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(1) Reportable: No
(2) Of interest to other Judges: Yes/No
(3) Revised

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 1512/2013

In the matter between:

SA TAXI DEVELOPMENT FINANCE (PTY) LIMITED Plaintiff
(Registration Number: 2008/012599/07)

and

PHALAFALA, MAHLODI RULPH Defendant
(Identity Number :...)

JUDGMENT

VAN EEDEN AJ:

1. The defendant opposes this application for summary judgment. He avers that he did not receive the required notice in terms of s 129(1)(a) of the National Credit Act 34 of 2005 ("the Act") prior to the commencement of these proceedings.

2. In terms of s 129(1)(b) the credit provider may not commence any legal proceedings to enforce the agreement before *inter alia* first providing the notice envisaged in s 129(1)(a) to the consumer. S 130(1) stipulates that before a credit provider may approach the court for an order to enforce a credit agreement, it has to comply with certain requirements, which for present purposes may be summarised as follows:

    2.1. first, there must be sufficient proof of delivery of a notice sent in terms of s 129(1)(a) drawing the default to the notice of the consumer in writing; and

    2.2. second, and in terms of s 130(1) and (1)(a), at the time that the credit provider approaches the court for an order to enforce a credit agreement, the consumer must have been in default for at least 20 (twenty) business days and at least 10 (ten) business days must have elapsed since the credit provider delivered the aforesaid notice.

3. Only once these steps have been completed may the credit provider approach the court for an order to enforce the credit agreement, for s 130(3) and

(3)(a) seeks to bar the court from determining a matter unless the procedures required by *inter alia* s 129 have been complied with. If the court determines that the credit provider had not complied with the provisions of the Act as contemplated in subsection (3)(a), the court must, in terms of s 130(4)(b)(i) and (ii), adjourn the matter and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

4. The summons was served on 25 January 2013. The relevant paragraphs of the particulars of claim are highlighted as follows to demonstrate why I am of the view that the credit provider complied with the provisions of the Act:

> *"10. In due satisfaction of the requirements of Section 129 read with Section 130 of Act 34 of 2005 a letter was sent by the Plaintiff to the Defendant on* ***13 November 2012 by pre-paid registered post at the address chosen by the Defendant as his domicilium citandi et executandi****, a copy of which letter is annexed hereto marked* ***"D"*** *and the contents of which is to be incorporated herein by reference and read as if specifically pleaded.*
>
> *11. The letter referred to* ***above reached the appropriate post office for delivery to the Defendant****,* ***but despite notification to the Defendant the letter was not collected. Proof of delivery to the appropriate post office appears from the relevant Track and Trace printout from the Website of the South African Post Office****, a copy of which is annexed hereto marked* ***"E"****.*

12. *The Tracking Number allocated by the South African Post Office which appears on **"D"** hereto **correlates** with the tracking number which appears on annexure **"E"** hereto.*

13. *The **Defendant failed to respond to the aforesaid notice** in that:*

13.1 *He has failed to pay the arrears within **20 (TWENTY)** business days from date of default, the current arrears being **R40 349.53**;*

13.2 *He has failed to refer the agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction to resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.*

13.3 ***He has not returned the vehicle to the Plaintiff** and there is no matter arising from the agreement before the National Consumer Tribunal.*

13.4 *A certificate certifying that the Plaintiff has complied with the provisions of Section 129 of the National Credit Act is annexed hereto marked **"F"** and the contents of which should be read as if specifically pleaded and incorporated herein by reference.*

14. *The Plaintiff gave notice to the Defendant in annexure **"D"** hereto of its election to claim immediate payment of all rentals due in terms of the agreement and, on failure by the Defendant to pay, of its intention to cancel the agreement.*

15. *The Plaintiff **herewith terminates the agreement of lease**.*

16. *The total amount outstanding as on the date of termination of the agreement is **R209 674.12** plus interest calculated thereon at the agreed interest rate.*

17. *The Defendant resides within the jurisdiction of the above Honourable Court.*

18. *The Plaintiff **submits that the Court is not prohibited in terms of Section 130(3)** of the National Credit Act 34 of 2005 to determine this matter."*

5. The affidavit opposing summary judgment was deposed to on 5 March 2013. The deponent denied that he had received the notice in these terms and again I provide the emphasis:

*"5. The above Honourable Court **has no jurisdiction** in this matter in that the Applicant has failed to comply with the section 129 read with section 86 (1) and 130 of the National Credit Act, 34 of 2005 ("NCA") in **that I have not received the notice in terms of section 129** of the*

NCA and I was not made aware of it even I was in constant communication with the Applicant.

7.1.5 ***I did not receive the notice in terms of 129*** *of the NCA."*

6. In **Rossouw**[1] the Supreme Court of Appeal held that actual receipt of the required notice in terms of s 129(1)(a) is unnecessary. In **Majola**[2] the defendant had also not received the notice, claiming that it had been sent to the wrong address. His argument that he had changed his *domicilium* address was rejected, and since the notice had been sent to his chosen *domicilium*, it did not matter that he had not received it. The SCA held that that there was proper service of the s 129(1)(a) notice *"and the fact that he never received it does not render the notice invalid and the issue of summons premature"*.[3]

7. Subsequently, and in **Sebola's** case,[4] the majority of the Constitutional Court determined that the Act requires a credit provider to prove that it had delivered the notice to the consumer as contemplated in s 129.[5] The statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible.[6] The credit provider must, however, make averments that will

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1 Rossouw and Another v FirstRand Bank Ltd 2010 (6) SA 439 SCA paras 31-32.
2 Majola v Nitro Securitisation 1 (Pty) Ltd) 2012 (1) SA 226 SCA.
3 Majola [19].
4 Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC).
5 Sebola [57].
6 Sebola [74].

satisfy the court that the notice, on a balance of probabilities, reached the consumer.[7] Guidelines were given as to how a credit provider could discharge the onus. Once sufficient proof of delivery of the notice has been demonstrated, judgment by default will be granted.

8. In **Mkhize's** case,[8] however, Olsen AJ found that there is non-compliance with the statute where it was conclusively proved that the notice did not reach the consumer, e.g. because the notice was not collected from the correct post office. In **Binneman's** case,[9] Griesel J came to the opposite conclusion in a matter where the notice reached the correct post office, but was subsequently returned to sender. The court held that the credit provider had duly provided notice as required by the majority decision in **Sebola's** case. In **Binneman's** case judgment by default was granted, whereas in **Mkhize's** case the court adjourned and made an order in terms of s 130(4)(b)(i) and (ii) setting out the steps the credit provider must complete before the matter may be resumed. Thus Olsen AJ refused to enforce the credit agreements, whereas Griesel J enforced them.

9. In both the **Mkhize** and **Binneman** matters the consumer clearly did not receive the notice prior to summons. It is the same in this matter. But even if actual receipt of the notice is an absolute requirement, it has been satisfied in this matter, since the required notice was attached to the summons, which was served on the defendant. What remains in issue is what to do with the

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7 Sebola [74].
8 Absa Bank Ltd v Mkhize and Another and Two Similar Cases 2012 (5) SA 574 (KZN)
9 Nedbank Ltd v Binneman and 13 similar cases 2012 (5) SA 569 (WCC).

fact that the credit provider commenced legal proceedings to enforce the credit agreement before first providing the notice to the consumer.

10. The defendant has had the notice in terms of s 129(1) since the date of the service of summons and was thus fully apprised of his rights. He has been in default under the credit agreement for at least 20 business days and at least 10 business days have elapsed since the credit provider delivered a notice as contemplated in s 129(1). The defendant has had the opportunity to do what the notice invited him to do since receipt of the summons. He is not asking for any directions in terms of s 130(4)(b)(ii), nor does he give any indication of prejudice or of what he would have done had he received the notice prior to the summons.

11. The bar in ss 129(1)(b) and 130(3)(a) is not absolute, but dilatory,[10] and must be read as being subject to s 130(4)(b). The latter section allows a court to adjourn a matter and to make an order setting out the steps the credit provider must complete before the matter may be resumed. It follows that non-compliance with the procedures required by s 129 is not necessarily fatal to the proceedings. In this regard I respectfully agree with the approach of Binns-Ward J in **ABSA Bank v Petersen**.[11] He refused an application for rescission under circumstances where the defendant had not received the s 129(1)(a) notice, since the infringement of the defendant's rights to have

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10 Sebola *supra* [53].
11 Absa Bank Ltd v Petersen 2013 (1) SA 481 (WCC) [25].

received it prior to summons was immaterial in the circumstances of that matter.

12. Non-receipt of the notice prior to receiving the summons is not a defence, dilatory or otherwise, to the plaintiff's claim in this matter. The subsequent receipt of notice at the time of service of the summons and the defendant's reaction thereto, entitle the plaintiff to approach the court for an order to enforce the credit agreement. No purpose would be served to give him the notice for a second time - it would be placing form above substance to require a further notice to be sent to the defendant. It is accordingly unnecessary to adjourn the matter or to make any orders in terms of s 130(4)(b), since the defendant actually received the notice and since the time periods of s 130(1) and (1)(a) have actually expired. I consequently find that the fact that the defendant did not receive the notice prior to service of summons *"does not render the notice invalid and the issue of summons premature"*.[12]

13. Two other issues were raised. In one instance the defendant contends that certain latent defects excuse him from making payment for the vehicle purchased by him, a 2011 CMC Sesbuyile 16 seater minibus. The other contention is that he is excused from payment because there was no meeting of the minds as he thought he was purchasing the vehicle, and it has turned out that the agreement is in fact one of lease. The defendant put it thus: *"The agreement is unlawful in that there was no consensus and/or meeting of minds as I was misled to thinking* (sic) *that I was entering into a sale/credit agreement*

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12 Majola [19].

instead of a lease agreement".[13] These are not defences to the plaintiff's claim at all, and no more needs to be said.

14. At this stage of the proceedings the plaintiff only seeks an order for the return of the vehicle together with an order for attorney and client costs in terms of clause 9 of the agreement.

15. In the premises I make the following orders:

    15.1. The defendant is ordered to return the 2011 CMC Sesbuyile 16 seater with engine number **4RB2115947** and chassis number **LJSKA3AH7AD801330** to the plaintiff;

    15.2. The defendant is directed to pay the plaintiff's costs of summary judgment on the scale as between attorney and client.

    15.3. The remainder of the matter is postponed *sine die*.

H VAN EEDEN
ACTING JUDGE

Counsel for plaintiff: Adv R Stevenson
Instructed by: Marie-Lou Bester Inc

Counsel for defendant: Adv B Nodada

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[13] Page 38 para 7.1.3.

Instructed by: Kekana Hlatshwayo Radebe

Date of hearing: 14 March 2013

Date of judgment: 28 March 2013