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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2024/080373

[1] REPORTABLE: NO

[2] OF INTEREST TO OTHER JUDGES: NO

[3] REVISED: NO

SIGNATURE

DATE: 20 NOVEMBER 2025

In the matter between:

NEDBANK LIMITED

Plaintiff

and

PATRICK TSHIVHASE

Defendant

JUDGMENT

DALRYMPLE AJ:

[1] The plaintiff applies for summary judgment against the defendant. The plaintiff and the defendant were parties to an instalment sale agreement in terms of which the plaintiff financed the purchase of the defendant's motor vehicle, being a 2016 BMW 420D Gran Coupe Sport A/T (F36), engine number 7[...] and chassis number W[...] ("**the vehicle**").

- [2] In its particulars of claim, the plaintiff alleged that the defendant had breached the instalment sale agreement in that he had failed to make due and punctual monthly payments to the plaintiff and was in arrears in the amount of R25 619,22 as at the date of the particulars of claim. The plaintiff further alleged that despite demand, the defendant had failed to make payment of the arrears, that it had elected to cancel the agreement and take repossession of the vehicle. The plaintiff thus sought cancellation of the instalment sale agreement and return of the vehicle.
- [3] The plaintiff pleaded that it had complied with section 129 of the National Credit Act 34 of 2005 (“**the NCA**”) and relied upon a letter dispatched by its attorneys to the defendant dated 1 July 2024. The defendant raised a special plea in which he contended that the plaintiff had not complied with sections 129(1)(a), 130(1)(a) and 130(3)(a) of the NCA. Several contentions were advanced in support of this special plea. It is only necessary to address one of them for present purposes. The defendant pleaded that the plaintiff’s section 129 notice recorded that the defendant’s account was in arrears by R288 660,99. This was an incorrect figure since the defendant’s account was in fact in arrears in the amount of R25 619,22. The correct amount of the arrears was pleaded in the particulars of claim but differed to the amount recorded in the section 129 notice. The defendant’s contention was that since the section 129 notice was defective, section 129 had not been complied with and this precluded the granting of summary judgment.
- [4] In its affidavit in support of its application for summary judgment, the plaintiff contended that the issue of non-compliance with the provisions of section 129 of the NCA was without merit. It conceded that the notice dated 1 July 2024 recorded the arrears in an incorrect amount of R288 660,99. The plaintiff contended however that another notice in terms of section 129 was delivered to the defendant and to his attorneys on 25 September 2024. This second section 129 letter correctly recorded the amount of the arrears so the defect was cured.

[5] At this juncture, it is apposite to set out the chronology of the relevant events. The plaintiff's first section 129 notice was delivered to the defendant on 1 July 2024 and its summons was issued on 19 July 2024. The defendant delivered notice of intention to defend on 13 August 2024, and pursuant to a notice of bar being filed on 16 August 2024, the defendant filed his plea (and special plea) on 20 August 2024. On 23 September 2024 the plaintiff delivered a second section 29 notice, this time reflecting the correct arrear amount. The defendant challenged the appropriateness of delivery of this notice on the basis that it was sent to his attorneys and not to him. Besides that, the defendant contended that it was procedurally and substantively improper for the plaintiff to attempt to cure a defective notice *ex post facto* by emailing a corrected one to his attorneys after commencement of the proceedings.

[6] Counsel for the defendant referred to *Amardien v Registrar of Deeds*.¹ In that matter, the Constitutional Court held as follows:

[60] *Section 129(1) of the NCA refers to a situation where the consumer is 'in default'. Section 129(1)(a) and (b) explain the obligations that the creditors must fulfil before moving to enforce their debt. The text explicitly refers to 'the default' that must be drawn to the notice of the consumer by the creditor – and not just the fact that the consumer is 'in default'. Read in conjunction with s130(4) which provides an opportunity to the debtor to remedy the default, s129(1) should be interpreted to include the amount so that the debtor knows how much to pay to avoid cancellation. The same applies to the notice under s19 of the ALA. In addition, in order to '[provide] consumers with adequate disclosure of standardised information in order to make informed choices' they must be informed of the extent of their arrears in the s129 of the NCA notice so as to decide how to move forward regarding the management of their debt.*

[61] *It is thus a necessary requirement to specify the amount and nature of the default in the s129 NCA notice. As s129(1) specifically requires the credit provider to 'draw the default to the attention of the consumer' it is clear that this will only be met if the amount of arrears is specified in the notice, since the consumer's attention will not have*

¹ 2019 (3) SA 341 (CC)

been drawn to the amount of the default otherwise. If the basis of the default is that the debtor has fallen into arrears, it must follow axiomatically that 'drawing the default to the attention of the consumer' entails that the consumer should be advised of the amount in arrears. It is only when this has been done that it can be said that notice of the 'default' has been drawn to the attention of the consumer.

[62] *If the consumer is not advised of the arrear amount she will be left none the wiser. The referral by the consumer of the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction presupposes that the consumer has been apprised of the facts to enable her to, amongst others, develop and agree on a plan to bring the payments under the agreement up to date. One may rhetorically ask: how is the consumer to agree on a plan to bring payments under the agreement up to date if she is not notified of the amount in arrears?"*

[7] The defendant submitted that the plaintiff was required not only to bring the defendant's attention to the fact of default, but to do so accurately. This would enable the defendant to reasonably understand the exact amount required to remedy the default and avoid cancellation of the agreement.

[8] With reference, *inter alia* to *Amardien*, a full bench of this Division, sitting in Pretoria, in *FirstRand Bank Limited v Reineke and Another*² held that the court *a quo* in that matter had correctly found that the section 129 notice was non-compliant with the NCA in that it did not contain the correct arrears amount.

[9] In *Gulf Steel v Rack-Rite BOP (Pty) Limited*³ the court held that even before considering whether the defendant has established a *bona fide* defence, the court must be satisfied that the plaintiff's claim has been clearly established and that his pleadings are technically in order; if either of these two requirements is not met, the court is obliged to refuse summary judgment

² (A103/2024) [2025] ZAGPPHC 57 (21 January 2025)

³ 1998 (1) SA 679 (O) at 683H to 684B

even if the defendant has failed to put up any defence or has put up a defence which did not meet the standard required to resist summary judgment.

[10] *Gulf Steel* was approved of in this Division, by the full court, in *Liquor Network Agency CC and Another v Skylim Beverages CC*.⁴ The court held that a plaintiff seeking summary judgment must establish a valid, competent claim before the court can consider whether the defendant has a *bona fide* defence. A defective application cannot be remedied by the defendant's response: it is either valid on its own merits or it is not. If it is not, then it is not necessary for the court to consider whether a *bona fide* defence has been established.⁵ The court held that the view in *Buttertum Property Letting (Pty) Limited v Dihlabeng Local Municipality*⁶ that this sets the bar too high for plaintiffs, and that prejudice to the defendant is a material factor to be considered by a court faced with a defective application for summary judgment is contrary to binding precedent.⁷

[11] It is common cause that the plaintiff's initial section 129 notice was incorrect in that it referred to the wrong amount of the arrears. Having regard to the aforementioned authorities, which are binding on this court, the section 129 notice sent by the plaintiff was defective and not compliant with the NCA. The plaintiff thus failed to establish a valid and competent claim in its particulars. This is not a "mechanical" objection to the first section 129 notice. On the plaintiff's own version, it failed to send a compliant section 129 notice. The cause of action verified by the deponent in the affidavit in support of the application for summary judgment was defective.

[12] The question that then arises is whether the plaintiff's second notice in terms of section 129 dated 23 September 2024 assists it. It is not necessary to decide whether delivery of that second notice accorded with the requirements of the NCA because even if it did, the second notice cannot cure the defective claim as pleaded in the particulars of claim nor can it cure the defective

⁴ 2025 (2) SA 507 (GJ)

⁵ *Liquor Network Agency CC and Another* paras [16] to [25]

⁶ [2016] 4 All SA 895 (FB)

⁷ *Liquor Network Agency CC and Another* paras [16] to [25]

summary judgment. This is firstly because it was never part of the cause of action that the plaintiff's deponent verified when the plaintiff applied for summary judgment. Secondly, it was held in *FirstRand Bank Limited t/a First National Bank v Moonsammy t/a Synka Liquors*⁸ that non-compliance with section 129 is not cured by attaching proof of purported compliance with section 129 to a summons, an application for default judgment or for summary judgment.⁹ The same principle applies. A defective section 129 notice cannot be cured by substituting it for a new one in summary judgment proceedings.

[13] The plaintiff on its own pleadings as well as in the affidavit in support of summary judgment does not establish a claim and is not entitled to summary judgment.

[14] Counsel for the defendant argued that the non-compliant section 129 notice was fatally defective not only to the plaintiff's application for summary judgment but for the plaintiff's entire action so that if the plaintiff wished to proceed with its claim against the defendant, it would have to withdraw the claim, tender its costs and start afresh. I disagree. As the defendant's counsel pointed out, the plaintiff may amend its particulars of claim. In that case, compliance with sections 129 and 130 of the NCA will have to be addressed again.

[15] The relevant portions of section 130 of the NCA provide as follows:

“ ...

(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 it 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;*

... ”

⁸ 2021 (1) SA 225 (GJ)

⁹ *Supra*, para [47]. This approach was approved of in *Wesbank v Ralushe* 2022 (2) SA 626 (ECG) at para [30]

(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), or has approached the court in circumstances contemplated in subsection (3)(c) 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;*

...”

[16] Section 130(4) finds application in the circumstances of this matter and it is appropriate that I make an order in accordance with it.

[17] The following order is made:

- (1) The application for summary judgment is dismissed.
- (2) The defendant is granted leave to defend with effect from the date of this judgment.
- (3) The action proceedings are stayed until ten (10) business days after the plaintiff, in due compliance with sections 129 and 130 of the National Credit Act 34 of 2005, has served a notice as contemplated in section 129(1)(a) of the National Credit Act at the addresses provided for in the instalment sale agreement and in the manner contemplated in section 129(5) of the National Credit Act.

(4) Costs are to be costs in the cause.

T DALRYMPLE

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date for hand-down is deemed to be 20 November 2025.

DATE OF HEARING: 14 OCTOBER 2025

DATE OF JUDGMENT: 20 NOVEMBER 2025

APPEARANCES:

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DENTONS