

SOUTH AFRICA / JUDGMENT

ABSA Bank Limited v Bianca Cara Prochaska t/a Bianca Cara Interiors (14839/2007) [2008] ZAKZHC 64; 2009 (2) SA 512 (D) (30 July 2008) [2008] ZAKZHC 64

COURT

High Courts - Kwazulu Natal

BEFORE

Naidu

CASE / FILE NUMBER

14839/2007

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IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO: 14839/2007

In

the matter between: ABSA BANK LIMITED Applicant
and
BIANCA CARA PROCHASKA t/a
BIANCA
CARA INTERIORS Respondent

JUDGMENT

DATE: 30 July 2008

NAIDU A J:

- [1] The Applicant is a commercial bank duly registered as a credit provider in terms of Section 40 of the National Credit Act 34 of 2005 ('the Act'). The Respondent is a businesswoman, and, for the purposes of this judgment, a consumer as defined in Section 1 of the Act.
- [2] During July 2006 the Applicant advanced monies to the Respondent under a Term Loan Agreement ('the Loan Agreement'), in which the Respondent acknowledged herself to be indebted to the Applicant in the sum of R238 446-07, constituting the principle sum borrowed and finance charges. A copy of the Loan Agreement is annexure 'A' to the Founding Affidavit.

- [3] A condition, inter alia, of the grant of the loan is that the Respondent cause a Notarial Covering Bond ('the Notarial Bond') to be registered over "the loose assets owned by Bianca Cara Interiors at Shop W1A, 4 McCausland Crescent, Umhlanga Plaza, Umhlanga Rocks"; and "generally allof the Respondent's movable property including all wares, merchandise, raw material, stock-in-trade, fixtures, fittings, furniture appliances, machinery and equipment of the business, Bianca Cara Interiors whatever its description and wheresoever is situated, and irrespective of whether or not it is in the Respondent's possession", as security for her obligations to the Applicant. The Notarial Bond, a copy of which is annexure 'C' to the founding affidavit, was duly registered over the assets described therein.
- [4] In addition, the Respondent, a customer of the Applicant enjoyed overdraft facilities ("the overdraft"), at her instance and request, and pursuant to an oral agreement between the parties.
- [5] Before me is an Application for judgment to be entered against the Respondent for payment of the sums of R168 323-21 and R18 031-88, interest (at such rates and for such periods stipulated in the Notice of Motion) and costs on the attorney and own client scale. The first claim being the full outstanding balance due in terms of the Loan Agreement and the second, being the amount of the Respondent's indebtedness in respect of the overdraft, as at 25th September 2007.
- [6] The Applicant also seeks an Order perfecting its security in terms of the Notarial Bond and other relief associated therewith.
- [7] In the founding affidavit, the Applicant justifies its entitlement to judgment for payment of the amount in the first claim as a result of the Respondent having breached the Loan Agreement by falling into arrears. Its claim for judgment in respect of the second claim finds foundation in the Respondent's failure to pay the amount which is due, owing and payable in terms of the oral agreement relating to the overdraft.
- [8] The Respondent has raised a point of law in terms of Uniform Rule 6(5) (d) (iii). It states:-
- "1. The Notice dated 25th September 2007 purports to be a Notice in terms of ss.127, 129 and 130 of the National Credit Act 34 of 2005 ("the Act").*
2. The address chosen as the Respondent's domicilium citandi et excutandi in annexure 'A' to the papers is 7 Chesterwood Close, Umhlanga Rocks.
 3. The address chosen as the Respondent's domicilium citandi et executandi in annexure 'C' (the "Notarial Bond") is 'Shop W1A, 4 McCausland Crescent, Umhlanga Plaza, Umhlanga Rocks' with an alternate address given, namely, '7 Chesterwood Close, 150 Mount Edgecombe Drive, Edgeview, Mount Edgecombe'.
 4. The despatch of the letters simply to '150 Mount Edgecombe Drive' without the additional information: '7 Chesterwood Close', is non-compliance with the regulations under the Act and invalidates the Notice.

5. In addition, even assuming that the Notice was correctly delivered (which is not conceded), the notice itself does not comply with the provisions of Section 129(1) as read with Section 130 of the Act.

6. In addition, the Plaintiff (sic) instituted identical proceedings under case number 8053/2007 which said proceedings:

were instituted on 20th July 2007;

were opposed pursuant to a Rule 6(5)(d)(iii) Notice;

were only withdrawn on 24th January 2008 at 2:20pm.

7. The purported s.129 notice was sent during the period within which the same proceedings were current and before this Honourable Court, so that the Defendant was precluded from exercising her rights under s.129 if she had wished to do so, because of the then pending action.

8. Accordingly any action taken by the Applicant is both “premature and bad in law”.

[9] The Respondent has not filed an answering affidavit. She relies exclusively on the notice in terms of Rule 6(5) (d) (iii). I must consequently take the allegations in the founding affidavit to be established facts.

Boxer Superstores Mthatha & Another vs Mbenya 2007(5) SA p.450 (SCA) at p.452 Paragraph [4].

[10] Mr Tobias, for the Respondent, limited his attack in the Heads of Argument and during argument, to the Applicant’s non-compliance with the procedural requirements demanded of it by Sections 127, 129 and 130 of the Act. No point was made of the other issues raised in the notice in terms of the Rule, so nothing further need be said about those.

[11] He contended that the Applicant was obliged to comply with the provisions of sub-section (1) (a) of section 129 of the Act. He submitted that the provisions of the sub-section, when construed contextually with Sections 127 and 130 of the Act, are a peremptory pre-requisite to any legal proceedings to enforce a credit agreement. He argued, by reference to the notices sent by the Applicant purportedly pursuant to section 129(1) (a) and relied upon by it, that none of these bore the addresses of the proposed recipient that had been chosen by the Respondent in the Loan Agreement. It follows therefore, so the argument went, that the Applicant, having brought this Application before complying with the provisions of Section 129

(1) (a) of the Act, is not entitled to any of the relief it seeks. He urged me to find that the Application is defective and that I should resort to the remedy available to a Court by the provisions of Section 130(4) (b) of the Act, namely, that I must –

adjourn the matter ; and

(ii) make an appropriate Order setting out the steps the Applicant must complete before the matter may be resumed.

[12] Mr Stokes, who appeared for the Applicant, endeavoured to persuade me that I should find that a notice in terms of Section 129(1)

(a) of the Act is not peremptory and is not a pre-requisite to a credit provider's rights to enforce payment under a credit agreement.

[13] He submitted, in the alternative, that, were I were to uphold the point of law raised by the Respondent regarding non-compliance with the provisions of Section 129 of the Act, then the relief which relates to the Applicant's endeavours to perfect the security provided by the Notarial Bond ought not to be affected, because a Notarial Bond is not a credit agreement by definition. He contended for this exclusion because the Notarial Bond in issue is singularly silent about any reference to lending money or granting credit. It is simply a document, he argued, evidencing the consumer's acknowledgement that the assets and movables described therein may be attached, removed and sold to satisfy the debt. That being so, he submits, it is still open to me to grant the relief available to the Applicant which would enable it to perfect and protect its security as provided by the Notarial Bond.

[14] Even before embarking upon the exercise of endeavouring to resolve the debates provoked by the Respondent's notice in terms of Rule 6(5) (d) (iii), it is prudent to consider the statutory framework, keeping in mind the purpose and scheme of the Act.

[15] The exponential growth in consumer credit granting and the concomitant increase in consumer debt prompted a serious rethink regarding the regulation of the consumer credit industry in our country. The result is this Act, which repeals, by the provisions of Section 172(4) of the Act, the Usury Act No. 73 of 1968 and the Credit Agreement's Act 75 of 1980, both of which had regulated consumer credit in South Africa for close on forty years. This Act, in my view, represents a bold, and no doubt timely, effort to make a clean break from the past.

[16] agree with the remarks expressed by J. M. Otto in his book, *The National Credit Act Explained*. The learned author states, on page 3:

"The National Credit Act introduces new forms of protection for debtors in South Africa. Examples are procedures aimed at preventing reckless credit and assistance to debtors who are overcommitted. New administrative and quasi-judicial bodies are introduced to oversee the Application of the Act. In fact, the Private and Commercial Law dimensions of the Act are not as dominant as they used to be in legislation of this nature in the past. The Formal Law is certainly putting up its hand. The provisions dealing with the establishment and powers of the National Credit Regulator and the National Consumer Tribunal, registration of role players, alternative dispute resolution, powers and jurisdiction of courts and other formal and administrative matters represent in the order of 40% of the National Credit Act's printed text".

- [17] Section 3 of the Act sets out its purposes. These are to promote and advance the social and economic welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry; and to protect consumers.
- [18] Of relevance to this judgment, the means by which this purpose can be achieved in terms of Section 3, are:-
- (i) addressing and preventing over-indebtedness of consumers and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
 - (ii) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and
 - (iii) providing for a consistent and harmonized system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.
- [19] The scheme of the Act encompasses the establishment of consumer credit institutions like the National Credit Regulator and the National Consumer Tribunal; the establishment of consumer norms and practices, credit regulation and policy; the provision for the registration of credit bureaux, credit providers and debt counselling services; the promotion of responsible credit granting; definition of consumer credit agreements; regulation of the collection, repayment and surrender; debt enforcement by repossession and judgment and alternative dispute resolution other than debt enforcement.
- [20] In addition, the regulations promulgated under the Act and published in Government Gazette No. 28864 under Government Notice R489 on the 31st May 2006, deal with a whole range of issues, like, inter alia, registration requirements, criteria and procedures; consumer credit policy and agreements; interest and fees; dispute resolution; record keeping and registers; compliance and reporting; and prescribed forms.
- [21] It is abundantly clear, in my view, that the Act has introduced innovative mechanisms and concepts directed more for the protection and in the interests of credit consumers than of credit providers.
- [22] Section 129 of the Act, under the heading “Required procedures before debt enforcement” provides:-
- “(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, alternate 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 maybe; and
 - (ii) Meeting any further requirements set out in Section 130.
- (2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that result in such an order.

Subject to subsection (4) a consumer may-

- (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and
- (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.

A consumer may not re-instate a credit agreement after-

- (a) the sale of any property pursuant to-
an attachment order; or
surrender of property in terms of Section 127;
- (b) the execution of any other court order enforcing that agreement; or
- (c) the termination thereof in accordance with Section 123.

[23] The single jurisdictional fact that must exist before sections 129 and 130 of the Act become available to a credit provider is that the consumer is in default of the credit agreement. In my view, the word "may" at the commencement of sub-section

- (1) (a) of section 129, contemplates a discretionary exercise available to the credit provider, once the consumer is in default. It provides for a situation in which the credit provider might elect to resort to one or other of the following steps: In the first instance, it may resort to some or other informal and less combative means of attempting to resolve the problem created by the consumer's default, for example, by writing to or calling the consumer to come in to discuss the matter; to negotiate; to settle the amount in arrears; to clarify any

dispute that the consumer might raise or contend, and possibly to grant some indulgence enabling the consumer to remedy the default. The consumer may utilize this opportunity, during this period, to apply to a debt counsellor in terms of section 86(1) of the Act, to be declared over-indebted. I shall revert, later in this judgment, to the implications for the credit provider should the consumer elect to pursue the course made available to him/her or it by section 86 of the Act. Alternatively, the credit provider may choose to commence the steps to enforce the agreement immediately upon or very soon after the consumer defaults, that is, by drawing the default to the notice of the consumer, in writing, in compliance with sub-section

(1) (a) of section 129.

[24] Resort by the credit provider to the step set out in Section 129(1)(a), obliges it to make those proposals, as set out in the sub-section, in the notice to the consumer, namely, to “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 arrear payments up to date.” The credit provider is also obliged to “draw the default to the notice of the consumer in writing”

[25] If the consumer decides to accept one of the proposals made in the notice contemplated in section 129 (1) (a), and elects to exercise the option of referring the credit agreement to either an alternate dispute resolution agent or to an ombud with jurisdiction, this could result in any dispute existing between the parties being resolved in favour of the consumer, for example, the credit provider and the consumer may agree on a lump sum payment being made on some date in the future which will both afford a respite to the consumer and have the effect of bringing the payments under the agreement “up to date”. In this event, the credit provider cannot resort to the further step contemplated in section 130 Of the Act, that is, the commencement of legal proceedings to enforce the agreement, because the consumer may no longer be regarded by the credit provider to be in default under the credit agreement concerned.

[26] Section 130 of the Act under the heading “debt procedures in a Court” has the effect, in sub-section 1, of laying down certain pre-requisites before a credit provider approaches a court for an order to enforce a credit agreement. These are:-

At the time of the commencement of legal proceedings, the consumer must be in default and must have so been for at least twenty (20) days;

At least ten (10) business days must have elapsed since the credit provider had delivered to the consumer the notice

contemplated in Section 129(1) of the Act, and the consumer

has not responded to that notice, or the consumer has responded to the notice but has rejected the proposals made in the notice;

In the case where the credit agreement is an instalment agreement, secured loan or lease agreement, the consumer has

not surrendered the relevant property to the credit provider as contemplated in Section 127 of the Act.

[27] Section 129(1) (b) of the Act, in my view, introduces a fourth pre-requisite before legal proceedings may be commenced to enforce the agreement, that is, the credit provider must have complied with the provisions of Section 129(1)(a) by drawing to the notice of the consumer, in writing, the default under the credit agreement and making those proposals referred to in the sub-section, at least ten

(10) days before. The words ‘commence any legal proceedings to enforce the agreement’ in sub-section (1)

(b) of section 129, means the actual institution of an action or the launching of an application to uphold, enforce, compel observance of or compliance with any obligation arising from a credit agreement.

[28] I am fortified in this conclusion by having regard to the scheme of the Act, particularly pertaining to the provisions of section 86 of the Act. The credit provider is also precluded by the provisions of section 129(1) (b), from commencing any legal proceedings before first providing notice to the consumer, as contemplated by section 86(10) of the Act to terminate the review that has been commenced by the debt counsellor pursuant to the provisions of section 86 of the Act.

[29] In terms of section 86(2) of the Act, a consumer is precluded from making an application to a debt counsellor to be declared over-indebted, if the credit provider, by that time, had already “proceeded to take the steps contemplated in section 129 to enforce the agreement”, that is, that the credit provider had already complied with the provisions of section 129(1)

(a) of the Act.

[30] The notice to the consumer to terminate the review, as envisaged in section 86(10) of the Act, may only be given at least 60 days after the application made by the consumer to apply for the review.

[31] The wording of section 86(11) of the Act, in my view, renders it beyond any argument that the notice contemplated in section 86 (10) of the Act, is a necessary first step before the credit provider proceeds to commence litigation.

[32] Section 86(11) of the Act states:

“If a credit provider who has given notice to terminate a review as contemplated in sub-section (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the Magistrate’s Court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances”.

- [33] The section in Part C of Chapter 6 of the Act which is pertinent to section 86(11) of the Act is section 130, which deals with the requirements applicable to a credit provider's approach to a court for an order to enforce a credit agreement. The Magistrates Court referred to in section 86(11) of the Act is the court to which the debt counsellor has referred the review with recommendations, in terms of section 86(7) (c) of the Act.
- [34] If the section 86(10) notice is a peremptory prerequisite for the commencement of legal proceedings against a consumer who has resorted to the route available to him/her or it by that section, then it must follow, in my view, that the notice in terms of section 129(1) (a) must also be a peremptory prerequisite for the commencement of legal proceedings against those other consumers who might have been invited by the credit provider to engage in the informal discussions and negotiations referred to in paragraph
- [23] of this judgement, but had not chosen the route afforded by section 86 of the Act. Section 129(1) (b) of the Act precludes the commencement of litigation before first providing the notice to the consumer, as contemplated in subsection (1) (a), or in terms of section 86(10), as the case may be. The effect of section 129 (1) (b), in my judgment, is that, if any legal proceedings to enforce the agreement is commenced before first providing the notices referred to in the subsection to the consumer , the court seized of the matter is, in terms of section 130(3) (a) of the Act, precluded from determining the matter. Section 130(3) (a) of the Act provides:
- “ 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 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;”
- [35] I must conclude, therefore, that the submission by Mr Stokes that the notice contemplated in Section 129(1) (a) of the Act is not a pre-requisite to a credit provider's commencing legal proceedings to enforce a credit agreement, is devoid of merit. In my view Section 129(1) (a) is a mechanism created by the Act to enable the consumer to take one or other of those steps proposed by the credit provider in the notice in terms of the subsection, before the credit provider commences litigation. In terms of section 130(1) (a) of the Act the consumer has at least 10 business days to take one or other of those steps.
- [36] Mr Tobias pointed out that, whereas in terms of Section 11 of the Credit Agreement's Act 75 of 1980, it was sufficient for a notice to be “posted”, and which need not come to the attention of the recipient, Section 130 of the Act, read with Section 129 refers instead to ‘delivered’.
- [37] Section 65 of the Act provides:

“(1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.

- (2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must-
 - (a) make the document available to the consumer through one or more of the following mechanisms-
 - (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer’s expense, or by ordinary mail;
 - (ii) by fax;
 - (iii) by email; or
 - (iv) by printable web- page; and
 - (v) deliver to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

”

[38] In the regulations, ‘delivered’, unless otherwise provided for, means “sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, the recipient’s registered address.”(my underlining)

[40] For the Respondent, it was contended that none of the notices relied upon by the Applicant had been ‘delivered’ to the address chosen by the Respondent in the Loan Agreement.

[41] Regarding the claim based on the Loan Agreement, the deponent to the founding affidavit, Johannes Arie Neeleman (“Neeleman”), avers that the Applicant “has sent a notice in terms of Section 129 of the National Credit Act 34 of 2005 to the First Respondent (sic), as per annexure ‘D’ hereto”.

[42] Annexure ‘D’ is a letter dated 25th September 2007 and addressed to the Respondent at P O Box 3033, Umhlanga Rocks,

4320. It refers to the ‘Term Loan Account’ and purports to be a “Notice in terms of Section 127, 129 and 130” of the Act.

[43] The address chosen by the Respondent in the Loan Agreement as her domicilium citandi et executandi is 7 Chesterwood Close, Umhlanga Rocks, 4319.

[44] Clause 17 of the terms and conditions of the Loan Agreement relating to domicilium provides:

“ 17.1 The parties hereto, respectively, choose domicilia citandi et executandi all purposes of and in connection with the agreement, at their respective addresses specified in the agreement.

17.2. Any party to the agreement shall be entitled to change domicilium time to time, provided that any new domicilium shall not be a box number, and any such change shall only be effected upon receipt of notice in writing by the other party of such change.

17.3 All notices, demands or communications intended for any party shall be made or given at such party's domicilium for the time being.

17.4. A notice sent by one party to the other party shall be deemed to be received -

On the same day, if delivered by hand;

On the same day, if sent by telex (subject to answer back) or telefax (provided the original is then immediately posted by pre-paid registered mail);

On the 7th day after posting, if sent by pre-paid registered mail.

Notwithstanding anything to the contrary herein contained, a written notice or communication actually received by a party shall be an adequate written notice or communication to that party, notwithstanding that it was not sent to or delivered at the chosen domicilium citandi et executandi. ”

- [45] There is nothing in the founding affidavit to suggest that the Respondent has given any notice of a change in domicilium the date of the conclusion of the agreement. There is also nothing in the founding affidavit to suggest that a written notice or notices had in fact been received by the Respondent. The Applicant goes no further than to state that it has “sent” the notices in question
- [46] Concerning the claim based on the Respondent's indebtedness in respect of the overdraft facility, Neeleman states that the “Applicant has sent a Notice in terms of Section 129 of the Act to the Respondent, as per annexure ‘F’ hereto”.
- [47] Annexure ‘F’, purporting to be a “notice” in terms of Section 127, 129 and 130 of the Act, is addressed to the Respondent at P O Box 3033, Umhlanga Rocks, 4320.
- [48] There is no allegation in the founding affidavit explaining why these notices had been sent to the addresses reflected in annexures ‘D’ and ‘F’. There is certainly nothing even to support the suggestion that these were addresses chosen by the Respondent.
- [49] The Respondent is described in the founding affidavit as one who carries on business under the style and name of Bianca Kara Interiors, and who has chosen as her domicilium citandi et executandi following addresses:
1. Shop W1A, 4 McCausland Crescent, Umhlanga Plaza, Umhlanga Rocks in terms of the Notarial Bond; and
 2. 7 Chesterwood Close, 150 Mount Edgecombe Drive, Edgeview, Mount Edgecombe in terms of the Notarial Bond and the Term Loan Agreement.

- [50] None of the addresses in the preceding paragraph hereof are referred to in the notices which are mentioned in the founding affidavit as those to which these notices had been sent by the Applicant.
- [51] There are two documents, unmarked as annexures, but constituting the bundle of documents attached to the founding affidavit, about which no reference is made in the founding affidavit. Both are dated the 25th September 2007 and appear to bear the name of the Respondent as the addressee. Both bear the heading “Notice in terms of Section 127, 129 and 130 of the National Credit Act”. Save for the addresses of the proposed recipient in each case, the contents of both are identical to those in annexure ‘D’. Both refer to the “Term Loan Account”. The one bears the address “Shop W1A, 4 McCausland Crescent (sic), Umhlanga Rocks, 4319 and the other bears the address 150 Mount Edgecombe Drive, Mount Edgecombe, 4300. Both have what purports to be a copy of a registered letter proof of posting acknowledgement copied on each, perhaps intended to signify that these had been posted to the addresses referred to on the receipts, which is the same address as those which appear on the respective documents themselves.
- [52] The Applicant does not allege that the unmarked documents referred to the preceding paragraph thereof had been sent or delivered to the Respondent. In fact the Applicant does not even refer to these documents in the founding affidavit. I shall consequently refrain from having any regard to these two documents.
- [53] Section 11 of the Credit Agreements Act 75 of 1980, the predecessor of this Act, provides:
- “No credit grantor shall, by reason of the failure of the credit receiver to comply with any obligations in terms of any agreement, be entitled to claim the return of the goods to which the credit agreement relates unless the credit grantor by letter, handed over to the credit receiver and for which an acknowledgement of receipt has been obtained or posted by prepaid registered mail to the credit receiver at his address stated in the credit agreement in terms of section 5(1) (b) or the address changed in terms of section 5(4), has notified the credit receiver that he has so failed and has required him to comply with the obligation in question within such period being not less than 30 days after such handing over or posting, as may be stated in the letter, and the credit receiver has failed to comply with such requirement.....”*
- [54] In *Marques v Unibank* 2001(1) S.A. 145(W), J, dealt with the wording of s 11 of the Credit Agreements Act 75 of 1980 and the extent to which it differs from s 13(1) of the Sale of Land on Instalments Act and the original version of s 19 of the Alienation of Land Act. The learned Judge stated:
- “Section 11 uses the word 'notify': the credit grantor cannot claim the return of the goods until he has 'notified' the credit receiver of the latter's failure to comply with an obligation in the credit agreement. The other two Acts used the word 'inform': in terms of s 13(1) of the Sale of Land on Instalments Act, the seller was not entitled to enforce specific rights 'unless he has by letter . . . informed the purchaser' of his failure to fulfil an obligation under the contract; and in terms of s 19(1) of the Alienation of Land Act in its original form, the seller was precluded from claiming certain specified relief 'unless he has by*

letter informed the purchaser of the breach of contract concerned'.

The apparently innocuous change in wording brought about to s 19(1) of the Alienation of Land Act by s 8 of The Alienation of Land Amendment Act 51 of 1983 was, in my view, effected to clarify the Legislature's intention. The amendment took effect on 21 April 1983 and was evidently not brought to the attention of Flemming J, who decided *Holme v Bardsley* on 20 September 1983. The amendment changed the word 'informed' to 'notified' (and I emphasise that it is the latter word which appears in s 11 of the Act). One may well ask what the difference is, as the words appear to be synonymous, as counsel representing the defendant contended they indeed are: The Oxford English Dictionary 2nd ed (1991) has under 'inform', inter alia:

'5.a. To impart knowledge of some particular fact or occurrence to (a person); to tell (one) of or acquaint (one) with something; to apprise. The prevailing modern sense.'

and under 'notify', inter alia:

'2.b. To give intimation of something. . . .

4. To give notice to; to inform.'

But the Legislature would not have gone to the trouble of amending an Act simply to substitute a synonym (cf *Durban City Council v Malloy and Another* 1977 (1) SA 61 (D) at 64B - C). There must have been a reason for the amendment. In my view, the reason lies in the subtle distinction that whereas to 'inform' necessarily implies that the information reaches the mind of the person informed, to 'notify' does not. As appears from the passages I have just quoted from The Oxford English Dictionary, 'inform' in the prevailing modern sense means 'to impart knowledge', which necessarily connotes that the knowledge has passed; and one cannot 'tell' someone something without its coming to his attention. The same applies to 'acquaint' and 'apprise'. On the other hand, whilst 'notify' can mean 'to inform', it can also mean 'to give notice to'; and the giving of a notice does not necessarily mean that the contents of the notice were received or came to the attention of the person to whom the notice was addressed. I find a similar difference in nuance in Webster's Third New International Dictionary (1993) which has the following entry under 'inform':

'Informs implies the imparting of knowledge, esp of facts or events necessary to the understanding of a pertinent matter. . . . To notify is to send a notice or make a usu formal communication generally about something requiring or worthy of attention.'

(My emphasis.)

In my view, the Legislature intended by the amendment to the Alienation of Land Act, to give effect to the distinction between an obligation to 'inform' and an obligation to 'notify' and by the substitution of the latter, intended to make it clear that the contents of a notice did not actually have to come to the attention of a purchaser. (Although I take responsibility for the reasoning, this

conclusion

accords with the views of Otto (*loc cit*) and Van Rensburg and Treitsman (*op cit* at 202).)

Section 11 of the Act, which accords with s 19(1) of the Alienation of Land Act since the latter was amended, imposes the obligation to notify, not to inform and therefore, in my view, does not require the notice to come to the attention of the credit receiver.”

[55] In my view, the present Act, with regard to the notice contemplated in section 129(1) (a) thereof, represents a radical departure from its predecessor. Whereas the Credit Agreements Act 75 of 1980 merely requires the credit receiver to post by prepaid registered mail and, in this way, “has notified the credit receiver” of the default, the present Act, in Section 129 (1)(a), creates an obligation on the credit provider (when it decides to take such a course) to “draw the default to the notice of the consumer in writing”. Section 129(1)(b) of the Act creates a bar against the credit provider legitimately commencing any legal proceedings to enforce the agreement before providing notice the consumer as contemplated in section 129(1)(a) of the Act. In terms of section 130(1)(a) of the Act a credit provider may only approach a court for an order to enforce a credit agreement if, *inter alia*, at least 10 business days have elapsed since a credit provider delivered a notice, as contemplated in section 129(1)(a) of the Act, to the consumer.

[55] The words “draw the default to the notice of the consumer”, “providing notice” and “delivered a notice”, in the context in which these appear in the previous paragraph hereof, to my mind, cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires much more than the mere despatching of the notice contemplated by section 129(1)(a) of the Act, to the consumer in the manner prescribed in the Act and the Regulations. The credit provider is required, in my view, to bring the default to the attention of the consumer in a way which provides an assurance to a court considering whether or not there has been proper compliance with the procedural requirements of section 129 and 130 of the Act, that the default has indeed been drawn “to the notice of the consumer”. ‘Notice’ according to The New Oxford Dictionary, means ‘attention; observation’. In a case where the consumer has chosen an address in the credit agreement as the domicile which all notices, demands or communications may be sent, and the credit provider has accepted that address as the address chosen by the consumer, then the credit provider should ensure, if the notice is sent by mail, that the address to which the notice is posted is in every respect precisely the same as that chosen by the credit provider in the credit agreement. It cannot content itself with sending the notice to an address referred to in a Notarial Bond, or such other address which, because of its similarity in some respects with the address chosen by the consumer in the credit agreement, might by chance or good fortune be accepted by the post office and/ or the postman as the same address as that which had been chosen by the consumer in the credit agreement.

- [56] As stated earlier in this judgement, this Act is structured and designed more for the protection of the consumer than the credit provider, and it seems more so than in the case of other credit consumer legislation. There is ample justification, therefore, that a stricter interpretation is warranted than in the case of previous legislation of this kind.
- [57] In my judgment the Applicant, which bears the onus of establishing that it has complied with the provisions of Section 129(1) read with Section 130 of the Act, has failed to do so.
- [58] As alluded to earlier in this judgment, I was urged by Mr Stokes, even if I uphold the legal point raised on behalf of the Respondent, to grant the relief relating to the Applicant's entitlement to perfect its security because, in his submission, a Notarial Bond is not a credit agreement as defined in the Act. In terms of Section 8 of the Act an agreement constitutes a credit agreement for the purposes of the Act if it is, inter alia, a credit transaction, as described in subsection (4). Subsection (4) provides that an agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is, inter alia, mortgage agreement or secured loan.
- [59] A secured loan is defined in the Act as an agreement irrespective of its form but not including an instalment agreement, in terms of which a person-
- advances money or grants credit to another; and
- retains, or receives a pledge or cession of the title to any immovable property or other thing of value as security for all
- amounts due under that agreement.
- [60] The definition of secured loan is somewhat inelegantly drafted. One cannot pledge or cede the title (meaning ownership) to movable property or other thing of value. Nevertheless, I must conclude that the legislature intended to mean a pledge or cession of the property or thing that constitutes the security of all amounts due under the agreement. In my view the Loan Agreement and the Notarial Bond together constitute a secured loan as defined in the Act. The distinction sought to be drawn by Mr Stokes is artificial in the extreme. The protection afforded to the Applicant by the Notarial Bond becomes operative only upon the Respondent defaulting on the terms of the Loan Agreement. In my view, therefore, the argument by Mr Stokes cannot be sustained.
- [59] Both Mr Stokes and Mr Tobias are in agreement that, should I come to the conclusion that the Applicant has not complied with Section 129 read with Section 130 of the Act, I should make an Order in terms of Section 130(4) (e) of the Act and I propose so to do.

In the result I make the following Order:-

The Application is adjourned sine die.

The Applicant may not set the matter down until it has completed the following steps:-

it has complied with the provisions of section 129(1) (a) of the National Credit Act 34 of 2005 (“the Act”). In

particular it must draw the default to the notice of the Respondent by delivering a notice which complies with the provisions of section 129(1) (a) of the Act, in the manner prescribed by the Act, (read with the Regulations promulgated thereto), to the Respondent at the address chosen by her as her domicilium in the Term Loan Agreement.

the provisions of section 130 of the Act have been complied with.

The Applicant is ordered to pay the costs of the application.

NAIDU AJ.

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