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IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No. 187/2015
Date Heard: 7/5/15
Date Delivered: 14/5/15
Not Reportable

In the matter between:

STANDARD BANK OF SOUTH AFRICA **Applicant**

and

[M….] [T…….] [B…..] **First Respondent**

[N…..] [E…….] B…..] **Second Respondent**

JUDGMENT

PLASKET, J

[1] The applicant, as plaintiff, brought separate applications for summary judgment against the first and second respondents, as defendants, claiming the following relief: (a) payment of R340 634.67; (b) payment of interest on that amount; (c) payment of monthly insurance premiums in the amount of R137.33 from 7 October 2014 to date of payment; (d) a declaration that an immovable property is specially executable; and (e) costs on an attorney and client scale.

[2] The claim is based upon a written agreement of loan in terms of which the plaintiff advanced money to the defendants, as well as on the mortgage bond passed by the defendants in favour of the plaintiff to secure the loan.

[3] The defendants are married to each other in community of property. They are, however, estranged and are in the throes of a divorce.

[4] The purpose of the summary judgment procedure in rule 32 of the Uniform Rules is to 'prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights'.[1] The proper approach to application of this kind, once it is accepted that the plaintiff's affidavit is in order, is well known. One cannot do better than to quote Corbett JA's oft-cited judgment in *Maharaj v Barclays National Bank Ltd*:[2]

'Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. 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 (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 both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some Judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence. . . At the same time the defendant is not expected to

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[1] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 31. See too *Majola v Nitro Securitization 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) para 25.
[2] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426 A-E.

formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.'

[5] The first defendant has raised a number of defences to the claim, one of which relates to the fact that the notice in terms of s 129 of the National Credit Act 34 of 2005 (the NCA) was never delivered to him. The only point raised by the second defendant relates to the s 129 notice, but the factual basis differs somewhat from the first defendant's point.

[6] The first point taken by the first defendant is that this court has no jurisdiction because the property in question is situated in East London. There is no merit in this point. This court is the main seat of the Eastern Cape Division of the High Court.[3] It has jurisdiction over the entire province, including East London.[4]

[7] The second point concerns the loan agreement. The first defendant submitted that not all of the initialling at the foot of the pages looked consistent. I am not sure that he is correct but, it any event, the point goes nowhere – and does not raise a *bona fide* defence – because he conceded that he entered into that loan agreement.

[8] The third point that he raised was that the application for summary judgment was premature. It was not. It was brought property after a notice of opposition was filed. This point accordingly has no merit.

[9] The fourth point raised by the first defendant concerns the s 129 notice and was set out as follows in his answering affidavit:

'The first defendant states his defence that the South African Post Office employees were on strike during the period stated in Annexure "D" of the Combined Summons therefore no mail was delivered to him during that period and no confirmation signature for receipt of that mail. The strike was well broadcast by both electronically and by print media. The first defendant further states that there can be no matter before the National Consumer Tribunal when Section 129(1)(a) of the NCA No. 34 of 2005 was not properly followed.'

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[3] Superior Courts Act 10 of 2013, s 6(1)(a).
[4] *Thembani Wholesalers (Pty) Ltd v September & another* 2014 (5) SA 51 (ECG) para 10.

[10] While it is common cause that the first defendant never took delivery of the s 129 notice, the track and trace reports filed by the plaintiff gainsay the first defendant's assertion that no mail was delivered to him during the post office strike.

[11] The plaintiff sent, by registered mail, a s 129 notice addressed to both defendants to two addresses, namely, their residential address, [1….] [H….] [H….] Road, East London, and the domicilium they chose in terms of clauses 14.2 and 14.3 of the mortgage bond. The track and trace reports show that the notices reached the correct post offices, namely [A……] and [M…..], and that in both instances, notifications had gone out to the addressees.

[12] The second defendant stated in her affidavit that she left the marital home and lives elsewhere. As a result, she never received the s 129 notice. She raises no substantive defence to the plaintiff's claim.

[13] She claims that she and the first defendant have been living apart since May 2011 when she left the marital home at [1……] [H……] Hills [R….], [E…] L….] and that there is no communication between them except through their lawyers. As the first defendant remained in occupation of the home, he was responsible for the payment of monthly instalments due to the plaintiff. The second defendant assumed that he was making these payments regularly. She makes the point that one of the s 129 notices – the one sent to [4…..] [N….], [M….] – was sent to the first defendant's 'family home'. Because of the breakdown in the marriage of the defendants, she never received either of the s 129 notices. She alleges, as a result, that the summons was issued prematurely, that the summary judgment application should be dismissed and that a directive in terms of s 130 of the NCA should be issued.

[14] In *Kubyana v Standard Bank of South Africa Ltd*,[5] the Constitutional Court considered the obligations of both credit providers and consumers in relation to the process of notification in terms of s 129 of the NCA. Mhlantla AJ identified three features concerning the obligation of a credit provider to deliver a s 129 notice to a consumer.

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[5] *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC).

[15] First, she held, there is no requirement in the NCA that the s 129 notice must be 'brought to the consumer's subjective attention by the credit provider, or that personal service on the consumer is necessary for valid delivery under the Act': instead, the credit provider's obligation is met when it makes the notice available to the consumer through 'an acceptable mode of delivery'. She continued to state that once a credit provider had taken steps aimed at ensuring that the consumer 'is adequately informed of her rights', the credit provider should thereafter not be 'non-suited or hamstrung if the consumer unreasonably fails to engage with or make use of the information provided'. This is so because 'it is the use of an acceptable mode of delivery — the taking of certain steps to apprise the consumer of the notice — which the statute requires of the credit provider, not the bringing of the contents of the s 129 notice to the consumer's subjective attention'.[6]

[16] Secondly, when a consumer has elected to receive notices by post, 'the credit provider's obligation to deliver thus ordinarily consists of (a) respecting the consumer's election; (b) undertaking the additional expense of sending notices by way of registered rather than ordinary mail; and (c) ensuring that any notice is sent to the correct branch of the Post Office for the consumer's collection'.[7]

[17] Thirdly, in order to 'deliver' a s 129 notice, a credit provider must take whatever steps are necessary to 'bring the s 129 notice to the attention of a reasonable consumer'.[8]

[18] Mhlantla AJ then turned her attention to the obligations imposed on the consumer. She held:[9]

'[34] Section 129 aims to establish a framework within which the parties to the credit agreement, in circumstances where the consumer has defaulted on her obligations, can come together and resolve their dispute without expensive, acrimonious and time-consuming recourse to the courts. However, this form of dispute resolution is possible only if both

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[6] Para 31.
[7] Para 32.
[8] Para 33.
[9] Paras 34-35.

parties come to the table: the credit provider must avoid hasty recourse to litigation and the consumer must seek to rectify her default in a reasonable and responsible manner.
[35] If the credit provider complies with the requirements set out in [31] – [33] above and receives no response from the consumer within the period designated by the Act, I fail to see what more can be expected of it. Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement. It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a "harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements". Indeed, if the consumer has unreasonably failed to respond to the s 129 notice, she will have eschewed reliance on the consensual dispute resolution mechanisms provided for by the Act. She will not subsequently be entitled to disrupt enforcement proceedings by claiming that the credit provider has failed to discharge its statutory notice obligations.'

[19] She concluded that even if the s 129 notice had been 'dispatched by registered mail and the Post Office has delivered the notification to the consumer's designated address, valid delivery will not take place if the notice would nevertheless not have come to the attention of a reasonable consumer' but if 'the credit provider has complied with the requirements set out above, it will be up to the consumer to show that the notice did not come to her attention and the reasons why it did not'. [10]

[20] In this case, the first defendant claims that he never received notification that a registered letter awaited his collection at the post offices concerned. That is, as I have said, gainsaid by the track and trace reports, showing that he was, indeed, notified. That being so, the only explanation he has given for his failure to receive the s 129 notices is not true and so cannot, by definition, be reasonable. Delivery of the s 129 notice must, in these circumstances, be taken to have been properly effected on the first defendant.

[21] The second defendant argues that it was unreasonable of the plaintiff to assume that she and the first defendant had a normal marriage relationship in which they lived together and communicated with each other. In my view, it is simply unrealistic and unreasonable to expect credit providers to try to keep tabs on the

[10] Para 36.

private lives of consumers with whom they do business. They are entitled to assume that a couple married in community of property live together as man and wife and it is incumbent on a consumer whose circumstances have changed to inform the credit provider of those changed circumstances. That is precisely why provision is made for the consumer to notify the credit provider of a change in the address to which notices are to be given. The second defendant failed to do so. Her defence is disingenuous for another reason. It is that she did not receive the s 129 notice because she had moved out of the marital home. This ignores the fact that the address that she chose in the mortgage bond for the delivery of notices was [4……] [N……], [M…..], which address she wishes away by saying that it is the first defendant's family home.

[22] The plaintiff complied with its obligations in terms of the delivery of the s 129 notice to the second defendant by posting it by registered mail to both the address where it believed (and was entitled to believe) the second defendant was living and to the address she had chosen for the delivery of notices. Her failure, from May 2011 to the present, to inform the plaintiff that she had moved to another address was the cause of her failure to obtain delivery of the s 129 notice. The fault lay exclusively with her and her explanation, such as it is, is not reasonable. Her defence that she did not receive the s 129 notice cannot avail her.

[23] In the result, the application for summary judgment must succeed. I make the following order.

Summary judgment is granted against the first and second defendants, and in favour of the plaintiff, for:

(a) payment of R340 634.67;

(b) payment of interest on the above amount at the rate of 8.45 percent per annum compounded monthly in arrear from 7 October 2014 to date of payment;

(c) payment of monthly insurance premiums in the amount of R137.33 from 7 October 2014 to date of payment;

(d) an order declaring the following property to be specially executable:

[Erf 6…….] East London

Buffalo City Local Municipality

Division of East London, Province of the Eastern Cape

In extent 275 (two hundred and seventy five) square metres
Held by deed of transfer number [T2…….]
Subject to the conditions therein contained;
(e) payment of costs of suit on an attorney and client scale.

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C Plasket
Judge of the High Court

Appearances
For the plaintiff: TS Miller instructed by Netteltons
For the first defendant: In person
For the second defendant: M Beard instructed by Cloete and Company