

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
(JOHANNESBURG)

CASE NO: 09/56251

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff

and

ROCKHILL, RAYMOND ANTHONY

First Defendant

VAN HEERDEN, CHRISTINA CATHARINA

Second Defendant

JUDGMENT

EPSTEIN AJ:

- [1] The plaintiff, a credit provider registered in terms of section 40 of the National Credit Act, no. 34 of 2005 ("**the NCA**"), applies for summary judgment against the first and second defendants for payment of the sum of R1 646 815.09 which amount is alleged to be the balance of the principal debt together with finance charges due and owing in

respect of monies lent and advanced by the plaintiff to the defendants. The amount is secured by a mortgage bond, a copy of which is attached to the plaintiff's summons. The aforesaid amount is alleged to be due and payable by reason of the failure of the defendants, notwithstanding demand, to pay punctually the instalments as provided for in the mortgage bond. The plaintiff also seeks interest, an order declaring the immovable property mortgaged executable, and attorney and client costs.

- [2] Sections 129 and 130 of the NCA, which must be read together, are central to the application for summary judgment. The following subsections are relevant:

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 councilor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop or 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.
- (2)

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(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
 - (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.¹
- (2)

[3] The transaction between the plaintiff and the defendants giving rise to the claim is governed by the NCA. The plaintiff has alleged compliance with section 129 of the NCA and in support thereof attaches copies of letters dated 25 November 2009 sent to the defendants, as well as the respective registered slips as proof of posting. The plaintiff alleges that the defendants have been in default for more than 20 business days as contemplated in section 130 of the NCA, and that 10 business days have

¹ Although the word 'may' is used in section 129(1)(a) of the NCA, the giving of the notice is peremptory. This is clear from a reading of section 129 (1) (a) together with sections 129 (1) (b) and 130 (1).

lapsed since the date of posting of the section 129 notices. Summons was issued on 17 December 2009 and served on the defendants on 21 December 2009.

[4] In the affidavit resisting summary judgment the defendants dispute that the plaintiff has complied with section 129 of the NCA and aver that by virtue of the non-compliance the plaintiff was precluded from commencing these legal proceedings. The Defendant states that they did not receive the section 129 letters which were sent by registered post.

[5] Section 129 requires the credit provider to *draw the default to the notice of the consumer in writing*. Although section 129 does not state how this must be done, section 130 provides the answer by referring to 10 days having elapsed since the credit provider *delivered* the notice to the consumer. The word *deliver* is not defined in the NCA itself² but there is a definition in the Regulations.³ The Regulations⁴ contain the following definition⁵:

‘**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. _ _ _

Section 129(1)(a) does not require the consumer to receive the notice. The credit provider discharges its obligation of delivering the notice by sending it to the postal

² Section 1 of the NCA

³ In the NCA, ‘this Act’ is defined to include a regulation made under the Act.

⁴ GNR489 of 31 May 2006

⁵ Regulation 1, Definitions

address selected by the consumer. *Munien vs BMW Financial Services (SA) (Pty) Ltd and Another*⁶

- [6] Ordinarily, if regard were had only to the provisions of the NCA, there would have been compliance with the prerequisites stipulated in section 129 read with section 130, and the plaintiff would have been entitled to approach this Court for a order to enforce its claim. However, the defendants have drawn attention to clause 14.3 of the mortgage bond and clause 33.2 of the “Terms and conditions of loans secured by mortgage bonds”. These clauses are in identical terms (save that the latter refers to *Borrower* instead of *Mortgagor*). The clauses both read as follows:

The Mortgagor (Borrower) chooses the postal address set out below as the address to which letters, statements and notices may be delivered, and the Mortgagor (Borrower) accepts that any letters and notices posted to this address by the Bank by registered post will be regarded as having been received within 14 (fourteen) days after posting:.....

What follows both clauses is an address (post box number) to which address the letters were sent.

- [7] The defendants argue that by virtue of the aforementioned contractual provision in the mortgage bond, the 10 business days provided for in section 130(1)(a) would only commence after the 14th day from the date of posting of the section 129 letters. If this

⁶ 2010 (1) SA 549 (KZD) at 555 A – I. See also *Marques v Unibank Ltd* 2001 (1) SA 145 (W).

contention is correct, the plaintiff has, in terms of section 130, approached the court prematurely.

[8] The defendants contend that the parties by agreement selected the time by when any notice would be deemed to have been received by the borrower, and that the plaintiff should be held bound by its agreement. On the other hand, it was argued on behalf of the plaintiff that in terms of section 90(2)(b)(iii) of the NCA, a provision of a credit agreement is unlawful if it directly or indirectly purports to set aside or override the effect of any provision of the Act.

[9] When construing a statute a court is entitled to have regard not only to the language of the legislature but also to its objects and purpose which may be gleaned from the wider contextual considerations, the history of the legislation and circumstances applicable to the subject matter. *Principal Immigration Officer v Hawabu And Another*.⁷

[10] “The purpose of the NCA is explicitly stated in section 3:

The purposes of this Act is to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers by -”

Section 3 then sets out how these purposes are to be achieved.

⁷ 1936 AD 26 at 30 – 32; See also *Jaga v Dönges, N.O. & Another* 1950 (4) SA 653 (AD) at 662.

[11] The preamble to the NCA also indicates its purpose:

“To promote a fair and non-discriminatory market place for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; _ _ _; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting;”

[12] *J.M. Otto, in Guide to the National Credit Act* states the following in the Introduction to the first chapter⁸:

“Legislation protecting debtors in various ways is an international phenomenon.....

Some legislation may aim at protecting what are popularly called ‘consumers’, while other legislation may have a wider field of application. A ‘consumer’ in this context is normally an individual or a small jurisdic person, and the legislation usually covers contracts up to a certain amount of debt extended by the creditor, which maximum amount serves as a ceiling for the legislation’s field of application. Credit extended above this amount is no longer regarded as consumer credit and it is left to the parties to determine their relationship and their contract, subject to the rules of the common law only. _ _ _”

[13] Clearly, the NCA has as its primary purpose the protection of consumers and it sets a minimum standard for protection. However, this does not preclude parties from incorporating into their agreements additional protection for the consumer. Such protection, as in the present case where an extended period by which notices are deemed to have been received is afforded to the borrowers, is not repulsive to the

⁸ 1.1 Introduction [issue 1]

general purpose of the NCA. It cannot be said that it overrides the effect of section 129 read with section 130. The effect of these sections is to draw the default to the attention of the consumer and to propose to the consumer alternative methods of dealing with his or her default. Affording the consumer more time than provided for in the NCA does not defeat the objects of the Act, nor the intention of the legislature.

[14] Section 130 is clearly concerned with specifying the least number of days which must have elapsed before a credit provider may approach the court; the section is not concerned with where a consumer in default has been afforded more than the minimum period. The interpretation which has been given to these sections is that notice is deemed to have been received on the day on which it is sent.⁹ Nevertheless, sections 129 and 130 do not forbid the parties from agreeing that a notice despatched in terms of the NCA will only be deemed to have been received 14 days after its posting. The law-giver's purpose is not defeated by the parties' agreement *in casu* and the agreement cannot be stated to be in conflict with the sections.

[15] Effect must be given to the parties' agreement which is valid, binding and lawful - *pacta sunt servanda*. In the premises, the notices are deemed to have been received 14 days after they were posted. The *10 business days* provided for in section 130(1)(a) had therefore not elapsed by the time the summons in this matter was issued. The action was therefore premature.

⁹ See Munien, *supra*, footnote 6.

[16] The remaining issue is whether the non-compliance by the plaintiff with its obligation in terms of section 129 of the NCA affords the defendants a defence to the application for summary judgment entitling them to be granted leave to defend. In *Standard Bank of South Africa Ltd vs Van Vuuren*¹⁰, the court found that a defendant in an application for summary judgment had raised a *bona fide* defence when it was established that there was not proper compliance with section 129. The defendant in that case was granted leave to defend. However, the Court did not deal with the provisions of subsections 130 (3) and 130 (4) of the NCA. The relevant portions of these sections read as follows:

“130

- (3) 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;
 - (b)

- (4) In any proceedings contemplated 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)..... the court must
 - i) adjourn the matter before it; and

¹⁰ 2009 (5) SA 557

ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.”

[17] In summary judgment proceedings, a defendant who does not give security to the plaintiff must satisfy the court by affidavit that he has a *bona fide* defence to the action.¹¹ In resisting the plaintiff’s claim the defendant’s contentions must be advanced with a sufficient degree of clarity to enable the court to ascertain whether he or she has deposed to a defence which, if proved at the trial, would constitute a good defence to the action.¹² Whilst non-compliance with section 129(1)(a) is an impediment to commencing any legal proceedings to enforce a credit agreement, it does not constitute a *bona fide* defence of the nature envisaged by Rule 32(3)(b). Once it is established at trial stage that the plaintiff has not complied with section 129(1)(a), the trial will be adjourned and an order made setting out the steps the plaintiff must complete before the trial is resumed. The fact that section 130(4)(b) envisages the resumption of the proceedings following the court having made an appropriate order, illustrates that non-compliance with section 129(1)(a) does not constitute a *bona fide* defence for summary judgment purposes.

[18] In the circumstances, I must respectfully disagree with the finding in *Standard Bank of South Africa Limited vs Van Vuuren*, namely that a defendant who establishes non-compliance with section 129 of the NCA has established a defence and is entitled to leave to defend. The court’s hands are tied and it must act in accordance with section 130(4)(b).

¹¹ Uniform Rule of Court 32 (3)

¹² *Maharaj vs Barclays National Bank Ltd* 1976 (1) SA 418 (A); Erasmus, Superior Court Practice, B1 – 222 [service 34, 2009]

[19] Accordingly, this matter will be adjourned *sine die* and an order will be made as to the steps which the plaintiff must take before it may again set down this application for summary judgment.

[20] The plaintiff is responsible for the adjournment of the summary judgment application and must therefore pay the wasted costs occasioned thereby.

The Order is as follows:

1. The application for summary judgment is adjourned *sine die*.
2. The plaintiff is afforded an opportunity to provide a notice to the defendants as contemplated in sections 129 and 130 of the NCA. If such notice is sent by registered mail to the defendants it shall be deemed to have been delivered to them 14 days after posting by the plaintiff.
3. The plaintiff may set down the application for summary judgment on notice to the defendants not less than 10 days after the notice in terms of section 129 has been delivered.
4. Save for the direction herein given relating to the sending of the notice contemplated in section 129, the defendants' rights in terms of the NCA remain unaffected.

5. The Plaintiff is directed to pay the Defendants' wasted costs caused by the adjournment of the application for summary judgment.

Epstein AJ
11 March 2010

Attorneys for Plaintiff:

Ramsay Webber
269 Oxford Street
Illovo
Johannesburg
Tel: 011 778 0600

Advocate Steven Ress
Counsel for Applicant
082 852 5791

Attorneys for Defendants:

R.A. Rockhill & C.C. van Heerden
c/o Eamonn David Quinn Attorneys
4 St David Lane
Houghton
Johannesburg
Tel: 011 784 2767
Ref: Mr E Quinn

Adv Darryl Williams
Counsel for Defendant