

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case number: 2024-096013

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____ DATE	_____ SIGNATURE

In the matter between:

NEDBANK LIMITED

Applicant

and

KHAZAMULA QELILE MATHYE

Respondent

JUDGMENT IN SUMMARY

NTHAMBELENI, AJ

Introduction

- [1] This is an application for summary judgment in which the Applicant seeks confirmation of cancellation of an instalment sale agreement, return of a motor vehicle, and costs.
- [2] The Respondent opposes the application and has filed a plea and an affidavit resisting summary judgment. The Respondent appears in person.
- [3] The central issue is whether the Respondent has disclosed a bona fide defence sufficient to resist summary judgment.

Applicable legal principles

[4] Summary judgment is an extraordinary and stringent remedy. An applicant must establish a clear and unanswerable case. A respondent resisting summary judgment is required to:

- 4.1 disclose fully the nature and grounds of the defence; and
- 4.2 satisfy the court that the defence is bona fide and good in law.

[5] The court does not determine the probabilities at this stage but considers whether the defence raises a triable issue.

Evaluation of the Respondent's defence

Approach to Self-Represented Litigants

[6] The Respondent is a self-represented litigant, however this court notes that he is an Attorney of this Honourable Court and is thus not a total lay person although he placed on record regarding his deficiencies in the knowledge of this matter. This court allowed him right of audience and also considered his heads of arguments. It is trite that pleadings by laypersons must be construed generously and with due regard to substance over form.

[7] Accordingly, the Respondent's, who are the Defendants in the main action, plea and affidavit must be read holistically and contextually.

Alleged non-compliance with the National Credit Act

[8] A central pillar of the Respondent's opposition is the alleged non-compliance with sections 129 and 130 of the National Credit Act 34 of 2005 ("the NCA"). The Respondent raises, inter alia, that the section 129 notice was not properly delivered; that it was sent to an incorrect address and postal code; that service by email was not contractually authorised for legal notices; and that the notice may have been issued prematurely.

[9] The Respondent further disputes actual receipt of the notice. These allegations, if established at trial, may constitute a complete or partial defence to enforcement proceedings. Compliance with section 129 is a statutory precondition to enforcement. It is not a mere technicality, but a substantive requirement designed to afford the consumer an opportunity to remedy the default. On the papers before this court, there was a concession that there was non-compliance with section 129 of the NCA by Counsel for the applicant. However, he made arguments and submissions that such non-compliance was remedied through the issue of the summons which the Respondent has received.

Alleged prematurity of the proceedings

[10] The Respondent contends that the section 129 notice was issued before the statutory period of default had elapsed. If correct, this would render the enforcement proceedings procedurally defective. This contention raises a factual and legal issue that cannot be dismissed as fanciful.

Dispute regarding outstanding amount

[11] The Respondent disputes the quantum reflected in the certificate of balance and alleges incorrect calculation of arrears. While a certificate of balance constitutes prima facie proof, it is not conclusive. A genuine dispute as to the amount owing constitutes a triable issue.

Contractual breaches and forum selection

[12] The Respondent further alleges breach of contractual provisions relating to delivery of notices; and that the agreement contemplated proceedings in the Magistrates' Court. These contentions, though ultimately to be determined at trial, are not inherently implausible.

Legal framework

- [13] Section 129(1)(a) of the NCA obliges a credit provider, before enforcing a credit agreement, to draw the default to the consumer's attention in writing and propose that the consumer refer the matter to a debt counsellor, alternative dispute resolution agent, consumer court or ombud.
- [14] Section 130(1)(a) prohibits the commencement of legal proceedings unless the credit provider has delivered such notice and complied with the statutory time periods.
- [15] The Constitutional Court in *Sebola v Standard Bank of South Africa Ltd*¹ held that a credit provider must show, (a) that the section 129 notice was sent to the consumer's chosen address (domicilium),² and (b) that the notice reached the correct post office for delivery to that address. The Court emphasised that proof of registered dispatch to the correct address and proof that the notice reached the appropriate post office constitutes sufficient compliance.³
- [16] In *Kubyana v Standard Bank of South Africa Ltd*,⁴ the court reaffirmed that the credit provider must show that the notice was sent to the correct address, and that the consumer had a reasonable opportunity to receive it.⁵ The Court stressed that the address must be the one selected by the consumer in the credit agreement.⁶
- [17] Where the credit provider uses the wrong address or incorrect postal code, courts have consistently held that there is **non-compliance** with the NCA.⁷

¹ 2012 (8) BCLR 785 (CC); 2012 (5) SA 142 (CC); [2012] ZACC 11.

² *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) at para 173.

³ Id.

⁴ 2014 (4) BCLR 400 (CC); 2014 (3) SA 56 (CC); [2014] ZACC 1.

⁵ Id at paras 28, 30 and 52.

⁶ Id para 30.

⁷ See: *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA); *Baliso v FirstRand Bank Ltd* 2016 (10) BCLR 1253 (CC), [2016] ZACC 23, 2017 (1) SA 292 (CC); *Absa Bank Ltd v Mkhize and Another* (716/12) [2013] ZASCA 139. These cases confirm that strict compliance with the statutory notice requirements is mandatory.

Evaluation and application of the law to facts

- [18] The Applicant bears the onus to show compliance with sections 129 and 130. This includes demonstrating that the notice was sent to the correct address and that it reached the correct post office. Moreover, the Applicant's reliance on electronic registered mail does not cure the defect where the address and postal code are incorrect. As held in *Sebola*, the credit provider must show that the notice was sent to the address selected by the consumer in the main agreement as demonstrated by the Respondent during his arguments in court where he referred this court to the contents of the agreement and his domicilium address.
- [19] The Applicant's failure to use the domicilium address constitutes non-compliance with the NCA. The use of an incorrect postal code further undermines any assertion that the notice reached the correct post office. The inconsistency between the address used for the section 129 notice and the address used for service of summons raises legitimate concerns. If the Applicant believed the section 129 address was correct, it is unclear why it elected to use a different method of service. This inconsistency supports the Respondent's contention that the Applicant did not act with candour and that the notice was not properly delivered.
- [20] Section 130(4)(b) empowers the court to adjourn proceedings or dismiss the application where the credit provider has not complied with section 129. In *Absa Bank Ltd v Mkhize*,⁸ the court held that non-compliance with section 129 renders the proceedings premature and summary judgment inappropriate. As stipulated previously, a summary judgment is a stringent remedy. Where there is any triable issue, particularly one involving statutory compliance, the court must refuse summary judgment.⁹

⁸ (716/12) [2013] ZASCA 139.

⁹ See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

Agreement between the parties and a Draft Orders

[21] During the proceedings, the Respondent indicate that he was amenable to enter into an agreement with the Applicant regarding some form of settlement and the manner in which the matter should proceed. Thereafter, two draft orders were submitted to me to consider.

[22] This court is not bound by agreements between voluntary agreements entered into between the parties and in the same breath, the court does not take a dim view to parties voluntarily entering into such agreements. Therefore, one of the prayers of one of the draft that will be agreed by the parties will be incorporated into this judgment and made an order of this court.

Order

[23] As a result, the following order is made:

1. The application for summary judgment is dismissed.
2. The Applicant is directed to comply with sections 129 and 130 of the National Credit Act before proceeding further and is hereby directed to serve the relevant notice in terms of section 129 of the National Credit Act 34 of 2005 on the Respondent at O[...] V[...] Estate, Unit N[...] (N[...] V[...]), N[...] Road, 2[...] and or Office No. 3 [...], 3rd Floor, K[...] T[...], 151 C[...] Street, Johannesburg.
3. The Applicant is ordered to pay costs on scale A.

NTHAMBELENI AJ
Acting Judge of the High Court
Gauteng Local Division, Johannesburg