FORM A
FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH

PARTIES**:** **NEDBANK LIMITED V CLIFFORD NEIL BARNARD**

NOT REPORTABLE

Case Number: **1142/08**

[1] High Court: **PORT ELIZABETH**

[1] DATE HEARD: **18 AUGUST 2009**

[2] DATE DELIVERED: **1 SEPTEMBER 2009**

JUDGE(S): **EKSTEEN AJ**

LEGAL REPRESENTATIVES –

Appearances:

[1] for the Plaintiff(s):**ADV SCOTT**
[2] for the Defendant(s): **ADV GAJJAR**
[3]

Instructing attorneys:

[1] Plaintiff(s): **BOQWANA LOON & CONNELLAN**
[2] Defendant(s): **LISTON BREWIS & CO**

CASE INFORMATION -

[1] *Nature of proceedings*:
[2] *Key Words*:
[3] *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 1142/08

Date delivered: 1 September 2009

In the matter between:

NEDBANK LIMITED Plaintiff

and

CLIFFORD NEIL BARNARD Defendant

JUDGMENT

EKSTEEN AJ:

[1] On 11 October 2005 the plaintiff entered into a written agreement with the defendant in terms of which the plaintiff lent and advanced to the defendant an amount of R850 000. The loan was repayable in monthly instalments and the balance outstanding from time to time was to bear interest at 1% below the plaintiff's mortgage bond rate, as varied from time to time.

[2] In terms of the written agreement the plaintiff would be entitled to forthwith to claim payment of all amounts owing to it together with interest in the event of the defendant being in breach of any conditions. The loan was duly secured by the registration on 23 November 2005 of a mortgage bond over his property, Erf 479 Walmer, in the Nelson Mandela Metropolitan Municipality.

[3] In breach of his contractual obligations the defendant fell in arrears with the monthly instalments which he had undertaken to pay. In these circumstances, on 3 December 2007, the plaintiff, who is a credit provider as envisaged in the National Credit Act 34 of 2005 (hereinafter referred to as "the Act") addressed a notice to the defendant drawing his attention to the terms of the agreement and his default. The notice bears a bold inscription at the top of the page which includes the following:

> "Notice of default in terms of section 129(1) of the National Credit Act … and of suspension of facility".

[4] The body of the letter reads as follows:

> "We confirm that you are in default on the terms of the agreement in that you are in arrears with both the November and December instalments on your repayments. The total arrears is R36 094,36.
>
> Accordingly, should the full arrear amount not be paid within 10 (TEN) business days from the date of this letter, the full amount owing, namely the amount of **R1 373 391,92** plus interest at the rate of **13% (Prime – 1%)**, calculated on the daily balance and capitalised monthly from **4 December 2007** to date of payment, both days inclusive, is now due and payable.
>
> As a result of the aforementioned default your access to credit, if any, in terms of the agreement is suspended with immediate effect. You are advised to ensure that the necessary alternative arrangements are made with regard to any payment mandates operating on the account, as these mandates will not be executed.

> We propose that you refer the agreement to a debt counsellor, alternative dispute resolution agent, consumer court or bank ombudsman, with a view to resolving any dispute under the agreement or developing and agreeing to a plan to bring the payments under the agreement up to date.
>
> Should you not do so and not pay the amount within 10 (TEN) business days from the date to delivery of this letter to you, legal proceedings to enforce compliance with your obligations under the agreement will be instituted against you without further notice ..."

[5] Notwithstanding the aforegoing demand the plaintiff alleges that the defendant remained in default. In the circumstances, on 4 June 2008, the plaintiff issued summons in which he claims payment of the outstanding amount of R1 399 079,99 together with interest thereon and an order in terms of which the property bonded by the defendant in favour of the plaintiff be declared specially executable. The defendant duly entered an appearance to defend. In response hereto the plaintiff issued summary judgment proceedings.

[6] The defendant does not dispute his liability nor the extent thereof. He raises three defences. As a result of the conclusion to which I have come I shall only consider the second defence. The essence of this defence is set out below. The defendant alleges that he is unable to recall having received the notice in terms of section 129 of the Act, however, he does not dispute receipt thereof. Realising his default the defendant states that during December 2007 he paid an amount of R24 000 to the plaintiff. As a

result of financial difficulties which he experienced he did not pay any instalment in January, February or March 2008. He did however pay an amount of R18 000 on 3 April 2008 and a further amount of R20 000 on 5 May 2008.

[7] Summons was issued on 4 June 2008 and served on the defendant on 5 June 2008. The defendant avers that during June 2008 he telephoned Mr Peet Burger of the plaintiff's legal department and enquired as to the outstanding arrears as at 30 June 2008. Mr Burger advised that the arrears at that date were approximately R54 000. With this information he then proceeded to make a payment on 30 June 2008 in the amount of R70 000. He alleges that with this payment the entire arrears were extinguished.

[8] Subsequent to June 2008 he made the following payments:

(a)	2 August 2008	-	R18 000,00
(b)	17 September	-	R20 000,00
(c)	6 December	-	R18 500,00
(d)	2 January 2009	-	R18 940,00
(e)	4 February 2009	-	R18 000,00
(f)	17 March 2009	-	R13 004,40
(g)	3 June 2009	-	R12 800,00
(h)	1 July 2009	-	R12 800,00

[9] On this basis the defendant submits that all amounts overdue in terms of the agreement concluded between the parties have been paid, together with any amounts which the plaintiff may have debited to the account in respect of default charges or reasonable costs of enforcing the agreement. In support hereof the defendant has annexed a "loan statement" issued by

the plaintiff on 30 April 2009 in respect of the period 1 April 2009 to 30 April 2009. The statement reflects that there are no overdue amounts owing.

[10] Reliant on the aforestated the defendant contends that, accepting the correctness of the notice issued by the plaintiff in December 2007, the agreement has been reinstated in terms of the provisions of section 129(3) of the National Credit Act, 34 of 2005.

[11] On behalf of the plaintiff it is argued that the submission by the defendant that all arrears together with any default charges and reasonable costs of enforcing the agreement have been extinguished is not capable of belief. In support hereof Mr **Scott**, who appears on behalf of the plaintiff has made a calculation of amounts which he contends would have fallen due and compared this amount with the admitted payments set out in the affidavit. For purposes of this calculation reliance has been placed on a notice issued by the plaintiff to the defendant dated 25 March 2009 indicating a change in interest rate. It is apparent from the notice that the interest rate applicable to the loan was reduced from 13% to 12% with effect from 1 April 2009. The effect thereof would be to reduce the monthly instalment from R14 626,94 to R13 642,90. It is further apparent from the notice issued by the plaintiff on 3 December 2007 that the applicable interest rate at that time was 13%. On this basis Mr **Scott** has assumed for purposes of his calculation that a constant monthly instalment of R14 600 would have fallen due throughout the period up to 1

April 2009. The calculation done reveals that on the admitted payments the defendant remained in arrears at all times, save in September 2008 when his account would have been in credit by an amount of approximately R2 000.

[12] The exercise set out above is a useful one, however, the difficulty with such calculation is that we do not know what fluctuations in the interest rate may have occurred between December 2007 to April 2009. I would accordingly be disinclined to reject the defendant's figures merely on the strength of this exercise. Even on an acceptance of this theoretical calculation there is at least one occasion that the account was in credit. The defendant's contentions are furthermore supported by the "loan statement" issued by the plaintiff in April 2009 which indicates that there were at that time no arrears at all in respect of repayments on the loan account. In the circumstances on the evidence which is before me on oath and documents issued by the plaintiff itself it seems to me that at best for the plaintiff, there must be a reasonable prospect of establishing at the trial that plaintiff has acknowledged by its "loan statement" that there were no overdue amounts owing in April 2009.

[13] Section 129(3) of the Act provides, subject to subsection (4), that a consumer may;

> "(a) at any time before the credit provider has cancelled the agreement reinstate a credit agreement that is in default by paying to

the credit provider all amounts that are overdue, together with the credit providers permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement; and

(b) …."

Subsection (4) finds no application to the present facts.

[14] It is not in dispute that the plaintiff has not cancelled the agreement. On behalf of the plaintiff it is argued that a defendant who wishes to reinstate an agreement in terms of section 129(3) must first approach a credit provider in order to ascertain the extent of his overdue indebtedness, as well as the extent of the aforesaid default charges and reasonable costs of enforcing the agreement and must advise the credit provider that he intends reinstating such an agreement by paying the amounts so due. The agreement cannot, so the argument goes, be automatically reinstated merely by the consumer paying all the said amounts.

[15] I am unable to find anything in the section which requires a consultative process of this nature before a credit agreement could be reinstated. The express provision of the section is that the agreement will be reinstated "by paying to the creditor provider all amounts that are overdue …". I consider that the consumer can unilaterally reinstate the agreement merely by making payment of sufficient amounts of money to cover all the charges referred to in section 129(3). Once that has occurred I am of the view that the agreement is automatically reinstated. The mere fact that such

payments are made would be sufficient for a credit provider to infer the intention of the defendant to reinstate the contract.

[16]The defendant in the present matter is unable to state what the permitted default charges and reasonable costs of enforcing the agreement up until 13 June 2007 were. The defendant, however, submits that having paid an amount of R26 000 more than that which the plaintiff had advised was overdue on 30 June 2008, he did cover those expenses. The payment made would have to be allocated on the basis set out in section 126(3) of the National Credit Act which provides for the payment to be applied firstly to satisfy any due or unpaid interest charges, secondly to satisfy any due or unpaid fees or charges and thirdly, to reduce the amount of the principle debt. Having applied this payment, and the subsequent payments, in this fashion a loan statement was issued by the plaintiff in April 2009 that there were no arrears. In these circumstances, if the loan statement is proved to be correct, then the agreement would not only have been reinstated but, as of April 2009 it would appear that the defendant had not fallen in arrears again.

[17]On the view which I have taken it appears to me that in the event of the defendant establishing the facts set out in his second defence at trial it would constitute a valid defence in law. In the circumstances I consider that the defendant should be granted leave to defend. By virtue of this finding it is not necessary for me to consider the first and third defences raised and I express no view on these defences.

In the result the order which I make is the following:

1. The application for summary judgment is dismissed.
2. The defendant is given leave to defend and
3. The costs of the summary judgment application are to be costs in the action.

_____

J W EKSTEEN

ACTING JUDGE OF THE HIGH COURT