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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 07747/2018

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes, 14 April 2020

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In the matter between:

FIRSTRAND BANK LTD T/A FIRST NATIONAL BANK Applicant

and

YUGASH MOONSAMMY T/A SYNKA LIQUORS Respondent

Summary judgment refused for the summons being excipiable and for non-compliance with sections 129 and 130 of the National Credit Act 34 of 2005. Line of cases about compliance by attaching a section 129 demand to the summons to purge non-compliance with the National Credit Act, not followed.

JUDGMENT

DE VILLIERS, AJ

Introduction

[1] There are two issues for determination in this application for summary judgment relating to (a) a defence that the summons is excipiable, and (b) non-compliance with sections 129 and 130 of the National Credit Act 34 of 2005 ("the NCA") and its effect at summary judgment stage. In the end the defence on the merits and the NCA defence overlap. When I refer to sections 86, 129 and 130 below, it is in each case a reference to the section in the NCA.

[2] The defence on the merits in essence is that the contract required a prior demand before the debt became payable. No such notice was given. If such a notice was necessary, it had to be given, and it had to be alleged as having been given, before a default notice could be given under section 129. Other defences on the merits were raised, but they need not be addressed in this judgment. The defence on non-compliance with section 129 is that it is clear from the wording of the so-called "*track-and-trace*" report, that the default notice was sent to the incorrect post office.

[3] The matter came before me in the opposed summary judgment court as one of two similar matters on successive days. The counsel for the applicants in both cases relied on *SA Taxi Development Finance (Pty) Ltd v Phalafala*[1] to the effect that there was proper compliance with the NCA if the section 129 default notice is attached to the summons. Counsel for both applicants knew of no further cases in point. I questioned the correctness of the submissions on the law. The counsel for the applicant in this matter argued that judges (in the plural) accept the case as setting out the law. The representatives for the

[1] 2013 JDR 0688 (GSJ).

respondents could not refer me to authority to the contrary in this division. In fact, the attorney in this matter referred me to no authority.

[4] I did not reserve judgment in the second matter. I did so because the only defence raised was non-compliance with section 129. I postponed the matter in terms of section 130(4) for re-service of the section 129 notice at an agreed stipulated address, acting in terms of my residual discretion in summary judgment matters. By then I had already reserved judgment in this matter where a defence on the merits was raised. I first address that defence.

Defence on the merits

[5] In issue in this case was a loan granted under a written so-called "*overdraft facility agreement*". The particulars of claim did not reflect any obligation on the defendant to make "*regular and sufficient deposits and credits into the facility account to repay interest, costs, fees and charges debited*", yet the plaintiff relied upon alleged non-compliance with such an obligation as a breach of contract by the defendant entitling it to call up the loan. I could not find such a term in the written agreement. In addition, the contract contained notice terms that the plaintiff had to comply with, before the loan became repayable. Those terms were not pleaded, but clause 5.1.2 of the applicable terms reads (underlining added):

> "*5.1 An event of default shall occur should:*
>
> *5.1.1 …*
>
> *5.1.2 the Client, fail to comply with any term or condition of this Agreement and fail to remedy that breach within 5 (five) days after having been called upon do so;*
>
> *5.1.3 …*"

[6] As such, notice to the defendant in terms of clause 5.1.2 was required before it could be alleged that the defendant was in breach of the repayment obligation and that thus an event of default had occurred, entitling the plaintiff to call up the loan. No notice in terms of clause 5.1.2 has been pleaded. This case therefore is one that is governed by *Caltex Oil (SA) Ltd v Crescent*

Express (Pty) Ltd and Others[2], in which it was held that although the defendant may be indebted to the plaintiff, it does not follow that that indebtedness is due and payable. In a summary judgment context, the learned judge held:

> "… *For there to be a verification of a cause of action within the meaning of Rule 32(2) it seems to me that there must be made to appear a complete cause of action. Unless a complete cause of action is made to appear it does not seem to me that it can be said to be verified*. …"

[7] This statement of the law accords with *Bentley Maudesley and Company, Ltd v 'Carburol' (Pty) Ltd and Another*[3]. The facts of this matter do not apply in every case where the claim is based on an overdraft agreement, but arises from the wording of the contract. In a case addressed later herein, *Amardien and Others v Registrar of Deeds and Others*[4], the Constitutional Court also makes the point that it is only after a debt has become due that the credit consumer is obliged to make payment.[5]

[8] Accordingly, the plaintiff did not plead a completed cause of action, such a cause of action was not verified, and the particulars of claim are excipiable. Added thereto, is that the defendant is not alleged to have been in default when the section 129 default notice was attached to the summons.

[9] In the circumstances I ought to refuse summary judgment and I do as the summons is excipiable. See too *Buchner and Another v Johannesburg Consolidated Investment Co Ltd*.[6] The matter does not end here, the applicant alleged that it has complied with sections 129 and 130. It may amend its particulars of claim, and in that case, compliance with sections 129 and 130 will have to be addressed again. Accordingly, I address the issue.

Sections 129 and 130 of the NCA

[10] Thirteen years ago, these two sections in the NCA came into effect and four years ago important changes were made to them by the National Credit

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[2] 1967 (1) SA 466 (D) at 469C.
[3] 1949 (4) SA 873 (C).
[4] 2019 (3) SA 341 (CC).
[5] Para 33-35.
[6] 1995 (1) SA 215 (T).

Amendment Act 19 of 2014, as reflected in the footnotes below (underlining added):

"***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) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10),[7] as the case may be; and

(ii) meeting any further requirements set out in section 130.

(2) …

(5)[8] The notice contemplated in subsection (1)(a) must be delivered to the consumer-

(a) by registered mail; or

(b) to an adult person at the location designated by the consumer.

(6)[9] The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).

(7)[10] Proof of delivery contemplated in subsection (5) is satisfied by-

(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

(b) the signature or identifying mark of the recipient contemplated in subsection (5) (b).

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[7] Not relevant in this case, a provision dealing with debt review.
[8] This sub-section was only added with effect from 13 March 2015 by section 32 of the National Credit Amendment Act 19 of 2014.
[9] This sub-section also was only added with effect from 13 March 2015 by section 32 of the National Credit Amendment Act 19 of 2014.
[10] This sub-section also was only added with effect from 13 March 2015 by section 32 of the National Credit Amendment Act 19 of 2014.

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 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-

> *(a)[11] at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), 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.*

(2) …

(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 the court 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;*
>
> *(b) …*

(4) In any proceedings contemplated in this section, if the court determines that-

> *(a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;*
>
> *(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*

[11] This sub-section was added with effect from 13 March 2015 by section 33 of the National Credit Amendment Act 19 of 2014.

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;

(c) …"

[11] Section 129(1)(b)(i) and section 130(1)(a) refer to a notice in terms of section 129(1), the notice in issue in this case, or to one in terms of section 86(10). A notice under section 86(10) is a notice by the credit provider to terminate certain debt review procedures.

[12] Although the NCA is the subject matter of repeated criticism in our courts due to the poor quality of its drafting, such criticism cannot be levelled against the sections I have to interpret. One does not need to address the other drafting difficulties in the NCA to give effect to them. In summary <u>on the issues of this case</u>:

[12.1] If the credit consumer is in default under a credit agreement, the credit provider <u>must</u>[12] draw the default to the notice of the credit consumer in writing;

[12.2] The credit provider <u>may not</u> commence any legal proceedings to enforce the agreement before giving such a notice of default;

[12.3] The notice of default under section 129 must contain certain detail such as a proposal that the credit 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*";

[12.4] A credit provider <u>may only</u> approach the court for an order to enforce a credit agreement if, at that time-

[12.4.1] The credit consumer is in default;

[12] The meaning of "*may*" in this instance is addressed later herein.

[12.4.2] The credit consumer has been in default for at least 20 business days;

[12.4.3] At least 10 business days have elapsed since the credit provider delivered a notice of default and-

[12.4.3.1] The credit consumer has not responded to the default notice;

[12.4.3.2] The credit consumer responded to the default notice by rejecting the credit provider's proposals; and

[12.4.3.3] In the case of an instalment agreement, secured loan, or lease, the credit consumer has not surrendered the relevant property to the credit provider as contemplated in section 127;

[12.5] A court may determine the matter only if the court is satisfied that the procedures required by (in this case) section 129 has been complied with; and

[12.6] If the court determines that the credit provider did not give notice of default as contemplated in section 129 "*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*".

[13] Had I been the author of the section 130, I would have added a provision that would have empowered a credit grantor to fix an error in complying with section 129 without prior intervention by a court, and to seek condonation when the matter gets to court.

[14] A court may disagree with the legislation, but the wording is clear. In none of the judgments that I differ with, did the court find that the clear wording

means something different. In none of the judgments that I differ with, did the court rely on the Constitution to read words into the legislation. The question that I raise is, with great respect, if those judgments did not impermissibly cross the line between an adjudication function, and a legislative function. I further respectfully point out that when faced with an impractical interpretation of the NCA (and I do not find that section 130(4) is an impractical remedy), the Supreme Court of Appeal ("the SCA") felt bound by the clear text of the NCA. See *Du Bruyn NO and Others v Karsten* [13] where the court concluded:

> "… *That it is an imperfect solution is readily accepted, but it is for the legislature to remedy, rather than for the courts to attempt to accommodate deficient drafting by attributing a meaning to s 40(1)(b) that is not justified by the wording of the statute*."

[15] In a judgment more fully addressed below, *Kubyana v Standard Bank of South Africa Ltd,*[14] the court expressed the limitations on interpretation of legislation as follows (underlining added):

> "*It is well established that statutes must be interpreted with due regard to their purpose and within their context.*[15] *This general principle is buttressed by s 2(1) of the Act, which expressly requires a purposive approach to the statute's construction.*[16] *Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms.*[17] *However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.*[18]**"**

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[13] 2019 (1) SA 403 (SCA) para 28.
[14] 2014 (3) SA 56 (CC) para 18.
[15] "*20 See Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009 (1) SA 337 (CC) (2008 (11) BCLR 1123; [2008] ZACC 12) in para 61; and Mistry v Interim Medical and Dental Council of South Africa and Others 1998 (4) SA 1127 (CC) (1998 (7) BCLR 880; [1998] ZACC 10) in paras 17 – 18*."
[16] "*21 Section 2(1) states that '(t)his Act must be interpreted in a manner that gives effect to the purposes set out in section 3'. I set out those purposes in [19] – [21] below*."
[17] "*22 See generally Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15)*."
[18] "*23 In S v Zuma and Others 1995 (2) SA 642 (CC) (1995 (1) SACR 568; 1995 (4) BCLR 401; [1995] ZACC 1) Kentridge AJ, in paras 17 – 18, stated:*

> *'I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.*

[16] I do not lightly disagree with several judgments. I am acutely aware of the finding in *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another*[19] where the court held (footnotes omitted):

> "… *This argument raises issues concerning the principle that finds application in the Latin maxim of stare decisis (to stand by decisions previously taken) or the doctrine of precedent. Considerations underlying the doctrine were formulated extensively by Hahlo and Kahn. What it boils down to, according to the authors, is: "certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis." Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos*."

<u>The relevant decisions of the Constitutional Court</u>

[17] There have been three main judgments in the Constitutional Court addressing the NCA that are relevant to this matter, the most recent being the one already referred to, *Amardien and Others v Registrar of Deeds and Others*.[20] This matter dealt with a case where default notices in terms of section 129 were given, but these did not specify the outstanding amount. The notices were held to be defective. In setting out its reasoning, the Constitutional Court made the point that section 129 provides protection to credit consumers by requiring that notice of default must be given before legal remedies could be enforced in the courts by creditor providers, giving

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We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'
While these remarks referred to constitutional interpretation, they apply even more forcefully in relation to statutory interpretation generally. See also Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079; [2000] ZACC 12) in paras 23 – 24 and 26."

[19] 2011 (4) SA 42 (CC) para 28.
[20] 2019 (3) SA 341 (CC).

notice to the credit consumer to consider what steps to take.[21] Paragraph 56 of *Amardien* on the purpose of section 129 is instructive (underlining added):

> *"[56] The purposes of section 129 of the NCA are as follows:*
>
> > *(a) It brings to the attention of the consumer the default status of her credit agreement.*
> >
> > *(b) It provides the consumer with an opportunity to rectify the default status of the credit agreement in order to avoid legal action being instituted on the credit agreement or to regain possession of the asset subject to the credit agreement.*
> >
> > *(c) It is the only gateway for a credit provider to be able to institute legal action against a consumer who is in default under a credit agreement.*"

[18] In my view a finding that a default notice attached to a summons would achieve the three purposes, is unsustainable, with respect. *Amardien* made it clear that a section 129 notice is a distinct document with a particular notice purpose. It is a prior step that must be complied with. The credit provider's rights to enforce the credit agreement are suspended pending compliance. The process prescribes a pause in the proceedings (underlining added and footnotes omitted):

> *"[57] This section reveals that in the event of the consumer being in default of her repayments of the loan, the credit provider is obliged to draw the default to the attention of the consumer. It prescribes that the notice given to the consumer must be in writing and specifies what the notice must contain. The notice must propose the options available to the consumer who is in financial distress and unable to purge the default. It must point out that the consumer has the option to refer the credit agreement to a debt counsellor, dispute resolution agent, consumer court or ombudsman. The purpose of the referral must also be stated in the notice.*
>
> *[58] There are two statutory conditions which must be met before the credit provider may institute litigation under section 129. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before (a) providing notice to the consumer; and (b) meeting further requirements set out in section 130.*
>
> *[59] The reference to section 130 reveals a strong link between the two provisions hence they are required to be read together. When a credit*

[21] Para 43.

> *provider seeks to enforce the agreement by means of litigation, it must first show compliance with section 130, which, by extension, refers back to section 129. The application of these sections is triggered by the consumer's failure to repay the loan. These sections suspend the credit provider's rights under the credit agreement until certain steps have been taken. The credit provider is not entitled to exercise its rights immediately under the agreement. It is first required to notify the consumer of the specific default and demand that the arrears be paid. If the consumer pays up the arrears, then the dispute is settled."*

[19] In many ways the matter could end here. In my respectful view, both the text of sections 129 and 130, and the reasoning in *Amardien* would stand firmly against a finding that non-compliance with section 129 could be cured by attaching such a notice to the summons, to an application for payment, for default judgment, or for summary judgment. The NCA clearly requires prior default notice in terms of section 129 and the lapse of ten business days before litigation may commence. It provides for the process to be followed in case of non-compliance.

[20] In most cases the obligation on creditors to give notice in terms of section 129 would cause no hardship. Both the amendments to section 129 and 130 and earlier Constitutional Court cases addressed next, did not impose an unduly burdensome process. In some cases, an error may creep in and the default notice would for example be re-directed by the postal services to the wrong post office (as what seemed to have happened in the case before me). If an error has crept in, the fact that such prior default notice in terms of section 129 has not been given is not fatal, as section 130(4) of the NCA provides a remedy: A court must adjourn the matter and must make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

[21] Before *Amardien,* sections 129 and 130 of the NCA were dealt with in *Sebola and Another v Standard Bank of South Africa Ltd and Another*,[22] as clarified in *Kubyana v Standard Bank of South Africa Ltd*,[23] already referred to. I do not refer to them in full. Both cases dealt with the sections before their

[22] 2012 (5) SA 142 (CC).
[23] 2014 (3) SA 56 (CC).

amendment by the National Credit Amendment Act 19 of 2014, and presumably caused the amendments.

[22] In *Sebola* the Constitutional Court interpreted the NCA saying the notice is a prior step that must be taken before litigation commences. Section 129 is "*a 'gateway' provision, or a 'new pre-litigation layer to the enforcement process*",[24] it is a compulsory notice, and the NCA "*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*."[25] *Sebola* stated that compliance with section 129 had to be pleaded (footnotes omitted and underlining added):

> *"[77] The credit provider's summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence of contrary indication, and the credit provider may credibly aver, that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office."*

[23] It is for this reason that I stated at the outset that the two defences dealt with in this judgment, overlap. The Constitutional Court in *Sebola* dealt with the delaying nature of the bar on proceedings prior to compliance with section 129 of the NCA, as set out in section 130(4), saying:

> *"[53] First, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while s 129(1)(b) appears to prohibit the commencement of legal proceedings altogether ('may not commence'), s 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 s 129 in the light of s 130. Section 129 prescribes what a credit provider must prove (notice as contemplated) before judgment can be obtained, while s 130 sets out how this can be proved (by delivery)*."

[24] Para 45.
[25] Para 45.

[24] The remark in *Sebola* that non-compliance with section 129 is a dilatory defence, does not mean that it is not a valid defence or a time-wasting defence. The Constitutional Court is quite clear that the NCA must be complied with, despite its effect (in many or in some cases) to be no more than a pause in the court processes.

[25] Some aspects of *Sebola* were clarified in *Kubyana.* The Constitutional Court also reasoned that compliance with the section 129 notice is a step before litigation commences[26] and that it is an essential step for a credit provider to enforce its rights.[27] The intent is that the creditor must avoid hasty recourse to litigation.[28] Finally, the court held (underlining added):

> *"[85] If the court is not satisfied that the s 129 notice was delivered to the consumer, it is obliged to adjourn the proceedings and specify steps to be taken by the credit provider before resuming the hearing of the matter. This illustrates that enforcement of the credit agreement through litigation is suspended for as long as the credit provider has not complied with the requirements of the relevant sections*."

[26] *Sebola* dealt with an appeal against a refusal of an application for rescission, *Kubyana* dealt with an appeal against the judgment in a trial, and *Amardien* dealt with an appeal regarding the cancellation of instalment sale agreements and eviction in opposed motion proceedings.

[27] There is one more matter to address, in *Allpay Consolidated Investment Holdings (Pty) Ltd And Others v Chief Executive Officer, South African Social Security Agency, And Others*[29] the Constitutional Court rejected an approach that inconsequential irregularities could be overlooked, and that one should consider if the purpose of legal requirements have been met before setting aside a procurement process. *Sebola* makes the point that the provisions of the NCA will have significant impact on public law too as it introduces protection for credit consumers.[30] Time will tell if the Constitutional Court will introduce the *Allpay* approach with regard to section 129 too, no matter if the non-compliance was inconsequential (such as when the notice

[26] Para 22.
[27] Para 24.
[28] Para 34
[29] 2014 (1) SA 604 (CC).
[30] Para 41.

improperly delivered, in fact reaches the attention of the credit consumer). In one of the judgments below the learned judge reasoned that condoning non-compliance with the section 129 would amount the condonation of an illegality.

Relevant decisions of the Supreme Court of Appeal

[28] The SCA too has stressed that compliance with section 129 is a pre-litigation step. Indeed, it found that a failure to allege compliance with the section renders the summons excipiable. See *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others (National Credit Regulator as Amicus Curiae)*.[31] Similarly to the reasoning of the Constitutional Court in *Sebola*, *Kubyana*, and *Amardien* the SCA reflected that notice in terms of section 129 accords with the broad purposes of the NCA.[32] Compliance with section 129 is a mandatory requirement, and the court approved of the statement in *Kubyana* that the purpose of a section 129 notice was to establish a framework where a creditor and a consumer who has defaulted could resolve their dispute "*without expensive, acrimonious and time-consuming recourse to the courts*".[33] Paragraphs 18-20 *in Blue Chip 49* are of importance (underlining added):

> *"[18] The delivery of a s 129 notice is a peremptory step which is a prereguisite for any judgment sought on a claim arising out of a default of a credit agreement. The failure to take the necessary steps prior to judgment will result in a court refusing to grant judgment in favour of the claimant. It is a step which is recognised in the NCA as essential to granting judgment in favour of a claimant. Hence, in para 87 of Sebola it is pointed out that, if indeed a litigant has failed to comply with any provision of the NCA, including s 129, s 130(4)(b) provides for steps which may be taken in order to remedy the situation in terms of an order of the court. A failure to allege and prove compliance with s 129(1) (even after s 130 procedures) would render a summons excipiable and the matter would end without judgment in favour of the claimant being granted.*
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> *[19] As was said by Majiedt AJP in Beets v Swanepoel[34] para 19:*

[31] 2016 (6) SA 102 (SCA) para 16-20.
[32] Para 16.
[33] Para 17.
[34] "*10 Beets v Swanepoel [2010] ZANCHC 55*." Also reported as [2010] JOL 26422 (NC).

> *'A plaintiff must in my view aver compliance with these sections [s 129 and s 130] in the summons or particulars of claim to disclose a cause of action where the suit is based on a credit agreement to which the Act applies. It is a material averment, the absence whereof would render the pleading excipiable. Without the requisite notice, a claim cannot be enforced.'*

The reason for this is that the pleadings would lack a proper cause of action.

[20] In order to disclose a cause of action to enforce a claim emanating from a default of a credit agreement, an averment of compliance with s 129 must be contained in the summons and proved. Delivery of a s 129 notice forms part of the cause of action. It is an essential component of a plaintiff's cause of action.[35]"

[29] See too *Investec Bank Ltd t/a Investec Private Bank v Ramurunzi.*[36] Finally, in *ABSA Bank Ltd v Mkhize and Two Similar Cases*[37] the SCA held (footnotes omitted and underlining added):

> "*[51] I do not think it necessary to go so far. The purpose of s 130(4)(b) is to require the court, where a credit provider has not complied with any provision of the NCA (in this instance it would be non-compliance with s 129(1), as interpreted in Sebola), to adjourn the matter and 'make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed'. Once the credit provider complies with the court order, when the matter is set down again the court will doubtless be able to grant judgment. As Alkema J pointed out, the adjournment will increase the burden on the credit provider and on the courts, and will of course increase the cost of providing credit. But that is the consequence of the poorly drafted NCA and the interpretation of its provisions by the Constitutional Court. That court appreciated that consumers would bear the additional costs of obtaining credit by requiring proof of receipt of notices sent by registered mail at post offices. But that was warranted by the importance of ensuring that s 129(1) notices be provided to consumers. Cameron J said:*
>
> > *'I accept that this judgment may heighten the cost of credit and that this will affect the pockets of not only credit institutions but also consumers, particularly those new to the credit market. That is a social burden the legislation imposes. The alternative would be to underplay the importance of the notice, and under-weigh the impact of the wording of s 129*.'"

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[35] "*11 Rossouw and Another v FirstRand Bank Ltd 2010 (6) SA 439 (SCA) ([2010] ZASCA 130) para 38*".
[36] 2014 (4) SA 394 (SCA) para 23.
[37] 2014 (5) SA 16 (SCA)

[30] It seems to me that two matters are emphasised in the Supreme Court of Appeal, compliance with section 129 of the NCA is a step that must precede the litigation for good reason, and where it has not taken place, litigation must be stayed pending rectification in terms of section 130(4) of the NCA. Compliance with the provisions of section 129(1)(a) is thus mandatory notwithstanding the use of the word "*may*". See *Nedbank Ltd and Others v National Credit Regulator*.[38]

[31] *Blue Chip 49* dealt with an appeal regarding the jurisdiction of a Magistrate's Court, *Ramurunzi* dealt with an appeal regarding a prescription defence, and *Mkhize and Two Similar Cases* dealt with an appeal against a postponement to rectify non-compliance with section 129.

[32] In *Navin Naidoo v The Standard Bank of South Africa*[39] the SCA dealt with what seems to be an appeal against a default judgment. The court held that actual receipt of the section 129 default notice is proper compliance with sections 129 and 130. The court applied a purposive interpretation. The Constitutional Court refused leave to appeal the decision.[40]

Authority in Gauteng against the bank's contentions and comments thereon

[33] Due to the provincial manner in which *stare decisis* is still applied,[41] I focused in this judgment on Gauteng judgments.

[34] In *African Bank Ltd v Myambo NO and Others*[42] the majority of a full court held at 310I-311B that a cause of action is not complete without an averment in the summons that "… *ss 129(1)(a) or 86(10) has been complied with or an allegation that notice was not necessary, stating the reason"*.[43] This accords with the reasoning in *Blue Chip 49* by the SCA and in *Sebola* by the Constitutional Court. *Myambo* dealt with a review of a decision by a magistrate in an application for rescission of judgment.

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[38] 2011 (3) SA 581 (SCA) paras 8, 9 and 14.
[39] [2016] ZASCA 9.
[40] *Naidoo v Standard Bank of South Africa* [2017] ZAGPPHC 780 para 19.
[41] It may be questioned if time has not come to develop the Common Law for one unitary High Court for our country, as opposed to the remnants of colonies and old Boer Republics determining which courts judges must follow.
[42] 2010 (6) SA 298 (GNP).
[43] 310I-311B.

[35] Three more judgments by single judges in Gauteng address non-compliance with sections 129 and 130.

[36] First, in *Land and Agricultural Development Bank of South Africa v Chidawaya and Another*[44] the court dealt with an application for summary judgment and held (underlining added and quotation from *Sebola* omitted):

> "*[21] To my mind, the reasoning in both the Phalafala and the Jardine*[45] *decisions is flawed and should be rejected. It is flawed because it does not take into account one of the basic purposes for which the NCA was brought into existence. That purpose is captured succinctly in Sebola v Standard Bank 2012 (5) SA (CC) at 161 (para 59 - 60) where the following was stated:*
>
> > *"[59] ….*
> >
> > *[60 …."*
>
> *[22] A Section 129 notice may be attached to a summons as proof of compliance with the Act but not as constituting compliance. It is clear from the wording of the Act that it is a pre-litigation step and must accordingly precede litigation. If litigation is embarked upon without compliance with Section 129 then Section 130 (4) provides the procedural mechanism to remedy this defect. To hold otherwise would render Section 130 (4) irrelevant and would ignore the directives of the legislature as well as undermine the purpose of the Act as set out in Section 3, namely to address issues such as over indebtedness and debt restructuring. These would be undermined if the pre-litigation notice is dispensed with.*"

[37] Second, in *Kgomo and Another v Standard Bank of South Africa and Others*[46] dealt with an application for rescission judgment and held (footnote omitted and underlining added)-

> "*[54] Based on Kubyana, strict compliance with s 129(1) remains the order of the day. Strict compliance requires that where s 129(1) is not complied with, section 130(4)(b) comes into play. It peremptorily requires that the court "must ... adjourn the matter ... and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed".*
>
> *[55] The bank as plaintiff pleaded delivery of the notice to the applicants as defendants, in its particulars of claim. Yet it is clear that its pleading was erroneous and that there was no such delivery. In terms of s 129(1)(b), the respondent was precluded from commencing any legal proceedings without*

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[44] 2016 (2) SA 115 (GP).
[45] *Standard Bank v Jardine* [2014] ZAGPPHC 790.
[46] 2016 (2) SA 184 (GP).

> *delivering a s 129(1) notice beforehand. In terms of s 130(1)(a), ten business days had to have lapsed after any notice, before legal proceedings were commenced. That too was not complied with. The judgment was therefore erroneously sought.*
>
> *[56] The flawed s 129(1) notice, reflecting the incorrect address for the applicants, was an annexure to the particulars of claim. That the address was incorrect was apparent by comparing it with the correct address reflected in the particulars of claim. That address reflected a street number that did not coincide with the erf number. The error was thus apparent on the record when default judgment was granted. In any event, it is not necessary for compliance with the requirements for rescission in rule 42(1)(a) that the error be apparent on the record. In those circumstances, the court was required to proceed in terms of s 130(4)(b)(i) and (ii) of the NCA by adjourning the proceedings and directing what steps the bank must take before the proceedings were resumed. It did not do so. The judgment was thus erroneously granted within the meaning of rule 42(1)(a)*".

[38] Third, in *More v BMW Financial Services*[47] the court dealt with an application for rescission of judgment. The court held that compliance with section 129 is a mandatory statutory procedure that must be complied with before the credit provider can sue upon a credit agreement.[48] Although the credit receiver had no defence on the merits, non-compliance with section 129 is a sufficient ground for a rescission application.[49] The court held that "*if the Court refuses to set aside such a default judgment, then it confirms and perpetuates an illegality*".[50]

[39] The wording of the NCA, the purpose of the act (especially the purpose with sections 129 and 130), and the judgments referred to above in the Constitutional Court, in the SCA and these the four judgments in Gauteng, are incompatible with reasoning that the NCA could be complied with by attaching a section 129 default notice to a notice to the summons, to an application for payment, for default judgment, or for summary judgment.

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[47] [2018] ZAGPPHC 583.
[48] Para 17.
[49] Para 18.
[50] Para 18.

Authority in Gauteng in favour of the bank's contentions and comments thereon

[40] The judgment relied upon by the bank, *SA Taxi Development Finance (Pty) Ltd v Phalafala*[51], referred to earlier, was handed down on 20 March 2013, before the changes to the wording of sections 129 and 130 of the NCA were effected as indicated above. It also predates *Amardien* and *Kubyana* in the Constitutional Court, *Blue Chip 49* and *Ramurunzi* in the SCA*, Chidawaya, Kgomo* and *More* in Gauteng. It was by no stretch of the imagination the only case in point.

[41] In *Phalafala* the default notice in terms of section 129 was duly sent by registered mail to the correct post office, but the credit consumer did not collect it. The relevant portion of the judgment reads (underlining added):

> "*[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.*[52]*"*

[42] The reasoning in *Phalafala* was followed by single judges in Gauteng at least in *SA Taxi Finance Solutions (Pty) Ltd v Ringani,*[53] *SA Taxi Finance Solutions (Pty) Ltd v Mthembu,*[54] *Standard Bank v Jardine,*[55] *Wentzel v Absa Bank Limited*,[56] and in *Shongwe v Firstrand Bank Limited t/a Land Rover Financial Services*.[57] The central reasoning in these cases is that by attaching the section 129 notice to the summons, or application for payment,

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[51] 2013 JDR 0688 (GSJ).
[52] "*12 Majola v Nitro Securitisation 1 (Pty) Ltd) 2012 (1) SA 226 SCA para [19]*."
[53] [2013] ZAGPJHC 307 para 9.
[54] [2013] ZAGPJHC 238 para 11-12.
[55] 2014 JDR 2129 (GP) para 31.
[56] [2017] ZAGPJHC 63 (6 March 2017) para 13-14.
[57] 2017 JDR 0453 (GJ).

for default judgment, or for summary judgment, default notice has been given.[58] A theme in several of these judgments is that the credit receiver did not plead what steps she or he would have taken had proper notice in terms of section 129 been given, what prejudice was suffered.[59] (The onus to show compliance with the NCA rests on the credit grantor.) None of these judgments refer to the judgments to the contrary in Gauteng. In fact, most predate the judgments to the contrary in Gauteng.

[43] The judgment, with respect, that seeks to address the current wording of the NCA most completely, is *Shongwe.* However in that matter the acting judge criticises the Constitutional Court for adding "*glosses and complexities to the provisions of the NCA that were neither called for nor necessary*",[60] criticises the architecture of the NCA (with some merit),[61] criticises the reasoning in *Sebola* and *Kubyana,*[62] and criticises the legislature for taking its lead from the Constitutional Court in providing primarily for service by registered post.[63] All of this was unnecessary, with respect, as it was common cause that section 129 had been complied with in *Shongwe*.[64]

[44] Before I state the reasons why I believe *Phalafala* and the cases that followed its reasoning are clearly wrong, I need to address a full court judgment that supports the reasoning: *Benson and Another v Standard Bank of South Africa (Pty) Limited and Others*.[65] In this matter, the full court dealt with the same issue: a section 129 notice attached to the application for default judgment as compliance with section 129.

[45] The section 129 notice was given on 26 May 2011, but the legal proceedings commenced prematurely on 5 May 2011 The court held (underlining added):

> "*18. What the Sebola decision did not have to decide is whether any non-compliance with the provisions of the NCA <u>that is cured prior to the hearing of the application for judgment by default, nevertheless requires an adjournment</u>*

[58] *Ringani* para 7; *Jardine* para 31; *Mthembu* para 11; *Wentzel* para 13; *and Shongwe* para 26
[59] *Phalafala* para 10; *Ringani* para 8; *Mthembu* para 10-11; and *Wentzel* para 13.
[60] Para 15.
[61] Para 16.3-16.10.
[62] Para 17-20
[63] Para 22
[64] Para 23-25.
[65] 2019 (5) SA 152 (GJ).

of the application. The answer to this question flows from the provisions of s 130(4)(b)(ii). If there are no further steps that are required of the credit provider, there can be no purpose served in adjourning the proceedings. Further delay would serve no purpose, and, as Sebola makes plain, any non-compliance does not invalidate the proceedings but simply delays their finalization to ensure that due process is followed and the credit receiver can enjoy his or her rights. Of course, the non-compliance must be properly cured, and the credit receiver must be given the statutory time to consider his or her position. But if that is done between the time that the non-compliance is cured and the time that the matter is heard in court, to require an adjournment for its own sake has no point and is inconsistent with the scheme of ss129 and 130. In so far as the decision in Kgomo suggests otherwise, I am in respectful disagreement with it.

19. On the facts in this appeal, the Appellants obtained actual notice of their rights as required in terms of s 129. The Appellants take no issue with the contents of the letter from the attorneys of the Standard Bank advising them of their rights under the NCA. That being so, no further steps were required to give notice under s 129 to the Appellants. The Standard Bank application was served on the Appellants on 5 May 2011.[66] *The Standard Bank application was heard on 1 June 2011. By that time, the Appellants had been in default under their credit agreements for at least 20 days and 10 business days had elapsed since delivery of the s129 notice on 5 May 2011. By my calculation, some 18 business days had elapsed. There was accordingly compliance by the Standard Bank with the requirements of ss129 and 130 at the time the Standard Bank application was heard on 1 June 2011. The default judgment was thus not erroneously sought and granted. And for these reasons also this appeal must fail.*"

[46] As reflected earlier, I too would welcome a legislative amendment that would enable a credit provider who realises that an error has crept in with the default notice process, to fix the error and seek forgiveness without having to approach the court, but I disagree with the solution in *Benson*, with respect.

Conclusion

[66] The date when the application for default judgment was served.

[47] With great respect, for the reasons already set out, 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. With respect, the flaws in that reasoning are the following:

[47.1] I have already addressed the limits on statutory interpretation, and that the judiciary should not step into the legislative terrain. I have to add, with respect, that decisions by the Constitutional Court and by the SCA must be applied by lower courts. It is not a matter of substance over form to find that non-compliance with section 129 cannot simply be overlooked and that a court does not have such a discretion;

[47.2] Compliance with sections 129 and 130 is not elective, but compulsory. The net effect of *Phalafala*, *Ringani*, *Mthembu*, *Jardin*e, *Wentzel*, *Shongwe* and *Benson* is that the provisions in the NCA (as interpreted by the Constitutional Court and the SCA) that require prior notice in terms of section 129, before proceedings may be launched, are elective. Of course, one could tweak this simplistic summary of the reasoning by adding provisos such as that there must have been an attempt to comply with section 129 and/or that there must have been a mere error before one could follow the reasoning in those cases. Even such a more sophisticated formulation, in my view would still boil down to the effect of the judgment being that compliance with sections 129 and 130 is elective, not compulsory. I respectfully disagree;

[47.3] The NCA in fact makes no provision for the curing of the non-compliance with section 129, other than a stay of proceedings until a court order in terms of section 130(4) is given effect to. The wording of the NCA is that if the credit provider has not complied with section 129, the court must adjourn the matter before it. This gives effect to the purpose of the notice under section 129 of the NCA, and ensures that proper notice of default is given;

[47.4] The NCA does not provide for a parallel process (court proceedings and compliance with the NCA happening at the same time), but for a series of processes commencing with the default notice. The intent is to make a creditor take steps in series, to slow down debt recovery for alternate solutions to be considered by the credit receiver;

[47.5] Attaching a section 129 default notice to a summons, or application for payment, for default judgment or for summary judgment is not notice to a consumer of default, advising her or him what options she or he may have. It does not bring about a pause;

[47.6] The very purpose of such an attachment is to prove prior compliance with section 129 and no notice is given to the credit receiver that she or he has time to consider alternate steps whilst litigation is paused;

[47.7] Accordingly, nothing could be deduced from the lack of a reaction by the credit receiver to the notice in terms of section 129 attached to the summons, or application for payment, for default judgment, or for summary judgment. She or he is not called upon to react to the notice; and

[47.8] The law requires of the creditor, as part of its cause of action, to allege compliance with section 129 of the NCA. This judgment does not address the question if the summons must be amended to reflect due compliance with section 129 and 130 after a court order in terms of section 130(4). The question did not serve before me.

[48] I do not have to follow the full court decision in *Benson* as this matter is distinguishable. The matter before me included a defence that the summons is excipiable. Such a defence was not addressed in *Benson*. The issue of an excipiable summons was considered in another full court decision in *African Bank Ltd v Myambo NO and Others*[67] (as set out in *Blue Chip 2 (Pty) Ltd t/a*

[67] 2010 (6) SA 298 (GNP)

Blue Chip 49 v Ryneveldt and Others).[68] *African Bank* remains a full court decision despite being a split decision, and I may elect to follow it. See *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) at 538D. In my view, by applying *African Bank*, I also apply the relevant decisions in the Constitutional Court and the SCA referred to earlier herein, an approach that gives proper effect to the NCA. It would not promote a speedy resolution of this matter if I only to dismiss the application and not also make an order addressing the non-compliance with the NCA.

[49] I make the following order:

1. The application for summary judgment is dismissed;

2. The defendant is granted leave to defend with effect from date of this judgment;

3. The defendant is to deliver its consequential pleading within the time allowed in the Uniform Rules of Court;

4. The action proceedings are stayed until ten business days after the plaintiff, in due compliance with sections 129 and 130 of National Credit Act 34 of 2005, has served a notice as contemplated in section 129(1)(a) of the National Credit Act on the defendant at […], Lenasia South in the manner contemplated in section 129(5) of the National Credit Act;

5. Costs are to be costs in the cause.

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DP de Villiers AJ

Heard on: 27 February 2020

Delivered on: 14 April 2020 electronically, by e-mail

On behalf of the Applicant: Adv C Denichaud

[68] 2016 (6) SA 102 (SCA).

Instructed by:	Jay Mothobi Inc
On behalf of the Respondents:	Mr R Zimerman
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