REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A3096/09

In the matter between:-

PARETO LIMITED	**First Appellant**
ABSA BANK LIMITED N.O. IN ITS CAPACITY AS TRUSTEE FOR THE ALAN GRAY PROPERTY TRUST SCHEME	**Second Appellant**
ABSA BANK LIMITED N.O. IN ITS CAPACITY AS TRUSTEE FOR THE SYCOM PROPERTYFUND COLLECTIVE INVESTMENT SCHEME	**Third Appellant**

And

KALNISHA SIGABAN t/a KS FLOWERS N MORE

Respondent

J U D G M E N T

MATHOPO, J:

[1] This is an appeal against the refusal of the Magistrate Johannesburg to grant default judgment in respect of the appellants claim for rental and other related charges i.e. electricity, water, sewerage charges unpaid municipal rates.

[2] The appellants issued summons against the respondent for the payment of rentals and other amounts or charges.

[3] The summons was served on the respondent at her chosen domicilium address and after the expiry of the dies and the respondent's failure to enter appearance to defend, the appellants applied for default judgment in terms of Rule 12(1) of the Magistrate's Court Rules.

[4] The Magistrate refused to grant default judgment on the appellants claims on the basis that since the appellants claims were for rental and other related charges, these charges were in the nature of a utility as defined in Section 1 of National Credit Act 34 of 2005 (The Act), and that absent compliance with section 129 of the Act, the appellants claims were premature.

[5] The appeal is therefore directed at two consequences of the magistrate's order:

5.1 his refusal to grant judgment in respect of the rental component

5.2 his refusal to grant judgment in respect of the so-called "utility" charges

[6] The crisp point in this appeal, is thus whether section 129 of the Act (which obliges a creditor in certain circumstances to deliver a specific form of notice of demand to a debtor prior to the institution of the court proceedings) applies to amounts other than rental payable by the

lessee in terms of a lease notwithstanding that section 129 does not apply to the rental component of the landlord's claim.

[7] It seems to me that the Magistrate simply lumped the two claims together and concluded that since there had not been compliance with section 129 in regard to one part of the claim (utility charges), the entire action of the appellants was premature and denied the appellants judgment in respect of the rental component on the claim.

[8] Although not very clear from the Magistrate's judgment it appears that the Magistrate applied the provisions of the Act to one isolated portion of the agreement of lease dealing with the lessee's obligation to pay for electricity, unpaid municipal rates, water and sewerage and classified same as a Credit Agreement in terms of section 4 of the Act or an incidental Credit Agreement in terms of section 5 of the Act.

This approach is fallacious because it is in conflict with the provisions of the Act. According to the Act, an agreement constitutes a credit agreement if it is:

a) a credit facility
b) a credit transaction
c) a credit guarantee
d) any combination of the above transactions

[9] A lease agreement in respect of immovable property is specifically excluded in the Act does not fall within the definition of a credit agreement as contemplated in the Act. Thus the approach of the Magistrate is fallacious because it is in conflict with the provisions of the Act.

[10] The fallacy in the Magistrate's approach is that a lease agreement is a composition of rights and obligations enforceable between the landlord and tenant. It is incongruous to single out that part of the agreement of lease which relates specifically to the right of the tenant to utilise the

immovable property and the concomitant obligation to pay the landlord for the use of that property and call that "the lease" and then call everything else agreed upon by some other name.

[11] A lease agreement does not mean that part of the agreement dealing with rental but the composite agreement which includes all the material terms. It is incorrect and fallacious to attempt to sever or isolate certain parts of the agreement from the entire or whole agreement. **See Johnston v Leal 1980 (3) SA 927 (A)** where Corbett JA dealing with a case relating to the agreement from the Sale of Immovable property held that the provisions of the **Alienation of land Act, Act 68 of 1981** do not apply solely to the essentialia of a sale but the provisions apply to all material terms thereof. The agreement must be read in its entirety, because to attempt to read the agreement as isolated like the Magistrate did, would in my view be tantamount to creating a new agreement for the parties. Thus when the Act specifically excludes a lease of immovable property as in the instant case it is incorrect to say that certain parts of the agreement are hit by the provisions of the Act while others be exempt. The agreement constitutes a composite, indivisible and the entire agreement is regarded as an agreement for the lease of immovable property.

[12] Consequently a lease as contemplated in the Act does not mean simply that part of the agreement which constitutes the essentialia of the lease but includes also all the material terms thereof.

[13] It is clear from the reading Section 8(2) of the Act that it does not apply to a claim for rental in respect of immovable property. **Professor Otto in his book National Credit Act Explained,** also shares the view that a lease in terms whereof the lessee pays rents which does not include a fee, charge or interests and in terms whereof ownership remains with the lessor throughout will not be subject to the Act at all. It is difficult to glean from the Magistrate's judgment why he did not grant judgment in

respect of the rental component of the claim. In my view there is no reason save an oversight on the part of the Magistrate why the appellants should not have succeeded in respect of the claim for the rental component.

[14] I now turn to deal with the utility charges claim.

The Act defines a "utility" as:

The supply to the public of an essential-

(a) commodity such as electricity, water or gas: or

(b) service, such as waste removal, or access to sewage lines, telecommunication networks or any transportation infrastructure

Subsection 4(6)(b) provides as follows:

"Despite any provision of this Act-

(b) if an agreement provides that a supplier of a utility or other continuous services-

(i) will defer payment by the consumer until the supplier has provided a periodic statement of account for that utility or other continuous services; and

(ii) will not impose any charge contemplated in Section 103 in respect of any amount so deferred, unless the consumer fails to pay the full amount due within at least 30 days after the date on which the periodic statement is delivered to the consumer

that agreement is not a credit facility within the meaning of section 8(3), but any overdue amount in terms of that agreement, as contemplated in subparagraph (ii), is incidental credit to which this Act applies to the extent set out in section 5.

[15] From the section it appears that in respect of any overdue amount owing in terms of an agreement, the Act does apply. Now to apply the Act to that portion of the lease which obliges the tenant to pay the landlord for those utility charges, a number of conditions have to be satisfied:

15.1 There has to be an agreement for the supply of the services in respect of which the utility charges are owed. There is in *casu* no such agreement. It is highly artificial to regard the lease as constituting such an agreement. The appellants certainly have not agreed to supply the respondent those utilities.

15.2 Section 4(6) (a) refers specifically to

"the person who sells the goods or services".

The landlord is not such a person. Reading the whole of section 4(6) contextually, it is clear that the section is referring to an agreement as between the **utility supplier** and the **ultimate consumer.** The overdue portion of the amount owing in respect of a utility charge is then regarded as constituting incidental credit, as defined. The purpose of section 4(6) is therefore to bring within the net, the overdue portion which a consumer owes a utility supplier. Nothing therein indicates that the amounts owing in respect of utility charged by a tenant to a landlord (the latter not being a utility supplier) are to be regarded as falling within the scope of the Act.

[16] In essence, the rationale of the Magistrate's judgment is to the effect that if the lease were to vest a landlord with a right to claim immediate payment of the rental or eviction upon the commission of the breach by the tenant, the landlord would not be entitled to claim everything then owing by the tenant. I do not think that the legislature would have

intended to bring about such a state of affairs which might possibly lead to a multiplicity of actions. I say this for the reason that the landlord is not entitled to split up its claims. It cannot claim rental in one action and at a later stage claim the separate amounts in respects of the utility charges. Such conduct would lead to an anomaly and cause hardship to defaulting tenants who would have to face multiple actions all arising out of the same agreement which could have been adjudicated or enforced in one action.

[17] In my view it is clear that provisions in a lease agreement which entitle the landlord to recover from the tenant utility charges are not ones intended to profit the landlord in any manner. In effect, the landlord disburses money to a utility provider on behalf of the tenant and all that the landlord is seeking to do is to recover from the tenant that which it disbursed on the latter's behalf and for the latter's benefit. The Magistrate erred in regarding the Act as applicable to that portion of the appellants claims which relates to utility charges.

[18] I therefore conclude that the Magistrate misconstrued his position by refusing default judgment on the basis of non-compliance with section 129 of the Act which is clearly not applicable in the present matter.

1. Based on the conclusions made above, the appeal should therefore be upheld. I therefore make the following order:

2. The appeal is allowed to the extent that the order of the Magistrate is set aside and substituted with the following:

    a) Judgment is granted in favour of the plaintiff in terms of prayer 3 of the Particulars of Claim for payment of the sum of R59 946.18

    b) The defendant is ordered to pay the plaintiff's costs on an attorneys and client scale.

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RS MATHOPO
JUDGE OF THE HIGH COURT

I agree:

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BHAM AJ
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant	:	Adv. AJ Horwitz SC
		With Adv. C Robertson
Instructed by	:	Gideon Pretorius Incorporated
For the Respondents	:	No appearance
Instructed by	:	
Date of hearing	:	12 April 2010
Date of Judgment	:	15 April 2010