IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Application Number: 5214/2014

In the matter between:

WILLEM JOHANNES NATHANIEL LOCKE Applicant

IDENTITY NUMBER: [.........]

and

ABSA BANK Respondent

Registration number: 1986/004794/06

HEARD ON: 12 NOVEMBER 2015

JUDGMENT BY: BOKWA, AJ

DELIVERED ON: 28 JANUARY 2016

A **INTRODUCTION**

[1] An instalment sale agreement was concluded on 07/12/2010 by the applicant and the respondent in respect of a 2009 Chevrolet Cruze 1.6 LS motor car. The applicant was obliged to pay 72 instalments monthly of R3 409.79 to the respondent.

[2] During 2014 the applicant was involved in a divorce as a result, his financial position changed dramatically which resulted in him falling in arrears with the payment of his monthly instalment in respect of the vehicle to the respondent. As a result, the respondent instituted legal action against the applicant by issuing summons on 25/11/2014. As it is apparent from the sheriff's return of service, the summons were served by affixing to the main entrance of the applicant's address being the applicant's *domicilium citandi et executandi*, at [.........], Vaalpark.

[3] On 05/02/2015, Judgment by Default was granted in favour of the respondent against the applicant for inter alia, return of the vehicle, 2009, Chevrolet Cruze 1.6 LS with engine number F16D34596361 and chassis number KL1PD5D65AK534378. Although applicant claims that he did not receive the summons, he does not deny that at the time that the summons were served, he still lived at the same address namely [.........], Vaalpark.

[4] In these proceedings, applicant seeks rescission of Judgment granted against him on 05/02/2015. There was also an arrangement between the parties that although judgment was obtained the respondent would pend a warrant of execution for delivery of goods pending the outcome of the application for rescission of Judgment.

[5] In the circumstances, it is the applicant's contention that he is entitled to rescission on the basis that he did not receive the summons firstly, and secondly, that he has a good defence to the claim of the respondent on the basis that the respondent had not complied with the provisions of Section 129(1)(a) of the National Credit Act, 34 of 2005 read with Section 130, 65 (2) and 168 of the same act.

[6] It is not in dispute that the respondent addressed a notice complying with Section 129 (1)(a) of the NCA to the applicant and that this notice, was delivered to the applicant at his chosen *domicilium*. What is in dispute is that the said notice was not brought to the attention of the applicant because, although sent to the applicant's chosen *domicilium citandi*, it was received by a person other than the applicant who is also unknown to the applicant.

[7] Furthermore it is also not in dispute that the respondent made various attempts to notify the applicant that it was in arrears with its monthly instalments. The respondent filed its opposition on

17/04/2015 and proceeded to file the opposing affidavit on 22/05/2015. Applicant replied on 18/06/2015 and the matter was ripe for argument on 12/11/2015.

B FACTS

Applicant's case

[8] The applicant seeks rescission of judgment granted by default against it in favour of the respondent on 05/02/2015 on the basis that he did not receive the summons. Applicant submits that it has a good defence in law to the claim of the respondent because the respondent did not strictly comply with the provisions of Section 129 (1)(a) of the National Credit Act 34 of 2005 (the NCA), read with Section 130, 65(2) and 168, which it submits had to be given effect to, prior to the respondent issuing summons and obtaining default judgment as a consequence thereof.

[9] Applicant contends that the respondent's failure to serve the Section 129 (1)(a), resulted in the action not being brought to its attention. Had the said notice been served in compliance with the provisions of the act, applicant would have rectified the arrears which at the time was R5 845.66, after which it would have performed in terms of the agreement, until the vehicle was fully paid.

[10] The applicant attached annexure "C" which is a copy of the respondent's proof of delivery, stating that the letter in terms of Section 129 of the NCA, was sent by way of an e-telegram and was received by one FJ Koene who is described as the son-in-law of the applicant. Applicant deny that he knew the recipient of the letter. Needless to say, the e-telegram delivery report indicates that the address of delivery is [.........], Vaalpark and the postal code being 1947.

[11] The applicant contends that when the respondent applied for default judgment against it, it did not comply with the provisions of Section 129 read with 130 of the Act which states that a credit provider must "draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor…". The applicant submits further in its heads of argument that "In clause 7 of the Respondent's particulars of claim in its application for default judgment, the Respondent indicates to the Honourable Court that it complied with the provisions of the National credit Act, while in fact**, the Respondent, on its own version did not comply with these provisions as the Respondent caused the letter of Demand to be delivered by way of e-telegram, which is not a mode of delivery contemplated by the National Credit Act, and is therefore in conflict with section 65(2) and section 168 of the Act.** The contract entered into between the Applicant and the Respondent does not provide for service by way of e-telegram either."

[12] The applicant takes issues with the averments made by the respondent in its application for default judgment especially paragraph 7 of the particulars of claim where it is stated that "**A copy hereto and marked Annexure "D" was delivered and signed for by the Defendant**". Applicant relies on the provision of Section 168 of the NCA that there was no service upon it, which provides as follows:

> "Unless otherwise provided for in this Act, a notice, order or other document that, in terms of this Act must be served on a person will have been properly served when it has been either-
>
> a.- delivered to that person; or
>
> b.- sent by registered mail to that person's last known address."

The Respondent's Case

[13] The respondent denies that the applicant has made out a case for the relief it claims. Respondent submits that the applicant did not show any reason why the judgment granted on 05/02/2015 against the applicant should be rescinded. Respondent submits further that it complied with the provisions of Section 129 (1)(a) read with 130 and 65(2) of the NCA and therefore that proper notice was given to the applicant.

[14] Respondent submits that it is common cause that the applicant fell into arrears with the instalments of its motor vehicle:

> "I confirm that I was in arrears when my vehicle was attached and removed."

Respondent therefore submits that it did comply with the peremptory requirements of Section 129 of the NCA and was entitled to issue summons and obtain judgment.

[15] In his confirmatory affidavit filed in support of the respondent's opposing affidavit, Mr. Johan Buys provides details on various attempts made to collect payments from the applicant and these include:

> "11.1 12 September 2014 - A visit to the Applicant home and a card is left with a worker on the premises;
>
> 11.2 17 September 2014 - A further visit to the home of the Applicant and a letter is left in the post box;
>
> 11.3 3 October 2014 - A further visit to the home of the Applicant and a letter is left with a lady working in the house;
>
> 11.4 10 October 2014 - A further visit to the home of the Applicant and a final letter is left with a young lady;
>
> 11.5 17 November 2014 - A voice message was left for the Applicant; and

11.6 17 November 2014 - Cell phone message to Applicant informing him that his account is in arrears."

[16] In response to this allegations the applicant submits in reply as follows in paragraph 8 at page 66:

> "The content of paragraph 12.1 through to 12.4 is noted. I acknowledge that I was in arrears on the date judgment was granted in my absence. The remainder of the averments are irrelevant to this application in that averments, whether factually correct or not, cannot and do not cure the fact that I never received the letter of demand in terms of section 129. I was supposed to have been given an opportunity to bring the arrears in respect of the vehicle up to date or to avail myself of the rights afforded to every debtor in terms of section 129 of the National Credit Act. The procedures set out in terms of section 129 are REQUIRED PROCEDURES and the credit provider, the Respondent, must therefore comply."

C ISSUES TO BE DETERMINED

[17] What needs to be determined in the present case, is whether a notice under Section 129(1)(a) of "the NCA" is "delivered" within the meaning of the provisions of "the NCA" to the address selected by the consumer, irrespective of whether it comes to the attention of the consumer.

D THE LAW

The National Credit Regulation Act 34 of 2005

[18] Section 129(1)(a) deals with the required procedure before debt enforcement. Subsection 1 reads as follows:

> "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 payment 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."[1]

[19] Section 130 of the NCA deals with debt procedures in a Court. The relevant provision of 130 reads:

> "(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

[1] The National Credit Act 34 of 2005

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…..

(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; ……

(4) In any proceedings contemplated in this section, if the court determines that –

…..

(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

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed”.[2]

[20] Both section 129 and 130 do not define acceptable modes of delivery under the statute. It is section 65 and 168 which deals with delivery of documentation under the Act. Section 65 is entitled “right to receive documents”. Sub section 1 and 2 states as follows:

“(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

[2] National Credit Act 34 of 2005

(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)."[3]

[20] Section 96 entitled "Address for notice", reads:

"(1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at –

(a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or

(b) the address most recently provided by the recipient in accordance with subsection (2)

(2) A party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an email address."[4]

[21] Section 168, entitled "Serving documents", states as follows:

"Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either –

(a) delivered to that person; or

[3] The National Credit Act 34 of 2005

[4] The National Credit Act 34 of 2005

(b) sent by registered mail to that person's last known address."[5]

[22] Section 129 requires the credit provider to "draw the default to the notice of the consumer in writing". However it does not state how this must be done. The word deliver is not defined in the NCA itself but in the Regulations. The Regulation contains the following definition:

> "'delivered' unless otherwise provided for, means sending a document by hand, by fax, by email, 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. _ _ _ _"[6]

[23] 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 - …."[7]

[24] 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

[5] The National Credit Act 34 of 2005
[6] Regulation 1, Definitions
[7] The National Credit Act 34 of 2005

regulation of the consumer credit and improved standards of consumer information; _ _ _; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; …"[8]

Case law

[25] 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 address selected by the consumer. *Munien vs BMW Financial Services (SA) (Pty) Ltd and Another.*[9] At paragraph 22 of the judgment Wallis J. (as he then was) stated as follows:

> "It follows that in my judgment, provided the credit provider delivered the notice in the manner chosen by the consumer in the agreement and such manner was one specified in section 65(2)(a), it is irrelevant whether the notice in fact came to the attention of the consumer. As the consumer has the right to choose the manner in which notice is to be given it is for the consumer to ensure that the method chosen will be one that is reasonably certain to bring any notice to his or her attention."

[26] When delivering the majority judgment, Mhlantla AJA, in the matter of Kubyana v Standard Bank of South Africa LTD [2014] ZACC 1 at paragraph 31 stated as follows:

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[8] The National Credit Act 34 of 2005

[9] 2010 (1) SA 549 (KZD) at 555 A – I.

> "These statutory provisions were comprehensively treated in *Sebola* and I agree with what was stated there. For present purposes three features merit emphasis. First, there is no general requirement that the notice be brought to the consumer's subjective attention by the credit provider, or that personal service on the consumer is necessary for valid delivery under the Act. I am minded to agree with the High Court that, had the legislation meant either of these aspects to be a necessary condition for delivery, express provision would have been made for them. Thus, while the section 129 obligation on the credit provider is to "draw the default to the notice of the consumer in writing", this obligation is discharged, in the words of section 65(2), by "[making} the document available to the consumer". This accords with section 130(1)(b)(i), which provides that a credit provider may seek to enforce its rights if a consumer has not responded to a section 129 notice. While a credit provider must take certain steps to ensure that a consumer is adequately informed of her rights, such a credit provider cannot be non-suited or hamstrung if the consumer unreasonably fails to engage with or make use of the information provided. In other words, it is the use of an acceptable mode of delivery – the taking of certain steps to apprise the consumer of the notice – which the statute requires of the credit provider, not the bringing of the contents of the section 129 notice to the consumer's subjective attention."[10]

[27] The Judge went further at paragraph 35 and stated as follows:

> "If the credit provider complies with the requirements set out in [31] to [33] above and receives no response from the consumer within the period designated by the Act, I fail to see what more can be expected of

[10] Kubyana v Standard Bank of South Africa LTD [2014] ZACC 1

> it. Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement. It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a "harmonised system of debt restructuring, enforcement and judgment, *which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements."* Indeed, if the consumer has unreasonably failed to respond to the section 129 notice, she will have eschewed reliance on the consensual dispute resolution mechanisms provided for by the Act. She will not subsequently be entitled to disrupt enforcement proceedings by claiming that the credit provider has failed to discharge its statutory notice obligations."[11]

E ANALYSIS

[28] The applicant's main argument is that the respondent failed to comply with section 129 of the National Creditors Act 34 of 2005 in that the purported notice was not drawn to the notice of the applicant in writing. Conversely the respondent submitted that it complied with the peremptory requirements of section 129 and 130 and 65(2) of the NCA.

[29] It is not the applicant's case that it vacated its chosen *domicilium citandi et executandi* address. The summons were served by affixing at the applicant's chosen address in line with the sheriff's return of service. The instalment agreement states as follows at paragraph 25:

[11] Kubyana *supra*

"25 CHOSEN ADDRESS

25.1 The Purchaser chooses the address set out above under his name as his address at which all notices and legal process in terms of this agreement may be served on or delivered to him."

[30] The question is therefore whether the fact that the notice was not received personally by the applicant, though delivered at his chosen address, means that the respondent did not comply with section 129 (1)(a). In terms of section 65(2)(b)

"the notice was delivered to the consumer in the manner chosen by the consumer".

He gave this address in the instalment agreement. Although the notice was received by one FJ Koene, for the purpose of section 65(2)(b) it was delivered to the applicant's chosen address.

[31] The applicant does not deny that the respondent made various attempts to bring to his attention that he was in arrears with his instalments. These attempts are listed in the respondent's opposing affidavit briefly as follows:

> *"A visit to the applicant's home by the respondent's agent, on 12/09/2014 where a card was left with a worker found on the premises. A visit on 17/09/2014 where a letter was left in his post box. A further visit to the home of the applicant on 03/10/2014 where a letter was left with a domestic worker. A visit on 10/10/2014 to applicant's home where a final letter of demand was left with a young lady. Voice messages left on the applicant's cell phone informing him his account was in arrears."*

[32] In the replying affidavit the applicant does not deny that all this efforts were made or that they did not come to his attention and that he failed to give any acceptable responses. In my view, this cannot be the actions expected out of a reasonable consumer. The purpose of the Act was not to give unreasonable consumers an unfair advantage against credit providers acting in good faith to recoup monies owed to them. In the dictum of Mhlantla AJA in Kubyana v Standard Bank at paragraph 38, the judge stated as follows:

> "However, it is also the case that a consumer will not be entitled to rely on a credit provider's alleged non-compliance with section 129 if she has been unreasonably remiss in failing to engage with the notice. The notion of a "reasonable consumer" implies obligations for both credit providers and consumers." [12]

[33] Mr. Anton Roux on behalf of the respondent, submitted that when the notice in terms of section 129(1)(a) was delivered to the address

[12] Kubyana *supra*

of the applicant, the post office workers were on strike at the time. The respondent elected to dispatch the notice by way of e-telegram. It is common cause that the e-telegram notice was delivered at the chosen address of the applicant. It is not in dispute that the applicant was residing at that address. What is in dispute is that the recipient of the notice is known or related to the applicant. Applicant denies that the said letter came to his attention in the circumstances.

[34] I am of the opinion that the notice delivered to the applicant was within the provision of section 65 of the NCA. In the premise, the respondent has complied with the provision of sections 129(1)(a) and 130 of the NCA.

[35] It is common cause that the applicant fell into arrears with the instalment of his motor vehicle. In my view the applicant does not have any reasonable prospects in succeeding in his application of rescission of the judgment granted against him. The balance of convenience is not in the applicant's favour. The respondent will be prejudiced if it cannot take the vehicle in question in its possession to avoid the risks of depreciation in value, wear and tear and possible damages.

[36] In the result the application is dismissed with costs.

I.R.O BOKWA, AJ

On behalf of the applicant:	Ms. Magda Vermeulen Instructed by: C/O Shardelow Smith Attorneys
On behalf of the respondent:	Mr. LA Roux (Counsel for Respondent) Instructed by: Strauss Daly Inc.

/PC