Reportable	**YES** / ~~NO~~
Circulate to Judges	**YES** / ~~NO~~
Circulate to Magistrates:	~~YES~~ / **NO**
Circulate to Regional Magistrates:	~~YES~~ / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

Case Nr: 1995/2010
Date heard: 10 June 2011
Date delivered: 5 August 2011

GRIEKWALAND-WES KORPORATIEF LIMITED **APPLICANT**

and

HERMAN DANIËL JACOBS **RESPONDENT**

JUDGMENT

HENRIQUES AJ

[1] This is an application for summary judgment in which the plaintiff seeks an order as follows:

> "[1.1] Payment of the sum of R318 531.59;
>
> [1.2] Interest on the amount aforesaid at the rate of prime plus 7% per annum from 1 September 2010 to date of payment capitalized monthly;
>
> [1.3] Payment of the insurance premiums on the sum of R318 531.59, from 1 September 2010 to date of payment;
>
> [1.4] An order declaring the respondent's immovable property specially executable;
>
> [1.5] Costs of the action on an attorney and client scale."[1]

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[1] This is my translation of the order which appears at pages 1 and 2 of Volume 2.

[2] The matter was argued as an opposed application on 10 June 2011. During the course of argument it became evident that proper consideration had not been given specifically to the provisions of Section 129 and the judgment in the matter of **Rossouw and Another v First Rand Bank Limited**[2]

[3] I consequently granted leave to to the parties representatives to file additional heads of argument by 24 June 2011.

[4] It is trite that the court may grant summary judgment in respect of claims based on a liquid document[3] for a liquidated amount in money[4], for delivery of specified movable property[5] or for ejectment[6] together with any claim for interest and costs.

[5] A respondent in opposing an application for summary judgment is required to satisfy the court on oath that he or she has a *bona fide* defence to the action. Such affidavit must disclose fully the nature and the grounds of the defence and the material facts relied upon therefor.[7] In other words the defendant must set out facts which if proved at trial would constitute a defence to the plaintiff's claim.[8]

[6] Even if the content of affidavits are terse but contain sufficient indications of a *bona fide* defence, then it is sufficient for summary judgment purposes and for the court to refuse summary judgment. However, if the affidavit lacks particularity regarding the material facts relied upon the court may not be able to assess the *bona fides* but may still decide in favour of the defendant if the court is of the view that the plaintiff's case is unanswerable.[9]

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2 2010 (6) SA 439 (SCA)
3 Rule 32(1)(a)
4 Rule 32(1)(b)
5 Rule 32(1)(c)
6 Rule 32(1)(d)
7 Rule 32(3)(b); **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A) at 426
8 **Breitenbach v Fiat SA (Edms) Bpk** 1972 (2) SA 226 (T)
9 **Tesven CC v SA Bank of Athens** 2000 (1) SA 268 (A)

[7] If a defendant merely denies it is in default this may be "bald, vague and sketchy" and it would be insufficient to overcome the test as set out in **Breitenbach**.[10]

[8] In his heads of argument, Advocate Pienaar, who appeared for the applicant, sought an order granting summary judgment together with the relief as contained in the application for summary judgment, alternatively in the event of this court finding that the provisions of Sections 129 and 130 had not been satisfied, he sought an order as follows:-

[8.1] adjourning the summary judgment application *sine die*;

[8.2] granting leave to the applicant to serve a notice as required in terms of Sections 129 and 130 of the National Credit Act, Act 34 of 2005;

[8.3] granting the applicant leave to re-enrol the summary judgment application once the requirements of Sections 129 and 130 had been met.

[9] The plaintiff's cause of action arises from a written acknowledgement of debt[11] concluded between the parties. The terms of the acknowledgement of debt are pleaded in the particulars of claim.[12]

[10] In opposing the application for summary judgment, the respondent raises the following defences, namely:-

[10.1] that the action had been instituted prematurely in that the plaintiff has not complied with the provisions of Sections 86, 129 and 130 of the Act in that the notice despatched in terms of Section 129 does not contain

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10 **SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases** 2011 (1) SA 310 (GSJ)
11 Annexure "A", pages 16-25, Vol 1
12 Paragraphs 3 to 5, pages 5 to 11, Volume 1

all the information relating to the cause of action and the defendant's indebtedness as pleaded in the particulars of claim;[13]

[10.2] the action is premature in that the particulars of claim do not contain any specific allegations relating to the acknowledgement of debt and the contents of annexure "A" to the acknowledgement of debt, nor is it pleaded that the payment terms contained therein were accepted by the applicant;[14]

[10.3] the certificate of balance does not comply with clause 7[15] of annexure "A" in that it is not clear from the affidavit of J J Klopper whether he is a person who can depose to the affidavit as required in clause 7;[16]

[10.4] that insofar as the registration of the mortgage bonds over the immovable property are concerned, he did not give anyone authority to register such mortgage bonds and same was done without his knowledge or permission;

[10.5] the respondent, in addition, merely denies that he is indebted to the applicant in the sum claimed together with interest and costs.[17]

[11] The issue which I am required to decide is whether or not the defences raised by the respondent are sufficient to resist summary judgment and are they defences envisaged in terms of Rule 32(3)(a).

[12] Section 129 of the Act reads as follows:

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13 Paragraph 4, specifically paragraph 4.5, Opposing Affidavit, pages 10 and 11, Vol 2

14 Paragraph 5, page 11, Opposing Affidavit, Vol 2, page 24, Vol 1

15 The applicable portion of clause 7 of annexure "A" reads as follows: *"Die SKULDENAAR bevestig dat 'n sertifikaat onderteken deur enigeeen van die skuldeiser se direkteure, hoofbestuurslede, sekretaris of bestuurder: Kredietbeheer,……."*

16 Paragraph 6.2, page 12, Opposing Affidavit, Vol 2

17 Paragraph 6.1, page 11, Opposing Affidavit, Vol 2

"129 (1) 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) subject to section 130(2), 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; and

(ii) meeting any further requirements set out in section 130."

[13] Section 130 provides:-

"130 (1) Subject to subsection (2), 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), or Section 129(1), as the case may be;

(b) in the case of a notice contemplated in section 129(1), the consumer has –

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and"

[14] The giving of notice in terms of Section 129(1)(a) has been held to be peremptory.[18] This would be in keeping with the underlying purposes of the Act, namely to strike a balance between the interests of the credit grantor and the credit receiver.

[15] The Act requires that a notice in terms of Section 129 be delivered to the address nominated in the credit agreement by the credit receiver and in the

[18] **Rossouw** (*supra*), paragraphs 22 and 38

manner chosen. It does not require that the credit grantor prove receipt of the actual notice and receipt of the notice is the consumer's responsibility.[19]

[16] Having regard to annexure "A" to the particulars of claim, the domicilium chosen by the respondent was his physical address, namely "Perseel 26B 8, Bullhill". [20]

[17] The applicant alleges in its summons and particulars of claim that it has complied with the provisions of Sections 129 and 130 of the Act in that a notice in terms of Section 129 was despatched.[21]

[18] Having regard to the particulars of claim, it is clear that the applicant was aware of the domicilium chosen by the respondent.[22]

[19] If one considers annexures "D1" and "D2", it is clear that that the Section 129 notice was not despatched to the chosen domicilium and was despatched to a P O Box address, consequently the applicant has not complied with section 129.

[20] Whilst I appreciate that the consumer assumes the risk of non-receipt of the Section 129 notice, it is peremptory for the applicant to despatch the notice to the chosen domicilium address. In this matter the notice was not despatched to the chosen domicilum address.

[21] I now turn to consider the content of the notice despatched in terms of Section 129. The section provides that the credit grantor may in writing draw to the attention of the consumer his or her default 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*

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19 **Rossouw** (*supra*), paragraph 32
20 Paragraph 9.1, page 20, Vol 1
21 Paragraph 7, page 12, Particulars of Claim,Vol 1
22 annexures "D1" and "D2, pages 41 and 43, Vol 1
Paragraph 4.9, page 9, Particulars of Claim, Vol 1

parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up do date".

[22] Our courts have held that all is that is required is that the notice complies with the requirements of the section. This, it has been held, is in keeping with the purpose of the Act.

[23] In **Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport**[23] Swain J held as follows:-

> "In my view, what is intended in section 129(1)(a) is that the first objective is to bring to the attention of the consumer the default complained of. The second objective is to propose to the consumer that the consumer seeks the assistance of one of the entities enumerated in the section, in order to attain the third objective, being a resolution of the dispute under the agreement, or the development and agreement of a plan to bring the payments under the agreement up to date. It is clear that the 'proposal' envisaged in the section is to engage the services of one of the named entities 'with the intent' to achieve a resolution of the dispute. The fact that section 130(1)(b)(ii) provides for a rejection of 'the credit provider's proposals' does not imply that the proposal must be something more than is expressly provided for in section 129(1)(a) of the Act."

[24] It has been held that the effect of the section is to draw the consumer's default and to propose alternative methods for dealing with his or her default.[24]

[25] I do not agree with the submissions made by Advocate Stanton appearing on behalf of the respondent, that the applicant was required in its section 129 notice, to set out the basis for the cause of action in detail as is pleaded in the particulars of claim. The section makes it clear what the notice has to contain.

[26] Does the notice comply with the provisions of Section 129? The relevant parts of the notice reads as follows:

> "Ons tree op namens GWK Beperk in hierdie aangelentheid. Dis ons instruksies vanaf ons kliënt dat u die bedrag van R392 184.79 aan ons kliënt verskuldig is uit hoofde van 'n kredietooreenkoms aangegaan op 20 Mei 2008 tussen uself en ons kliënt, waarvan R341 772.33 reeds vir 'n periode van 20 besigheidsdae in verstek is.

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23 2010 (5) SA 518 KZP at paragraphs 10 - 14

24 **Standard Bank of South Africa Limited v Rockhill and Another** 2010 (5) SA 252 (GSJ) at paragraph 13

> As gevolg hiervan en in terme van die kredietooreenkoms, is u volle uitstaande balans, te same met verdere rente nou opeisbaar en betaalbaar.
>
> Ingevolge art 129(1) van die Nationale Kredietwet is u geregtig om die aangeleentheid na a skuldberedderaar, alternatiewelik dispuut resolusie-agent, verbruikershof of ombud met jurisdiksie te verwys met die doel om einege dispuut in terme van hierdie ooreenkoms, tussen uself en GWK Beperk op te los, ten einde die betaalings onder die kredietooreenkoms op datum te bring…."

[27] In my view the notice does not comply with the provisions of Section 129.The applicant has not drawn the respondent's attention to the fact that the parties can develop and agree on a plan to bring the payments under the agreement up to date. This, to my mind, defeats the purpose of the Act, namely the protection of the consumer and redressing the imbalance between the credit provider and the consumer.[25] If a consumer is not advised of the options available to him how can he exercise them prior to the action being instituted and take steps to prevent an applicant from instituting legal proceedings.

[28] Is the non-compliance with Section 129 a *bona fide* defence. The authorities are to the effect that depending on the circumstances of the matter, it may not always constitute a *bona fide* defence to a summary judgment application.[26]

[29] I pause to also consider the other defences raised by the respondent. Nowhere in his papers does the respondent dispute that he signed the acknowledgement of debt or dispute any of the terms of the acknowledgement of debt. Annexure "A" to the acknowledgement of debt is a payment plan which the respondent had to comply with in order not to fall in breach of the acknowledgement of debt. This is not disputed.

[30] In paragraph 2.2 of the acknowledgment of debt, the respondent acknowledges that he is to make payments in terms of annexure "A". The respondent specifically acknowledges that in the event of payments not being

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25 BMW Financial Services (SA)(PTY) LTD V Mudaly 2010 (5) SA 618 (KZD) at paragraph 16

26 Carter Trading (PTY) LTD V Blignaut 2010 (2) SA 46 (ECP) at paragraph 30

made timeously on or before the dates set out in annexure "A", then the full amount owing will become due and payable. To my mind it is not necessary for this to have been specifically pleaded and this is not a bar to the acknowledgment of debt coming into operation and entitling the applicant to institute these proceedings.

[31] Insofar as the defence to the certificate of balance is concerned, it is clear that what is envisaged in clause 7 of annexure "A" is that a certificate can be signed by a director and/or senior managing director who would appear to have knowledge of the debt and/or the credit arrangements. Klopper is an executive director of financing in the applicant. He would, by virtue of the office that he holds, have knowledge of any credit agreements and/or financing concluded. In addition, his affidavit filed in support of summary judgment states not only that the facts fall within his personal knowledge. He goes further to state that he has personal knowledge of all the facts relevant to the action and moreover that all documents relating to this matter fall under his control and he has knowledge thereof.[27]

[32] Accordingly this defence cannot succeed.

[33] Lastly, having regard to page 27 of Volume 1, it is clear that the respondent has granted authority to a conveyancer to register these mortgage bonds and same would not have been done without his consent. Accordingly this defence cannot stand.

[34] What then is the appropriate relief under the circumstances.

[35] Advocate Pienaar has submitted that I ought to follow the process envisaged in Section 130(4)(b). The provisions of that section read as follows:-

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[27] Nedcor v Behardien 2000 (1) SA 307 (C) at 310 F to 3112 C

"(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;"

[36] Given the facts of this matter,I am of the view that non-compliance with sections 129 and 130 does not constitute a complete defence as envisaged in Rule 32(3)(b) and in light of the fact that I am of the view that the other defences raised are not *bona fide* defences which result in triable issues, I am of the view that I ought to accede to Advocate Pienaar's request.

[37] In light of the fact that the applicant had not complied with the provisions of section 129 of the Act, I am of the view that it ought to bear the costs occasioned by the summary judgmment application.

[38] **In the result, I make the following order:-**

[38.1] the application for summary judgment is adjourned *sine die*;

[38.2] the applicant may not re-enrol the matter until it has complied with the following steps:-

[38.2.1] it has complied with the provisions of section 129(1)(a) of the National Credit Act, 34 of 2005, in particular it must in its notice draw the respondent's attention to the fact that the parties can develop and agree on a plan to bring his payments under the agreement up to date; and such notice must be

delivered in the manner prescribed in the Act to the respondent at the address chosen by him as his *domicilium* in the acknowledgement of debt, namely the physical address situated at Perseel 26B 8, Bullhill, Jankempdorp, Kimberley;

[38.2.2] the provisions of section 130 of the Act have been complied with;

[38.3] the applicant is ordered to pay the costs of the summary judgment application.

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JI HENRIQUES
ACTING JUDGE

APPEARANCE

Adv. CD Pienaar instructed by Engelsman Magabane Inc on behalf of the applicant

Adv. A Stanton Instructed by Fletcher's Attorneys on behalf of the respondent