for the loan whilst legal action was pending. To date,

he still gets ‘piece jobs’. The payment he received for these odd jobs varied between R200 and R800 per job.

[25] He testified that there were certain insurance payments that were deducted from his bank account at the end of the month. These were also reflected by the statement he received from the bank. According to him, he was thoroughly informed, by a certain lady known as Chriselda, about these insurance policies when he was signing the loan agreement.

[26] He could not say what the insurance policies covered. Chriselda told him that she would send all the documents to him as she could not, at that stage, afford him an opportunity to read the documents before he signed them. Chriselda however explained the detail of what the insurance policies covered during the conversation he had with her. He however could not remember such details but recalls that he was happy with the terms and conditions. Chriselda told him that the insurance would cover him through difficulties of making payments. He initialled and/or signed every document presented to him by Chriselda. He could however not comment on the loan cover quotation as it was unsigned. He went further to state that he did not have knowledge of what was contained in the insurance documents and in particular did not have knowledge that he was covered for retrenchment for a period of six months. He was not sure whether he was covered for unemployment hence he enquired in his letter (dated 4 June 2009). He stated that the word *‘if’* appearing in his letter, (in relation to the sentence: *‘I would kindly appreciate if the insurance on the Bonded Property Stand No: 3186 SILWOOD HEIGHTS would pay my instalments for a reasonable period until I can find a job’)* bears this out. He recalls that after he had explained his situation to him during the telephonic conversation, Dube told him that their insurance did not cover ‘for that’, although he could not recall Dube’s exact words.

[27] The defendant could not comment on the cession documents and stated that he did not even know what a cession was and in particular could not comment on whether the contested page 57 (the disputed page) formed part of the Covering

Mortgage Bond document. He testified that he could not comment on the business sale agreement or legal documents put to him as he had no legal education.

Evaluation

Plaintiff's *locus standi*

[28] Defendant's counsel, Ms Dzai, challenged the plaintiff's standing on many fronts. The main points can be crystallised as follows. Firstly, she submitted that the allegations relating to the plaintiff's identity in the simple summons are different to those in the declaration. The plaintiff's registration status as a public company, its registration number and registration as a bank were placed in dispute in the defendant's plea.

[29] She also raised an objection regarding the credit provider certificate. She argued that although she agreed that the plaintiff is a registered credit provider and that the number that is reflected in the certificate is correct, she had an issue with reference to FNB Housing Finance. According to her the registration number on the website of the National Credit Regulator has been used by both FFC and the plaintiff.

[30] She further submitted that cession is not alleged in the simple summons but only in the declaration and that the cession documents were not attached to the summons and that could justify the setting aside of the summons. Furthermore, cession documents were placed in dispute.

[31] Van der Spuy's evidence identifying the plaintiff's registration as a company and as a bank in terms of the Banks Act was unchallenged during his cross examination. It is unclear why this was denied in the defendant's plea in the first place.

[32] It is so that the plaintiff, in simple summons cited FNB Housing Finance as its trading name, with its principal place at 1 Lakeview Crescent Centurion, whereas in the declaration it cited FNB Homeloan and gave a regional office address of 3rd floor Colosseum Building, 41 Kruis Street, Johannesburg. That, in

my view, does not affect the question of who the legal person suing the defendant is. Van der Spuy testified that both Homeloan and Housing Finance are divisions of the plaintiff. The plaintiff is clearly identified in both the summons and the declaration as FirstRand Bank Limited.

[33] It is trite that a division is not a legal *persona*. In this regard see **Volkskas Bank (`n Divisie van Absa Bank Bpk) v Pietersen**[2] where the Court pointed out that in our law there was no legal *persona* such as a division.[3] In **Megaflex (`n Divisie van Sentrachem Bpk) en `n Ander v White River Motor Trading (Edms) Bpk**[4] the court held that where a drafter of a pleading (or application) uses the word 'division' he or she is only indicating that a department of the said body corporate is wholly owned by that body corporate and conducting business under the trade name. Therefore, the use of FNB Housing Finance or FNB Home Loans does not change the identity of the person or entity suing.

[34] It is regrettable that a large part of evidence and argument was devoted to this issue. Equally, the use of a different business addresses in the pleadings does not in my view result in any confusion as to whom the plaintiff is.

[35] The question of who the plaintiff is, is very clear in both the summons and the declaration, in my view. The letterheads of the plaintiff and company registration papers clearly show its registration number as 1929/001225/06. Furthermore, the plaintiff and FFC are two separate legal entities. FFC's registration number is 1987/005437/07.

[36] In any event, FFC denied in its plea to the third party notice that it is trading as FNB Housing Finance. Van der Spuy testified that he was employed by FFC at the FNB Housing Finance Division which was sold to the plaintiff. By virtue of the sale of business agreement concluded between the plaintiff and FFC on 27 July 2009, FFC sold part of its business as a going concern through its division, FNB

[2] 1993 (1) SA 312 (C) at 314B-C
[3] See also Two Sixty Four Investments (Pty) Ltd v Trust Bank 1993 (3) SA 384 (W)
[4] 1996 (1) SA 616 (T) at 618D - E

Housing Finance. FNB Housing Finance became part of the plaintiff effective from 01 March 2009.

[37] Summons was issued on 20 October 2009. That clearly was after the effective date of the business sale agreement and after the agreement was concluded. To suggest that the plaintiff acted on behalf of FFC when it initiated legal proceedings is without any merit. The section 129 Notice was correctly sent by the plaintiff. That was not done on behalf of FFC. The section 129 notice is dated 12 August 2009. Again, that is after the sale of business of FFC's FNB Housing Finance division to the plaintiff.

[38] The submission that the plaintiff acted as agent of FFC by sending a homeloan statement dated 28 February 2009 (barely a day before the effective date) whereas the sale was effective on 01 March 2009 bears no relevance in these proceeding. It is not clear when this document was received by the defendant. Of relevance though is that it notified the defendant of the change of legal services address.

[39] Ms Dzai submitted that the plaintiff led the defendant to believe that FFC was the party suing him in the main action. That did not come across when the defendant was giving evidence. The defendant clearly knew that he was being sued by the plaintiff. In any event, there is no cause for confusion as both the summons and declaration are clear as to who the plaintiff is.

Cession

[40] Moving to the issue of a cession. I am satisfied that by virtue of the business sale agreement all outstanding loan agreements were sold to the plaintiff by FFC effective from 1 March 2009. The plaintiff consequently became the legal holder of the loan agreement. The mortgage bond was ceded and such cession endorsed by the Registrar of Deeds. Henning's evidence was clear. He clarified the disputed cession documents through his investigations at the Deeds Office. According to him, the mortgage bond B72356/08 was ceded from FFC to the plaintiff and that cession was duly registered by the Deeds Office under BC 33202/09 on 31 July

2009 in accordance with the endorsement appearing on page 63 or 57 of Exhibit 'A'. There was no evidence presented to rebut Henning's evidence by the defendant. Henning came across as a credible and truthful witness. His evidence was not disturbed in cross-examination and I have no reason to reject it.

[41] Furthermore, the records from the Deeds Office recording cession of the bond and the endorsement of the mortgage bond are conclusive proof[5] that the mortgage bond in this matter was ceded from FFC to the plaintiff. I am accordingly satisfied that the plaintiff has discharged its onus and has been able to show that it indeed is a present legal holder of the mortgage loan agreement and bond ceded to it by FFC.

[42] The fact that a cession was not alleged in the summons but only in the declaration is a non-issue, in my view. I say this because the defendant never raised any special point or defence in his plea, he simply alleged that he had no knowledge of the cession and challenged the plaintiff to prove it. The proceedings have moved beyond that point now. Cession was alleged in the declaration and cession documents were deliberated upon extensively during the trial.

[43] The averment about the cession was made in the declaration. Ms Dzai argues that the requirements in the **ABSA Bank v Janse van Rensburg**[6] full bench decision were not complied with in that the cession documents were not attached to the summons. The Court in the **Janse van Rensburg** matter found that although simple summons is not a pleading, it is nevertheless necessary, on a proper interpretation of rule 17 (2) (b), read with form 9, to attach a written agreement where the plaintiff's cause of action is based on such agreement. In light of that, the matters were postponed *sine die* to afford the bank amendments to their respective summonses.[7] Had a special point been raised at an appropriate stage, the

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[5] See Barclays National Bank Ltd v Chaldon Investments (Pty) Ltd; Barclays National Bank Ltd v Swartzberg 1975 (2) SA 344 (W) at 349H-350A

[6] ABSA Bank v Janse van Rensburg 2013 (5) SA 173 (WCC) at paragraph 15

[7] ABSA Bank v Janse van Rensburg supra paragraph 22 and 23

plaintiff may, in any event, have been allowed to rectify the complaint or the alleged irregularity by amending its pleadings.

[44] In **Smith v Williams**[8] the Court held that summons must be read together with the declaration and that declaration is incorporated by reference in the summons. The Court held further that: 'the Court may always in its discretion allow an amendment of a pleading even where that pleading does not sufficiently set out a cause of action. Courts may allow amendments unless there is prejudice or injustice, and even where an amendment is necessary in order to enable a plaintiff to succeed in his action such amendments may and are frequently made.'[9] Summonses would therefore not be dismissed *ab initio* as claimed by the defendant. Reference to the **ABSA Bank v Janse van Rensburg** decision is in these circumstances therefore misplaced. It is also known by now that a'rule of procedure cannot deprive the plaintiff of his cause of action or of his right to adduce secondary evidence of the contract, though the rules would still require the plaintiff to plead with appropriate particularity the conclusion of the contract and its terms' as it was held by Rogers J (with Traverso DJP concurring) in **ABSA Bank Ltd v Zalvest Twenty (Pty) Ltd and Another**[10]

[45] The learned judge went on to say at paragraph [21] ,'...[i]n the absence of the written agreement the basis of the [plaintiffs'] cause of action does not appear *ex facie* the pleadings' (para 18). <u>If a plaintiff pleads the conclusion of a written contract and the terms relevant to his cause of action, the cause of action will appear *ex facie* the particulars of claim.</u> That, after all, is how causes of action based on written contracts were legitimately pleaded prior to the amendment of rule 18(6) in 1987, at a time when there was no procedural requirements to annex the written contract. What is true is that since 1987 a plaintiff who fails to annex the written contract will (at least in the absence of a properly pleaded explanation) be in breach of rule 18(6).' (Own emphasis)

[46] In any event, I am of the view that the cession issue has no bearing on the cause of action but merely concerns the plaintiff's *locus standi* as it was found in

[8] Smith v Williams; Smith v Kok 1952 (2) SA 682 (WLD) at 685 H – 686 B

[9] Smith v Williams supra at 686 G

[10] 2014 (2) SA 119 (WCC) at paragraph [20].

the matter of **Corporate Finance Solutions (Pty) Ltd v Hope Restoration Ministries** [11], where the plaintiff sought to amend its declaration by relying on it having become a cessionary pursuant to an agreement. In its judgment the court held as follows:

> 'The basis of the defendant's objection to the proposed amendment is that the plaintiff's reliance on a cession entirely different from the original cession would result in the introduction of a new cause of action. <u>The contention conflates the basic difference between *locus standi* and cause of action. The amendment, as rightly conceded by counsel for the defendant, has no bearing on the plaintiff's cause of action</u>. It merely concerns its *locus standi* to claim as the cessionary of SGR.' (Own emphasis)

[47] For the reasons above the defendant's points of contention on the issue of the cession are rejected.

<u>Non-compliance with the NCA</u>

[48] The defendant further alleges that the plaintiff and/or FFC did not comply with the provisions of the NCA in the mortgage loan agreement. It is submitted on behalf of the defendant that FFC identified itself as an authorised Financial Service Provider and Credit Provider (NCRCP20) in the loan agreement. Ms Dzai argued that the plaintiff initiated legal proceedings using FFC's details. It is common cause that the plaintiff is a registered credit provider under NCRCP20. Ms Dzai brought documents extracted from a National Credit Regulator search which in fact confirm that the plaintiff and the third party, FFC, are two different service providers with two different registration numbers. It is in any event not clear what relief is sought on this point.

[49] In terms of the evidence of Van der Spuy FNB Housing Finance was once a branch of FFC. The NCR Certificate refers to FNB Housing Finance, which was sold to the plaintiff as a going concern. FNB Housing Finance, a division under which the lending of money business was sold, was at the stage when the credit

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[11] (2009/8872) [2013] ZAGPJHC 68 (6 March 2013)

agreement was entered into with the defendant, a division of FFC or FFC had traded under that name as reflected in the loan agreement.

[50] To the extent that the two entities are accused of fraud or misrepresentation proper channels and legal processes should be followed in that regard. I am not called upon to make a finding on that issue. In any event, I am not convinced that there had been any unlawfulness or misrepresentation as alleged on behalf of the defendant.

[51] As far as the section 129 (1) notice is concerned, the defendant admitted receiving the letter. He did not take up the options set out in section 129 (1) (a) of the NCA, which are to refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, upon receipt of the notice. The invitation to contact Dube, which was the only thing the defendant did, does not constitute any one of the credit provider's proposals.

[52] A further point raised on the defendant's plea is that the plaintiff failed to comply with section 111 read with section 66 of the NCA. Section 111 stipulates as follows:

> **'Disputed entries in accounts**
>
> **111.** (1) A consumer <u>may dispute</u> all or part of any particular credit or debit entered under a credit agreement, by delivering a written notice to the credit provider.
>
> (2) A credit provider who receives a notice of dispute in terms of subsection **(1)**-
>
> ***(a)*** must give the consumer a written notice either-
>
> (i) explaining the entry in reasonable detail; or
>
> (ii) confirming that the statement was in error either in whole or in part, and setting out the revised entry; and
>
> ***(b)*** must not begin enforcement proceedings on the basis of a default arising from the disputed entry-
>
> (i) until the credit provider has complied with paragraph ***(a);*** or
>
> (ii) at any time that the matter is under alternative dispute resolution procedures, or before the Tribunal in terms of section **115.**

[53] The letter written by the defendant on 04 June 2009 did not dispute all or any part of any particular credit or debit under the credit agreement. Reliance on section 111 is therefore misplaced. The letter that the defendant wrote informed the

plaintiff that the defendant was no longer employed in that he accepted his employer's summary dismissal. He also enquired whether the insurance could make reasonable payments on his behalf whilst he was unemployed. There is no evidence that any other provisions of the NCA were breached, including sections 130(1) (b), 86 and 129 that Ms Dzai referred to in her heads of argument.

Plaintiff's claim

[54] Turning to the plaintiff's claim. The defendant acknowledged that he was lent and advanced monies by FFC pursuant to a mortgage loan agreement concluded on 29 September 2008 in the sum of R263 990.00. He caused a covering mortgage bond to be registered over the property in favour of FFC. He has not paid his instalments since May 2009 due to his non-employment. He received the section 129 Notice. He enquired about insurance in the letter already mentioned. Dube informed him telephonically that his situation was not covered.

[55] Van der Spuy testified on behalf of the plaintiff that the defendant was insured under the loan cover. The loan cover premiums appear on the home loan statement sent to the defendant. Although Van der Spuy was not the person that administered the loan at the time of signing the agreement, the evidence he gave with regard to the insurance policies is cogent. It is also supported by a loan cover quotation document, detailing the benefits and exclusions of this cover, which he said would have been given to the defendant when signing the loan agreement with the conveyancers. He added that it was computer generated hence it had no signature or the name of the author on it. The defendant testified that he would have signed all the documents that he received and it was unlikely that he had received the loan cover quotation document as it is unsigned. Even if one were to disregard the loan cover quotation document or insurance application, Van der Spuy's evidence as to what the loan cover stood for and what benefits it covered and when those would be applicable was not challenged. No evidence was produced by the defendant to contradict Van der Spuy's evidence in this regard.

[56] Furthermore the defendant testified in cross-examination that Chriselda, who discussed the insurance policies with him, thoroughly explained the different covers but he could not remember what she said in detail. He also confirmed the allegation in his plea that he was satisfied with the terms and conditions.

[57] When pressed under cross-examination he conceded that he was not sure if he was covered for unemployment as evidenced by the use of the word '*if*' in his letter date 04 June 2009. The terms and conditions alleged in the defendant's amended plea cannot be accepted as they are not supported by the loan agreement or any evidence. There is therefore no basis in law to support the contention that the alleged terms and conditions were expressly, alternatively tacitly or impliedly agreed upon.

[58] To the extent the defendant alleges that he was unable to set out the terms and conditions of the insurance cover because he did not receive the documents he was promised, I find it strange that he never asked for these documents, upon discovering that they were not sent to him, particularly at the time when he was enquiring about whether the insurance could pay for him during the period of his unemployment.

[59] In the absence of evidence to the contrary, there is no reason not to accept Van der Spuy's evidence that the loan cover would come into play upon the defendant's retrenchment and his monthly instalments would be covered for a maximum period of six months. The defendant stated in his letter dated 04 June 2009 that he was summarily dismissed by his employer who told the employees in a meeting that they would work in Durban without any overtime paid and that anyone who did not want to accede to that demand could leave their job. He chose to leave. He also stated in his letter that he had instituted legal action for breach of contract in this Court. It cannot be concluded from his letter dated 04 June 2009 that he was retrenched, without any evidence to support that. In any event, he did not allege retrenchment as a reason for his dismissal before this Court.

[60] Nevertheless, the alleged insurance defence cannot excuse the defendant from his contractual obligations, because he, in any event, would still be liable to pay. At best, the insurance payment would reduce the amount that was due to be paid by the defendant to the plaintiff at the end of the day.

[61] The defendant came across as an honest witness and made concessions when he needed to. He was however unsure of the crucial details relevant to his defence and case. There was no evidence to support allegations that that the defendant was entitled to have his instalments paid upon his being unemployed (regardless of the reason). He also appeared not to understand any of the various complex issues placed in dispute by his legal team on the pleadings.

[62] In the circumstances, the plaintiff has been able to show that the defendant breached the loan agreement and was liable to pay to the plaintiff the amount claimed. The certificate of balance stating the amount claimed in the summons was not disputed during Van der Spuy's cross-examination. Ms Dzai objected to the introduction of the new certificate of balance indicating a new balance, and Mr Jonker did not persist with it.

[63] It is trite that the court must be satisfied that, where the property constitutes a primary residence, circumstances are fitting to declare property executable. All relevant circumstances must be considered.

[64] It can be deduced from the evidence that the property in this case is residential. I have no difficulty in accepting that it is the defendant's primary residence. The defendant has been unemployed since May 2009 and has not paid his instalment since then. His initial instalment was estimated to be R2797.72 and the full amount owing as at September 2009 was R280 156.60 with arrears of R9735.47. The defendant has been in arrears for more than five years. The defendant testified that he has had 'odd jobs' since then but could not pay the balance owing to the plaintiff as it was higher than the 'wages' he received. He did not indicate that he would at any stage be able to pay the instalments. Furthermore, he did not indicate any arrangements he would make to endeavour to meet his

contractual obligations other than the enquiries he made in respect of the insurance claims, which in any event would not have covered him for the entire period since May 2009. According to Van der Spuy, the new balance was R514 777.75 as at September 2014. If the insurance policy would have paid for him, the balance owing on his loan account would have been R474 653.76 as at end of September 2014. This was not disputed in cross-examination.

[65] The defendant has not placed any circumstances before the Court to support a contention that his constitutional rights in terms of section 26(1) of the Constitution would be infringed if the property were to be declared executable. While the Court is sympathetic to the defendant's unemployment situation, it cannot deprive the plaintiff the claim to have the property declared executable in these circumstances. The decision of Rogers J in the matter of **Standard Bank of South Africa Limited v Hunkydory Investments 188 (Pty) Ltd and others**[12] is apposite, in which it is stated that the right of access to adequate housing enshrined in the Constitution in terms of section 26 does not entail a right to stay in a house of one's choice even though one cannot afford it.

<u>Third party claims</u>

[66] There is no legal basis for the claims sought against the third party and no evidence was led to support such claims by the defendant. Those stand to be dismissed.

[67] For the reasons outlined above, I make the following order:

1. The defendant is ordered to pay to the plaintiff:

   1.1 The sum of R280 156.60; (two hundred and eighty thousand and one hundred and fifty six rand and sixty cents).

   1.2 Interest calculated on a daily basis and compounded monthly on the aforesaid amount at the rate of 13.8% *per annum* calculated from 1 September 2009 to date of payment;

   1.3 Costs of suit;

[12] 2010 (1) SA 634 (WCC) at paragraph 30

2. The property known as Erf 3186 Eerste River, in the City of Cape Town, Division Stellenbosch, Province of the Western Cape and held by deed of transfer number T80791/08, is declared executable for the said sum, interest and costs.
3. The claims against the third party are dismissed with costs.

N P BOQWANA

Judge of the High Court

APPEARANCES

FORTHE PLAINTIFF & THIRD PARTY: Advocate J W Jonker

Instructed by: Fourie Basson &Veldtman, Parow C/O Walkers Inc., Cape Town

FOR THE DEFENDANT: Advocate L Dzai

Instructed by: Dentons Inc as Kapditwala Inc, Rondebosch