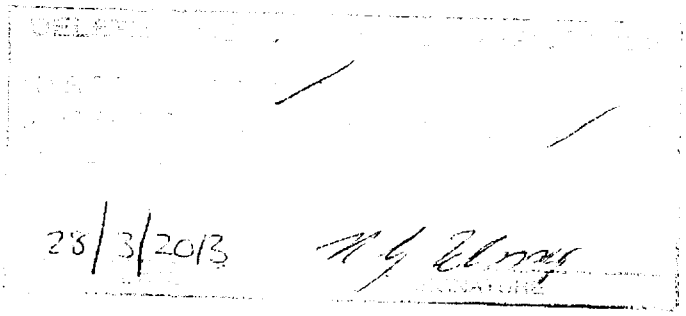
IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH-AFRICA)

CASE NO: 36247/2011



28/3/2013

4/4/2013

In the matter between:

FIRST RAND BANK LIMITED

(Formerly known as FIRST NATIONAL BANK

OF SOUTH-AFRICA) **PLAINTIFF**

AND

PHIRI, LUCAS **1ST RESPONDENT**

PHIRI, HUNANDI JOHANNAH **2ND RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] The applicant brought an application that leave be granted to the applicant to comply with the requirements of section 129 of the National Credit Act 43, of 2005 (the NCA) by delivering a notice in terms of section 129(1)(a) of the NCA to the first respondent. The respondents opposed this application, despite the fact that this application is only relevant to the position of the first respondent.

BACKGROUND

[2] During January 2007 the applicant and the respondents concluded a written home loan agreement. The parties caused a mortgage bond to be registered as security for their indebtedness to the applicant.

[3] The applicant alleged that the respondent failed to comply with their obligations in terms of the loan agreement and failed to effect regular payments of the required instalments.

[4] Prior to the institution of this action applicant issued summons under case no. 47765/2010 and asked for summary judgment. This application was opposed. The summary judgment was refused. Applicant withdrew that summons and instituted action in this case.

[5] The applicant alleged that as at 8 June 2011 the total outstanding balance due amounted to R346 454-69, and the arrears amounted to R55 351-69. As a result the applicant instituted action against the respondent.

[6] The applicant obtained default judgment against the respondents. The default judgment was however rescinded and set aside by order of court on 23 April 2012. Subsequent to the order being granted the respondents entered an appearance to defend and delivered a plea to the applicant's declaration.

[7] The applicant contends that in the bona fide but mistaken belief that it has indeed complied with the requirements of sec 129 of the NCA, the applicant erroneously alleged in its declaration that it has duly delivered a notice in terms of sec 129(1)(a) of the NCA to the first respondent. The respondents were previously married and as a result the applicant erroneously delivered only one sec 129 notice to the respondents. The fact however is that the parties were divorced when the notice was served and no longer living together. Consequently there was no proper service of the sec 129 notice on first respondent as he didn't reside at the address where the notice was served.

[8] It is thus common cause between the parties that the applicant failed and/or neglected to deliver a notice in terms of sec 129(1)(a) of the NCA to the first respondent.

[9] Respondents opposed the application and contends that the applicant's interpretation of sec 130(4)(b)(ii) of the NCA relating to instances where a credit provider has failed to comply with the provisions of sec 129(1)(a) of the NCA is unconstitutional in that it contravenes sec 39(2), sec 32(1)(b), sec 34, sec, 25, 26 and sec 165 to 180 of the Constitution. The respondents filed a notice in terms of Rule 16 A of the Uniform Rules of Court.

[10] The respondents alleged in the affidavit by their attorney that granting this order will have the same effect as a declaration of rights that will have an impact on not only respondents but on many other indigent consumers.

THE LEGAL FRAMEWORK

[11] [12] Section 130(4)(b) of the NCA reads as follows:

"(4) In any proceedings contemplated in this section, if the court determines that –

(a) ...

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) (a), or has approached the court in circumstances contemplated in subsection (3) (c) the court must -

(i) Adjourn the matter before it; and

(ii) Make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;"

[12] The purpose of the NCA is to protect the consumer on the one hand and on the other hand it aspires to establish responsible and viable credit granting practices. It stands to reason that the rights of credit providers should also be protected, as the creation of viable credit granting practices will not be possible in the absence thereof.

[13] Section 130(4)(b) and its application must be interpreted within the broader context of the act and with due regard to its purpose. The purpose of the NCA is *inter alia* to protect the consumer and making credit and banking services more accessible. The preamble to the NCA states as follows:

"*To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information, to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act, 1968, and the Credit Agreement Act, 1980; and to provide for related incidental matters.*"

[14] In **Firstrand Bank t/a FNB Seyfrett**[1] Willis J held that:

"*Certainly, the NCA is designed to protect consumers but it was not intended to make South Africa a 'debtors paradise'. Indeed a 'debtors' paradise' will not last for long. Very soon, credit would not be available to ordinary people. Sight must not be lost of the fact that among the purpose of the Act is the 'development of a credit market that is accessible to all South Africans'. It should be remembered that access to responsibly granted credit, on fair and reasonable terms, is an important means of social upliftment for ordinary citizens. It also needs to be borne in mind that responsibly granted credit has a 'multiplier effect' in an economy. For example, money lent to build a house is used not only to pay the wages of the builders but also to buy materials (and, in so doing, pays the wages of those who produced the materials). These payments by the borrowers who is building a house find their way back into the banking systems as deposits and are lent out again. This the system multiplies, depending on the reserve ratios that the banks, either voluntarily or by regulation, maintain. In other words, money-lending not only creates wealth but jobs as well. It is inconceivable that it could have been the intention for the legislature to facilitate the wholesale evasion of debt under the banner of 'consumer protection'. Moreover, sec 86(5)(b) requires hat, when it comes to debt review, consumers and credit providers are to act in good faith towards one another.*"

[1] 2010(6) SA 429 (GSJ) at p 434, par 10

[15] In **Nedbank v National Credit Regulator**[2] Malan JA stated in paragraph 2 that:

"Unfortunately, the NCA cannot be described as 'the best drafted Act of Parliament which was ever passed, nor can the draftsman be said to have been blessed with 'draftsmanship of the Chalmers'. Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise ... The interpretation of the NCA calls for a careful balancing of the competing interest sough to be protected, and not for a consideration of only the interest of either the consumer or the credit provider."

[16] The problems with the drafting of the NCA is illustrated in *casu* as the wording of sec 130(4)(b) gives the impression that the matter "must" be adjourned at the same time as the directions are being given for compliance with the NCA.

[17] The respondent contended that the trial court must grant an order giving directions for compliance. This approach is in my view not correct. The purpose of sec 130(4)(b) is to ensure that there is compliance with sec 129. Section 130 envisages a postponement of the matter if there was no compliance with sec 129. In my view there is nothing that prevent a party to approach the court prior to the hearing of the matter to give directions as envisaged in sec 130(4)(b)(ii). The legislators' intention could not have been that only the trial court is empowered to postpone and give directions in this regard or that the adjournment of the matter should be adjourned by the trial

[2] 2011(3) SA 581 (SCA)

court. Such a narrow interpretation of sec 130(4)(b) will not assist the credit provider or the consumer as it will only delay the process and cause further costs.

[18] The purpose of sec 130(4)(b) is to ensure compliance with the NCA and the reference to an adjournment should not be seen in isolation. The purpose of the adjournment is to ensure compliance with the Act and nothing else. In my view the court in which division the action has been launched remains vested with the discretion and power set out in section 130(4)(b). Therefore the reference to the court refers to the division in which the matter is vested and can therefore include the court hearing default judgment, summary judgment, the trial itself or even the court in an interlocutory application, as in this case.

[19] In my view sec 130(4)(b) of the NCA is directed at providing the court with an inherent discretion to deal with matters where there has not been compliance with *inter alia* sec 127, 129 or 131, and nothing more than that.

[20] The reference to "setting out the steps" in sec 130(4)(b)(ii) clearly should be interpreted to mean providing direct guidelines as to the path which needs to be followed to enable the matter to proceed to trial. Therefore the section is designed not to be an absolute bar to proceedings to trial but rather to function as a bridge to address issues which impede the matter from proceeding to trial.

[21] Our courts have taken the approach in summary judgment applications and default judgments that matters be adjourned to ensure compliance with the act.

[22] In this regard the following was stated pertaining to a summary judgment application, in **Firstrand Bank v Dhlamini**[3] *supra*:

"[32] ... Section 130 (4) (b) provides that if it is determined that the credit provider has not complied with s 129(1)(a), and has instituted action prematurely, the court may adjourn the matter and make an appropriate order setting out the steps the credit provider must complete before the matter may resume. The respondent in the present case has failed to put up a defence on the merits, it may be that if the process contemplated in s 129 are followed without success, summary judgment should be granted. It would be unfair to the credit provider to deny it that possibility on the ground of a procedural defect. Accordingly the orders that follow are appropriate in a case such as this."

[23] Thus in summary judgment applications the approach has been adopted where there is non-compliance with the provisions of section 129 or where compliance is lacking, that those applications are postponed to enable the

[3] 2010(4) SA 531 (GNP) at 539I (par 32) to 540

plaintiff to comply by sending a fresh notice, where after the summary judgment application could be re-enrolled[4].

[24] In the matter of **Standard Bank of South Africa Limited v Bekker & Another**[5] and four similar cases the full Court dealt with an application in terms of Uniform Rules of Court 46(1)(a). In one of the cases dealt with in that matter the Summons was issued prior to the period of a minimum of 10 business days required in terms of section 129(1)(b) and 130(1)(a) of the NCA having lapsed. The full Court referred with approval to the decision of **Standard Bank of South Africa Limited v Rockhill & Another**[6] and held that it would be appropriate, under those circumstances, to adjourn the application for default judgment and to direct the plaintiff, if it wishes to proceed with the application, to first provide notice afresh to the defendants in terms of section 129(1) of the NCA.

[25] Accordingly the full Court acknowledged the principle that the Court is vested with the discretion and power to grant an order in terms of section 130(4)(b) and to direct a party to take the steps the Court deems fit to rectify any non-compliance.

---

[4] Standard Bank of South Africa Limited v Rockhill & Another 2010(5) SA 252 (GSJ); Absa Bank Ltd v Prochaska t/a Bianca Interiors 2009(2) SA 512 (P & CLD) and Cater Trading v Blignaut 2010(2) SA (ECP) at 52E-53E

[5] 2011(6) SA 111 (WCC) at p 131

[6] Supra 2010(5) SA 252 (GSJ) p 131

[26] As the guidelines which the court will give are to ensure compliance of sec 129 it is inconceivable that the respondents could argue, as they do:

(i) by doing so the consumer will be deprived of his right to notice as envisaged in sec 129 or

(ii) that by doing so the consumers will be deprived of their rights in terms of the Constitution or that it will prevent them from having a fair trial.

[27] The respondent's argument is not valid in that:

(i) This section merely sets out the steps that needs to be followed to ensure compliance with section 129(1)(a);

(ii) The purpose of sec 129 is to protect the rights of the consumer and ensure that notice is given to the consumer; and

(iii) No right of the consumer is affected as the court merely gives guidelines to ensure compliance with the NCA. The consumer still has all the defences in terms of the NCA as well as all other defences available to him.

[28] There is thus no merit in the argument that to apply sec 130(4)(b) will undermine the purpose of the Act. The respondents' rights in terms of the Constitution remain unaffected and to the contrary the consumer's rights are protected as compliance with the NCA is ensured. The Court furthermore does not make any order pertaining to the rights of the consumer and thus the

argument that consumers will be deprived of any of their rights is without any merit. As a result the application should be granted.

[29] The applicant proposed that apart from service on the first respondent, the notice should also be served on the respondent's attorney of record, strangely enough respondent's attorney opposed this proposal. I am of the view that, as he is their representative it is appropriate and in the interest of the respondent that the notice is served on him too. The applicant conceded that costs of this application should be costs in the cause, in the light thereof such an order is made.

[30] In the light of the aforesaid I make the following order:

30.1 The applicant is ordered to deliver a notice in terms of section 129(1)(a) of the national Credit Act 34 of 2005, per registered post to:

30.1.1 The first respondents, at the following address:

Number 53, Block E, MABOPANE

30.1.2 The first respondent's attorney of record, at the following address:

Greef & van Wyk Attorneys

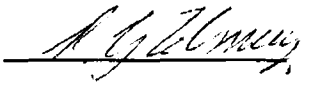
745 Park Street

ARCADIA

PRETORIA

30.2 The action against the first respondent may not be set down for hearing, until such time that the applicant has complied with the order set out in paragraph 1 above; and

30.3 The costs related to the applicant's application in terms of section 130(4)(b) of the National Credit Act 34 of 2005, are costs in the cause.



R G TOLMAY

JUDGE OF THE HIGH COURT

CASE NAME:	FIRST RAND BANK vs L & H J PHIRI
CASE NO:	36247/2011
JUDGE:	TOLMAY
DATE OF HEARING:	18 MARCH 2013
DATE OF JUDGMENT:	4 APRIL 2013
ATTORNEY FOR APPLICANT:	HACK STUPEL & ROSS PRETORIA
ADVOCATE FOR APPLCIANT:	ADV J A DU PLESSIS
ATTONREY FOR RESPONDENT;	GREEFF & VAN WYK ATTORNEYS ARCADIA, PRETORIA
ATTORNEY FOR RESPONDENT:	F GREEFF