IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No: **22445 / 07**
Date heard: **14 November 2007**
Date of judgment: _____

In the matter between:

Nedbank Ltd Plaintiff

and

Ditsheho Isaak Motaung Defendant

JUDGMENT

DU PLESSIS J:

The plaintiff sues the defendant for payment of R236 677,40 being the balance due and owing in respect of moneys that the plaintiff lent to the defendant under security of a mortgage bond registered over the defendant's property. The plaintiff also claims interest at the agreed rate, an order that the mortgaged property be declared executable and costs on the attorney and client scale as provided for in the mortgage bond. The defendant entered an appearance to defend the action and the plaintiff thereafter launched an application for summary judgment. The defendant filed and affidavit opposing the summary judgment. The application was argued and this judgment concerns the plaintiff's application for summary judgment.

The date upon which the plaintiff instituted this action is relevant to one of the arguments that counsel advanced. It is to that issue that I now turn.

The plaintiff first instituted the action by way of a simple summons issued out of this court on 6 June 2007. That summons was served on the defendant on 11 June 2007. It did not contain an allegation to the effect that the plaintiff had complied with the provisions of sections 129 and 130 of the **National**

Credit Act, 34 of 2005 ("the Act"). The plaintiff's attorney then prepared a new simple summons, this time containing the allegation that the plaintiff has "complied with the provisions of sections 129 and 130 of the National Credit Act as appears from Annexure 'C' hereto". The attorney re-issued the summons in its new, changed form on 21 September 2007. The re-issued summons was served on the defendant on 8 October 2007 and in reaction thereto, the defendant entered an appearance to defend. The present application for summary judgment followed.

As a general proposition and from a procedural perspective, amendments to pleadings are effected retrospectively. A party cannot by way of amendment, however, obtain substantive rights retrospectively. Thus, from a perspective of substantive rights, amendments to pleadings take effect when they are actually made (See **Harms: Civil Procedure in the Supreme Court** B28.1 at footnotes 2 and 3). In this case the plaintiff, by re-issuing and serving the re-issued summons, is in no better position: its substantive rights flowing from the issue of the summons must be determined as on the date of the re-issue of the summons. I hold that the summons in this case was for purposes of determining substantive rights, issued on 21 September 2007.

In his affidavit resisting summary judgment, the defendant states that, having realised that he was in financial difficulties, he applied, in terms of the Act, to a debt counsellor to be placed under debt review. From the annexure to his opposing affidavit it is apparent that the defendant made such application on 17 September 2007.

In order to understand how the defendant's allegations could constitute a *bona fide* defence to the plaintiff's claim, it is necessary first to point out that it is common cause that the debt owing to the plaintiff arises from a credit agreement as defined in the **National Credit Act**. In the second place reference must be made to three innovations that the Act introduced in respect of debt collection. The defendant's defence pertains to the interaction between these three innovations and I shall deal therewith in the third place.

The first innovation is to be found in section 129(1) of the Act that, relevant to this case, provides: "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) … 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; …"

The second innovation that I must refer to is to be found in section 86 of the Act that deals with applications for "debt review". In terms of section 86(1) a "consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted." Although that did not happen in this case, I must for the sake of clarity point out that a credit provider may in terms of section 86(10) terminate a debt review in respect of a particular credit agreement.

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)[1], or section 129 (1), as the case may be" (Section 130(1)(a) of the Act).

The third innovation is to be found in section 130(3) of the Act. Relevant to the defence that the defendant raised in his affidavit, section 130(3)(c)(i) provides that: "Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied … (c) that the credit provider has not approached the court …(i) during the time that the matter was before a debt counsellor …". The defence that appears from the defendant's affidavit thus relates to the interaction between sections 86 and 130 of the Act and it is with that defence that I now proceed to deal.

The reader will recall that the plaintiff instituted the present action on 21 September 2007 while the defendant had applied for debt review in terms of section 86(1) already on 17 September 2007. Does it follow, in the words of section 130(3)(c)(i), that the plaintiff "approached the court … during the time that the

[1] This should be a reference to section 86(10).

matter was before a debt counsellor"? If so, the court is in terms of the same subsection precluded from determining the matter.

It is for present purposes sufficient to assume that a plaintiff "approaches a court" for purposes of section 130(3) when he institutes action[2] which, in this case, happened on 21 September 2007 after the defendant had approached the debt counsellor. Importantly, section 130(3)(c)(i) does not preclude the court from determining the matter after the defendant (consumer) had approached a debt counsellor in terms of section 86, but during the time that the matter is before a debt counsellor. "The matter" as used in the subsection clearly refers to the subject matter of the case that is before the court. The question in this case therefore is whether the present matter between the parties was before a debt counsellor when the action was instituted.

The answer to the question is in the express provisions of section 86(2) of the Act that provides as follows: "An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement." (My underlining.) In its summons the plaintiff alleges that it has complied with the provisions of section 129 and 130 of the Act "as appears from Annexure 'C' hereto". Annexure "C" to the summons is a certificate by a manager in the plaintiff's employ *inter alia* to the effect that a notice in terms of section 129(1) of the Act was delivered to the defendant on 15 February 2007. In his affidavit resisting summary judgment the defendant does not dispute this allegation and it must therefore be regarded as being common cause. Thus, when the defendant on 17 September 2007 applied for debt review in terms of section 86 of the Act, the plaintiff had already "proceeded to take the steps contemplated in section 129 to enforce that agreement". In the words of section 86(2) that I have underlined, the defendant's application for debt review does not apply to the credit agreement now under consideration. The defence based on section 130(3)(c)(i) of the Act must therefore fail.

Mr Ruabenheimer who appeared for the defendant submitted that, in nay event, the provisions of section 130(3)(a) of the Act precludes the court from granting summary judgment. The subsection provides: "Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in

[2] It could be argued that the plaintiff only does so when he applies for judgment.

respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that … (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with". In the absence of evidence, so counsel submitted, that section 129 has been complied with, the court cannot be satisfied as contemplated in section 130(3).

I realise that there is a debate as to how a plaintiff must for purposes of default judgment "satisfy" the court as envisaged in section 130(3)(a). I need not enter that debate. I have pointed out that, in the re-issued summons, the plaintiff alleges compliance with sections 129 and 130 of the Act. In the affidavit supporting summary judgment, a manager in the plaintiff's employ swears positively to the "facts verifying the cause of action". Moreover, I have already pointed out that the defendant does not in his opposing affidavit dispute the allegation that the relevant sections have been complied with. In the circumstances, to the extent that evidence is needed, such evidence is before the court and is not in dispute. I am therefore satisfied that the provisions of section 129 have been complied with.

In the result summary judgment is granted against the defendant as follows:

1. Payment of the sum of R236 677,40.
2. Interest on the amount of R236 677,40 at the rate of 11,9% per annum from 2 May 2007 to date of payment.
3. An order declaring the mortgaged property referred to in the summons executable for the said sums and costs.
4. Costs on the scale as between attorney and client.

B. R. DU PLESSIS
Judge of the High Court

Plaintiff's Legal Representation:

Adv. JP van den Berg (012 452 8725 / 082 466 4588)

Defendants Legal Representation:

Adv. E. Raubenheimer (011 784 7777 / 082 571 5194)