IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

15/11/13

CASE NO: 67890/2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
	DATE: 15 Nov 2013
	SIGNATURE: .... Jansen

In the matter between:

WESBANK A DIVISION OF FIRST RAND BANK LIMITED — Plaintiff
(Registration No. 1929/001225/06)

and

MAAKE: PETER MAPHETHA — Defendant
(Registration No. 610605 5175 08 6)

JUDGMENT

JANSEN AJ

Background:

[1] This is an opposed exception by the plaintiff raised against the defendant's plea on the grounds that it is vague and embarrassing,

alternatively does not disclose a defence to the plaintiff's claim. The defendant opposes the exception.

[2] On 24 July 2008, the plaintiff and defendant entered into a credit agreement in terms of which the defendant purchased a Nissan Navara motor vehicle. The defendant fell in arrears with his normal monthly instalments.

[3] The plaintiff duly sent, per registered post, a section 129 notice in terms of the National Credit Act 34 of 2005 (the "**NCA**") to the defendant's address as reflected in the credit agreement, namely 50 Ridgeway Drive, Morningside Manor 2196.

[4] Paragraph 12.2.4 of the Credit Agreement reads as follows: —

> "***12.2.4 Legal proceedings will not be commenced against you unless:***
>
> - ***You have been in default for at least 20 business days;***
> - ***At least 10 business days have elapsed since the default letter or notice referred to above has been delivered (which 10-day period may run concurrently with the 20-day default period);***

- ***You have failed to respond to the default letter or you have responded by rejecting our proposal;***
- ***You have not surrendered the Goods to us in terms of section127 of the Act.***"

[5] Sections 129(1) and 130(1) of the **NCA** read as follows: –

"***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 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) *<u>subject to section 130(2), may not commence any legal proceedings to enforce the agreement before</u>: —*

(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 <u>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</u>: —*

(a) *<u>at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9),</u>*

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) . . . " [emphasis added]

[6] The registered letter in terms of section 129 was despatched on 31 October 2012 and reached the post office responsible for the delivery of post to the defendant's address on 3 November 2012 and the summons was served on the defendant on 30 November 2012.

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

[7] On 8 February 2013 an application for summary judgment was made. The alleged *bona fide* defence raised by the defendant in its affidavit opposing the grant of the summary judgment was that there had been non-compliance with section 130 read with section 129(1)(a) of the **NCA**. It is unclear as to what happened to this application which has been bound into the exception bundle which is indexed and paginated. From the inscription on the court file it appears that the application was dismissed by Muller AJ. It was stated in the opposing affidavit for summary judgment that the plaintiff's summons was premature. Furthermore, the defendant attached proof of two payments and stated that he had never been in arrears with his payments in terms of the credit agreement. It was apparently based on the contents of this opposing affidavit, that the application for summary judgment was dismissed.

[8] The summons was issued on 23 November 2012, as per the registrar's stamp on it, twenty calendar days after the date on which the section 129 registered letter reached the post office responsible for the delivery of post at the defendant's address, namely on 3 November 2012. It was stated in the opposing affidavit that twenty three calendar days breach the mandatory thirty business days that have to elapse before a creditor may sue the debtor. The reference to <u>business</u> days is intentional as the **NCA** and the credit agreement refer to business days.

[9] After the dismissal of the application for summary judgment the defendant duly filed his plea.

[10] A notice to remove causes of complaint in terms of Rule 23(1) was served on the defendant by the plaintiff in respect of his plea in that it was alleged that the defendant misread section 130 of the **NCA** in believing that the twenty day period and the ten day period referred to therein run concurrently. It was thus stated in the said Rule 23(1) notice that the summons was premature.

[11] The defendant failed to remove the causes of complaint within the prescribed fifteen day period and hence the plaintiff took an exception to the plaintiff's pleas. In a nutshell the plaintiff's exception is to the following effect: –

> "***4. The aforesaid paragraphs are vague and embarrassing in that:***
>
> ***4.1 The periods referred to in section 130(1) and 130(1)(a) do not run concurrently for purposes of calculating the <u>dies</u> before summons can be issued;***
>
> ***4.2 All that is required is that the ten day period referred to in section 130(1)(a) had lapsed since the credit provider despatched a notice in***

terms of section 129(1) to the consumer, which notice is despatched only if the consumer had been in default for a period of twenty days; ..."

[12] The prayers set out in the exception are as follows: –

"*WHEREFORE the plaintiff prays for an order:*

1. *Upholding the plaintiff's exception.*
2. *Striking out the defendant's plea.*
3. *Judgment in favour of the plaintiff in the following terms:*

3.1 *The defendant is directed to forthwith* (sic) *return the motor vehicle being a 2008 NISSAN NAVARA 2.5 DCI D/CAB (4 X2) with engine number YD25901861 and chassis number VSKCVAD40Z0253153 to the plaintiff, and failing immediate compliance with this order, the sheriff or his deputy is authorised and directed to take the motor vehicle into his possession wherever same may be found and to deliver it to the plaintiff;*

3.2 *Judgment for the amount to which the plaintiff may be entitled in terms of paragraph 3.1 above, together with interest*

thereon to date of payment, is postponed <u>sine die</u>, pending the return of the motor vehicle to the plaintiff and the subsequent determination of the value thereof and calculation of the amount to which the plaintiff is entitled, and thereafter judgment for that amount;

3.3 ***Costs of suit.***

4. ***Costs of exception.***

5. ***Further and/or alternative relief.***"

[13] In ***Standard Bank of South Africa Ltd v Rockhill and Another* 2010 (5) SA 252 (GSJ)** it was, in this court's opinion, correctly held that non-compliance with section 129 is not a *bona fide* defence in summary judgment proceedings. Once it is established at trial stage that the credit provider has not complied with section 129, the trial will be adjourned and an order made setting out the steps the credit provider must complete before the trial is resumed, as prescribed by section 130(4)(b) of the **NCA**.

[14] In ***Nedbank Limited v Mokhonoana* 2010 (5) SA 551 (GNP)** it was held that legal proceedings for purposes of section 129(1)(b) of the **NCA** are commenced, not by the issue of summons, but the service thereof (at paragraphs [13] and [14] at 554). In support of this dictum Ellis AJ referred to: —

"[13] ***Ms Fitzroy, however, contended, with reference to Steinberg v Cosmopolitan National Bank of Chicago 1973 (3) SA 885 (RA); Dada v Dada 1977 (2) SA 287 (T) at 288C - E; Mills v Starwell Finance (Pty) Ltd 1981 (3) SA 84 (N) at 89D - G; and a thesis by Hermie Coetzee 'Impact of the National Credit Act on Civil Procedural Aspects Relating to Debt Enforcement' (Ch 6), that service of summons rather than the issue thereof should be determinative.***" [emphasis added]

[15] Further, in ***Nedbank Limited v Mokhonoana* 2010 (5) SA 551 (GNP)** Ellis AJ held the following at page 553 (paragraphs [7] and [8]): –

"I am mindful of the current debate which arose pursuant to the judgments of Wallace J in Munien v BMW Finance Services (SA) Ltd and Another 2010 (1) SA 549 (KZD), in which it was found that the sending, and not receipt, of the s 129 notice amounts to delivery thereof; and the judgment of Murphy J in FirstRand Bank Ltd v Dhlamini 2010 (4) SA 531 (GNP), where his Lordship required receipt of the

> ***notice, to satisfy the requirement of delivery - a debate, it is hoped, will soon be authoritatively decided by the Supreme Court of Appeal.***
>
> ***On the strength of the Munien judgment, with which I agreed in FirstRand Bank Ltd t/a Fnb Homeloans v Benjamin Rossouw and Sandra Wilson-Rossouw (unreported), Ms Fitzroy, who appeared for the plaintiff, submitted that, since ten days had elapsed between posting and service of the summons on the defendant, the plaintiff was entitled to an order enforcing the credit agreement.***"

[16] The dispute was conclusively laid to rest in the case of ***Sebola v Standard Bank of SA Ltd and Another* 2012 (5) SA 142 (CC)**.

[17] In this exception, as was argued by the plaintiff, the credit agreement required ten business days to have lapsed since a default letter had been delivered (emphasis added). Thus, the plaintiff argued that the twenty day period and the ten day period may run concurrently. The section 129 letter, as set out above, was despatched on 31 October 2012 and, in terms of the track and trace records, reached the relevant post office on 3 November 2012.

[18] In terms of whether the twenty business day period and the ten day period run concurrently, the learned authors M Roestoff, F Haupt, H Coetzee and M Erasmus in an article entitled "**The Debt Counselling Process – Closing the Loopholes in the National Credit Act 34 of 2005**" Potchefstroomse Electronic Law Journal 2009 Volume 12 No 41 state the following: —

> "***(a)*** ***A section 129(1)(a) notice or a section 86(10) notice should have been delivered to the consumer at least 10 business days[2] prior to enforcement proceedings, and***
>
> ***(b)*** ***The consumer is in default under that credit agreement for at least 20 business days, which two periods may run concurrently.***[3] [emphasis added]

[19] In the ***Standard Bank of South Africa Ltd v Rockhill*** *supra* matter the following was held by Epstein AJ at page 225 (paragraph [5]): —

[2] Scholtz JW *et al* ***Guide to the National Credit Act*** (LexisNexis Butterworths Durban 2008) (n 44) 12-8 point out that s 129(1)(a) does not indicate any time limits applicable to the section itself. The 10 days requirement is derived from s 130(1)(a). They submit however, that a s 129(1)(a) notice should expressly state that a response is required within 10 business days from delivery of the notice. Also see Van Heerden CM and Otto JM "***Debt enforcement in terms of the National Credit Act 34 of 2005***" 2007 *Journal of South African Law* (n 87) 662.

[3] Da Silva M *et al* 2008 ***Debt Counselling – Principles and Guidelines*** (n 12) 14; Otto JM ***The National Credit Act Explained*** (LexisNexis Butterworths Durban 2006) (n 81) 91; Scholtz *et al* (n 44) 12–21.

"Section 129 requires the credit provider to draw the default to the notice of the consumer in writing. Although s 129 does not state how this must be done, s 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 itself[4] *but there is a definition in the regulations.*[5] *The regulations*[6] *contain the following definition*[7]*:*

> *"'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 address selected by the consumer. Munien

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[4] Section 1 of the NCA.
[5] In the NCA, 'this Act' is defined to include a regulation made under the Act.
[6] GN R489 of 31 May 2006.
[7] Regulation 1, Definitions.

v BMW Financial Services (SA) (Pty) Ltd and Another.[8]

[20] However in the Constitutional court matter of ***Sebola v Standard Bank of SA Ltd and Another* 2012 (5) SA 142 (CC)** in paragraphs [63]–[64], it was correctly pointed out that one cannot construe a statue by having regard to regulations. Hence, regard was had to section 65(2) of the **NCA**, as it pertains to "consumer rights". It provides: –

> ***"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;***

[8] **2010 (1) SA 549 (KZD)** at 555A - I. See also ***Marques v Unibank Ltd* 2001 (1) SA 145 (W) ([2000] 4 All SA 1)**.

(ii) by fax;

(iii) by email; or

(iv) by printable web-page; and

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

[64] *Section 96 appears in ch 5 of the Act, which regulates consumer credit agreements. It appears in part B of that chapter, which deals with 'disclosure, form and effect of credit agreements'. The provision is headed 'Address for notice'. It 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).*

Subsection (2) provides that a party to a credit agreement may change its 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."

[21] In paragraph [65] the following is further stated: —

[65] Section 168, which appears in ch 8, is concerned with the enforcement of the Act. It appears in part C, which concerns 'miscellaneous matters'. It provides: —

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

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

If is clear that the notice never reached the consumer, for example, because it was returned to the credit provider then there has been no compliance with section 129.

[22] In ***Absa Bank Ltd v Mkhize and Another and Two Similar Cases 2012 (5) SA 574 (KZD)*** at par [56] the following is stated: –

> ***"In that context, what is conveyed in paragraph 77 of the majority judgment of Sebola v Standard Bank of SA Ltd and Another supra is clear enough. Coupled with the required allegations in the credit provider's summons, proof that the notice reached the correct post office brings about that –***
>
> > ***'it may reasonably be assumed <u>in the absence of contrary indication</u> . . . that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office'. [My emphasis.]"***

[23] In the premises, none of the grounds of exception raised by the plaintiff to the defendant's plea has merit. Ground 1 is that the periods set out in section 130(1) and (1)(a) do not run concurrently.

This ground has no merit as the two periods may run concurrently on a proper reading of the **NCA**.

[24] The case law also seems clear regarding the purpose of compliance with a section 129(1)(a) notice. Notice in terms of section 129(1)(a) of the **NCA** is a mandatory, statutory procedure before launching litigation proceedings as set out in ***First Rand Bank Ltd v Olivier*** **2009 (3) SA 353 (SEC)** and ***Nedbank Ltd & Others v National Credit Regulator*** **2011 (3) SA 581 (SCA)**.

[25] The court's attention was also drawn by counsel for the defendant to the case law which prescribes that when a section 129(1)(a) notice has been issued and the arrear amount has been paid, a fresh notice is required prior to the issuing of any court proceedings should a party fall into arrears again as was held in ***Sarita v ABSA Bank Ltd*** **2010 (3) SA 443 (GSJ)** at paragraph [10].

[26] The Honourable Judge Cameron J in the case of ***Sebola v Standard Bank of SA Ltd and Another*** **2012 (5) SA 142 (CC)** discusses both sections 129 and 130. It is clear from paragraph [53] thereof *et seq.* that once issued, summons remains alive regardless of the credit provider's compliance with the **NCA** or lack thereof. In this case the meaning of "delivery" of a section 129 notice is discussed in full and it is held, in paragraph [68] thereof, that at the very least, despatch of the section 129

notice must be effected by registered mail. As set out above, the majority in the ***Sebola*** *supra* matter further held that the credit provider must go further and establish that the requisite section 129 notice reached the addressee's post office and constitutes sufficient proof of delivery "in the absence of contrary indication".

[27] The second ground of exception is that the manner in which it has been pleaded that the summons is premature is vague and embarrassing. It is stated that the bald denial to be found in paragraph 13 of the plea renders it difficult to understand the plea to paragraphs 8.1 to 8.5 of the particulars of claim. This argument is unsound. The denial in paragraph 13 is immediately qualified by what is pleaded in paragraphs 14–17 of the plea wherein the despatch of the section 129 letter on 31 October 2012 is admitted as is the issue of summons on 23 November 2012. Ten business days, as required by section 130(1)(a) of the **NCA** would have lapsed on 14 November 2012.

[28] In the premises, the exception is without merit.

Order

In the event, the following order is made: —

1. The exception is dismissed with costs.

M M Jansen

MM JANSEN AJ
ACTING JUDGE OF THE HIGH COURT

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