



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: 227/2015

In the matter between:

**THE STANDARD BANK OF SOUTH AFRICA
LIMITED**

Applicant

And

B C MKHWANAZI

First Respondent

P MKHWANAZI

Second Respondent

JUDGMENT

Heard: 22nd April 2015
Delivered: 8th July 2015

JEFFREY AJ:

- [1] The applicant claims default judgment against the respondents for R589 547.28 together with interest and ancillary relief and an order declaring the respondents' immovable property executable. The amount claimed arises from a loan made by the applicant to

the respondents that was secured by a first mortgage bond registered over their immovable property. The respondents have fallen into arrears with their repayments.

[2] The application is undefended.

[3] When this matter came before me I raised with counsel whether the applicant's notice to the respondents as contemplated in s 129(1)(a) of the National Credit Act, No. 34 of 2005, complied with the provisions of the Act. In particular, I questioned whether the applicant had established on the papers that the provisions of s 130 had been met. That section stipulates *inter alia* that at least 10 business days must have elapsed after the delivery of the s 129(1)(a) notice before a credit provider may approach the Court for an order to enforce a credit agreement. If these provisions were not met by the applicant then the summons would have been issued prematurely; but, even if it was issued prematurely, s 130(4)(b) provides that the matter must be adjourned and that an appropriate order must be made setting out the steps that the applicant must complete before the matter can be resumed.

[4] It has been established on papers before me, read with an annexed track and trace report supplied by the South African Post Office, that on 23 December 2014 the applicant's attorneys posted a s 129(1)(a) notice to the respondents' chosen *domicilium citandi*

et executandi by registered mail; that on 30 December 2014 the registered item reached the relevant branch of the post office, namely Yellowwood Park; and, on the same day, that branch sent a notification to the respondents informing them that a registered item was available for their collection. Whether the respondents collected the registered item or it was returned unclaimed by the post office to the applicant's attorney, does not appear from the track and trace report or from the papers. The summons was issued by the registrar of this Court on 14th January 2015.

[5] The interpretation of the provisions of the Act is fraught with difficulties. In particular, the manner in which the s 129(1)(a) notice must be 'delivered' to the consumer has been the controversial issue.¹

[6] Prior to the amendment to s 129 by the National Credit Amendment Act, No. 19 of 2014, that came into operation on 13th March 2015, the word 'delivered' was not defined in the Act and, indeed, its meaning in s 130 could be described as enigmatic, at best. The Constitutional Court had occasion to explain the meaning of 'delivered' first, in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) and thereafter in *Kubyana v Standard Bank of South Africa Ltd* 2014

¹ See Professor Michelle Kelly-Louw 'The overcomplicated interpretation of the word 'may' in sections 129 and 123 of the National Credit Act' (2015) 132 *SALJ* 245 at 246-

(3) SA 56 (CC). The court said in *Kubyana* that the following considerations applied in determining the issue of proof of delivery of the s 129(1)(a) notice when it is posted to the consumer by registered post:

“[54] The Act prescribes obligations that credit providers must discharge in order to bring s 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that —

(a) the s 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;

(b) the Post Office issued a notification to the consumer that a registered item was available for her collection;

(c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and

(d) a reasonable consumer would have collected the s 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a) – (c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.”

[7] The Amendment Act, that came into operation on 13th March 2015 as I have said above, introduced certain amendments *inter alia* to s 129 seemingly to address the shortfalls in that section of the Act. New subsections (5), (6) and (7) have been included that now address the matter of ‘delivery’ of the s 129(1)(a) notice. These

7, where the several authorities on the controversial issue of what is meant by ‘delivered’ have been conveniently gathered and referred to.

subsections provide:

"(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).

[8] It is, however, unnecessary for the purposes of this judgment because of the facts before me that I will refer to below, to consider the constitutionality of the new subsection 129(7)(a) that merely provides that proof of delivery to the relevant post office is sufficient. These provisions are *prima facie* at variance with what the Constitutional Court said in *Kubyana* in para [54] that I have quoted above concerning proof of delivery. I, therefore, leave this question open.

[9] On the facts of this matter according to the track and trace report, the date when the s 129(1)(a) notice was received by the correct or relevant branch of the post office and the date when that branch issued a notification to the respondents that a registered item was

available for their collection, are one and the same – namely, the 30th December 2014.

[10] With the date of ‘delivery’ being a known factor, the calculation of the period of 10 business days from the date of delivery as contemplated in s 130(1)(a) can be accurately computed. The section provides that ‘at least 10 business days’ must have elapsed from the date of delivery. In other words 10 clear business days are afforded to the consumer. Accordingly the first and last days must be excluded. It follows once this calculation is made that the summons was issued prematurely – the applicant’s attorneys were one day early in issuing the summons - possibly because the New Year’s Day public holiday was incorrectly included in the calculation. The period of ‘at least 10 days’ expired on 14th January 2015 and the 15th January 2015 was the earliest date when the summons could have been issued.

[11] The applicant has accordingly not complied with the provisions of s 129(1)(b)(ii) read with s 130(1)(a) of the Act. In the circumstances the following order will be made in terms of s 130(4)(b).

[12] It is ordered:

1. The application for default judgment is postponed *sine die*.
2. The applicant is afforded an opportunity to deliver a notice to the respondents as contemplated in s 129(1) of the National Credit Act, No. 34 of 2005, by registered post directed to the respondents' chosen address, namely 7 Oriole Road, Yellowwood Park, 4004.
3. Such notice must, in addition to meeting the requirements of s 129(1)(a) of the Act, also draw the respondents' attention to:
 - (a) the fact that an action has already been instituted against the respondents, the relevant case number and the fact that an application for default judgment has been adjourned *sine die*;
 - (b) the current amount of arrears;
 - (c) the fact that the respondents' rights in terms of the Act, and in particular those contemplated by s 129(1)(a) of the Act, are unaffected by the fact that action has already been instituted and accordingly, the respondents may forthwith 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.
4. The applicant is granted leave to set down the application for default judgment on notice to the respondents, but shall not do so until at least 10 business days have elapsed since the delivery of the notice referred to in para 2 of this order.

5. The application for default judgment shall be accompanied by evidence on oath:

(a) establishing to the best of the applicant's ability that the notice required by para 2 of this order was delivered to the respondents;

(b) dealing with the matters referred to s 130(1)(b) of the Act;
and

(c) establishing that there was personal delivery of the said registered item containing the notice on the respondents by way of a track and trace report issued by the South African Post Office; *alternatively* establishing the deemed date of delivery by way of a track and trace report issued by the South African Post Office indicating the date that the correct branch of the Post Office issued and sent a notification to the respondents that a registered item was available for their collection at that branch.

(6) The costs of the action to date are reserved for later determination.

JEFFREY AJ

Appearances:

Counsel for the applicant: Mr A J Boule

Applicants' attorneys : Goodrickes

Ref. Mr J A Allan/vn/MAT15005
Tel. 031 301 6211

No appearance for the respondents

Date of hearing : 22nd April 2015

Date of judgment : 8th July 2015