REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
NORTH GAUTENG DIVISION, PRETORIA

CASE NO: 73350/2015
DATE: 3/10/2016
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD Applicant

And

PIET NKHEBI MOKWANA Respondent
(IDENTITY NUMBER: […])

JUDGMENT

MSIMEKI J,

INTRODUCTION

1. The applicant, in September 2015, instituted an action against the respondent seeking payment of an amount of R251 359 57; interest thereon at the rate of 12.75% per annum from 25 July 2015 to date of payment and costs of suit. The

respondent delivered his notice of intention to defend the action whereupon the applicant filed its application for summary judgment which is opposed by the respondent.

BRIEF BACKGROUND FACTS

2. On 5 April 2013 the applicant and the respondent entered into a written loan agreement ("the agreement"). The minimum monthly repayment amount was R5 035 00 for a period of 60 months. The respondent fell in arrears with the repayment of the monthly instalments. The applicant became entitled to claim payment of the full outstanding amount in terms of clause 11.4 of the agreement which provides:

"11.4 In the event of default, we may, at our election and without affecting any other rights that we may have in terms of this Agreement or otherwise, recover from you payment of all amounts owing under this Agreement by adhering to the default procedure described above."

3. The respondent filed an affidavit opposing the application for summary judgment. In sum, the respondent's defences are that:

1. the deponent to the affidavit supporting the application for summary judgment "failed to attach confirmation of authorisation and or confirmation that he indeed is employed by the Applicant" and the application for that reason alone, should be dismissed. The respondent further denied that the deponent has knowledge of the matter and that the relevant documents are under his control.
2. the applicant is not entitled to proceed with legal action "as it has failed to comply with **Section 129 read with Section 130 of the Credit Act** in that the compulsory **Section 129** was not served on the *domicilium* address as specified in the agreement".
3. he "should have written consent" from his spouse and that the applicant "should have cited" his wife as the second respondent. For this reason alone, the application ought to be dismissed.

4. In respect of the respondent's defences, it was submitted on behalf of the applicant as follows:

1. CONFIRMATION OF AUTHORISATION/EMPLOYMENT AND PERSONAL KNOWLEDGE

1.1. It was not necessary to annex confirmation of authorisation or confirmation that the deponent to the founding affidavit is employed by the applicant. What must be authorised is the institution of the proceedings and the prosecution thereof as the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. This, indeed, is law (See in this regard, **Firstrand Bank Ltd v Fillis 2010 (6) SA 565 (ECP) at [13]** and **Games and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) ([2004] 2 ALL SA 609]).** It was specifically submitted that the deponent, with regard to his employment, makes the allegation under oath and that there was no need for the deponent to annex any confirmation regarding such employment. In any event, it was submitted, the respondent does not deny the deponent's employment with the applicant. I agree.

1.2. Regarding the respondent's denial that the deponent has knowledge of the matter and that the documents are under his control, it was submitted that the respondent denies without raising any acceptable and plausible reasons as to why he comes with such a denial. This, according to the submission.amounts to a bare denial. I agree. In any event, as correctly submitted, the respondent produces no allegations to controvert the deponent's declaration under oath, that that, indeed, is the position.

In **Rees and Another v Investec Bank Ltd 2014 (4) SA 220 (SCA) at 226E,** the court said that:
"...*first-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institution or large corporation".*
Indeed, it would not be proper as many summary judgments applications are launched by financial institutions and large corporations. Regarding the aspect, it was lastly submitted that there was nothing wrong with the affidavit supporting the summary judgment application. I agree because the affidavit, in my view, reflects the necessary and required information.

2. **SECTION 129 READ WITH SECTION 130 OF THE ACT**

2.1. The respondent contends that the applicant could not institute proceedings because Section 129 and 130 had not been complied with as the Section 129 Notice "was not served on his *domicilium* address".

2.2. The respondent further contends that the Section 129 notice should have been served on his postal address. His address, according to the respondent, was changed and that the document with such information is annexed to the agreement.

2.3. The respondent, lastly, contends that the Post Office does not effect deliveries at his street address meaning that the applicant was obliged to deliver the Section 129 Notice on his postal address in terms of the agreement.

The submissions, in response to the respondent's contentions are as follows:

1. Part A of the agreement read with Clause 13.1 of Part B of the agreement clearly demonstrates that the address: 1106 Besembiesie Road, Montana Park, X23 is, indeed, the respondent's *domicilium* address.

   Clause 13.1 provides"
   "13.1 You choose, as the address for the serving of legal notices in terms of this agreement (notice address), your address set out in Part A, to which these terms and conditions are attached". (my emphasis).

   Clause 13.3 of Part B of the agreement provides:
   "13.3 You must give us written notice to change your notice address, postal address, telefax number or e-mail address. The change will be effective on 10th (tenth) Business Day after receipt of the notice". (my emphasis).

   There is a document dated 5 April 2013, which is the date of the agreement, which reflects the respondent's postal address annexed to the agreement.

   The document appears on page 35 of the papers. It further, below the home address, reflects the postal address. It is this very document which discloses

that the respondent is married in community of property after 11 December 1993. The e-mail address is also provided.

2. The respondent has not changed his Notice address as there is no allegation or document annexed to his opposing affidavit disclosing that the address has been changed. It appears, according to the response to the respondent's contentions, that the only document the respondent could be referring to in terms of which the notice of address would have been changed is the document which forms page 35 of the papers.

   It will be remembered that the document bears the same date as the agreement, namely, 5 April 2012. The document, in my view, in no way changes the notice address. It can never be said that the respondent changed his notice address as the document does not say so.

3. Regarding street delivery which the respondent alleges is not effected by the Post Office, it was submitted on behalf of the applicant that the Section 129 Notice was indeed sent to the correct *domicilium* address and, accordingly, duly delivered for purposes of the Act.

   Section 96(1)(a) of Act 34 of 2005 (of the National Credit Act), provides that a party required or wishing to give legal notice to the other party for any purpose contemplated in the agreement must deliver such notice to the other party at "the address of that other party as set out in the agreement".

   In terms of **Section 96(2) of the Act:**
   "(2) A *party to* a *credit agreement* *may change their address by delivering to the other party* a *written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an email address".* (my emphasis).

5. It is noteworthy that Clause 13 of the agreement relating to *domicilium* addresses and change thereof is in line with what **Section 96** makes provision for. It was submitted on behalf of the applicant that the respondent did not change his

domicilium address; that his postal address was never his *domicilium* address; and that the **Section 129** Notice was sent to the correct *domicilium* address. I agree.

6. The respondent contends that the **Section 129** Notice had to be "served". It was submitted on behalf of the applicant, that the **Section 129** Notice, indeed, did not have to be served. Indeed, **Section 129 (5)(a) of the Act** provides that the Notice only has to be delivered to the consumer by registered mail or to an adult person at the location designated by the consumer (See: **Section 129(5)(b)**).

7. Proof of delivery in terms of **Section 129(7) of the Act** is satisfied by-

1. Written confirmation by the postal service or its authorised agent, of delivery to the relevant Post Office or postal agency **(Section 129(7)(a));** or
2. The signature or identifying mark of the recipient contemplated in **subsection (5)(b) (Section 129(7)(b)**).

8. Courts have had occasions to deal with the word "delivery". In **Standard Bank of South Africa Ltd v Rockhill 2010 (5) SA 252 (GSJ) at 2550 and 255F,** the Court said:

"Section 129(1)(a) does not require the consumer to receive the notice. The credit provider discharges its obligation of delivering the notice by sending it to the postal address selected by the consumer'. The court applied **Munien v BMW Financial Services 2010 (1) SA 549 (KZD).** Non-compliance with **Section 129(1)(a),** according to the Court, in no way constitutes a *bona fide* defence for purposes of summary judgment. The Court, in **Rossouw v Flrstrand Bank Ltd 2010 (6) 439 (SCA) [31]-[32],** held that it will be compliance with **Section 129(1)(a) of the Act** if the credit provider dispatches the required notice to the consumer in the manner that the consumer has chosen, for an example, sending the notice to the consumer's *domicilium* address by registered mail. This simply means that it is the consumer's responsibility to have actual receipt of the notice. In **Majola v Nitro Securitisation 1 (Pty) Ltd 2012 (1) SA 226 (SCA)** the principles set out in **Rossouw v Firstrand Bank Ltd and Munien v BMW Financial Services (SA) (Pty) Ltd** *(supra)* were followed. The Court in **Majola v Nitro Securitisation 1 (Pty) Ltd** *(supra)* said that the fact that there is no receipt of a notice does not render the notice invalid and the issue of summons premature.

In **Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC) at 71G-72A,** the Court, *inter atia,* said:

"[39]...When the consumer has elected to receive notices by way of the postal seNice, the credit provider's obligation to deliver generally consists of dispatching the notice by registered mail, ensuring that the notice reaches the correct branch of the Post Office for collection and ensuring that the Post Office notifies the consumer (at her designated address) that a *registered item is awaiting her collection. This is subject to the narrow qualification that, if these steps would not have drawn* a *reasonable consumer's attention to the section 129 notice, delivery will not have been effected. The ultimate question is whether delivery* as *envisaged in the Act has been effected. In each* case, *this must be determined by evidence.*

At **76D-G** the court said:

"[56] The Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that-

(a) the s129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;

(b) the Post Office issued a notification to the consumer that a registered item was available for her collection;

(c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and

(d) a reasonable consumer would have collected the s129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a)-(c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer."

9. It was submitted, correctly, in my view, that **Section 129** Notice was duly delivered in accordance with the prevailing case law and the amended provisions of the Act. This, according to the submission, because delivery in this case, via registered post is sanctioned by Clause 13 of the agreement; the **Section 129** Notice was sent to the respondent's *domicilium* address via registered post; and the first notification was sent to the respondent as evidenced by the annexed track and trace report appearing on page 43 of the papers.

10. It was submitted, on behalf of the applicant, that the respondent's contention that the Post Office does not deliver post at his *domicilium* address and that the applicant was obliged to deliver the notice at his postal address should not be accepted as there is a track and trace report confirming that the first notification was sent to the respondent implying that the Post Office does effect delivery at the respondent's *domicilium* address. As correctly submitted, there is no allegation made or any documentary proof annexed proving if and why the Post Office is not delivering post at the given address. It was further submitted that the applicant could (Clause 13.6 of the agreement uses "may") "send any notices in terms of this Agreement to your Post Office box number". The clause gives the applicant the option where it is apparent that the Post Office does not effect delivery at the *domicilium* address to send any notices in terms of the agreement to the respondent's Post Office box number. It is an option which is created in favour of the applicant and not an obligation. It was submitted, on behalf of the applicant, that the option could not be exercised as a valid postal code existed and that the first notification was indeed sent to the respondent. There is merit in this submission.

FAILURE TO JOIN THE RESPONDENT'S SPOUSE AS THE SECOND RESPONDENT

11. The respondent contends that:

(i) he is married in community of property;
(ii) he should have a written consent from his spouse;
(iii) his spouse should have been cited as the second respondent; and
(iv) that the application should, accordingly, be dismissed.

On behalf of the applicant, it was submitted that it is not clear if the respondent

denies that he had such written consent prior to his entering into the agreement. It appears that the respondent raises this aspect as a defence, however, he has a problem which I shall demonstrate shortly.

12. The document termed 'Assessment of Repayment Ability' appearing on page 39 of the papers forms an insurmountable problem for the respondent. The document states:

"I understand that if I am *married in community of property, I* am *required to obtain the written consent of my spouse, in terms of the Matrimonial Property Act No. 88 of 1984, before entering into this Agreement and/or before increasing the credit limit under my credit facility. I confirm that the required spousal consent is held."* (my emphasis).

The respondent has not annexed a spousal confirmatory affidavit stating that she did not consent to the loan applied for in order to controvert the declaration which he made when he applied for the loan.

13. **Section 16(9) of the Matrimonial Property Act 88 of 1984** provides:

"(9) When a *spouse enters into* a *transaction with* a *person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and-*

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (21 or (3). or while the power concerned of the spouse has not been suspended. as the case *may* be... (my emphasis).

It is, consequently, submitted on behalf of the applicant that the respondent's contention is devoid of merit and should be rejected.

14. The actual defence raised by the respondent, according to the applicant's Counsel, worthy of consideration, relates to non-joinder of the respondent's spouse to the proceedings. I agree.

Section 17(5) of the Matrimonial Property Act 88 of 1984 provides:

"(5) Where a debt is recoverable from a joint estate, the spouse who incurred the

debt or both spouses iointly may be sued therefor, and where a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally therefor." (my emphasis).

Again the applicant is given an option by the section to sue the spouse who incurred the debtor or to sue both jointly. In **Zake v Nedcor Bank Ltd and Another 1999 (3) SA 767 (SE) at 7700-7718,** the Court said: "... *Technical points of non-joinder could have been raised by either spouse long after the debt had been incurred and creditors, in those circumstances, could be severely prejudiced. In my view, the enactment of s 17(5/ was done with the specific purpose of protecting creditors in these circumstances. so as to enable a creditor to sue the spouse who incurred the debt or the spouse jointly. To attach a different interpretation to s 17(5) would lead to absurdities and give rise to difficulties with regard to who to sue at any given time. It could open the way to unscrupulous debtor-spouses who could avoid their liability in respect of debts incurred in the furtherance of the interest of the joint estate. I agree with Mr Buchanan thats 17(5) is unambiguous and must be interpreted in the sense that a creditor is permitted to sue the spouse who incurred the debt in his or her own name. It would, in those circumstances. Be unnecessary for a creditor to join both spouses in the same action."* (my emphasis).

15. It was submitted, on behalf of the applicant, that the respondent raised technical defences which are not permitted.

16. The gist of the submissions, on behalf of the applicant, is that the respondent has failed to raise a defence on the merits. He also does not deny that he is indebted to the applicant as it alleges. The respondent also does not attack the validity of the agreement. All the defences the respondent raised are indeed, purely technical in nature disclosing nothing to show that they, indeed, are *bona fide* defences. I agree. This paves the way for the applicant to be entitled to the relief that it seeks. I, therefore, have no valid reason to refuse the application which must succeed.

ORDER

17. I, in the result, make the following order:

An order is granted in terms of prayers 1, 2 and 3 of the Application for

Summary Judgment dated 9 November 2015.

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M. W. MSIMEKI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION OF THE HIGH COURT,

PRETORIA