

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)**

Appeal Case: A309/18

Court a Quo Case No: 28722/16

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

17 February 2021

C.J. COLLIS

In the matter between:

X[....] S[....] W[....]

**FIRST APPELLANT
(FIRST DEFENDANT COURT A QUO)**

X[....] L[....] M[....]

**SECOND APPELLANT
(SECOND DEFENDANT COURT A QUO)**

and

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 17 February 2021.

JUDGMENT

COLLIS J (RABIE J et LESO AJ concurring)

INTRODUCTION

- (1) This is an appeal, with leave of the *court a quo*, against a judgment handed down under case number: 28722/2016.
- (2) In the said judgment Heystek AJ, granted judgment against the appellants in favour of the respondent for payment of the sum of R 1 167 347.93 with interest thereon at the variable rate of 1.1% above prime from 1 March 2018 to date of payment with costs on an attorney and client scale.
- (3) The *court a quo*, on being served with an application for leave to appeal, deemed it necessary to grant leave to appeal on only a limited aspect that being:

*'.....whether the plaintiff (in the court a quo) allowed ten business days to elapsd since delivery of the notice to the defendants (in the court a quo) before it approached the Court for an order to enforce the credit agreement as required by Section 130(1)(a).'*¹

BACKGROUND

- (4) By way of background the following facts were common cause before the *court a quo*:
- 4.1. On or about 24 February 2011, the plaintiff and the defendants concluded a home loan agreement. Pursuant thereto, a bond was registered in favour of the plaintiff as a continuing security for the total amount owing from time to time by the defendants to the plaintiff in respect of all amounts advanced.
 - 4.2. The defendants committed a breach of the provisions of the home loan agreement, as read with the bond, in that they failed to pay monthly instalments as and when they fell due.
 - 4.3. As a result of the breach so committed the plaintiff then proceeded to address notices to the defendants in terms of s 129(1)(a) of the National Credit Act, Act 34 of 2005 (the NCA).
 - 4.4. The notices were sent by registered post to both the chosen domicilium and residential addresses of the defendants.
 - 4.5. At the hearing the parties were in agreement as to the facts as they appear on the relevant postal documentation, i.e. that the notices were sent to the addresses reflected on the notices by registered mail and that they were sent to the defendants as allocated on the relevant track reports.
 - 4.6. Further, that the relevant track and tracing reports show the relevant addresses of the addressees together with the corresponding item number (being the registered letter).
 - 4.7. It reflects receipt by the original Post Office on 17 March 2016 as well as that they were scanned last by the Edleen branch on 31 March 2016.

¹ Record Vol 2 p 170

4.8. On the same day the 'First Notification' was sent to the recipient (i.e. the defendants). There is no further indication as to what happened thereafter, particularly as to whether the item was collected, or else whether it had been returned.

LEGISLATIVE FRAMEWORK

(5) In order for this court to determine the scope of this appeal, it will be apposite to have regard to the relevant provisions specifically section 129 and 130 of the National Credit Act. The relevant sections are quoted hereunder for ease of reference:

"Section 129(1) If the consumer is in default under a credit agreement, the credit provider-

- (a) May draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
- (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-
 - (i) first providing notice to the consumer, as contemplated in paragraph (a),
or
 - (ii) meeting any further requirements set out in section 130....."

(6) Section 130 provides as follows:

“(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at the time, the consumer is in default and has been in default under that credit agreement for at least twenty business days and-

(a) at least 10 business days have elapsed since the credit provider delivered 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) has not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider’s proposal; and

(c)”

(7) Having regard to the common facts placed before the *court a quo*, it is so that a period of ten business days had not elapsed before the respondent approached this court for enforcement of the credit agreement in question. This much was conceded by the *court a quo*.²

(8) In *casu*, the first notification was dispatched by the relevant post office on 31 March 2016 and the summons subsequently issued on 11 April 2016.³ The actual service of the summons however only occurred on 28 April 2016.⁴

ARGUMENTS ADVANCED ON BEHALF OF THE APPELLANTS

(9) In determining the question in this appeal the arguments advanced on behalf of the appellants can succinctly be tabulated as the following:

² Judgment Heystek AJ Volume 2 para 18 p 157

³ Volume 1 pages 38 (First Notification) & 1 (Date issuing of summons) respectively.

⁴ Volume 1 pages 50A & 50B respectively. Sheriff returns of service.

- 9.1 Mr Nxumalo on behalf of the appellants had argued that the provisions of section 130(1) read with section 129 of the National Credit Act should be interpreted to mean that enforcement of a credit agreement should not commence before at least a period of ten business days has elapsed since the credit provider has delivered the notices contemplated in section 129;
- 9.2 that enforcement of a credit agreement commences with the issuing of summons and not the service of summons;
- 9.3 that having regard to the time frames applicable in the present instance, that the summons of the respondent was issued prematurely, in that ten business days had not elapsed before the respondent proceeded to issue its summons;
- 9.4 that the notice as contemplated in section 129 of the NCA is designed to prevent unnecessary litigation and premature foreclosures on consumer assets and that the purpose of the NCA is to be significantly consumer friendly and envisages a court-avoidant procedure.
- 9.5 As a consequence of the premature issuing of the summons, the appellants had argued it precluded them from exercising their rights afforded to them, as envisaged in the provisions of section 129.

9.6 In support of the above arguments so advanced, the appellants had placed reliance on the Constitutional Court decision of *Sebola and Another v Standard Bank of South African Ltd and Another* [2012] ZACC; 2012 (5) SA 142 (CC), wherein it was held that compliance with the provisions of section 129 read with section 130 of the NCA should have been pleaded by a credit provider who wishes to enforce a credit agreement. Albeit that compliance with the provisions of section 129 and 130 of the NCA was indeed, pleaded by the credit provider in question, these averments were not true as the issuing of the summons had taken place before ten business days had expired upon the section 129 notice having been dispatched to the consumers.

ARGUMENTS ADVANCED ON BEHALF THE RESPONDENT

- (10) Counsel on behalf of the respondent had submitted that this court in applying the stare decisis principle, is bound by the Full Court decision of this division where in *De Beer v Nedbank*⁵ it was held that the date of service of the summons is determinative of the date of calculation of commencement of legal proceedings, unless this court is of the opinion that the De Beer decision was clearly wrong;
- (11) Furthermore, that at common law, legal proceedings are commenced with the service of the summons and that unless the summons is served on a defendant, proceedings which ensued in the absence of service of the summons may be set aside as being irregular;⁶

⁵ *De Beer v Nedbank* (A431/2017) [2018] ZAGPHC delivered 16 May 2018 para 21-23

⁶ *LAWSA Vol 3 (Part 1) Second Ed para 86 p 52*

- (12) It was also submitted by Ms Strydom that statutes such as the NCA must be interpreted with due regard to their purpose and within their context. In this regard section 2(1) of the NCA expressly requires a purposive approach to the statute's construction.

JUDGMENT COURT A QUO

- (13) In its judgment Heystek AJ had placed reliance on the *ratio* of *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) specifically para 53 where the following was held:

"Once a credit provider has produced the track and trace report indicating that the s 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider would generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls on the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour."

Premised on this judgment the *court a quo* had found in the absence of any rebuttal evidence presented by the appellants, wherein they challenged the delivery of the section 129 notice, the court accepted that the respondent had complied with the provisions of the NCA.

(14) At paragraph 18 of the same judgment, it was also held:

'It is well established that statutes must be interpreted with due regard to their purpose and within their context. This general principle buttressed by s 2(1) of the Act, which 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 and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.'

It was further held at paragraph [21] that: "the correct interpretation of s 129 is one that strikes an appropriate balance between the competing interest of both parties to a credit agreement."

(15) Taking therefore into account the different wording employed in section 129 and 130 of the NCA, regarding whether the credit provider had complied with the provisions set out in these two sections and having regard to the provisions of the NCA holistically and also striking a balance between the competing interest, the *court a quo* therefore concluded that the correct date for purposes of section 130 of the NCA is not the date of issuing of the summons but rather the date as to when the summons is served on the consumer. This is the same reasoning employed by Ellis AJ in the earlier decision of *Nedbank Ltd vs Mkhonoana* 2010 (5) SA 551 (GNP).

- (16) The reasoning employed by the *court a quo*, I could find no criticism with. Not only was the *court a quo* satisfied that there had been compliance with the provisions of section 129 read with section 130 of the NCA, but in the absence of any rebuttal evidence presented by the appellants wherein they challenged receipt of the section 129 notice, the *court a quo* correctly found that the respondent had complied with the provision of the NCA.
- (17) In the present instance, not only did the appellants⁷ deny receipt of the section 129 notice in their plea, but as held by Kubyana mentioned above, the reasonableness of their conduct lies solely within their knowledge. As such, they ought to have taken the court into their confidence to explain the reason as to why the section 129 notice was never received by them and in the absence of doing so, the *court a quo* correctly found that the respondent had complied with the provisions of section 129 read with section 130 of the NCA.

ORDER

- (18) In the result the following order is proposed:

18.1 The appeal is dismissed with costs.

⁷ Defendant's Plea Record Volume I p 55 para 14 & 15

C. COLLIS
JUDGE OF THE HIGH COURT

I AGREE

P. RABIE
JUDGE OF THE HIGH COURT

I AGREE

M. LESO
ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the Appellants	: Adv. S. Nxumalo
Attorney for the Appellants	: Twala Attorneys
Counsel for the Respondent	: Adv. D. Strydom
Attorney for the Respondent	: Bezuidenhout Van Zyl & Associates Inc.
Date of Hearing	: 04 November 2020
Date of Judgment	: 17 February 2021

Judgment transmitted electronically.