THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20595/14

In the matter between Not Reportable

NAVIN NAIDOO **APPELLANT**

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED **RESPONDENT**

Neutral citation: *Navin Naidoo v The Standard Bank of South Africa* (20595/14) [2016] ZASCA 9 (9 March 2016)

Coram: Majiedt, Mbha and Mathopo JJA and Fourie and Victor AJJA

Heard: **26 FEBRUARY 2016**

Delivered: **9 MARCH 2016**

Summary: National Credit Act 34 of 2005 – notice in terms of s 129(1) – purpose is to bring default to the attention of a consumer – on appellant's own pleadings he had been aware of the notice and had responded thereto – defence amounts to an abuse of process – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Masipa and Bam JJ and Strauss AJ sitting as court of appeal):

1 The appeal is dismissed with costs.

JUDGMENT

MAJIEDT JA (Mbha and Mathopo JJA and Fourie and Victor AJJA concurring):

[1] The appellant, Dr Navin Naidoo, appeals with special leave of this court against the dismissal of his appeal by the full court of the Gauteng Division, Pretoria (Masipa and Bam JJ and Strauss AJ). The full court confirmed the default judgment granted by J W Louw J against the appellant on the application of the respondent, The Standard Bank of South Africa.

[2] The respondent sued in the trial court on a loan advanced to the appellant, secured by a mortgage bond. The appellant had fallen into arrears with his payments and after demand, a summons was issued for payment in the sum of R3 412 946.69, interest, related insurance premium payments and for costs. The respondent averred in its declaration that it had complied with the provisions of s 129(1) and s 130 of the National Credit Act 34 of 2005 (the Act). In respect of s 129 it averred that '(o)n or about 9 March 2010 it delivered a notice as contemplated by Section 129(1)(a) of the Act to the Defendant [Respondent]'. To this the appellant pleaded as follows in his first special plea:

'The Defendant has responded to the Plaintiff's section 129 Notice. The Defendant's reply to the Plaintiff was within 20 days of having been made aware of the Plaintiff's section 129 Notice. The Plaintiff has failed to acknowledge the Defendant's response to its section 129 Notice.'

The appellant did not dispute that he was in arrears with his payments.

[3] At the trial the appellant moved a substantive application for postponement and, when it was refused, his counsel withdrew from the proceedings. The trial court then proceeded to grant default judgment in the amount claimed. The appellant then appealed to the court below, which refused leave to appeal, resulting in this court granting the appellant leave to appeal to the full court. The latter dismissed the appeal, holding that on his own pleadings the appellant had admitted that the s 129(1) notice had come to his attention.

[4] The crisp issue is whether the full court had erred in its finding above. In relevant part s 129 of the act reads as follows:

'**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.'

[5] The ultimate purpose of s 129 is to ensure that a consumer is notified of his or her default and of the various options available to him or her. Relying on the Constitutional Court's judgments in *Sebola & another v Standard Bank of South Africa Limited & another* (CCT 98/11) [2012] ZACC 11; 2012 (5)

SA 142 (CC) and *Kubyana v Standard Bank of South Africa Limited* (CCT 65/13) [2014] ZACC 1; 2014 (3) SA 56 (CC), it was contended in the appellant's heads of argument that there has not been compliance with the provisions of s 129(1). In particular, emphasis was placed on the fact that a credit provider must:

(a) show that it has effected the notice by registered mail;
(b) prove that the notice was delivered to the correct post office; and
(c) in order to prove delivery, furnish a post-despatch (track and trace) printout from the post office website.

See: *Sebola* paras 68, 75 and 76. But this line of argument was wisely not pursued during oral argument by counsel (who did not draft the heads). All that is required of a credit provider is to 'satisfy the court from which enforcement is sought that the notice, on a balance of probabilities, reached the consumer' (*Sebola* para 74). Ultimately, the question is whether delivery as envisaged in the Act has been effected (*Kubyana* paras 31, 36, 39, 52 and 53).

[6] Before us the appellant's counsel, after abandoning this argument, instead sought to rely on an argument that the respondent had failed to consider the appellant's response to the notice. When pressed on this, counsel very fairly conceded that this new point does not fall within the ambit of the special leave, nor had it been considered at all by the full court since that was not a ground of appeal before it.

[7] The manner in which the appellant conducted his litigation must be strongly deprecated. Not only is he a qualified medical doctor (practising in Australia), but he practised as an advocate at the Pretoria Bar until December 2011. He is therefore not only a well-educated man, but also schooled in the law. His fanciful reliance on a technical argument regarding a strict mechanical compliance with s 129(1) in the face of an admitted receipt of and response to the notice, strikes me as rather cynical. His 'defence' amounts to an abuse of s 129(1) and the application for postponement followed by the withdrawal of his counsel immediately thereafter, appears to be an ill-

conceived stratagem. After a protracted exercise in futility through three courts, it is time that he meets his obligations to the bank.

[8] The respondent sought the costs of two counsel on the basis that it was reasonable for the bank to protect its interests by briefing two counsel. I disagree. This is a straightforward matter and, while the bank is entitled to protect its interests, this case does not justify the employment of two counsel.

[9] The appeal is dismissed with costs.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

For Appellant:	N Snellenburg SC
Instructed by:	Spies Bester Potgieter Attorneys, Pretoria
	Honey Attorneys, Bloemfontein
For Respondent:	B H Swart SC with M T Shepherd
Instructed by:	Hack Stupel & Ross Attorneys, Pretoria
	Lovius Block, Bloemfontein