

IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)

Appeal no. A233/2014

In the matter between:

BLUE CHIP 2 (PTY) LTD t/a BLUE CHIP 49

Appellant

and

CEDRIC DEAN RYNEVELDT & 26 OTHERS

Respondents

NATIONAL CREDIT REGULATOR

Amicus Curiae

CORAM:

VAN ZYL, J et SJ REINDERS, AJ

HEARD ON:

2 MARCH 2015

JUDGMENT BY:

S J REINDERS, AJ

DELIVERED ON:

19 MARCH 2015

[1] The Magistrate Bloemfontein was approached in accordance with the provisions of Section 58 of the Magistrate's Court Act

no. 32 of 1994 (“the Act”) for default judgment against various defendants.

[2] Having perused the applications for default judgment, the Magistrate was uncertain as to whether the whole cause of action arose within his jurisdiction and raised the said concern as he was compelled to do.

[3] It was common cause before the Magistrate that the plaintiff (now appellant) is a registered credit provider in terms of Section 40 of the National Credit Act (NCA) and, as such has entered into a number of unsecured small and intermediate credit agreements with the relevant respondents herein. The respondents however were not resident within the Court’s jurisdiction but allegations were made in affidavits in terms of Rules 4(2) read with Rule 12(6)A of the rules regulating the conduct of the proceedings in the Magistrate’s Courts that the whole cause of action arose within its jurisdiction. When the respondents’ respective accounts fell in arrears, the appellant caused notices in terms of Section 129 read with Section 130 of the NCA to be delivered by registered post to addresses outside the Court’s jurisdiction. The appellant attached the registered mail receipts as well as the track-and-trace reports indicating that the notices at least reached the respondents’ respective post offices and were accordingly notified of the awaiting registered mail. The respondents failed to act upon these notices and appellant issued letters of demand to these same addresses in terms of Section 56 of the act informing them that

they are in default of the obligations in terms of the credit agreements and that these amounts are due and immediately payable. These letters of demand all appeared to have been hand-delivered and the respondents resultantly consented to judgment for the amount of the debt, interest and costs claimed in terms of Section 58 of the act.

- [4] Having heard argument, the Learned Magistrate on the 31st July 2014 in a comprehensive written judgment came to the conclusion that the delivery of the Section 129 notice is a *facta probanda* and therefore forms part of the cause of action, where the plaintiff claims repayment of a loan governed by the NCA. In coming to the said conclusion, the Magistrate considered himself to be bound by decisions like **African Bank v Additional Magistrate Mayambo N.O. and Others** 2010 (6) SA 298 GNP at 311 A – B, where it was *inter alia* stated that the credit provider's cause of action is not complete unless the Section 129 notice or a Section 86(10) notice has been given and that the allegation (of compliance with Section 129(1)(a) or Section 86(10)) completes a cause of action. The Magistrate was furthermore fortified by the decision in **Beets v Swanepoel** (2010) JOL 26422 (NC), where Majiedt J (as he then was) held that the statutory pre-enforcement notice forms part of the cause of action and that the credit provider must aver compliance to disclose a cause of action where the suit is based on a credit agreement, the absence of which could render the pleading excipiable. Reliance was furthermore placed on **Absa Technology Finance Solutions Ltd v Pabi's Guest House**

CC and Others 2011 (6) SA 606 (FB) where Kruger J held at par. [21] that Section 129(1)(b)(i) unequivocally prohibits the credit provider from commencing legal proceedings prior to notice being given to the consumer as contemplated in the act and that proof of the notice forms part of the *facta probanda* in an action for specific performance or cancellation.

[5] Having concluded that the delivery of the Section 129 notice forms part of the cause of action, the Magistrate investigated whether the whole cause of action arose in Bloemfontein, since these notices were delivered in districts outside of the Court's jurisdiction. He relied on **Whyte v Rathbone** 1936 NPD 549, wherein it was held that the whole cause of action could not have arisen in the jurisdiction of the Court since a letter of demand which had to complete the cause of action was dispatched to another district. Accordingly, the Magistrate refused to grant judgment as requested with the resulting effect that the appellant, in order to obtain judgment, would have to follow the defendants to his/her particular magisterial district.

[6] Not satisfied with the effect of this ruling, the appellant now in essence contends that the Magistrate erred in that a Section 129 notice is merely a peremptory procedural requirement prior to the enforcement of litigation and that it cannot be said that such notice forms part of a cause of action based on the breach of an agreement between the parties.

- [7] The respondents decided not to participate in the appeal. The National Credit Regulator (“NCR”) was granted relief to intervene in the appeal as *amicus curiae* by an order of Moloi J on the 29th January 2015. The NCR believes that due to the contentious issue raised in the appeal, its intervention is necessitated. Mr Grobler, appearing on behalf of the NCR (and to whom I am indebted for his comprehensive heads and argument) agrees with the appellant that the Section 129 notice only serves as a pre-litigation requirement. He however, submits that the true answer in the appeal is to be found in the proper consideration of the term “*cause of action arising*”. His view is that the appeal should fail in that a credit provider must allege and prove compliance with Section 129 and as such same is a fact “*giving rise to jurisdiction*” which needs to be set out and proved, for jurisdictional purposes.
- [8] Mr Botes SC (appearing with Mrs Le Roux) and Mr Grobler as *amicus curiae* do not seek any cost orders regardless of the result of the appeal and agrees that no order as to costs should be made.
- [9] To my mind a clear distinction must be made between the cause of action that a plaintiff must set out in its summons and the provisions of Section 28(1)(d) of the Act.
- [10] **African Bank v Mayambo** *supra* at 311, par. (b) (with reference to what is to be stated in the summons) concluded:

“It follows that where the action against a consumer is commenced by way of summons, the summons must contain an allegation that either ss 129(1)(a) or 86(10) has been complied with or an allegation that notice was not necessary, stating the reason.”

And later –

“That is so because the allegation completes a cause of action and also because the consumer must be aware that the allegation is made.”

At 311 C.

- [11] Section 129(1)(a) requires a credit provider to draw the default to the notice of the consumer in writing before commencing any legal proceedings to enforce a credit agreement. This includes legal proceedings to cancel the agreement. (**Nedbank Limited and Others v National Credit Regulator and Another** 2011 (3) SA 581 (SCA) at 589 par. [12]). Whilst Section 129(1)(b) seems to prohibit the commencement of legal proceedings, Section 130 has the effect that such an action is not void.

“Thus, while Section 129(1)(b) appears to prohibit the commencement of legal proceedings altogether (may not commence), Section 130 makes it clear that where action is instituted without prior notice, the action is not void. Far from it. The proceedings have life, but a Court ‘must’ adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter. The bar on proceedings is thus not absolute, but only dilatory. The absence of notice leads to a pause, not to nullity, but to deduce this, it is necessary to read Section 129 in the light of Section 130. Section 129 prescribes what a

credit provider must prove (notice as contemplated) before judgment can be obtained, whilst Section 130 sets out how this can be proved (by delivery)."

Sebola v Standard Bank 2012 (5) SA 142 CC at 160 par. B - D

- [12] In **Investec Bank Limited t/a Investec Private Bank v Ramurunzi** 2014 (4) SA 394 (SCA), the Supreme Court of Appeal had to pronounce on the question whether a summons served before the requisite notice in terms of Section 129 of the National Credit Act has been delivered to the consumer, interrupt the running of prescription. Lewis JA, writing on behalf of the Court posed the question in the following terms:

"Is a summons of no effect until the Section 129 notice has been served?"
p. 395, par. G.

- [13] Relying on the **Sebola**-matter (*supra*) the Court found that Section 130 regulates debt procedures in Court and it ensures that any shortcomings in the pre-summons enforcement procedure is made good which is for the benefit of the consumer. (At p. 400, par. C). The Court came to the conclusion that the summons interrupted the running of prescription when it was served on Mr Ramurunzi. The High Court could not, however, grant a judgment against him until, after adjourning the matter for this purpose, a Section 129 notice was delivered to him, - at 401, par. B – C.

[14] In my view, a plaintiff (where the NCA is applicable) have to aver in his summons, compliance with Section 129 thereof. The purpose thereof is to take the barriers away which prohibits such a plaintiff to proceed with the enforcement procedure. It enlightens the Court that the procedural requirement of notice has been met (or not met). It does not however, form part of the cause of action that has to be alleged in the summons. It is merely a peremptory procedural requirement and a plaintiff has to allege compliance therewith or why same is not applicable. *In casu*, the cause of action remains the conclusion of the contract and the breach thereof. The Section 129 notice therefore does not become an element of the contract or to the breach thereof. It however completes the cause of action. **Sebola** *supra* at p. 166, par. G.

[15] Section 28(d) of the Magistrate's Court Act determines:

“(1) *saving any other jurisdiction assigned to a Court by this act or by any other law, the persons in respect of whom the Court shall, subject to sub-section (1A), have jurisdiction shall be the following and no other:*

(a) ...

(b) ...

(c) ...

(d) *Any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional Court.”*

A Magistrate's Court is a creature of statute and it is well-established that a Magistrate's Court has no jurisdiction or powers beyond those that were granted by the act. **Ndamase v Functions** 4 All 2004 (5) SA 602 (SCA) at 605 G. **Mason Motors (Edms) Bpk v Van Niekerk** 1983 (4) SA 406 (TPA) at 409 D – F. In **Veneta Mineraria Spa v Carolina Collieries' (Pty) Ltd** 1987 (4) SA 883 AD at 886 D, "*jurisdiction*" was described as "*a lawful power to decide something in a case or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction.*"

[16] For purposes of jurisdiction the words used in Section 28(1)(d) is not to be understood to mean only the cause of action (to wit the contract *in casu*) as set out in the summons. In **Bisonboard Ltd v Braun Woodwork and Machinery (Pty) Ltd** 1991 (1) SA 482 (A) at 486 D – E, the appellate division (as it then was) interpreted "*causes of action arising*" to be "*legal proceedings duly arising*".

[17] Jafta JA writing on behalf of the full bench of the Supreme Court of Appeal referred with approval to the **Bisonboard**-matter and further stated:

"Plainly, what is meant in the above interpretation is that 'causes arising' does not refer to causes of action but to all factors giving rise to jurisdiction under the common law. Of course, such factors do not exclude a cause of action. It is by now well-established that, in appropriate cases, a Court which has jurisdiction over the area within which a cause of action arose is competent to decide a matter on that basis alone."

Cordiant Trading CC v Daimler Chrysler Financial Services

2005 (6) SA 205 (SCA) at 211 C – E

- [18] The provisions of Section 28(1)(d) is a departure from the common law rule *actor sequitur forum rei*, which requires a defendant to be sued in the district where he resides or carries on business. The right of a plaintiff to make use of this special jurisdiction is therefore restricted, and he may sue the defendant under this provision only if the cause of action arose wholly within the district. (Jones & Buckle, **The Civil Practice of the Magistrate's Court in South Africa**, 10th Ed, Vol. 1 Act 104). Rule 5(6)(a) accordingly requires that if a defendant is cited under the jurisdiction conferred upon the Magistrate's Court by this section, the summons must contain an averment that the whole cause of action arose within the district. Attached to the compliance affidavit (on behalf of the appellant in the Magistrate's Court) was the relevant track-and-trace report (of the Section 129 notice) which indicated that the item had been delivered to Mr Van Ryneveldt on the 27th November 2013 in Kimberley. It is common cause that Kimberley does not fall within the magisterial district of the Magistrate's Court of Bloemfontein. It was accordingly incumbent upon the appellant for jurisdictional purposes to allege and prove that the said notice was delivered to the Respondents. (Delivery on the basis as set out in **Sebola** *supra* at 166 G). The appellant's cause of action would be completed therefore on "*receipt*" of the

Section 129 notice, which in this instance is outside the territorial and jurisdictional area of the Magistrate.

- [19] As alluded to above, a Section 129 notice has been described as a gateway provision or a new pre-litigation layer to the enforcement process. One of the means by which the legislation expressly provides for its purposes to be pursued is consensual resolution. *“Section 129(1) is pivotal to this. It precludes legal enforcement of a debt before the credit provider has suggested to the consumer that he or she explore non-litigious ways to purge the default. Specifically, the notice must propose that the default in consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or Ombud, with the intent that the parties resolve their dispute, or agree on a plan to remedy the default.”* **Sebola** *supra* at 158, par. F.

In order to obtain judgment, the plaintiff will therefore have to prove delivery of the Section 129 notice in terms of Section 130. Where default judgment is sought, the consumer's lack of opposition will entitle the Court from which enforcement is sought, to conclude that the credit provider's averment that the notice reached the consumer is not contested. If it is contested and the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended to, the Court will have to make a finding whether, despite the credit provider's proven efforts, the consumer's allegations are true and if so, act in accordance with Section 130(4)(b). **Sebola** *supra* at 166, par. [77] to [167], par. A

[20] In **Nedbank v National Credit Regulator** 2011 (3) SA 581 (SCA) at 590 (O), par. 14, the Supreme Court of Appeal stated the following:

“One of the objects of the NCA is the provision of a consistent and accessible system of consensual dispute resolution. A notice in terms of Section 129(1)(a), however, does not exclude the resolution of a dispute relating to a specific credit agreement in this manner. The purpose of a Section 129(1)(a) notice is a resolution of a dispute and the bringing up to date of payments under a specific credit agreement. While it is a step prior to the commencement of legal proceedings, it is also the first step the credit provider has proceeded to take to enforce that agreement.”

[21] So seen, the giving and receiving of the notice is a fact “*giving rise to jurisdiction*” which needs to be set out and proved to vest jurisdiction in terms of Section 28(1)(d).

[22] One of the factors so giving rise to jurisdiction, was not within the jurisdiction of the Magistrate’s Court of Bloemfontein, but in fact Kimberley and other Magisterial areas where the cause of action on “*receipt*” of the Section 129 notice was completed.

[23] The appellant submitted that the finding that the Magistrate’s Court don’t have jurisdiction *in casu* have far-reaching effects in that it directly impacts both on the common law as well as the very purpose of the NCA, with specific reference to the preamble thereof. The respondent submitted that the appellant may still enforce its perceived rights in the proper forum. There is no reason why Mr Ryneveldt and the other consumers cannot

be sued where they reside. Bertelsmann J in **Absa Bank Limited v Myburgh** 2009 (3) SA 340 TPD, authoritatively deals with the avowed aims of the NCA to lighten the financial burden which the conclusion of a credit agreement may impose on a consumer. Although it dealt with the question whether a High Court should deal with the matter where a Magistrate's Court has concurrent jurisdiction the Court's remarks regarding the purpose of the act to protect consumers and the way the act should be interpreted is apposite:

"In instances of this nature, purposive interpretation is therefore called for. The Act is indubitably aimed at protecting the consumer's fundamental rights to dignity, equality, non-discrimination and fair administrative and trial procedures and must be purposively interpreted for that reason alone ..." At 346, par. G and 347 par. B

- [24] *In casu*, the appellant realized at the time of the conclusion of the agreement that the respondents did not reside within the Magistrate's Court jurisdiction in Bloemfontein. He can hardly be heard to complain at this stage that it is inconvenient or expensive to follow the Respondents to the jurisdictional area where they reside. It is likewise inconvenient and expensive for the consumer to litigate in an area where he/she does not reside.
- [25] In the circumstances, and for the reasons set out herein, I am not convinced that the Magistrate can be faulted for finding that

he has no jurisdiction to entertain the matters. Accordingly
the following orders are made:

25.1 The appeal is dismissed.

25.2 No order as to costs.

S. J. REINDERS, AJ

I agree.

C. VAN ZYL, J

On behalf of the appellants: Adv. F. W. Botes SC
with
Adv. L. le Roux
Instructed by:
Jordaans Rijkheer Inc.
BLOEMFONTEIN

On behalf of the *amicus curiae*: Adv. S. Grobler
Instructed by:
Honey Attorneys
BLOEMFONTEIN