
SOUTH AFRICA / JUDGMENT

Malinga v Absa Bank Limited (55937/2016) [2018] ZAGPPHC 315 (23 April 2018) [2018] ZAGPPHC 315

COURT

North Gauteng High Court, Pretoria

BEFORE

A A Crutchfield

CASE / FILE NUMBER

55937/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGHCOURT OF SOUTH AFRICA ,

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE

(2) OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NO: 55937/2016

23/4/2018

In the matter between:-

NDODA DAVID MALINGA

Applicant

and

ABSA BANK LIMITED

Respondent

In re :-

ABSA BANK LIMITED

Plaintiff

NDODA DAVID MALINGA

Defendan

JUDGMENT

CRUTCHFIELD AJ:

[1] This is an application for the rescission of a default judgment granted on 30 August 2016.

[2] The application was brought in terms of Rule 42(1)(a) of the Uniform Rules of Court on the basis that the judgment was erroneously sought or granted.

[3] The common cause facts relevant to the determination are the following:

3.1 The applicant received a notice in terms of s 129 of the National Credit Act, 34 of 2005 ('the Act') on 14 July 2016, (the 's 129(1) notice').

3.2 The track-and-trace report revealed that the s 129(1) notice, dated 27 June 2016 and remitted to the applicant by registered post on that date, was delivered to the applicant's post office on 6 July 2016 and collected by the applicant on 14 July 2016.

3.3 The summons was issued on 19 July 2016.

3.4 The summons was served on the applicant on 10 August 2016.

3.5 Default judgment was granted by the registrar on 30 August 2016.

3.6 The applicant's notice of intention to defend was served on 1 September 2016.

[4] The applicant contended that the order for default judgment was irregular as the summons was issued prior to the lapse of the ten (10) day period referred to in s 130(1)(a) of the Act.

[5] The applicant argued that whether the word 'commence' in s 129(1)(b) referred to the issue or the service of the summons was dispositive of the matter.

5.1 In the event that 'commence' referred to the issue of the summons then the rescission should be granted and the court furnish directions in terms of s 130(4)(b) of the Act.

[6] The relevant provisions of s 129 state the following:

"129. Required procedures before debt enforcement

(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.

...

(5) The notice contemplated in subsection (1)(a) must be delivered to the consumer -

(a) by registered mail ; or

(b)

(7) Proof of delivery contemplated in subsection (5) is satisfied by -

(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

(b) the signature or identifying mark of the recipient contemplated in subsection (5)(b)...."

[7] Section 130 provides the following:

"130. Debt procedures in a Court

(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(10),

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 ...".

[8] In so far as the respondent relied upon the presumption in the credit agreement that a notice sent to the applicant's chosen address would be presumed to have been received within seven (7) days after the respondent posted it, the presumption was rebutted by the application of the undisputed facts to s 129(7)(b), in that; the notice was posted on 27 June 2016 and the seven(7) day period provided in the credit agreement lapsed on 4 July 2016. The track and trace report reflects. however, that the s 129(1) notice was delivered to the applicant's post office on 6 July 2016, and collected by the applicant on 14 July 2016.

- [9] Hence, in terms of s 129(7)(b). delivery occurred on 14 July 2016, that being the date upon which the applicant obtained knowledge of the notice.
- [10] Furthermore, the court in *Kubyana v Standard Bank of South Africa Limited*[1] found that:
- '[98] The determination of the facts that would constitute adequate proof of delivery of a notice in a particular case must be left to the court before which the proceedings are launched. It is that court which must be satisfied that section 129 has been followed. Therefore, it is not prudent to lay down a general principle save to state that a credit provider must place before the court facts which show that the notice, on a balance of probabilities , has reached a consumer. This is what Sebola must be understood to state.'
- [11] The applicant argued that the ten (10) day period (from which the respondent was entitled to commence proceedings) in terms of s 130(1)(a) of the Act ought to be calculated from the date upon which the applicant gained knowledge of the s 129 notice, being 14 July 2016.
- [12] The respondent contended that the ten (10) day period commenced on 4 July 2016, in terms of the presumption in the credit agreement.
- [13] The provisions of s 130 must be applied within the context of s 129, which serve to afford the consumer an opportunity to consider and potentially take various steps aimed at resolving the indebtedness, the goal being agreement with the credit provider on a plan aimed at bringing the arrear payments up to date.
- [14] I was referred by the applicant to *Nedbank Limited v Namashishi Dorian Mokhonoana*[2] to the effect that once it is established that ten (10) business days have elapsed between delivery of the s 129(1) letter and the service of the summons, the process cannot be faulted and the plaintiff is entitled to its judgment.[3]
- [15] *Mokhonoana*[4] referred[5] to and rejected the statement that the issue of a summons (as opposed to the service of a summons), constitutes commencement of legal proceedings. The proposition was rejected[6] in that:
- '... Commencement of legal proceedings has a distinct and far-reaching effect on the rights of a consumer. In terms of section 86 (2) of the Act a consumer is precluded from applying to a debt counsellor to have him or her declared over-indebted after the commencement of legal proceedings. Legal uncertainty will abound if the consumer's ability to apply for debt review is determined by the date of issue of the summons of which he or she may not be aware (as opposed to the date of service thereof). I therefore find as a matter of law that legal proceedings for purposes of section 129(1)(b) of the Act is commenced not by the issue of a summons but by the service thereof.'
- [16] Subsequent to the *Mokhonoane* judgment, the Constitutional Court[7] found that the provisions of s 129(1)(b)(i) preclude the commencement of legal proceedings unless the notice in terms of s 129(1)(a) is first given.

- [17] The issue of legal certainty arises given the reference in s 129(1)(b)(i) to s 86(2) of the Act.
- [18] The debate as to whether s 86(2) prevents a consumer to whom a s 129(1)(a) notice has been delivered from applying for debt review was resolved[8] to the effect that the provisions of s 86(2) operate to prohibit such a consumer from applying for debt review in respect of the specific agreement that is the subject of the s 129 (1) (a) notice.
- [19] Thereafter, s 86(2) of the Act was amended by the inclusion therein of a reference to 'steps contemplated in s130'.
- [20] The result of that amendment was that the delivery of a notice in terms of s 129(1)(a) will not serve to exclude the specific credit agreement in respect of which the s 129(1)(a) notice applies, from an application for debt review.
- [21] Furthermore, the consumer will be afforded the additional time between the delivery of the s 129(1)(a) notice and the commencement of enforcement proceedings. to take up debt review proceedings.
- [22] The findings in Nedbank together with the amendment to s 86(2) of the Act served to render the reasoning (and the conclusion) in Mokhonoana irrelevant to the outcome of this matter. The SCA in Nedbank referred to the s 129(1)(a) notice as 'a mandatory requirement prior to litigation to enforce a credit agreement'.[9] "This is apparent when the subsection is read with ss 129(1)(b) and 130(1). Section 129(1) has been described as a 'gateway' or 'new' pre-litigation layer to the enforcement process."
- [23] 'Enforce', was found[10] to mean the 'enforcement of (all contractual remedies including cancellation and ancillary relief) by judicial means'. Furthermore,
- "Section 129 itself is entitled 'Required procedures before debt enforcement' and s 129(1)(b) expressly provides that legal
- proceedings may not be commenced ·to enforce· the agreement before certain requirements are met."
- [24] In the event that· commence· refers to service of the summons, the possibility arises that a credit provider w111 deliver the s 129(1)(a) notice to which the issued summons is attached and serve the summons on the consumer subsequent to the lapse of the 10-dayperiod.
- [25] That would defeat the purpose of the s 129(1)(a) notice. to allow the consumer an opportunity to enter into an agreement with the credit provider aimed at regularising the payments under the specific credit
- agreement involved.
- [26] The ordinary grammatical meaning of 'commence' is to 'begin' or 'start'. [11]
- [27] As referred to in Mokhonoana:[12]

"The issue of a summons, not the service of it, ordinarily constitutes commencement of proceedings. The issue of a summons is the initiation of an action... It prevents the plaintiff from issuing another summons on the same subject matter against the same defendant in the same or another court. If the plaintiff does so the defendant can plead *lis pendens*, i.e. that there is pending litigation on the same subject matter between the same parties. The issue of summons is sufficient for this purpose."

[28] In giving meaning,[13] "one must attribute to words in a statute 'their ordinary grammatical meaning'. unless to do so would result in an absurdity".[14]

[29] Furthermore, in terms of s 39(2) of the Constitution, statutes are required to be interpreted through 'the prism of the Bill of Rights ... the general rule of statutory construction is that Courts will give unambiguous provisions of a statute their plain meaning unless that meaning creates a result that is contrary to the purpose of the statute itself or when it leads to an absurd result'.[15]

[30] Section 2(1) of the Act:[16]

'[18] Expressly requires a purposive approach to the statute's construction. Furthermore legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning in clear language may be discarded, interpretation is not divination and Courts must respect the separation of powers when construing Acts of Parliament.

[20] There can be no doubt that the Act is directed at consumer protection. However, this should not be taken to mean that the Act is relentlessly one-sided and concerned with nothing more than devolving rights and benefits on consumers without any regard within interests of credit providers. No. For Justas the Act seeks to protect the consumers, so too does it seek to promote a competitive, sustainable, efficient and effective credit industry. This objections to be attained by promoting responsibility in the credit market;... discouraging contractual default; and adhering to a debt enforcement system that prioritises "the eventual satisfaction of all responsible consumer obligations under credit agreements" ·

....

[22] It is also fitting to have regard to section 129 in particular. This section sets out the procedures a credit provider must follow before enforcing a debt its purpose is two-fold. First, it serves to ensure that the attention of the consumer is sufficiently drawn to her default. Second, it enables the consumer to be empowered with knowledge of the variety of options she may utilise in order to remedy that default.

[23] This exposition of the aims and objects of the Act would inform our understanding of its particular provisions. However, interpretation is about giving meaning to words, and it is therefore appropriate to commence the interpretive exercise by considering the language of the statute ..."

[31] In Nedbank,[17] it was held that:

"One of the objects of the NCA is the provision of a consistent and accessible system of consensual dispute resolution.... The purpose of s 129(1)(a) notice is the resolution of a dispute and the bringing up to date of payments under specific credit agreement. While it is a 'step' prior to the commencement of legal proceedings it is also the first 'step' ... Section 129(1)(b)(i) makes it clear that the notice in terms of s 129(1)(a) is a necessary 'step' before legal proceedings may be commenced. It follows that by giving the notice envisaged by s 129(1)(a) the credit provider 'has proceeded to take the steps contemplated in section 129 to enforce that agreement'..."

[32] By attributing to the word 'commence', the meaning of 'issue the summons' it will result in the consumer having the benefit of the ten

(10) day period in which to enter into an agreement with the credit provider in order to regularise its payment position. Such an agreement would render the issue of summons unnecessary at that stage and result in the stated purpose of s 129(1) notice, within its given context, being met.

[33] The potential alternative is, as already stated, that credit providers may undermine the stated purpose of the s 129(1) notice by delivering the notice with a copy of the issued summons already attached to it.

[34] In the circumstances, I am of the view that 'commence' in s 129(1)(b) refers to the issue of a summons.

[35] There is a long line of authority[18] to the effect that once a court finds that a judgment was erroneously granted as in this particular case, it should rescind the order and it is not necessary for a party to show good cause for the application of the Rule.

[36] The respondent argued that notwithstanding the aforementioned, the court required to be satisfied that the applicant under Rule 42 was bona fide and that in the light of the applicant's dilatory conduct the application was nothing other than an opportunistic attempt to delay the respondent from exercising its contractual rights and that the applicant was dilatory[19] in his conduct, all of which may well be correct.

[37] However, in so far as there is an error in respect of the granting of the judgment, there is no obligation upon the applicant to demonstrate anything other than an error in the granting of the judgment.

[38] In the circumstances, grant the following order:

1. The default judgment granted on 30 August 2016 is rescinded;
2. The applicant is ordered to deliver his plea within twenty (20) Court days of this order;
3. The respondent is ordered to pay the costs of the application.

A A CRUTCHFIELD

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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DATE OF HEARING

9 October 2017.

DATE OF JUDGMENT

23 April 2018.

[1] Kubyana v Standard Bank of South Africa Limited 2014 (3) SA 56 ('Kubyana') para 98.

[2] Nedbank Limited v Namashishi Dorian Mokhonoana 2010 (5) SA 551 (GNP) ('Mokhonoana').

[3] Id para 15.

[4] Id para 11

[5] Herbstein & Van Winsen's The Civil Practice of the High Courts of South Africa(5th Ed) Vol1 p 503.

[6] Mokhonoana note 2 above para 14

[7] Sebola and Another v Standard Bank of South Africa and Another 2012 (5) SA 142(CC) ('Sebola') para 45.

[8] Nedbank Limited & Others v The National Credit Regulator 2011 (3) SA 5 1 8 (SCA) ('Nedbank').

[9] Nedbank note 8 above para 8.

[10]Id para 12.

[11] Collins English Dictionary

[12]Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa (5th Ed Vol 1 p 503).

[13] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras 20 - 24.

[14] Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) para 28.

[15] Botha and Another v Rich NO and Others 2014 (4) SA 121 (CC) paras 28 - 29; Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) para 28.

[16] Kubyana note 1 above para 18.

[17] Nedbank note 8 above para 14 (footnotes excluded.)

[18] Erasmus Superior Court Practice (2nd Ed) Van Loggerenberg Vol 2 01-568 footnote 7.

[19] Kubyana note 1 above para 51.

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