REPUBLIC OF SOUTH AFRICA

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

06/09/2016.

CASE NO: 82515/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

2/9/2016 ..... DATE

..... SIGNATURE

In the matter between:

ABSA BANK LIMITED Applicant

and

D HURWITZ Respondent

In re:

ABSA BANK LIMITED Plaintiff

and

D HURWITZ Defendant

J U D G M E N T

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1. In this matter, the applicant seeks a declarator that it has fully complied with the requirements of section 129 (1)(a) of the National Credit Act 34 of 2005 ("NCA") ahead of the trial that has been set down for hearing some time next year. In the alternative, it seeks leave, in terms of section 130 of the NCA, to serve a section 129 notice on the respondent at his attorneys offices (being his chosen domicilium address) or in such manner as stipulated by the Court.

2. Following the breach of a mortgage agreement between the parties, the applicant sought to exercise its right to enforce the agreement and delivered a notice to the respondent on 29 May 2012 in accordance with section 129(5) of the NCA to the mortgaged property which had been chosen by the respondent as his *domicilium* address.

3. Thereafter, the applicant instituted action against the respondent under case number 34552/2012 (" the prior action"). When the respondent failed to enter an appearance to defend, default judgment was obtained against him on 26 October 2012. This was later rescinded as it emerged that the service of the summons had been defective and the applicant withdrew the action and issued a new summons under the current case no 82515/2014 on the same cause of action and in respect of the same debt.

4. The respondent has, in its plea, disputed the validity of the section 129 notice which was served by the applicant in prior action instituted

against the respondent for the purposes of the current proceedings, averring that the applicant has not complied with its obligations in terms of sections 129 and 130 in respect of the current action, alternatively the notices are of no force and effect, further alternatively are irrelevant to the current action.

5. The respondent has not, however, disputed receipt of the section 129 notice served on him prior to the launching of the prior action. In that notice, the applicant was informed of his rights to refer the credit agreement to a debt counsellor alternatively a dispute resolution agent, Consumer Court or Ombud with jurisdiction prior to action being instituted against him so that the parties can attempt to resolve the dispute under the agreement or develop and agree a plan to bring the arrears under the agreement up to date as required in terms of section 129.

6. In view of this dispute on the pleadings, in order to avoid the unnecessary postponement of the trial, the applicant wishes the Court at this stage to determine the validity of its prior notice and, in the event of it being held that it does not constitute compliance in respect of the current matter, to grant it leave to serve a further notice as contemplated in section 129(1) (a) of the NCA or that the court make directions in terms of section 130(4)(b)(ii) as to what steps should be taken before the matter can resume.

7. The application is necessary as in terms of section 130 (4)(b)(i) of the NCA the Court is obliged to adjourn the proceedings which may not resume until there has been compliance with section 129(1).

8. In support of its application, the applicant has relied upon an unreported judgment in this division of *First Rand Bank Limited v Phiri* 2013 JDR 068(GNP) which held that there is nothing to preclude a court to grant such relief ahead of the trial to avoid the unnecessary postponement of the trial where section 129(1) was not complied with.

9. The respondent sought to distinguish this case and disputed the applicant's entitlement to seek relief at this stage on the basis that:

9.1. Compliance with the provisions of section 129 is a substantive issue on the pleadings which only the trial Court can decide;

9.2. The applicant has, by delaying some 18 months before reinstituting the action, indicated its election not to institute action and waived its right to rely on the section 129 notice served on the respondent prior to the institution of the prior action which was withdrawn; and

9.3. The failure of the applicant to give the respondent the requisite notice has deprived the applicant of exercising his rights under sections 85 and 86 of the NCA to obtain debt restructuring prior to

action being instituted which, once instituted, it is precluded in terms of section 86(2) from exercising despite the provisions of section 130(4)(b). As such, the relief sought in the alternative is incompetent and meaningless.

9.4. It is further averred that any attempts to declare that the respondent is entitled to debt restructuring as contemplated in any newly issued notice to get around this lacuna, despite the issuing of the summons in contravention of section 129(1) and the plain meaning of section 86(2), would be tantamount to legislating and would be unconstitutional.

10. Much of the Court's time was taken up with the last two arguments which appeared to highlight a lacuna in the applicable legislation which was ultimately unnecessary in view of the amendment to section 86 (2) by the National Credit Amendment Act 19 of 2014 published in GG37665 of 19 May 2014 which came into operation on 13 March 2015 as per GG38557, which has, when read together with the Supreme Court Appeal decision of *Nedbank Ltd v The National Credit Regulator and Another* 2011 (3) SA 581 (SCA), remedied this apparent lacuna.

THE APPLICABLE LEGISLATION.

11. Section 129 sets out the required procedures before a debt may be enforced in any Court of law, with section 130 stipulating what the Court

must do in the event that such procedures are not complied with. These sections provide respectively:

"***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), as the case may be; and

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

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.

(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

(4) A credit provider may not re-instate or revive a credit agreement after-

(a) the sale of any property pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127;

(b) the execution of any other court order enforcing that agreement; or

(c) the termination thereof in accordance with section 123.

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

(7) 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).

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) 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) In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if-

(a) all relevant property has been sold pursuant to-

(i) an attachment order; or

(ii) surrender of property in terms of section 127; and

(b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.

(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) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and

(c) that the credit provider has not approached the court-

(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

(ii) despite the consumer having-

(aa) surrendered property to the credit provider, and before that property has been sold;

(bb) agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;

(cc) complied with an agreed plan as contemplated in section 129(1)(a); or

(dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).

(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

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

(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may-

(i) adjourn the matter, pending a final determination of the debt review proceedings;

(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or

(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b);

(d) there is a matter pending before the Tribunal, as contemplated in subsection (3)(b), the court may-

(i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or

(ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or

(e) the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter."(my emphasis)

12. Section 86 relied upon by the respondent deals with debt restructuring and, prior to its amendment, provided:

"86. Application for debt review

(1) A consumer may apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.

(2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under the credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement."(my emphasis)

13. However, subsection (2) was substituted by section 26(a) of Act 19 of 2014 with the following:

"(2) An application in terms of this section may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application,

the credit provider under that credit agreement has proceeded to take the steps contemplated in section 130 to enforce that agreement"(my emphasis).

14. The remainder of section 86 has been left unchanged and goes on to provide:

"(3) A debt counsellor-

(a) may require the consumer to pay an application fee, not exceeding the prescribed amount, before accepting an application in terms of subsection (1); and

(b) may not require or accept a fee from a credit provider in respect of an application in terms of this section.

(4) On receipt of an application in terms of subsection (1), a debt counsellor must-

(a) provide the consumer with proof of receipt of the application;

(b) notify, in the prescribed manner and form-

(i) all credit providers that are listed in the application; and

(ii) every registered credit bureau.

(5) A consumer who applies to a debt counsellor, and each credit provider contemplated in subsection (4)(b), must-

(a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement; and

(b) participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement.

(6) A debt counsellor who has accepted an application in terms of this section must determine, in the prescribed manner and within the prescribed time-

(a) whether the consumer appears to be over-indebted; and

(b) if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.

(7) If, as a result of an assessment conducted in terms of subsection (6), a debt counsellor reasonably concludes that-

(a) the consumer is not over-indebted, the debt counsellor must reject the application, even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into;

(b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner, the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement; or

(c) the consumer is over-indebted, the debt counsellor may issue a proposal recommending that the Magistrate's Court make either or both of the following orders-

> *(i) that one or more of the consumer's credit agreements be declared to be reckless credit, if the debt counsellor has concluded that those agreements appear to be reckless; and*
>
> *(ii) that one or more of the consumer's obligations be re-arranged by-*

(aa) extending the period of the agreement and reducing the amount of each payment due accordingly;

(bb) postponing during a specified period the dates on which payments are due under the agreement;

(cc) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(dd) recalculating the consumer's obligations because of contraventions of Part A or B of Chapter 5, or Part A of Chapter 6.

(8) If a debt counsellor makes a recommendation in terms of subsection (7)(b) and-

(a) the consumer and each credit provider concerned accept that proposal, the debt counsellor must record the proposal in the form of an order, and if it is consented to by the consumer and each credit provider concerned, file it as a consent order in terms of section 138; or

(b) if paragraph (a) does not apply, the debt counsellor must refer the matter to the Magistrate's Court with the recommendation.

(9) If a debt counsellor rejects an application as contemplated in subsection (7)(a), the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection (7)(c).

(10)

(a) If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may, at any time at least 60 business days after the date on which the consumer applied

for the debt review, give notice to terminate the review in the prescribed manner to-

(i) the consumer;

(ii) the debt counsellor; and

(iii) the National Credit Regulator; and

(b) No credit provider may terminate an application for debt review lodged in terms of this Act, if such application for review has already been filed in a court or in the Tribunal.

(11) If a credit provider who has given notice to terminate a review as contemplated in subsection (10) proceeds to enforce that agreement in terms of Part C of Chapter 6, the court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances."

ISSUES FOR DETERMINATION

15. On my analysis the essential issues for determination are:

15.1. Whether the service of the section 129 notice prior to the institution of the prior action serves as sufficient compliance with the section in respect of the current proceedings;

15.2. Whether this Court has jurisdiction to determine the validity of the notice (which is final in effect) where this is a substantive issue on the pleadings which can only be determined by the trial Court ;

15.3. Whether if the notice is found to be valid, the applicant has, by withdrawing the prior action and waiting some 18 months before reinstituting the action, waived its rights to rely thereon in the current proceedings;

15.4. Whether the applicant's rights to debt review in terms of section 86 of the NCA would be infringed by the re-service of the section 129 notice which it is argued, on the basis of authority of the Supreme Court of Appeal, precludes debt review in respect of the debt sought to be enforced as soon as a section 129 notice is served. (*Nedbank Ltd v The National Credit Regulator and another* 2011(3) SA 581 (SCA)

16. I will deal with each of these in turn.

THE COURTS JURISDICTION TO CONSIDER THE VALIDITY OF THE PRIOR SECTION 129 NOTICE IN THE CURRENT PROCEEDINGS AHEAD OF THE TRIAL

17. It is argued that it is necessary to consider the validity of the prior notice both for the purposes of considering the declaratory relief sought but also as a pre-requisite to considering the alternative relief in prayers 1 and 2 of the notice of motion. This is because the court is not empowered to grant the alternative relief sought in prayers 2 and 3 without making a final definitive finding on prayer 1. This is on the basis

that the Court is not entitled to exercise its discretion in terms of section 130(4)(b)(ii) unless it makes a positive finding on the issue in prayer 1 that there has been non-compliance with section 129 as if relief is granted under prayer 1, there would be no need for any relief under prayers 2 or 3. It is argued that this is an issue that only the trial court can decide.

18. I agree with the former of these views. On a plain reading of subsection 130(4)(b), the Court would only have discretion to make directions as to what steps should be taken to rectify the failure to comply with the notice where it has "*made a determination that the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a)*".

19. The respondent's latter argument that only the trial court can make such a determination is premised on the assumption that only the trial court can decide an issue on the pleadings. Were this correct, this would necessitate a hearing on the issue by the trial court which, if it is found that the prior notice is not valid, would require that the matter be postponed to enable compliance to take place.

20. This is the very thing that the applicant wishes to avoid relying on the unreported judgment of *First Rand Bank Limited v Phiri* 2013 JDR 068(GNP) which held that there is nothing to prevent a party from

approaching the court prior to the hearing to give directions as envisaged in section 130(4)(b)(ii). The Court stated:

> *"[17] The respondent contended that the trial court must grant an order giving directions for compliance. This approach is in my view not correct. The purpose of sec 130(4)(b) is to ensure that there is compliance with sec 129. Section 130 envisages a postponement of the matter if there was no compliance with sec 129. In my view there is nothing that prevent(sic) a party to approach the court prior to the hearing of the matter to give directions as envisaged in sec 130(4)(b)(ii). The legislators' intention could not have been that only the trial court is empowered to postpone and give directions in this regard or that the adjournment of the matter should be adjourned by the trial court. Such a narrow interpretation of sec 130(4)(b) will not assist the credit provider or the consumer as it will only delay the process and cause further costs."*

21. Although this is an eminently sensible approach, the respondent contended that this was only permissible where the validity of the notice given was not an issue on the pleadings and accordingly the current matter was distinguishable from that before the Court in the *Phiri matter*, where it was not.

22. The respondent argues that although the application purports to be an interlocutory one, the declaratory relief sought is final in nature in that any order as sought would "*irreparably anticipate or preclude*" a decision on this issue by the trial court which would not be appealable. In this respect, reliance was placed upon the decision of *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948(1) SA 839 A at 870 approved by the Supreme Court of Appeal in *Absa Bank Ltd v Mkhize and two similar cases* 2014(5) SA16 (SCA) at [59] where it was held that:

> ". . . *[S]ince the decision of this Court in Globe and Phoenix GM Company v Rhodesian Corporation (1932 AD 146) the test to be applied has appeared with some certainty, whatever difficulty must inevitably remain in regard to its application. From the judgments of Wessels and Curlewis JJA, the principle emerges that a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit" or, which amounts, I think, to the same thing, unless it "irreparably anticipates or precludes some of the relief which would or might be given at the hearing". The earlier judgments were interpreted in that case and a clear indication was given that regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit'.*

23. An interlocutory order is one "*pronounced by the court, upon matters incidental to the main dispute, preparatory to or during the progress of, the litigation*"(*South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549; *Betlane v Shelly Court CC*2011 (1) SA 388 (CC); *Ivanov v North West Gambling Board and Others* [2012] 4 All SA 1 (SCA)).

24. A distinction, however, is drawn between simple interlocutory orders, on the one hand, and interlocutory orders having a final and definitive effect, on the other, which are generally regarded as appealable. As was said in the *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd case (supra)* relied upon by the respondent, a "*simple*" interlocutory order is a preparatory or procedural order that does not "*dispose of any issue or any portion of the issue in the main action or suit*" or that "*irreparably anticipates or precludes some of the relief which would or might be given at the hearing.*"

25. It is trite that any rule or order made in a civil suit or proceeding and having the effect of a final judgment may be appealed against (*Durban's Water Wonderland (Pty) Ltd v Botha* [1999] 1 All SA 411 (A), 1999 (1) SA 982 (SCA); Ndlovu v Santam Ltd 2006 (2) SA 239 (SCA)).

26. However, even this distinction has become more fluid with the amendment to Section 18(2) of the Superior Courts Act, which now makes specific provision for appealing interlocutory orders not having the effect of a final judgment.

27. As Harms, Civil Procedure in the Superior Courts states:

> "*While the classification of the order might at one time have been considered to be determinative of whether it is susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle". Phillips v South African Reserve Bank* [2012] 2 All SA 532 (SCA), (221/11) [2012] ZASCA 38 (29 March 2012) at [26].

28. However, although the statement by Schreiner JA in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948(1) SA 839 A at 870 relied upon by the respondent was approved by Ponnan JA in *Absa Bank Ltd v Mkhize and two similar cases* 2014(5) SA16(SCA) at [59], the learned judge was at pains to point out that there was nothing to preclude the court from giving directions as to the further conduct of the matter and in particular as to the steps to be taken to comply with

section 129 before default judgment is proceeded with, which he found were purely interlocutory and would not be appealable. To my mind his comments are directly in point:

> *"[55] Section 20(1) of the Supreme Court Act 59 of 1959 creates a right of appeal to this court from a 'judgment or order' of the high court. Whether a decision is appealable has been the subject of detailed analysis in a number of cases over the years. A comprehensive re-examination of those cases would serve little purpose. The salient principles to be distilled from those cases appear in the judgment of Harms AJA in Zweni v Minister of Law and Order 1993 (1) SA 523 (A). It was said there (at 532J-533A) that a judgment or order is a decision which, as a general principle, has three attributes: first, the decision must be final in effect and not susceptible to alteration by the court that made it; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.*
>
> *[56] What served before the high court was an application for default judgment. A default judgment is a judgment entered or given in the absence of the party against whom it is made. Ordinarily it arises for consideration in consequence of a failure to enter an appearance to defend or where there has been a failure to file a plea. The high court was concerned with the former. It postponed the application for default judgment sine die (paragraph 1 of its order). Had the matter ended there, that order could not have been described as one having any of the attributes for appealability laid down in Zweni. The order went further however.*
>
> *[57] In paragraph 2 of its order the high court 'afforded [Absa] an opportunity to provide a notice to the defendant as contemplated in section 129(1) of the National Credit Act of 2005 through one or more of the mechanisms listed in paragraph 65(2)(a) of the Act, and also by registered post directed to the defendant's chosen address'. And, in paragraph 4, which to all intents and purposes is the logical corollary of paragraph 1, the high court granted Absa leave to, in due course, set down the application for default judgment on notice to the defendant. The remaining orders are ancillary orders and thus warrant no independent consideration.*
>
> *[58] There appear to be strong indicators in the judgment of the high court that the order that it proposed issuing was neither definitive of the rights of the parties nor intended to have the effect of disposing of any portion of the relief claimed in the main action. The high court held:*
>
> > *'[60] I conclude, accordingly, that in the three matters before me there has not been compliance with the procedures required by section 129 of the Act, as a result of which I must adjourn these matters and make appropriate orders as to the steps ABSA must complete before these matters may be resumed.*
> >
> > . . . .
> >
> > *[71] In the three cases before me I do not have all of the information I have referred to above. But given the exigencies of the occasion, I propose to work around that.*

. . . .

[77] I propose in these cases to leave all options provided by section 65(2) of the Act open. One or more of the other alternatives, including delivery by hand to the address (if not into the hands of the consumer), may be found more convenient, or more likely to generate a successful application to resume the proceedings, depending on the information available to ABSA concerning the consumers in question, and depending on the administrative capacity and manpower available to ABSA to service these matters.'

[59] To my mind paragraph 2 of the order, on which the present debate turns, did not render what would otherwise have been a non-appealable order (paragraph 1), appealable. For, it amounted to no more than a direction from the high court, before the main action could be entered into, as to the manner in which the matter should proceed. Being a preparatory or procedural order that was incidental to the main dispute, it fell into what has been described as the general category of 'interlocutory'. (my emphasis).

29. After quoting the statement by Schreiner JA *in Pretoria Garrison Institutes v Danish Variety Products (Pty), Limited supra* quoted above, Ponnan JA went on to add that the prior distinction between interlocutory orders, which are not appealable, and final orders, which are, is no longer significant:

[60] Of the term 'interlocutory' Corbett JA stated in South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 549:

> *'In a wide and general sense the term "interlocutory" refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation.'*

Corbett JA added:

> *'But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper", which do not. . .'*

That distinction, according to Harms JA (Zweni at 534B-D), is now of little consequence. He explains that 'the practical implication of s 20(1) is that the real distinction is between a "judgment or order" on the one hand and a decision (conveniently called a "ruling") which is not. It is no longer necessary or conducive to clear thinking to consider, in this context, whether a decision is a simple interlocutory order'.(my emphasis)

30. With this in mind, the learned judge considered the facts before him and held:

[61] In the present case the 'main suit' or 'main action' is Absa's claim. An order such as that in paragraph 2 is, I conceive, a 'preparatory or procedural order' which does not bear upon or in any way affect the decision in the main action. In Tropical (Commercial & Industrial) Ltd v Plywood Products Ltd. 1956 (1) SA 339 (A) at 344 Centlivres CJ held:

> *'As the order made by the trial Judge "decided no definite application for relief" and was merely a direction as to the manner in which the case should proceed it was not an order in the legal sense, vide Dickinson's case, supra. Not being an order in the legal sense, it was not an order which fell within the meaning of the words "judgment or order" in sec. 2 (c) of the Act.'*

In Dickinson & another v Fischer's Executors 1914 AD 424, which is referred to with approval by the learned Chief Justice, Innes CJ stated (at 427):

> *'But every decision or ruling of a court during the progress of a suit does not amount to an order. That term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but the Court must be duly asked to grant some definite and distinct relief, before its decision upon the matter can properly be called an order. A trial Court is sometimes called upon to decide questions which come up during the progress of a case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin: the Court decides it, and the hearing proceeds. But that decision, though it may be of considerable practical importance, is not an order from which an appeal could under any circumstance lie, apart from the final decision on the merits.'*

[62] In this matter the high court is yet to delve into the merits of the case or pronounce on Absa's entitlement to judgment. That remains for another day. To that end Absa has been granted leave to set down the application for default judgment on notice to the defendant. All that has occurred for the present is that, not being satisfied with the service effected by Absa, the high court has directed that certain further steps be taken. It has not been suggested that those additional steps are so onerous as to bar Absa from obtaining default judgment in due course. In that, Lewis JA and I appear to be at one. For, implicit in my learned colleague's dismissal of Absa's appeal on the merits, seems to me to be an acceptance that Absa can indeed comply with paragraph 2 of the high court's order and in due course move it for judgment.

[63] The order does not amount to a refusal of default judgment, nor does it directly bear upon or dispose of any of the issues in main action, it thus cannot be said that it is tantamount to a dismissal of Absa's action (contra Durban City Council v Petersen 1970 (1) SA 720 (N) at 723). It may be that the order of the high court causes Absa some inconvenience but as Harms AJA, with reference to South Cape Corporation supra, pointed out (Zweni at 533B-C): 'The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability'.

[64] Accepting that this order is appealable could result in a situation where virtually every refusal to enter default judgment, including those for want of proper service, would be appealable. That 'would indeed open the door to the "fractional disposal" of actions and the "piecemeal hearing of appeals"' (Levco Investments (Pty) Ltd v Standard Bank of SA Ltd 1983 (4) SA 921 (A) at 928H). In seeking and obtaining leave to appeal to this court, no consideration was given by Absa or the high court as to whether the order was indeed appealable. Thus the fact that the

high court granted leave carries the matter no further, since its power to do so arises only in respect of 'a judgment or order' within the meaning of that expression. In truth the matter was approached as if an appeal lies against the reasons for judgment. It does not. Rather, an appeal lies against the substantive order made by a court. (Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 355.)

[65] It follows in my view that as the order of the high court is not 'a rule or order having the effect of a final judgment' within the meaning of that expression, this court lacks jurisdiction to entertain the appeal. I am thus constrained to hold that the appeal must be struck off the roll with costs."(my emphasis)

31. Accordingly, when viewed in context, the approval by the Supreme Court of Appeal of the statements of Schreiner JA, far from supporting the argument advanced by the respondent, served to refute it. What the applicant seeks in this case is to have the court make a determination as to the validity of the prior notice in the current proceedings and in the event that it is found that the prior notice was is not valid, to seek directions as to the further conduct of the matter similar to those given by the court *a quo* in the aforementioned matter which would not be appealable as it would not be dispositive of a substantial issue in the main action.

32. In the circumstances, I do not believe that the fact that the issue of non-compliance with the NPA was not an issue in the pleadings in the *Phiri matter*, in any way distinguishes it from the current situation and either way, this court, is empowered to make an determination as to the validity of the section 129 notice and give directions as to the adjournment of the proceedings and the service of the notice prior to the matter being permitted to resume. I thus agree with and am bound

by the approach taken by the North Gauteng High Court in the aforementioned matter.

33. In any event, in so far as it is contended that any declarator made or directions given would in effect be dispositive of an issue on the pleadings where the validity of the prior notice is challenged, there is nothing to preclude the court from considering an issue on the pleadings ahead of the trial where this would be convenient.

34. In effect the Court is asked to make a determination of the matter on a separated issue in advance of the hearing to ensure that should the applicant's contentions be found to be wrong concerning the validity of the prior notice, it can remedy the defect prior to the hearing as contemplated in section 130 and avoid the unnecessary postponement of the matter on the date of the trial.

35. I believe that the fallacy in the respondent's argument is that only the trial court can decide issues defined in the pleadings and the parties may not approach the court prior to the hearing to seek make a finding of an issue on the pleadings or give directions which would be definitive and final in effect. The parties often do so and indeed, the court in so-called "*interlocutory proceedings*" often do make orders that are final in effect which are, because of this, appealable. One need only consider an application to determine a special plea ahead of a trial (*Labuschagne v Labuschagne; Labuschagne v Minisiter van Justisie*

1967 (2) SA 575 (A);*Smit v Oosthuizen* 1979 (3) SA 1079 (A); *Constantia Insurance Company Ltd v Nohamba* 1986 (3) SA 27 (A); *Carolskraal Farms (Edms) Bpk v Eerste Nasionele Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A) at 415B -416D) or separately determine an issue on the pleadings that would dispose of the need to determine the other issues (*Van Streepen &Gems (Pty) Ltd Transvaal Provincial Administration 1987(4) SA 569 (A); Marsay v Dilley* 1992(2) SA 944 (A); *SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992(2)SA786 (A) at 792C-H) or to consider an exception to a pleading which would, if upheld, be final in effect and appealable (*Elgin Brown and Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 (3) SA 424 (A); *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 289 I-J).

36. Indeed, should a party not take an exception upfront and wait for the trial court to decide the issue, even if the exception is upheld, that party may be penalized for unnecessarily incurring trial costs that should properly have been avoided. Similarly, where an issue decisive of the matter could be separated out and determined upfront, where a party fails to do so, it could also be penalized for unnecessarily incurring trial costs on the other issues that, by virtue of such a finding, did not need to be decided.

37. These procedures, aimed at the efficient administration of justice, entitle the parties to approach the court in advance of the hearing for

declaratory relief, to determine whether the claim is valid in law or a separated issue and thereby avoid the unnecessary incurrence of costs.

38. It is trite that in terms of Rule 33(4) an application for separation and to determine a separated issue may be made prior to the trial on notice, setting out the grounds for it *(Sibeka v Minister of Police* 1984 (1) SA 792 (W)).

39. Although the respondent contends that the issue of the validity of the prior section 129 notice may not be determined as a separated issue as no formal application for separation has been brought, the court may order a separation *mero motu*, without an application from any party where the Court deems it to be convenient to do so (*Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds* 1998 (4) SA 466 (C); *Berman & Fialkov v Lumb* [2002] 4 All SA 432 (C),2003 (2) SA 674 (C) par 17; *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C) 427).

40. Indeed, Rule 33(4) as presently formulated provides that an application for separation made by any party must be ordered unless it appears that the questions cannot conveniently be decided separately.

41. The word '*convenient*' in the context of the sub-rule is not used to convey the notion of facility, or ease, or expedience. As Harms *op cit* puts it:

> "*[i]t appears to be used to convey the notion of appropriateness; the procedure would be convenient if, in all the circumstances, it appeared to be fitting, and fair to the parties concerned*".

42. As to what convenient means, the following quotation is instructive, although it dealt with the rule in its initial form:

> "*The basis of the jurisdiction is convenience – the convenience not only of the parties but also of the Court. The advantages and disadvantages likely to follow upon the granting of an order must be weighed. If overall, and with due regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantages would outweigh the disadvantages, the Court would normally grant the application. When deciding an application under the sub-rule, the Court is not called upon to give a decision on the merits. But it must consider the cogency of the point concerned, because unless it has substance a separate hearing would be a waste of time and costs. So, the Court should not grant an application for a separate hearing "unless there appears to be a reasonable degree of likelihood that the alleged advantages would in fact result*". (see: *S v Malinde* [1990] 4 All SA 45 (A), 1990 (1) SA 57 (A) 68)

43. Thus, even if the relief sought is not regarded as strictly speaking interlocutory because it is an issue on the pleadings (which I refute), in my view it is convenient that this issue be separately determined. Although section 33(4) was not expressly invoked, I agree with the applicant that the application brought is pre-emptive in nature and the Court is entitled to invoke the provisions of section 33(4) *mero motu* where this is convenient.

44. I can see no prejudice to the respondent in determining this issue upfront. The respondent has not disputed proper delivery of the prior notice as required in terms of section 129(5) of the NCA and the Constitutional Court in *Sebola v Standard Bank of South Africa Limited* 2012 (5)SA142 (CC) ; on the contrary I am told that he admitted receipt of the prior notice under oath in his application for rescission of the default judgment that had been granted pursuant to the prior action (which is not before me) and has implicitly admitted receipt of the notice in paragraph 25.2.1 of his plea in the current matter. As the respondent has not denied proper delivery of the notice, the issue of its validity is simply one of law for which no oral testimony is necessary. And even if the respondent's general denial of these averments in paragraph 25.1 of his plea can be construed as denying receipt of the prior notice when read with paragraph 25.2, that issue would be academic should the Court direct that a new notice be sent to the respondent, which is what I propose to do.

45. It must be remembered that it is incumbent upon the courts to protect both the rights of a debtor, but also those of a creditor against a recalcitrant debtor seeking to delay the matter. Justice delayed is justice denied and I am in agreement that it seems a little pointless to require the applicant to await the hearing where the court would be required to consider the question of the validity of the prior 129 notice upfront before the hearing could continue, where another Court could equally as well determine this issue.

46. I intend therefore, to consider the validity of the prior notice both for the purposes of considering the declaratory relief sought and, in the event that the prior notice is found to be bad, to consider the alternative relief sought.

47. Although the respondent has also contended that its dispute as to the validity of the prior notice goes beyond the question as to whether the notice served in the prior action serves as sufficient compliance with the mandatory provisions in section 129 of the NCA and also goes to the quantification of the amount claimed which can only be determined by the trial court after hearing oral testimony and cross-examination on this issue, I do not believe that this is a bar to my determining the validity of the prior notice.

48. The respondent contends that the validity of the prior notice can only be properly determined by the trial court because the notice is not only a notice in which the respondent's rights are required to be set out, but is also a statement of the extent of his indebtedness which, so it is argued, it is implicit in section 129 must be a true and accurate reflection of such indebtedness which can only be determined by the trial court.

49. I do not agree. The fact that the respondent has disputed the accuracy of the amount sought in the notice and the interest rate charged is not a basis for challenging the validity of the notice; it is a defence that he can

raise at the trial by disputing the amount sought. Upholding the validity of the notice would in no way prejudice his right to dispute the amount claimed and to lead oral evidence thereon at the trial.

50. However, I believe that a notice that does not set out the full amount of the arrears prior to the institution of the action would not be sufficient as it would preclude the respondent from exercising his rights to pay the arrear amount set out in the notice and thereby reinstate the agreement under section 129(3), which is an aspect that I will deal with below.

THE VALIDITY OF THE PRIOR NOTICE

51. The plain intent of section 129 is to facilitate dispute resolution without recourse to the Courts and it has been accepted by the Courts that despite the fact that the section has been poorly drafted with section 129 using the word "*may*", suggesting that the sending of a section 129 notice may not be obligatory, because of the prescriptive nature of section 130 prescribing that the matter shall not continue unless such a notice is sent, it has been accepted by the courts that this is a mandatory requirement before any action to enforce a credit agreement may be taken or proceeded with (*Nedbank Ltd v The National Credit Regulator and Another supra* at para [8]) .

52. I agree with the applicant that a notice in accordance with section 129 "*is not related to a particular case number but rather to a specific cause*

of action and precedes the institution of action and perforce, a case number". However, the difficulty, as I see it, in allowing the applicant to rely on the prior notice in respect of proceedings launched some 18 months later is not so much one of waiver, as argued by the respondent (which I will deal with separately), but rather whether such notice can in reality achieve the purpose and intent of the NCA not only to engage the services of a debt counsellor to facilitate the consensual resolution of the matter without recourse to the courts, but also to afford the debtor the opportunity to reinstate the credit agreement by paying the arrears and reasonable costs due.

53. This latter right, although not focused on by the respondent, was the subject of a recent Constitutional Court judgment in *Nikata v Firstrand Bank Limited and others* (CCT73/15) [2016] ZACC 12; 2016 (6) BCLR 794 (CC); 2016 (4) SA 257 (CC) (21 APRIL 2016), to which I was not referred by counsel as I assume it was not yet reported.

54. In terms of section 129(3), the consumer is entitled to pay the arrears and thereby reinstate the agreement and prevent the invocation of the acceleration clause in the agreement. As 18 months have elapsed since the last notice was sent, the arrears would have substantially increased since the sending of the last notice where interest is capitalized as is the norm with credit agreements. This means that the payment of the arrear amount of R49 590.72 reflected in the prior notice (together with costs) would in no way enable the respondent to reinstate the

agreement and avoid the invocation of the acceleration clause in the agreement. The respondent is substantially prejudiced hereby as the certificate of balance currently relied upon reflects the total outstanding balance and not the arrears due as at the date of reinstitution of the action.

55. Whilst the debate whether the respondent would also have to pay the costs incurred by the applicant in seeking enforcement of the agreement is not relevant to the current matter, the Courts interpretation of the purpose of the NCA in the *Nkita matter (supra)* is instructive. Cameron J stated that:

> *"[53] I have had the benefit of reading the judgment of my colleague, Moseneke DCJ. We agree on this fundamental premise: in interpreting section 129(3), we must bear in mind the NCA's aims. The statute tells us what they are, and how they are to be achieved. It aims to protect consumers by "promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers". We also agree that the statute's express objectives mean that the correct interpretation of section 129 is one that strikes an appropriate balance between the competing interests of parties to a credit agreement. That is what this Court has previously held.*(I have omitted the references in this extract and in the further extracts from the judgment quoted hereafter.)

56. Cameron J went on to explain that the main purpose of section 129 was to avoid the harsh consequences of the invocation of acceleration clauses found in most credit agreement stating that:

> *[59] Historically, creditors to whom properties were mortgaged were entitled contractually to refuse late payment of home loan instalments. Only payment of the full outstanding accelerated amounts (not just the arrears) would save a mortgagor's property. Section 129(3) has drastically changed this. Justly so. It offers a consumer in dire circumstances a lifeline. It spares consumers the harshness of that era of debtor-unfriendly laws. It protects consumers who face the sale in execution of their properties by allowing them to reverse the credit*

provider's election to foreclose. But it does so on conditions. The consumer must fulfil the requirements for reinstatement. Simply bringing arrear bond instalments up to date is not enough.

[60] The provision is specifically designed to counter the harsh effects of an acceleration clause. It makes good sense – and just sense – for the consumer to bear the responsibility of initiating the process and taking the necessary steps, including those required to pay the enforcement costs. There is no suggestion that the Bank was obstructive or tried deliberately to frustrate reinstatement. There is no good reason to exonerate Ms Nkata from the responsibility the statute places on her and instead impose it on the Bank.

[61] This approach does not render the statute's protection of consumers nugatory – it simply sustains the balance the statute itself imposes. So whilst I agree with Moseneke DCJ, that the statute must be interpreted purposively and contextually, a degree of caution must be exercised in doing so. That much we decided in Kubyana:

> *"[L]egislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. 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." (footnotes omitted)*

[62] The purposes of the NCA are manifold. While it aims to correct imbalances by providing additional rights and protections to the consumer, it also aims to ensure that South Africa's credit market becomes and remains "competitive, sustainable, responsible [and] efficient". Sections 3(c) and (g) outline the importance of "responsible borrowing", the "fulfilment of financial obligations by consumers", and "discouraging . . . contractual default by consumers". These provisions signal that the legislation must be interpreted without disregarding or minimising the interests of credit providers.

[63] To borrow the words of Mhlantla AJ in Kubyana:

> *"It deserves re-emphasis that the purpose of the [NCA] is not only to protect consumers, but also to create a 'harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements'." (Emphasis in original and footnote omitted.)*

[64] In addition—

> *"[o]ne of the main aims of the [NCA] is to enable previously marginalised people to enter the credit market and access much needed credit. Credit is an invaluable tool in our economy. It must, however, be used wisely, ethically and responsibly. Just as these obligations of ethical and*

responsible behaviour apply to providers of credit, so too to consumers. . . The notion of a 'reasonable consumer' implies obligations for both credit providers and consumers." (footnotes omitted)

57. In a separate dissenting judgment Moseneke J also dealt with the purpose of the NCA and stated:

[92] It is now expedient to undertake the interpretive task. As I do, I acknowledge that my approach has drawn generously from the cogently reasoned judgment of the High Court. But first, I remind myself of the overarching objects of the Act and the narrower purpose of section 129(3) and what it lays down.

[93] Section 2 of the Act, somewhat redundantly, enjoins us to interpret the provisions of the Act in a way that gives effect to its purposes. The purposes are described in section 3. They are optimistic but sometimes in tension. They are about credit markets made up of credit providers and consumers of credit. Section 3 makes the point that the legislation is meant to advance both "social and economic welfare". It hopes to find a balance between the rigour of an "efficient, effective and accessible credit market and industry", often driven by profit, and measures "to protect consumers" propelled by social good. It places a premium on "sustainable market conditions", but also helps access to credit. For now, I single out two poignant purposes—

"(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

(e) addressing and correcting imbalances in negotiating power between consumers and credit providers."

[94] The Act seeks to infuse values of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate. Unlike in the past, the sheer raw financial power difference between the credit giver and its much needed but weaker counterpart, the credit consumer, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities. Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. But the human condition suggests that it is not always possible – particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes do. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution.

[95] On what I have just expressed, I am in good company. This Court has before expressed itself on the purposes of the Act. In Sebola, in the context of section 129(1)(a) of the Act, Cameron J observed that at the core of the Act is the objective to protect consumers. This protection, however, must be balanced against the interests of credit providers and should not stifle a "competitive, sustainable, responsible, efficient [and] effective . . . credit market and industry". The Act, the Court noted, replaces the apartheid era legislation that regulated the credit market, and infuses constitutional considerations into the culture of borrowing and lending between consumers and credit providers.

[96] The purposes of the Act are directly attributable to the constitutional values of fairness and equality. Sebola recognised that the Act is at pains to create a credit marketplace that agrees with our constitutional democracy both through its purpose – to promote "a fair . . . marketplace for access to consumer credit" – as well as through the means that ought to be adopted to achieve these goals. The tools for achieving the Act's purposes include the promotion of "equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers", and the development of "a consistent and accessible system of consensual resolution of disputes arising from credit agreements". In sum, the Act is "a clean break from the past" and encourages dialogue between consumers and credit providers.

[97] Kubya sought to clarify the interpretation of section 129(1) that was adopted in Sebola and had been understood and applied in conflicting ways in other courts. It relied on Sebola to make the point that the provision aspires "to facilitate the consensual resolution of credit agreement disputes".

[98] In Ferris, the issue was whether a credit provider could enforce, without further notice, a credit agreement once the consumer breached a debt restructuring order in terms of section 86(7)(c)(ii) of the Act. The Court recognised that Sebola stressed the means to be employed in order to achieve the purposes of the Act. It held that the good faith negotiations required by section 86(5) in an application for debt review were aimed at the parties reaching an agreement before the need for a debt restructuring order. Once the order had been granted, then the requirement for negotiations set by section 86(5) became superfluous.

58. Nugent AJ also expressed similar sentiments in a judgment concurring with Cameron J:

"[141] When home loans are made against the security of a mortgage bond, the agreement generally requires the borrower to repay the loan, with compounded interest, in monthly instalments. If the borrower fails to pay an instalment the full amount then outstanding becomes repayable to the bank. Unless new arrangements are made with the bank it can be expected that the borrower will not be able to repay the debt and the process for recovery will be set in motion. Demand will be made, summons will be issued, judgment will be taken, a writ of execution will be issued, the property will be attached, and ultimately it will be sold. At each point in that process the bank will incur costs of various

kinds. That was the form of the agreement in this case and those were the consequences that followed upon default.

[142] For good reasons eloquently expounded by my colleagues, section 129(3) of the Act makes inroads upon the ordinary right of the bank to recover the loan upon default. The borrower may at any time – from the time the default occurs right until the eve of the sale – interrupt the process and restore the earlier position. To do so he or she must fulfil three conditions: (i) all amounts overdue (the instalments required to have been paid by that time) must be paid; (ii) the bank's permitted default charges (if any) must be paid; and (iii) the reasonable costs incurred by the bank until then in enforcing the agreement (if any) must be paid.

[143] I agree with my colleagues that fulfilment of the conditions need not be communicated to the bank. All that is required is that they must be fulfilled, whereupon the agreement is automatically reinstated by operation of law, by which is meant the position before default is restored.

[144] The section affords powerful protection to borrowers who fall into temporary distress (or carelessness) at any time until the loan is repaid. But it requires the borrower to comply with its conditions if he or she is to have that protection. The language in which the conditions have been expressed is straightforward, and I see nothing, in the context or its purpose, not to construe it for what it says."

59. Bearing these sentiments in mind, it would be wrong to deprive the respondent of an important lifeline that would enable him to avoid the consequences of his default and I am inclined to direct that a new section 129 notice be sent to the respondent.

60. I am aware that the applicant avers that the objections raised by the respondent are but delaying tactics and that he does not in fact wish to avail himself of the substantial remedies afforded to him by section 129. It points out that no attempt was made by the applicant to avail himself of the available remedies when the prior notice was served and he has steadfastly refused to avail himself of these remedies although they have repeatedly been tendered to him. However, the respondent's stance has not been that he does not want to avail himself of these

remedies but rather that he is precluded by virtue of the provisions of section 86(2) from doing so now that a section 129 notice has been dispatched and summons has been served on him.

61. As I will demonstrate below, that difficulty has now been cured by the amendment to section 86(2) when read with the findings of the Supreme Court of Appeal in *Nedbank Ltd v The National Credit Regulator and Another (supra)*. It is thus hoped that the respondent will avail himself of his rights to seek the assistance of a debt counsellor to negotiate a way forward with the applicant or take steps to pay the arrears owing together with the requisite costs to reinstate the agreement. Because this will play out before the trial, should the respondent not avail himself of his rights or have no intention of doing so, he will not be permitted to delay the trial.

62. This serves as another cogent reason for having this issue determined in advance of the trial as it has been fully appreciated by the Constitutional Court that whilst the NCA affords considerable protection to consumers, this is not at the expense of the rights of credit providers to be paid and the Act should not be used as a mechanism by dilatory consumers to avoid or delay having to pay their debts.

WAIVER

63. The respondent argues that as the summons in the original action was a nullity one can only look at the summons in the current action issued some 18 months later. As there is an inherent assumption that the summons will be issued within a reasonable time after the issue of the notice, so the argument goes, the applicant has waived its right to rely upon the notice to enforce the agreement as, like in the case of a breach of contract, the applicant must exercise his rights within a reasonable time. (*Becker v Sunnypine Park(Pty) Ltd* 1982 (1) SA 958 W at 962 D/E-965C)

64. Because I have found that the prior notice is not valid for the reasons set out above, it is not strictly necessary for me to decide the issue of waiver. Nevertheless, I do not accept the respondent's argument. Firstly, the issuing of the notice is evidence of the applicant's intention to exercise its rights to enforce the credit agreement. It did not by withdrawing the action indicate that it no longer wished to exercise its rights; its abandonment of the judgment did not evince an intention not to enforce that right but rather an acceptance that the service of the summons may not have been valid.

65. Why it took 18 months for the applicant to again seek to enforce the agreement is not clear but the only restriction in section 129 is that a creditor is precluded from enforcing a credit agreement for 10 business

days after issuing the requisite notice to avail the debtor if an opportunity to avail himself of his rights set out in such notice. A delay in enforcing a right does not per se amount to a waiver. (*Zuurbekom Ltd v Union Corp Ltd* [1947] 1 All SA 319 (A), 1947 (1) SA 514 (A);*Mahabeer v Sharma NO* 1985 (3) SA 729 (A)).

66. However, I do believe that there is some merit in the contention that to be meaningful, the notice should be current and a notice delivered on 29 May 2012 may not be meaningful in respect of an action instituted in November 2014, particularly with regard to the amount of the arrears which if paid, would entitle the respondent reinstate the agreement and avoid the invocation of the acceleration clause as aforementioned.

67. What remains to consider, therefore, is whether, having found that the prior notice does not constitute sufficient compliance with section 129, the court is permitted to enable the applicant to cure this defect by reissuing a section 129 notice as contemplated in section 130(4) in view of the provisions of section 86(2) . I will demonstrate that this argument is without merit in view of the amendment to section 86(2) and the view expressed by the Supreme Court of Appeal in the matter of *Nedbank Ltd v The National Credit Regulator and Another (supra)*.

SEPARATION OF POWERS AND CONSTITUTIONALITY OF SECTION 129 WHEN READ WITH SECTION 86(2) OF THE NCA

68. The main argument raised by the respondent to the issuing of a new notice is that this would not help as once a notice has been issued and a summons served, as in this case, the respondent is *ipso facto* precluded from exercising his rights as set out in such notice. This was based upon the original wording of section 86(2) which provided that a debtor may not avail himself of debt review if the credit provider has proceeded to take steps contemplated in section 129 to enforce the agreement. The respondent argues that this means that once the section 129 notice is issued, (or alternatively in the event that, that notice is not found to be valid, summons is issued), the debtor is from that moment precluded from seeking debt review. Thus, regardless of the provisions of section 130(4)(b)(i) requiring that the proceedings to be adjourned to afford the debtor an opportunity to seek debt review (which, it is argued, can be the only purpose for requiring that the notice be issued) this can be of no consequence as the issuing of the notice itself constitutes the first step in enforcement of the credit agreement which then precludes debt review.

69. Alive to this difficulty the courts have hitherto tried to fashion their orders under section 130(4)(b)(ii) to declare that despite the wording of section 86(2) and the issuing of the summons, the debtor's rights set out in the notice remain unaffected. In this respect reference is made to

the orders made in *Mkhize* (supra) and *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 (5) SA 569 (WCC) which stipulated that in addition to meeting the requirements of section 129(1) (a) of the NCA, the notice required to be served must also draw the debtor's attention to the fact that "*the defendant's rights in terms of the Act and in particular those contemplated in section 129(1) (a) are unaffected by the fact that action has already been instituted,* " (as stated in *Mkhize (supra)* at para [38]) or that "*the defendant's rights in terms of the Act remain unaffected by the above direction*" (as stated in *Binneman (supra)* at para [13]).

70. The respondent's counsel argued that in making such orders, the Courts were in effect seeking to amend the legislation, which, by virtue of the separation of powers enshrined in the Constitution, the courts are not permitted to do; legislation can only be amended by the legislature.

71. Whilst I have a great deal of sympathy for the pragmatic approach taken by the Courts to deal with the apparent lacuna in the Act, I agree with the respondent's counsel that the aforementioned discretion would not encompass making directions purporting to confer substantive rights on the consumer to seek debt review within a period of 10 business days before the matter may be resumed which are in direct conflict with section 86(2).

72. The respondent's argument and these judgments, however, in this regard was prefaced upon the wording of section 86(2) prior to its amendment which now no longer refers to section 129 but rather to section 130.

73. Prior to its amendment effected by the National Credit Amendment Act 19 of 2014, it appeared that the debt review process, which, prior to the decision of the Supreme Court of Appeal in *Nedbank Ltd v The National Credit Regulator and Another (supra)* was viewed by some as being akin to that envisaged in section 129, was available only where steps had not been taken to enforce the debt. Because the serving of a section 129 notice was seen as the first mandatory step required in seeking to enforce a debt, there seemed little point in informing a debtor of his rights set out in section 129 as, as soon as the notice was served, he was deprived of these rights by the wording of section 86 (2). There also seemed little point in adjourning the proceedings in terms of section 130(4)(b) to ensure that such a notice be given so that the debtor was not deprived of his rights where the fact that summons had been issued, meant that the debtor had already been deprived of his rights to debt review.

74. Prior to the decision of the Supreme Court of Appeal in *Nedbank Ltd v The National Credit Regulator and Another (supra)*, this was the subject of much debate by the provincial divisions of our Courts. In *Nedbank v Motaung* [2007] ZAGPHC 367 (14 November 2007) the court

interpreted section 86(2) as meaning that once a section 129(1)(a) notice had been sent to the debtor, he was debarred from seeking debt review and in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009(2) SA 512 D at 519D, it was held that once a section 129 notice had been sent, the consumer was precluded by section 86(2) from applying to a debt counselor to be declared over-indebted. (See also *Standard bank of South Africa v Hales* 2009(3) SA 315 D.)

75. In an attempt to get over this difficulty, the parties in *National Credit Regulator v Nedbank Ltd and others* 2009(6) SA 295 (GNP) agreed that the court should make an order to the effect that the reference in section 86(2) to the taking of a step in terms of section 129 to enforce a credit agreement is a reference to the commencement of legal proceedings mentioned in section 129(1)(b) and does not include steps taken in terms of section 129(1)(a) to serve the requisite notice. This was to make it clear that the delivery of a section 129(1)(a) notice does not constitute a bar to debt review as contemplated in section 86(2).

76. However Du Plessis J declined to make such an Order finding that, while section 129(1)(a) envisages alternative dispute resolution and a plan to bring the arrears up to date, it does not envisage general debt restructuring under sections 86 and 87 (at para 43). He also found that in any event, even steps in terms of section 197(1)(a) are preliminary to debt enforcement and thus was not satisfied that the parties were correct in their interpretation.

77. The Supreme Court of Appeal agreed and made it plain that once a section 129 notice is served in respect of the particular debt sought to be enforced, this precludes debt review in respect of that debt but does not preclude the debtor seeking debt review in respect of the debtor's other debts (*Nedbank v The National Credit Regulator (supra)).*

78. In this respect the Supreme Court of Appeal stressed that it is important to distinguish the rights that a creditor has in terms of section 129 from those conferred upon a debtor to seek debt review of his entire indebtedness under sections 85 and 86 which seeks, not only to resolve the debtors difficulties with regard to the agreement sought to be enforced, but rather, his entire financial situation.

79. The court explained that the purpose of the section 129 notice is markedly different from the debt restructuring contemplated in section 86 and 87. Section 129 is designed to afford the debtor the opportunity to resolve the dispute or to develop a plan to remedy his default of a specific credit agreement prior to the enforcement of the agreement and thereby avoid the risk of a judgment being granted against him; it does not contemplate a general debt restructuring as envisaged by sections 86 and 87 of the NCA. (See also *BMW Financial Services (SA) Pty ltd v Mudaly* 2010(5)SA 618(KZD) para 12; *BMW Financial Services (SA) Pty ltd v Donkin* 2009 (6) SA 63 (KZD) par 10; *National Credit regulator v Nedbank Ltd and Others* 2009(6) SA 295 (GNP) 319A which had expressed a similar view.)

80. In dealing with Du Plessis J's refusal to grant the declaratory relief sought, Malan JA stated as follows:

> *[7] The question posed by the Credit Regulator has been and still is the subject of considerable academic debate. Boraine and Renke remarked that '[t]o interpret s 86(2) to read that the delivery of the s 129(1)(a) notice to the consumer means that the credit provider has proceeded to take steps to enforce the agreement (with the effect that no application for debt review may be made) would be nonsensical as it is proposed in the s 129(1)(a) notice that the consumer refer the matter to a debt counsellor'.*
>
> *[8] Despite the use of the word 'may' in s 129(1)(a) the notice referred to therein is indeed a mandatory requirement prior to litigation to enforce a credit agreement This is apparent when the subsection is read with ss 129(1)(b) and 130(1). Section 129(1) has been described as a 'gateway' or 'new pre-litigation layer to the enforcement process'. Delivery of the s 129(1)(a) notice was said to be a compulsory step 'devised by the legislature in an attempt to encourage parties to iron out their differences before seeking court intervention' As such it was said to give effect to the object of the NCA set out in s 3(h) by encouraging 'a consistent and accessible system of consensual resolution of disputes arising from credit agreements', and as such it is also consistent with s 3(i). This construction is the subject-matter of the appeal by the Credit Regulator. It is not only the subject of the academic debate referred to but also of conflicting decisions. An analysis of the relevant provisions is thus required.*
>
> *[9] The notice required by s 129(1)(a) refers to a specific credit agreement in respect of which the consumer is in default. It must 'propose' that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud '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'. The s 129(1)(a) notice deals with one credit agreement only and seeks to bring about a consensual resolution relating to that agreement. It does not contemplate a general debt restructuring as envisaged by ss 86 and 87. As was stated by Wallis J in Mudaly's case, '[t]he proposal is directed at achieving a situation where the consumer and the credit provider, through the agency of the debt counsellor, negotiate a resolution to the consumer's particular difficultiesunder a particular credit agreement. It is a consensual process, the success or failure of which will depend upon whether the parties can arrive at a workable basis upon which to resolve the issues caused by the consumer's default.'*
>
> *[10] The scope of s 86, on the other hand, is general and deals with an application by a consumer to be declared over-indebteded. It is concerned with the obligations under all the credit agreements to which he is a party. A consumer is over-indebted if the preponderance of the available information at the time the determination is made, indicates that he will be unable to satisfy in a timely manner all his obligations under all the credit agreements to which he is a party having regard to his financial means, prospects and obligations and the probable propensity to satisfy them in a timely manner, as is indicated by his history of debt repayment. The application to be declared over-indebted or, as it is referred to in the heading of s 86, for debt review, is made to a debt counsellor. The outcome of this application may be an order of the magistrates' court declaring one or more of the credit agreements reckless or rearranging one or more of the consumer's*

obligations. As I have said, the notice envisaged by s 129(1)(a) is specific and refers to a particular credit agreement calling on the parties to resolve their dispute and agree on a plan to bring the payments up to date. It is not directed at a declaration of over-indebtedness at all.

[11] Section 86(2) states that an application for debt review 'may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in s 129 to enforce that agreement'. The section thus contemplates a debt review under which a specific credit agreement may be excluded. But even if a particular credit agreement falls outside the scope of debt review a court may, nevertheless, as provided for by s 85, in any court proceedings 'in which a credit agreement is being considered' and in which it is alleged that the consumer is over-indebted, refer that matter to a debt counsellor for evaluation and a recommendation in terms of s 86(7) or declare that the consumer is over-indebted and make any of the orders contemplated in s 87. Moreover, a court may also, in terms of s 83(1), in proceedings where a credit agreement is being considered, declare it to be reckless and make any of the orders provided for in s 83(2) and (3).

[12] Section 86(2) uses the words 'has proceeded to take the steps contemplated in section 129 to enforce that agreement'. 'Enforce', it seems, includes a reference to all contractual remedies including cancellation and ancillary relief and means the enforcement of those remedies by judicial means. This seems to be the meaning of the word where it is used in Part C of Ch 6. Section 129 itself is entitled 'Required procedures before debt enforcement' and s 129(1)(b) expressly provides that legal proceedings may not be commenced 'to enforce' the agreement before certain requirements are met.

[13] The language of s 86(2), particularly the plural 'steps contemplated in section 129' to enforce the agreement, was considered by Wallis J in Mudaly's case,who opined —

> *'(t)hat seems incompatible with it merely requiring the giving of notice under s 129(1)(a), both because that is a single step and because it is not a step directed at enforcing the agreement, but at resolving the problem occasioned by the consumer's default. Consistently with the language used, this must then be a reference to s 129(1)(b), which refers to both the giving of notice and meeting the requirements in s 130.'*

In his view the relevant provision referred to in s 86(2) is s 129(1)(b) since that elucidates the use of the plural 'steps'. However, he held that there was nothing in s 129(1)(b) to suggest that these steps included the commencement of legal proceedings. The steps, he said, required by s 129(1)(b) prior to legal proceedings being commenced include the giving of notice in s 129(1)(a); the giving of notice to terminate a debt review in terms of s 86(10); and meeting the further requirements of s 130. The latter includes the lapse of certain time periods, followed by the failure of the consumer to remedy the default or his not responding to the notice or rejecting the credit provider's proposals. Furthermore, where the credit agreement is an instalment agreement, secured loan or lease the credit provider may seek an order enforcing the remaining obligations under the agreement if the property has been sold and the net proceeds were insufficient to discharge all the consumer's obligations.

[14] I do not agree with these conclusions. One of the objects of the NCA is the provision of a consistent and accessible system of consensual dispute resolution. A notice in terms of s 129(1)(a), however, does not exclude the resolution of a dispute relating to a specific credit agreement in this manner. The purpose of a s 129(1)(a) notice is the resolution of a dispute and the bringing up to date of payments under a specific credit agreement. While it is a 'step' prior to the

commencement of legal proceedings it is also the first 'step' the credit provider 'has proceeded to take . . . to enforce that agreement' (s 86(2)). It does not exclude a debt review save insofar as it relates to the particular credit agreement under consideration. Nor does it exclude a general debt review pursuant to ss 83 and 85. Key to the construction of s 86(2) are the words 'has proceeded to take the steps' used in s 86(2). A 'step', amongst its meanings, includes 'an action or movement which leads to a result; one of a series of proceedings or measures'. To 'proceed' means 'to go on with an action' and also 'with stress on the progress or continuance of the action' to 'go on or continue what one has begun; to advance from the point already reached'. By the use of the words 'has proceeded' and 'steps' an ongoing process is indicated of which the s 129(1)(a) notice is the first 'step'.It is the only step expressly mentioned in s 129 although the other 'steps' or requirements referred to in s 130 are incorporated by reference.Section 129(1)(b)(i) makes it clear that the notice in terms of s 129(1)(a) is a necessary 'step' before legal proceedings may be commenced. It follows that by giving the notice envisaged by s 129(1)(a) the credit provider 'has proceeded to take the steps contemplated in section 129 to enforce that agreement': a debt review relating to that specific agreement is thereafter excluded.

[15] It follows that the court a quo was correct in not granting the declarator prayed for in prayer 1.13 of the notice of motion."(my emphasis and footnotes omitted)

81. But nothing precludes the debtor from availing himself of his rights under section 129 which, as was pointed out by the court, are distinct from those envisaged in section 86(2) on receipt of the notice. As was pointed out by the learned judge, even once the proceedings contemplated in section 130 are instituted, there is nothing to preclude the court from referring the matter to a debt counsellor as contemplated in sections 85, 86 and 87. Accordingly, there is nothing contained in section 86(2) which precludes the debtor from availing himself of his rights to refer the particular credit agreement sought to be enforced to a debt counsellor as envisaged in section 129 and thus no need for the courts to legislate to enable him to do so; a *fortiori* since the amendment to section 86(2) which now refers to section 130 and not section 129 which makes it clear that the steps taken to enforce the debt do not refer to the delivery of a section 129 notice but rather to the issuing of a summons as contemplated in section 130.

82. Such an amendment was recommended in an article in the Potchefstroom Law Journal, "*The Debt Couselling Process-Closing the Loopholes in the National Credit Act 34 of 2005*" [2009] PER 23 on the basis that enforcement commenced on the issuing of summons and not the service of a section 129 notice as was later found to be the case by the Supreme Court of Appeal *(supra)*. The learned authors took the view similar to that adopted by the Court in the *Mkhize* and *Binnemann* matters (*supra)* and opined:

> *"It is submitted that enforcement commences upon the issuing and service of a summons, after the credit provider has complied with the requirements set out in section 129(1) read with 130(1) of the Act. Moreover, a section 129(1)(a) notice delivered to a consumer by a credit provider does not constitute enforcement, as the heading to section 129 refers to "Required procedures before debt enforcement". Section 129(1)(a) provides that if the consumer is in default under a credit agreement the credit provider may draw the default to the notice of the credit provider 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 up to date...*
>
> *It would therefore appear that the legislator's reference to section 129 in section 86(2) is a reference to the commencement of legal proceedings mentioned in section 129(1)(b) and that a consumer should not be precluded from applying for debt review in respect of the specific credit agreement after receipt of a section 129(1)(a) notice. Section 129(1)(b) provides that, subject to section 130(2) a credit provider may not commence any legal proceedings to enforce the agreement before first providing notice to the consumer in terms of section 129(1)(a) or section 86(10), as the case may be, and complying with any further requirements set out in section 130.*
>
> *In the case of Frederick v Greenhouse Funding (Pty) Ltd, the court however found that the only step which a credit provider can take in terms of section 129, is the step in section 129(1)(a) namely, the sending of the letter. The court rejected the argument that the sending of the letter is not a step to enforce the agreement and found with reference to the matter of Nedbank Ltd v Motaung:*
>
> > *'If section 86(2) is read to mean that the sending of the letter is not a step under section 129 to enforce the agreement, then the section is rendered nugatory. In my view a proper interpretation must be provided to the section. The section must be interpreted so as to not have an absurd result and so as to reflect commercial reality. Such an interpretation would*

involve an interpretation of Section 86(2) as meaning that the sending of a letter constitutes a step contemplated in Section 129 to enforce the agreement.'

It is submitted that the interpretation of the court does not take into consideration the content of section 129(1)(a) namely that the credit provider may propose to the consumer that he refer the relevant credit agreement to a debt counsellor. It does not make sense to propose to the consumer to approach a debt counsellor and at the same time also preclude the consumer from applying for debt review. As a matter of fact, it would therefore appear that the interpretation the court attributes to section 86(2) actually leads to an absurd result. To clarify the uncertainty with regard to the question as to when enforcement for the purposes of section 86(2) commences, it is submitted that section 86(2) should be amended by substituting the words 'section 129' with 'section 130'.

83. After quoting section 130, the article goes on to state that before a creditor can commence with enforcement proceedings, section 129(1) read with section 130(1) provides that the following preconditions must be met:

83.1. A section 129(1)(a) notice or a section 86(10) notice should have been delivered to the consumer at least 10 business days prior to enforcement proceedings; and

83.2. The consumer is in default under that credit agreement for at least 20 business days, which two periods may run concurrently.

84. It was, however, also stressed that a credit provider must additionally also comply with the other requirements set out in section 130. So, for example, section 130(3)(c)(i) precludes the court from determining a matter unless it is satisfied, *inter alia* that the credit provider has not approached the court during the time that the matter was before a debt

counsellor. Additionally, in terms of section 130(3)(c)(ii), the credit provider is also prevented from approaching the court in respect of a credit agreement to which the Act applies, where the consumer has taken and fulfilled any of the steps mentioned in section 129(1)(a). Referring to the matter of *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D), it was stated that:

> "According to the Prochaska case the NCA represents a radical departure from its predecessor, the Credit Agreements Act (CAA), with regard to the notice in terms of section 129(1)(a). Whereas the CAA merely required the credit receiver to notify the creditor of his default by prepaid registered mail, section 129(1)(a) requires the credit provider to "draw the default to the notice of the consumer in writing". Section 129(1)(b) precludes the credit provider from commencing any legal proceedings to enforce the agreement before 'providing notice' to the consumer in terms of section 129(1)(a). Further to this, a credit provider may only approach a court for an order to enforce an agreement if, inter alia at least 10 business days have elapsed since a credit provider 'delivered a notice', as contemplated in section 129(1)(a) of the Act, to the consumer. According to the court in the Prochaska case, the words emphasised cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires much more than the mere dispatching of the notice contemplated by section 129(1)(a) of the Act, to the consumer in the manner prescribed in the Act and Regulations. The credit provider is required, in my view, to bring the default to the attention of the consumer in a way which provides assurance to a court considering whether or not there has been proper compliance with the procedural requirements of section 129 and 130 of the Act, that the default has indeed been drawn 'to the notice of the consumer."

85. This is in line with the views expressed by the Constitutional Court in *Sebola v Standard Bank of South Africa Limited (supra)*, where it was stressed that it is incumbent upon a credit provider to establish that the section 129 notice was correctly dispatched by registered post to the *domicilium* address provided by the debtor of the section 129 notice particularly as the procedures set out in section 129(1)(a):

"are designed to help debtors to restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls". (at para[59])

86. It is also in line with the provisions of section 129(7) which requires that the credit provider establish that the notice was indeed delivered as required in terms of sub-section (5) to the *domicilium* address.

87. If it is not averred in the particulars of claim that this has been complied with, the particulars of claim are excipiable. (*Beets v Swanepoel {2010] JOL 26422 (NC) ; unreported judgment of Moeng, AJ in Nedbank Ltd v Simcha Properties 12 CC and others, case no 341/2014, Free State Division, Bloemfontein on 5 February 2015*).

88. This all serves to highlight the importance of a section 129 notice being delivered before enforcement proceedings commence and the courts ensuring that the section is strictly complied with when exercising their discretion under section 129(3)(a). This fortifies my view that such notice must be reasonably current to be meaningful. I thus believe that it is of cardinal importance that the proceedings be stayed to afford the respondent the right to avail himself of his rights set out in section 129 of the NCA.

89. In this respect I point out that if summons is issued without first issuing the requisite notice, the proceedings are not a nullity (as contended by the respondent), but rather must be paused to issue the notice and afford the debtor an opportunity to exercise his rights set out in section

129. This has been confirmed by the Constitutional Court in the *Sebola matter (supra)* at [53] where it was stated that section 129 and 130 need to be read together:

> *[54]First, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while section 129(1)(b) appears to prohibit the commencement of legal proceedings altogether ("may not commence"), section 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 section 129 in the light of section 130. Section 129 prescribes what a credit provider must prove (notice as contemplated) before judgment can be obtained, while section 130 sets out how this can be proved (by delivery).*"(footnotes omitted).

90. The suggested amendment now having been effected, the respondent would not, by the issuing of a fresh notice, be precluded from exercising its rights under section 129. Despite the fact that summons has already been issued, I believe that the respondent would have a 10 day window period after the issuing of such new notice to exercise his rights to include this agreement in an overall debt review of his position as contemplated in sections 85-87.

91. This is because section 129(1)(b) provides that, subject to section 130(2) a credit provider may not *commence any legal proceedings to enforce the agreement* before first providing notice to the consumer in terms of section 129(1)(a) and complying with any further requirements set out in section 130. Since the amendment to section 86(2), the debtor is afforded 10 business days after the issuing of a section 129 notice to seek debt counselling and debt review in respect of the debt

sought to be enforced before summons is issued. Once summons is issued, in light of the judgment of the Supreme Court of Appeal *(supra)*, he loses the right to include the debt sought to be enforced in an overall debt review.

92. However, the Supreme Court of Appeal has made it clear that notwithstanding the service of a section 129 notice, nothing precludes the court from allowing the debtor to exercise his rights under section 129 and to have a debt counsellor appointed to assist in restructuring his debt or declare him over-indebted as contemplated in sections 85, 86 and 87. It need not legislate to do so and is empowered in terms of the express provisions of the Act to do so.

93. Section 85 expressly permits the court to allow a credit agreement sought to be enforced to a debt counsellor where it appears that the debtor may be over-indebted and provides:

> ***85. Court may declare and relieve over-indebtedness***
>
> *Despite any provision of law or agreement to the contrary, in any court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may-*
>
> *(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7);*
>
> *(b) declare that the consumer is over-indebted, as determined in accordance with this Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.*

94. Similarly, nothing precludes the debtor from bringing his arrears and costs up to date as contemplated in section 129 to avoid the invocation of the acceleration clause in the agreement.

95. Since the amendment to section 86(2) of the NCA, nothing precludes a debtor from seeking debt review in respect of the indebtedness referred to in a section 129 notice which is now only precluded after the issuing of summons.

96. However, where summons is issued in breach of section 129 without first delivering a valid section 129 notice, I believe that the debtor would continue to have the right to debt review until proceedings contemplated in section 130 were validly instituted after the requisite notice had been delivered as contemplated in section 127(5) and a debtor cannot be in a worse position where a creditor has acted in breach of section 129 by instituting proceedings contemplated in section 130 prior to issuing a valid 129 notice. The discretion conferred upon the court in section 130(4)(b)(ii) is designed to remedy such default and to put the debtor in the position it was in had the requisite notice been sent. That is the only way to meaningfully make sense of section 86(2) when read with sections 129 and 130 of the Act.

97. In *Nedbank v The National Credit Regulator (supra)* , Malan JA dealt with the purpose of the NCA and expressed similar views to those expressed by the Constitutional Court in the *Nikita matter* stressing that:

[1] The National Credit Act 34 of 2005 (the NCA) came into full force and effect on 1 June 2007. The NCA is not an amendment of previous legislation dealing with consumer credit. It seeks to achieve much more and replaces legislation that governed consumer credit for more than a quarter of a century. The objects are set out in s 3 and are directed at providing protection for the consumer and addressing imbalances that exist between consumers and credit providers. The NCA seeks –

> *'to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –*
>
> ...
>
> *(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;*
>
> *(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and*
>
> *(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.'*

98. Although he lamented the poor drafting of the legislation, he stressed that the Act must be interpreted to give effect to these objects stating:

> *[2] The NCA must be interpreted in a manner that gives effect to these objects. Appropriate foreign and international law may be considered in construing the NCA. Unfortunately, the NCA cannot be described as the 'best drafted Act of Parliament which was ever passed,' nor can the draftsman be said to have been blessed with the 'draftsmanship of a Chalmers'. Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise. Indeed, these appeals demonstrate the numerous disputes that have arisen around the construction of the NCA. The interpretation of the NCA calls for a careful balancing of the competing interests sought to be protected, and not for a consideration of only the interests of either the consumer or the credit provider."*

99. To achieve the purpose of the Act, Section 130 referred to in section 86(2) can not be read in isolation and must be considered together with

section 130(4)(b). It is only when there has been proper compliance with section 129 that any proceedings can be regarded as having been instituted for the purposes of section 86(2). Section 86(2) must thus be interpreted to only preclude debt review where valid proceedings have been instituted under section 130. This would not amount to legislating in breach of the separation of powers between the courts and the legislature enshrined in the Constitution; on the contrary such power is expressly provided for in the legislation which empowers the Court alone to determine whether there has been compliance with section 129(1) and to give directions as to that steps should be taken to ensure compliance.

100. Although where a creditor has instituted action as contemplated section 130(1) in breach of the mandatory provisions of section 129 (1), the proceedings are not in fact a nullity and need not, in view of the provisions of section 130(4) (b) be re-instituted, they are for all intense and purposes regarded as a nullity until there is compliance with section 129(1).

101. In this respect, the views expressed by Jafta J in the *Nkata matter* are apposite. There, Jafta J, who concurred with Moseneke J but on different grounds, expressed the view that where the requisite notice is not sent and the proceedings are instituted in conflict with the Act, the proceedings are, despite the findings of the Constitutional Court in the *Sebola matter (supra),* a nullity and thus no costs can be reasonably

incurred which it can be said are required to be settled before a debtor who has been served with a section 129 notice may reinstate the agreement. He found that :

"[166]..... This is so because the action does not require payment of costs incurred in irregular proceedings or as a result of invalid judgments. On the authority of Motala and Changing Tides, the default judgment granted by the registrar was a nullity.

[167] Here the Bank commenced the legal action at a time when it was not permitted to do so. Section 130(1) prohibits the commencement of legal proceedings before the expiry of 10 business days from the date of delivery of notice in terms of section 129(1). The High Court held that the Bank failed to deliver the requisite notice and the correctness of this finding was not challenged in this Court.

[168] It is compulsory for any credit provider to comply with section 129 s(1) before instituting legal proceedings. In Sebola, Cameron J said:

> *"Section 129(1)(a) requires a credit provider, before commencing any legal proceedings to enforce a credit agreement, to draw the default to the notice of the consumer in writing. It has been described as a 'gateway' provision, or a 'new pre- litigation layer to the enforcement process'. Although section 129(1)(a) says the credit provider 'may' draw the consumer's default to his or her notice,section 129(1)(b)(i) precludes the commencement of legal proceedings unless notice is first given. So, in effect, the notice is compulsory." (Footnotes omitted and emphasis added.)*

[169] Parliament has considered compliance with section 129(1) to be so important that it deemed it necessary to preclude a court from adjudicating the dispute until the court itself is satisfied that there was compliance. Notably, it is the court that must be satisfied and nobody else. This signifies that legal proceedings to which the Act applies must be determined by the court only.

[170] Furthermore, section 130(3) precludes a court from deciding the case unless it is satisfied that the notice requirements in section 129 have been complied with. Section 130(3) provides:

> *"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."*

[171] If it appears to the court that the credit provider has not complied with section 130(3)(a) or that it is not positively satisfied that there was compliance, the court must—

(a) adjourn the matter before it; and

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

[172] Later in Kubyana, we reaffirmed the principle that the Court is precluded from deciding a matter unless it is satisfied that the procedures stipulated in sections 129 and 130 are met. We said:

> *"The text of 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. The section prescribes that the notice given to the consumer must be in writing. It further stipulates 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, at the election of the consumer, the credit agreement may be referred to a debt counsellor, dispute resolution agent, consumer court or ombud. The purpose of the referral must also be stated in the notice.*

The purpose of the referral is to resolve whatever disputes may have arisen from the credit agreement and also to agree on a plan to cure the default and bring the payments up to date. Furthermore, the section makes reference to section 130 which governs the institution of litigation for enforcing credit agreements. Section 129(1) lays down two conditions which must be met before the credit provider may institute litigation. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before—

(a) first providing notice to the consumer; and

(b) meeting further requirements set out in section 130."

[173] Here the legal fees claimed by the Bank arose in circumstances where the Bank had acted in breach of the Act in a number of respects. First, it failed to give notice as required by section 129 (1) read with section 130(1). Second, it sought and obtained a default judgment from the registrar of the High Court, something that is incompatible with section 130(3) which requires such matters to be determined by the court. Third, the Bank sought and obtained the default judgment without satisfying the Court on compliance with section 129 . Fourth, the Bank caused a writ to be issued, an attachment to be effected and Ms Nkata's home to be advertised for sale in execution on account of an invalid judgment. Fifth, the Bank opposed Ms Nkata's application for the rescission of that judgment.

[174] The High Court declared:

> *"The non-compliance with section 129 (1) also leads to the conclusion, in my opinion, that default judgment was 'erroneously' sought and granted within the meaning of rule 42(1)(a) (see Buys v Changing Tides 17 Pty Ltd NO & Others [2013] ZAWCHC 150). Compliance with section 129(1) is a substantive legal prerequisite for the valid institution of legal proceedings on a credit transaction to which the Act applies. .....*

[175] ..... It is apparent from the High Court's statement that had the request for the default judgment been placed before a court, that court could not have been satisfied that there was compliance with section 129(1) read with section 130(1). In that event, the Court could not have granted the default judgment

because it would not have been competent for it to do so, in light of the peremptory language of section 130(3). That section proclaims that a court may determine a matter to which the Act applies only if the court is satisfied that there was compliance with section 129. Thus the exercise of the court's competence or jurisdiction is deferred until compliance is achieved.

[176] This is the backdrop against which the reasonableness of the legal fees claimed by the Bank must be assessed. In my view, it cannot be said that costs incurred when the Bank acted in breach of the Act were reasonable costs contemplated in section 129(3). This section envisions costs incurred in legitimate proceedings. If the High Court had set aside the default judgment during the first application for rescission, the legal fees in question would have fallen away...

[177] ..... In view of the fact that the Bank was not entitled to issue the summons, those costs were not reasonable. This is because the entire process, from the stage the summons was issued up to the attachment and advertising the sale, was tainted by non-compliance with various provisions of the Act."(footnotes omitted and emphasis added)

102. Although this was not an approach that found favour with all the other members of the Constitutional Court and would seem to conflict with the dictum in *Sebola (supra)* which held that proceedings instituted in conflict with section 129 are not a nullity but are merely paused, I believe that they are of some relevance as to the meaning of the phrase in section 86(2) as amended precluding debt review where the credit provider "*has proceeded to take the steps contemplated in section 130 to enforce that agreement*". That, in my view, can only mean, in the words of the court *a quo* quoted by Jafta J, "*the valid institution of legal proceedings*".

103. Thus although I agree that the proceedings may not strictly speaking be a nullity, section 86(2) must be read as only precluding debt review once valid proceedings have been instituted or continued under section 130 once the court is satisfied that there has been compliance with section 129. This, I believe, also has a significant bearing on the

question as to who should bear the costs incurred when seeking relief in terms of section 130(b)(ii).

COSTS

104. It is trite that costs should follow the result . In this respect, in so far as the applicant has not been successful in obtaining the declaratory relief sought in prayer 1, the costs should follow that result (*Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd supra; Union Government v Gass 1959 (4) SA 401 (A) 413;Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd 1996 (3) SA 692 (C)).*

105. In addition, in so far as the alternative relief sought in prayers 2 and 3 are in essence sought as an indulgence to afford the applicant the opportunity to cure the fact that it instituted proceedings in breach of section 129, the applicant should also bear the costs that can reasonably be said to be wasted because of the application (*Macdonald Forman & Co v Van Aswegen* 1963 (2) SA 150 (O)155*; Badenhorst v Balju, Pretoria Sentraal* 1998 (4) SA 132 (T) 142*).*

106. Such costs should include the costs of reasonable opposition, depending on the circumstances, provided that it was not vexatious or frivolous (*Meintjies v Administrasieraad van Sentraal-Tvl* 1980 (1) SA 283 (T); *Genn v Rudick Holdings (Pty) Ltd* 1983 (2) SA 69 (W) 72; *Iveta Farms (Pty) Ltd v Murray* 1976 (1) SA 939 (T); *Manwood Underwriters (Pty) Ltd and Others*

3rd floor, "4 on Anslow", Anslow Crescent, Bryanston, Johannesburg;

109.2. Directing that proof hereof as contemplated in section 129(7)(b) of the NCA be provided before the proceedings may be resumed in terms of section 130 of the NCA.

109.3. Ordering the applicant to pay the costs of the application.

S.M WENTZEL

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

DATE HEARD: 2 June 2016

DATE OF JUDGMENT: 2 September 2016

Applicants Attorneys: Hack, Stupel &Ross; Counsel for the applicant: Ulrike Lottering

Respondents Attorneys: Peterson, Hertog & Associates; Counsel for the Respondent: Anthony Bishop

3rd floor, "4 on Anslow", Anslow Crescent, Bryanston, Johannesburg;

109.2. Directing that proof hereof as contemplated in section 129(7)(b) of the NCA be provided before the proceedings may be resumed in terms of section 130 of the NCA.

109.3. Ordering the applicant to pay the costs of the application.

S.M WENTZEL

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

DATE HEARD: 2 June 2016

DATE OF JUDGMENT: 5 September 2016

Applicants Attorneys: Hack, Stupel &Ross; Counsel for the applicant: Ulrike Lottering

Respondents Attorneys: Peterson, Hertog & Associates; Counsel for the Respondent: Anthony Bishop