**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION – GQEBERHA)**

**CASE NO.: 3135/2022**

**Matter heard on: 13 November 2024**

**Judgment delivered on: 06 February 2025**

In the matter between: -

**FIRSTRAND BANK LIMITED** Plaintiff

and

**GAWIN BHIKA** First Defendant

**ZURAIDA BHIKA** Second Defendant

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**JUDGMENT**

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**ROSSI AJ:**

[1] The plaintiff seeks an order for summary judgment[1] against the first and second defendants,[2] jointly and severally, the one paying the other to be absolved, for the

[1] In terms of rule 32(1) of the Uniform Rules of Court.

[2] The first and second defendants, who are married to one another in community of property, entered into the home loan agreement and further loan agreement with the plaintiff.

amount of R1 157 861.88[3] plus interest thereon, calculated daily and compounded monthly from 1 October 2022 to date of final payment, both dates inclusive, at the variable rate which is linked to the plaintiff's mortgage bond base rate, which variable interest rate is presently 12.45% per annum, and costs on the scale as between attorney and client.

[2] The plaintiff instituted action proceedings against the defendants for capital judgment in October 2022. The action was defended, and a plea was filed.[4] The plaintiff applied for summary judgment in January 2024 contending that the plea raised no triable defences. An opposing affidavit to the summary judgment was filed by the defendants. In August 2024 the defendants' attorneys of record withdrew. The application for summary judgment, which was originally set down for hearing on 3 September 2024, was postponed on several occasions to accommodate the defendants. Ultimately, the application was argued before me on the 13 November 2024;[5] which marked its fifth appearance on the unopposed motion court roll. The first defendant represented himself and his wife, the second defendant, at the hearing.

[3] The plaintiff's case on the pleadings is summarised as follows:

(a) The defendants entered into a home loan agreement and a further loan agreement (collectively referred to as the 'loan agreements') with the plaintiff in January 2011 and February 2012 in order to acquire the immovable property, more properly described as erf 759 Framesby situated in the Nelson Mandela Bay Metropolitan Municipality, Division of Port Elizabeth,[6] Eastern Cape in the extent of 1 152 square metres, situated at 38 Cornelia Avenue, Framesby, Gqeberha (the 'immovable property').

(b) The capital sums of R975 000.00 and R325 000.00 were lent and advanced by the plaintiff to the defendants pursuant to the loan agreements.

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[3] An updated certificate of balance was handed up at the hearing of the matter. The certificate dated 13 November 2024 indicates that the capital amount outstanding has increased to R1 333 553.06 (from R1 157 861.88) and the arrears component has increased to R482 861.07 (from R308 448.06).

[4] The date of the plea and counterclaim is not apparent from the documents filed of record. The defendants' plea was filed following an upliftment of bar by court order dated 17 October 2023.

[5] The application was enrolled for hearing on 12 November 2024 but due to it being crowded out was argued the following day.

[6] Now known as Gqeberha.

(c) On 28 February 2011 and 20 March 2012, mortgage bonds in favour of the plaintiff were registered over the immovable property.

(d) Clause 4.25 of the loan agreements states that if the defendants fail to pay any amount due in terms thereof and remain in default, subject to clause 4.25.17[7] which deals with the application of the National Credit Act, 38 of 2005 (the 'NCA'), the plaintiff may at its option claim immediate repayment of the full outstanding balance or terminate the agreement, in which event all amounts whatsoever owing by the defendants shall then forthwith become payable in full.

(e) Clause 4.28 of the loan agreement provides that a certificate purporting to be signed on behalf of the plaintiff shall be proof, until the contrary is proved, of the balance owing and the fact that it is due and payable, and the authority of the signatory or of the validity of the signature need not be established.

(f) The defendants nominated the postal address reflected on the first page of the loan agreements, being, 38 Cornelia Avenue, Framesby, Port Elizabeth, 6059 as their domicilium citandi et executandi.[8] This becomes a relevant aspect in relation to compliance (or the alleged non-compliance) with s 129 of the NCA.

(g) Collection costs on the attorney and client scale will be charged by the plaintiff in the event of the plaintiff having to enforce the agreement.[9]

(h) In terms of the loan agreements, the defendants undertook to pay interest on all amounts outstanding, which interest rate was variable and linked to

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[7] Which reads 'If the [National Credit] Act applies and the customer is in default under this agreement, then the lender will draw the default to the customer's notice in writing, and will propose that the customer refers this agreement to a debt counsellor with the intent to develop and agree on a plan to bring the payments under this agreement up to date. The customer further has the right to approach an alternative dispute resolution agent, consumer court or ombud with jurisdiction in order to resolve any dispute under this agreement. If the customer is in default under the agreement which is being reviewed in terms of section 86 of the Act and the review has not been finalised within 60 (sixty) business days after the date on which the customer applied for the debt review, the lender may give notice to terminate such review in the prescribed manner to the customer, the debt counsellor and the National Credit Regulator. If the customer is in default and has been in default under this agreement for at least 20 (twenty) business days and at least 10 (ten) business days have elapsed since the lender delivered a notice to the customer as stipulated in section 86(10) or section 129(1) of the Act, as the case may be, and if in the case of a notice as stipulated in section 129(1), the customer has not responded to that notice or responded to the notice by rejecting the lender's proposal, the lender may then approach the court for an order to enforce or terminate this agreement.'

[8] The address of the immovable property.

[9] Clause 2.15.2 of the loan agreements.

the plaintiff's prime overdraft rate. The interest rates were stipulated at the time as 9.5% and 9.7% nominal per annum in respect of the first and second loan agreements respectively.[10]

(i) The plaintiff alleges that the defendants are in breach of their obligations under the loan agreements by failing to timeously pay the instalments due to the plaintiff. The plaintiff attached a certificate of balance to its particulars of claim evidencing an amount of R986 720.88 together with interest at the variable rate of 10.45% nominal per annum, calculated daily and compounded monthly from 1 October 2022, being due and payable.

(j) The plaintiff pleads that notice in terms of s 129(1) of the NCA was despatched to the defendants by registered post to their chosen address. The s 129 notice was delivered to and reached the relevant post office for delivery to the defendants. A copy of a track and trace print-out from the South African Post Office is attached to the particulars of claim.

(k) The statutory 10 (ten) business days have lapsed since delivery of the s 129 notice, and the defendants have not responded thereto.

[4] The following facts, gleaned from the particulars of claim read in conjunction with the plea, are common cause:

(a) The defendants entered into the loan agreements with the plaintiff, copies of such loan agreements appear as annexures POC1 and POC2 to the particulars of claim.

(b) At the time of concluding the loan agreements, the defendants had appropriate means to repay the capital sum and finance charges.

(c) Mortgage bonds were registered over the immovable property. Incongruous to this admission is a denial that the mortgage bonds were registered as a consequence of the loan agreements.

(d) The defendants are in breach of the loan agreements and have been in default for more than 20 (twenty) business days.

[5] The defence to the summary judgment is summarised as follows:

[10] Clause 2.6 of the loan agreements.

(a) The plaintiff has not attached its registration certificate in terms of s 40 of the NCA to its particulars of claim nor has it attached the pre-agreement quotations. It is contended that there has been non-compliance with s 92 of the NCA.
(b) The plaintiff's authorised representative's signature does not appear on the loan agreements, which indicates that the loan agreements were not accepted by the plaintiff.
(c) The plaintiff has failed to make out a case for execution in terms of rule 46A.
(d) The indebtedness to the plaintiff is disputed.
(e) The plaintiff's notice in terms of s 129(1) of the NCA was not received by the defendants.

[6] Prior to analysing the merits of the opposition a few opening remarks stand to be made regarding summary judgment in general. Rule 32 provides for two possible responses to an application for summary judgment. A defendant may either provide security for the debt (rule 32(3)(a)) or a defendant may satisfy the court by affidavit or oral evidence that he/she has a bona fide defence to the claim (rule 32(3)(b)). If the defendant chooses the latter course, such as the defendants presently before me, the defendant must, in his/her affidavit 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor.'[11]

[7] In order to satisfy the court that a defendant has a bona fide defence, he/she must allege facts in the affidavit which, if proved at the trial, will constitute an answer to the plaintiff's claim.[12] The grounds for the defence referred to in this rule is the factual basis for the defence.[13] It has been held that while it is not required of a defendant to exhaustively deal with the facts and the evidence relied upon to substantiate the defence, he/she must at least disclose the defence and the material

[11] Rule 32(3)(b) – my own emphasis.
[12] See for example Breitenbach v Fiat (SA) Edms Beperk 1976 (2) SA 226 (T); Marsh v Standard Bank of South Africa Limited 2000 (4) SA 947 (W).
[13] Chairperson Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Beperk 1997 (1) SA 244 (T).

facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether a bona fide defence has indeed been disclosed.[14]

[8] I now proceed to deal with the defences raised by the defendants. As execution is not sought by the plaintiff at this stage, it is unnecessary for me to deal with the application of rule 46A.

[9] The defendants baldly deny that the plaintiff is a registered credit provider in terms of s 40 of the NCA. The denial is premised on the plaintiff's failure to attach to its particulars of claim, a registration certificate issued by the National Credit Regulator. A failure to register as a credit provider in appropriate circumstances carries with it severe financial consequences.[15]

[10] In answer to the denial, and in its summary judgment affidavit, it is repeated[16] that the plaintiff is duly registered with the National Credit Regulator and attaches a registration certificate dated 1 August 2023.[17] The plaintiff's deponent alleges further that it was duly registered on 19 January 2011 and 13 February 2012[18] and that proof of registration for the relevant period will be made available in due course. I reminded the parties of the plaintiff's undertaking and have since been provided with a registration certificate issued by the National Credit Regulator dated 15 November 2024 which states that the plaintiff has been continuously registered as a credit provider since its initial registration on 6 March 2007. To my mind this puts paid to this defence.

[11] In any event the defendants fail to plead any material facts to substantiate this defence, other than one premised on a lack of the certificate/s having been attached to the pleadings.[19] *Ex facie* the registration certificates presented to me, the plaintiff

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[14] Maharaj v Barclays National Bank Limited 1976 (1) SA 418 (A) at 426C-D.

[15] Prior to 13 March 2015 (the effective date of the National Credit Amendment Act 19 of 2014) a court was obliged to order that an agreement entered into by an unregistered credit provider was void ab initio. Section 89(5), as amended, now gives a court a discretion to order such agreement void, and to make any further appropriate order - Scholtz et al supra 5-5 and fn 24.

[16] As the positive averment was made in the particulars of claim.

[17] The registration certificate which is issued annually is dated 1 August 2023 and is valid until 31 July 2024. This is not for the relevant period concerned.

[18] The dates on which the loan agreements were concluded.

[19] Knox D'Arcy AG and Another v Land and Agricultural Bank of South Africa [2013] 3 All SA 404 (SCA) par 35.

was (and remains) duly registered. The defendants also complain that new material should not be introduced by the plaintiff. I do not consider proof of registration as new material. The allegation is positively averred in both the particulars of claim and the affidavit in support of summary judgment. The certificates serve only to verify what has already been alleged.[20] There can be no prejudice to the defendants.

[12] Applying the same method of reasoning, the defendants also dispute the validity of the loan agreements as the pre-quotation agreements have not been attached to the particulars of claim. Again, the defendants fail to allege any material facts to support this defence,[21] especially since it is not disputed that they have been living in the mortgage property for almost 15 years.

[13] In terms of s 92 of the NCA, a credit provider may not enter into an intermediate or large credit agreement[22] with a consumer unless it has complied with s 92(2). This section details the requirements of a pre-agreement quotation.

[14] Leaving aside that in answer to this defence, the pre-agreement quotations are attached to the summary judgment affidavit which evidence compliance, this defence fails for another reason. In terms of the acceptance and declaration clause incorporated in the loan agreements, the defendants confirmed that they had received and accepted the quotation/s and had received, read and understood the terms and conditions therein.[23] The clause also confirms that they have furnished the plaintiff with true and accurate information.[24] Accordingly, this defence fails.

[15] The defendants complain that the plaintiff's authorised representative's signature does not appear on the loan agreements. The plaintiff thus did not accept the loan agreements. This defence can be dealt with swiftly. Objectively, following the conclusion of the loan agreements (which are admitted by the defendants in their plea), funds were advanced by the plaintiff to the defendants which enabled them to acquire the immovable property. This took place some 15 years ago. In consequence

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[20] Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd 1967 (1) SA 466 (D) at 496C-D.
[21] Knox D'Arcy AG and Another v Land and Agricultural Bank of South Africa [2013] 3 All SA 404 (SCA) par 35.
[22] Section 9 of National Credit Act lists the categories of credit agreement and subsection (4) provides that a mortgage bond is a large agreement.
[23] Clause 5.1 of the loan agreements.
[24] Clause 5.16 of the loan agreements.

of these advances, two mortgage bonds were registered over the property to secure the plaintiff's advances. These mortgage bonds are admitted. The defendants have been living in the mortgaged property for a decade and a half. Both parties have complied with the terms of the loan agreements, albeit partial compliance by the defendants.[25] The defendants also admit in their plea that annexures POC1 and POC2 are true copies of the loan agreements. In the result, it cannot be said that the defendants have meaningfully disputed these objective facts or laid a factual foundation for this defence.[26] Accordingly, this defence must also fail.

[16] I turn to the defendants' arrears/indebtedness. As the defendants admit conclusion of the loan agreements and the copies annexed to the particulars of claim, they must equally accept application of clause 4.30 which concerns certificates of balance. The defendants have established no factual basis for me to doubt the validity or accuracy of the certificate. I accept that by application of clause 4.30, the certificate of balance constitutes proof of the balance due and owing to the plaintiff, which in turn is sought in the summary judgment application. In any event, the defence hinges only on what has already been raised in relation to alleged non-compliance with the NCA, and which I have already found to be devoid of merit. Accordingly, this defence is also rejected.

[17] A parting remark stands to be made in relation to the defences raised by the defendants.[27] Since the enactment of the NCA, there has been a tendency for defendants to make bland allegations that they are over-indebted or that there has been reckless credit.[28] These allegations like any other allegations made in an affidavit opposing summary judgment should not be 'inherently and seriously unconvincing', should contain a reasonable amount of verificatory detail, and should not be 'needlessly bald, vague or sketchy'.[29]

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[25] On account of the breach.
[26] Knox D'Arcy AG and Another v Land and Agricultural Bank of South Africa [2013] 3 All SA 404 (SCA) par 35.
[27] Which have been dealt with above.
[28] SA Taxi Securitisation v Mbatha 2011 (1) SA 310 (GSJ) ('SA Taxi Securitisation') par 26.
[29] Ibid.

[18] The purpose of the NCA is to provide a more efficient and equitable system by balancing the rights of credit providers and consumers. The intention of the legislature was not to shift the balance of power so much that all the power in the credit relationship would amass into the hands of the consumer.[30] The NCA is structured in such a way as to prevent over-indebtedness and to provide for a more efficient discharge of consumer debts. The purpose is not to enable an over-indebted consumer to retain a lender's depreciating security while at the same time not making debt payments.[31]

[19] The restoration of a lender's security to the lender while it still has value facilitates the efficient reduction and discharge of indebtedness.[32] The retention of deteriorating security has the opposite effect.[33] As aptly said by Levenberg AJ in **SA Taxi Securitisation** *'the NCA does not contemplate the consumer retaining the* "money and the box".'[34]

[20] Mr White for the plaintiff, correctly in my view, likens the defendants' opposition to an effort by them to retain the 'money and the box'. Such a stance clearly flies in the face of the purpose and object of the NCA. Nor does it satisfy the threshold of a bona fide defence as required of a defendant in terms of rule 32(3)(b).

[21] As a last line of defence, the defendants baldly deny that they received the s 129 notices which are attached to the particulars of claim.[35] Their plea reads:

'29.1 The contents of these paragraphs are admitted in [so] far as it refers to section 129 of the National Credit Act.

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[30] Ibid par 32.
[31] Ibid par 33.
[32] Ibid.
[33] Ibid.
[34] Ibid par 50.
[35] Which is the required procedure to be adopted before debt enforcement in terms of s 130 of the NCA. As was said in Sebola v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC) par 59 – 'These procedures are designed to help debtors to restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls.' Section 130(2) of the NCA provides that a credit provider may not commence any legal proceedings to enforce the agreement before first giving notice to the consumer as contemplated in s 129(1)(a) or s 86(10), as the case may be, and meeting any further requirements as set out in s 130.

29.2 The Defendants deny that the section 129 Notice was delivered to the Defendants.'

[22] At best a 'defence' of this nature serves only as a dilatory measure as a credit provider may resume proceedings against the consumer after complying with s 129 of the NCA.[36] Non-compliance with s 129 has been found not to constitute a bona fide defence for purposes of summary judgment.[37]

[23] In any event the plea does not meaningfully engage or dispute the following material averments by the plaintiff:

(a) The s 129 notices were sent via registered mail to the defendants' chosen address, namely, 28 Cornelia Avenue, Framesby, Gqeberha.
(b) The s 129 notices were delivered to and reached the relevant, correct and appropriate post office for delivery to the defendants.
(c) The post office would, in the normal course, have secured delivery of a registered item notification slip, informing the defendants that a registered item (the s 129 notices) was available for collection.
(d) Notification of the arrival of the said notices thus reached the defendants and a reasonable consumer would have ensured retrieval of the said registered item from the post office.
(e) The said notices were thus delivered to the defendants.
(f) A print-out from the website of the South African Post Office (a 'track and trace print-out') is annexed to the particulars of claim, which shows that a first notification was sent to the recipient on 12 October 2022.

[24] In their opposition to the summary judgment, the defendants contend that the track and trace print-out fails to indicate the name of the accepting officer who processed the transaction and further that the s 129 notice was delivered to the incorrect post office.[38] The defendants contend that the s 129 notice was received by the Linton Grange post office whereas their address is in Framesby. It is not a

[36] In terms of s 130(4)(b) of the NCA. Standard Bank of South Africa Ltd v Rockhill 2010 (5) SA 252 (GSJ) at 255D and 255F.
[37] Ibid.
[38] In the court rejected an argument by the consumer that the s 129 notice had to be delivered to the post office closest to her which was different from the post office in whose area the domicilium address was situated.

requirement of compliance to establish the identity of the accepting officer. Nor is it required that the s 129 notice be delivered to the post office closest to the domicilium address.[39]

[25] It has been definitively held by our courts that any notion that the NCA requires a credit provider to ensure, as a matter of fact, that a s 129 notice has reached the consumer is misconceived.[40] This is so because a consumer could simply eschew debt enforcement efforts by a credit provider by failing to pick up his/her registered mail.

[26] In **Kubyana v Standard Bank**[41] the Constitutional Court, having considered the relevant provisions of the NCA and **Sebola**,[42] laid this vexed question of what delivery entails to rest:

'[54] The Act prescribed 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 bene discharged entails proof that –

(a) The section 129 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 deducted 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;
(d) A reasonable consumer would have collected the section 129 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

[39] Nedbank Ltd v Ebrahim [2020] ZAGPPHC 460 (7 August 2020).
[40] Kubyana v Standard Bank of South Africa Ltd [2014] ZACC 1; 2014 (3) SA 56 (CC) par 47.
[41] Ibid at par 54.
[42] Sebola v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC).

the circumstances the notice would not have come to the attention of a reasonable consumer.'[43]

[27] There is nothing before me to gainsay that the Linton Grange post office is the correct post office. Nor do they contend that the incorrect postal address was used. The track and trace print-out shows that a notification was sent out to the defendants. I have already mentioned that the defendants fail to meaningfully plead to these positive averments in the particulars of claim.

[28] In the result, the plaintiff has complied with the requirements set out in **Kubyana** and is found to have shown that it has discharged its obligations under the NCA and is entitled to aver that it has done what is necessary to ensure that the notice reached the consumer.[44]

[29] It is then for the consumer to explain why it is not reasonable to expect the notice to have reached his/her attention and should bear this burden of rebuttal because the information regarding the reasonableness of his/her conduct generally lies solely within the consumer's knowledge.[45] The defendants have not met this burden of rebuttal. The inference has not been rebutted. The facts sustaining their denial is conspicuous in its absence. In the result, the final defence based on non-compliance with s 129 of the NCA is rejected.

[30] Accordingly, I am of the view that the plaintiff is entitled to summary judgment as sought. The defendants have not raised a bona fide defence which, if proved at trial, would constitute an answer to the plaintiff's claims.

[31] In the result, the following order is issued:

**1. Summary judgment against the first and second defendants, jointly and severally, the one paying the other to be absolved, is granted for the amount of R1 157 861.88;**

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[43] My own emphasis.
[44] Kubyana v Standard Bank of South Africa Ltd supra par 53.
[45] Ibid.

2. **The first and second defendants are ordered to pay interest on the aforesaid amount, calculated daily and compounded monthly from 1 October 2022 to date of final payment, both days inclusive, at a variable rate which is linked to the plaintiff's mortgage bond base rate, which variable interest rate is presently 12.45% nominal per annum calculated daily and compounded monthly from 1 December 2023;**

3. **Costs on the scale as between attorney and client.**

**T ROSSI**
**ACTING JUDGE OF THE HIGH COURT**

**Appearances:**

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|---|---|
| For the plaintiff: | Mr A White<br>Counsel for the plaintiff<br>Instructed by:<br>MINDE SCHAPIRO & SMITH INC.<br>Ascot Office Park Building No. 7<br>First Floor, Conyngham Road<br>Greenacres<br>GQEBERHA<br>Ref: Mr M Koen |
| For the defendants: | Mr G Bhika<br>Acting personally and on behalf of second defendant |