

SOUTH AFRICA / JUDGMENT

## ABSA Homeloans Guarantee Company (RF) and Another v Nondumo and Another (1472/2019) [2020] ZAMPMHC 43 (21 August 2020)

[2020] ZAMPMHC 43

COURT

Middelburg High Court, Mpumalanga

BEFORE

Jansen van Rensburg

CASE / FILE NUMBER

1472/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION

MIDDELBURG

Case : 1472/2019

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

Date : 21st August 2020

SIGNATURE: H.C. Jansen van Rensburg

In the matter between

ABSA HOMELOANS GUARANTEE COMPANY (RF) 1ST PLAINTIFF

ABSA BANK LTD

2ND PLAINTIFF

And

LGZ NONDUMO

1ST DEFENDANT

LI NONDUMO

2ND DEFENDANT

## JUDGMENT

JANSEN VAN RENSBURG AJ

## INTRODUCTION

[1]. This is an interlocutory application by the defendants based on an exception to the summons of the plaintiffs in that the summons of the plaintiffs 'lack averments to sustain any cause of action'. [1]

[2]. The defendants raised three grounds to except against the summons of the plaintiffs namely –

[2.1.]. That the section 129 notice was issued, and proof thereof is annexed as EDT5 & EDT 7 to the combined summons.

[2.2.]. The dies non induciae expired.

[2.3.]. An appearance to defend was not entered by the defendants. [2]

## THE LOAN AGREEMENT BETWEEN THE PLAINTIFFS AND THE DEFENDANTS

[3]. On 24th June 2015 at Secunda, the 2nd plaintiff and the defendants entered into a written mortgage agreement which included the mortgage Loan Quotation and the Agreement.

[3] The 2nd plaintiff agreed to advance a sum of R 646 038-00 to the defendants as a home loan to purchase the immovable property at Erf

717 Evander Township held by title deed T 10990/2015 at the physical address being 1[...] M[...] park Secunda. The loan amount included the purchase price fees and insurance. Provision was made for interest which was linked to the prime rate.

[4]. The principal debt was R 875 000-00 which required a monthly amount of R 5 292-77 payable to the 2nd plaintiff which amount was subjected to an adjustable interest rate. The defendants would default should they fail to make payments to the 2nd plaintiff of the monthly premiums on the loan amount. The agreement made provision for the 2nd plaintiff to enforce its rights against the defendants if the defendants default on the agreement.

[5]. Any notices should be delivered at the chosen domicilium address [4] which is the physical address of the immovable property which is occupied by the defendants. The defendants did not change the address for service of or delivery of notices with the 2nd respondent.

[6]. The agreement included an indemnity clause [5] and included the indemnity bond [6] and a guarantee. [7]

[7]. In terms of the agreement, the defendants breached the agreement by failing to make payment in the amount of R 5 292-77 per month. On or about 11 April 2019, the defendants were in arrears of R 66 599-12 which is corroborated by a certificate by the 2nd defendant,.

[8]. On 26 February 2019, the 2nd plaintiff sent 'section 29 notices' by registered post to the physical address of the defendants. In these letters addressed to both defendants the defendants were informed of their rights interms of section 129 of the NCA 34 OF 2005 as well as the consequences should the defendants not react to these letters.

[8] After no response received from the defendants , the on 19 March 2019 the 2nd plaintiff informed the defendants that they are in breach of the agreement and that the 2nd defendant is proceeding with legal action against the defendants.[9]

[9]. As of 21 February 2019 the defendants were indebted to the 2nd plaintiff in the amount of R 703 978-43 together with interest at 9,5% per annum, together with monthly insurance premium and service fees. [10] The arrear amount due by the defendants to the 2nd plaintiff is R 66 599 – 12.

[10]. The plaintiff issued summons under this case number for the payment of R 703 978-43 with interest at 9,5,% per annum from 21st February 2019 , monthly insurance and service fees. The plaintiff applied that the immovable property be declared especially executable and cost of suit and further and / or alternative relief.

#### ACTIONS BY THE DEFENDANTS

[11]. The defendants purportedly received the summons of the 2nd plaintiff dated 22nd July 2019 and entered a notice to defend the legal action instituted by the 2nd plaintiff. [11].

[12]. Due to the defendants not serving their plea, on 21st August 2019, the 2nd plaintiff served a notice to bar the defendants. [12]

[13]. The defendants served the notice to except dated 9th September 2019 against the 2nd plaintiffs summons. [13] The notice by the defendants set forth the grounds for excepting against the 2nd plaintiffs summons.

#### DEFENDANTS NOTICE TO EXCEPT

[14]. The grounds for exception –

[14.1.]. First ground : The 2nd plaintiffs section 129 Notice The defendant allege that they did not receive the notice issued in terms of section 129 of the NCA 34 of 2005.

[14.2.] .The second ground : That the dies non is irrelevant and not applicable in this case because the Notice in terms of section 129 of the NCA 34 of 2005 was not received by the defendants and therefore the defendants could not act in this regard.

[14.3.]. The third ground : The defendants did not enter a notice to defend the summons as indicated in paragraph 'C' of the combined summons because the defendants were not aware of the intention of the 2nd plaintiff.

[14.4.]. Fourth ground : That the defendants dispute the amount due to the 2nd plaintiff and who have made payments in the amount of R 47 000 -00, R 7 500 -00 and R 8000 – 00 respectively to the 2nd plaintiff respectively on 3rd July 2019, 30th July 2019 and 30th August 2019. [14]

[14.5.]. The defendants submit that the 2nd plaintiff took an irregular step by applying for default judgment without the issue of the section 129 notice or by not attaching proof thereof to its summons that was served on the defendants.

#### ANALYSIS OF THE 2ND PLAINTIFFS SUMMONS AND THE COUNTER ARGUMENTS BY THE DEFENDANTS

[17]. The signed agreement entered into between the 2nd plaintiff and the defendants clearly specify the domicillium of the defendants being 1[...] M[...] Park Secunda. [15]

[18]. The 2nd plaintiff posted its section 129 notices to the defendants. Proof of the relevant registered postal receipts is attached being addressed to the two defendants separately at the domicillium address. [16]

[19]. The 2nd plaintiff posted individual letters regarding the loans guarantee to the domicillium address of the defendants. [17]

[20]. A certificate of the outstanding balance as at 20th February 2019 confirmed the outstanding balance due and owed by the defendants to be R 703 987 – 43 together with interest at 9,5%. [18]

[21]. The track-and-trace receipts are attached to the summons indicating that the documents referred to above was posted to and received by the Post Office in Secunda. The defendants were notified that the documents were at the Secunda Post Office. [19]

[22]. The 2nd plaintiff issued its summons dated 16th April 2019. [20] The 2nd plaintiffs' notice in terms in terms of rule 31(2)(a), rule 46(1)(a)(ii) and 46A was issued and dated 29th May 2019. The dies non has expired and the 2nd plaintiff was entitled to apply for default judgment. On 22nd July 2019 the defendants entered a notice to defend the 2nd plaintiffs' summons dated 16TH April 2019, some 3 months after the summons was issued. The 2nd plaintiff removed the application for default judgment from the roll.

[23]. The only amount which are reflecting on the bank statement attached to the exception of the defendants shows an amount of R 47 000 – 00 deposited in the bank account of the 2nd plaintiff. [21]

[24]. The 2nd plaintiff had to issue a notice to bar dated 21st August 2019 on the defendants to serve their plea. [22] None was forthcoming.

[25]. The defendants then served their notice to except against the summons of the 2nd plaintiff based on the grounds referred to above.

#### ANALYSIS OF THE ISSUES IN DISPUTE

### Introduction

[25]. Rule 23(1)

Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of sub-rule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

[Sub-rule (1) amended by GN R 2164 of 1987 and GN R 2642 of 1987 and GN R 1262 OF 1991]

[My underlining]

[26]. The object of an exception is not to embarrass one's opponent but to settle the case (or part of it) in an inexpensive and easy fashion or to protect oneself against an embarrassment that is so serious that it merits the costs of an exception. The first requirement is to inform the other party that its pleadings should contain all the material facts of its claim and secondly the claim should be set forth in a 'clear and concise statement'. The excipient must allow the other party 15 days notice to correct or amend its cause of action.

[26.1.]. The first requirement poses the question as to what 'material fact' are? It requires a pleading to disclose a cause of action or defence as the case may be, even if this may not be expressly stated in Rule 23(1). Rule 23 is however interpreted and applied as requiring that a 'cause of action or defence must be contained in the pleading. The term 'cause of action' was defined in *McKenzie v Farmers' Co-operative Meat Industries Ltd*

[23] as -

'...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[26.2.]. The 'cause of action' is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action.[24]

[26.3.]. The requirement that a cause of action be contained in a pleading can and should therefore be read into the words 'material facts', which would in turn imply that only facts which serve to establish the cause of action would be regarded as 'material'. The converse also applies, namely that allegations that do not serve to establish the cause of action would not qualify as being 'material'.

[27]. In deciding an exception a court is bound only to the facts set out in the relevant pleading before it. It should be borne in mind that an exception is a pleading and must comply with the relevant rules of court. It must contain distinct averments and should contain clear and concise statements of

### facts

upon which the excipient wishes to rely. This should be done with sufficient particularity to enable the opposite party to reply thereto. [25] It follows that an excipient is obliged to confine his complaint to the stated grounds of his exception,[26] and that the excipient carries the onus of showing that a pleading is excipiable.[27] Where an exception is founded upon the contention that the summons disclosed no cause of action, its design is to obtain a decision on a point of law which will dispose of a case in whole or in part and to avoid the leading of unnecessary evidence at a trial. [28]

[28]. In the decision of McKenzie v Farmers' Co-operative Meat Industries Ltd

[29] the following definition of 'cause of action' was adopted by the Appellate Division and defined to mean the following –

'...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[29]. If evidence can be led which can disclose a cause of action or defence alleged in a pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action or defence. Unless the excipient can satisfy the court that there is a real point of law or no 'cause of action', the exception should be dismissed.

[30]. The defendants allege that they did not receive the 2nd plaintiffs section 129 Notice in terms of the NCA 34 of 2005. The denial of receipt of section 129 Notices has been dealt with at length by the Constitutional Court in the judgment or if no payments were made by either the defendants, or certain payments made by only some of the defendants, or payments which were made had been incorrectly allocated, it is a matter for the trial court to adjudicate upon the presentation of evidence. In respect of this ground of exception, the excipient once again fail to disclose how the particulars as pleaded renders them unable to plead their case or in what manner they are prejudiced and as such unable to prepare for trial.

The section 129 of the NCA 34 of 2005

[31]. The critical questions in this case are the following –

[31.1.]. What does the statute requires a credit provider to prove to establish [that a section 129(1) (a) letter came] to the attention of the consumer?.[30]

[31.2.]. It will seem impossible for the credit provider to prove that a section 129(1)(a) letter reached the consumer.[31]

[31.3.]. If a credit provider sends a section 129(1)(a) letter by registered post, it will ordinarily be taken to have reached the consumer, and, the credit provider will be taken to have complied with section 129(1)(a), if the letter has reached the consumer's local post office.

[31.4.]. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer as required by section 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.'

[My emphasis]

[32]. The defendants chose the address for service of notices in terms of the signed agreement being the physical address 1[...] M[...] Park.

[32] Communication would be via prepaid registered post which is one of the methods of informing the defendants of any notices and / or documents and will be regarded as having been received within 7 days after posting. [33]

[32]. The defendants were duly informed by the attorney of the 2nd plaintiff in its section 129 notices of the defendants default of which poof of the registered postage receipts and the track-and

–trace reports are attached to the summons. [34] Section 129 is headed 'Required procedures before debt enforcement'. It reads as follows –

*“(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), [35] 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—
  - (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and
  - (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.
- (4) A consumer may not re-instate 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.”

Section 130 is headed ‘Debt procedures in a Court’. It provides:

[33]. Section 130 of the NCA 34 of 2005 reads as follows –

- ‘(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(9), 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—

- (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.’

[34]. The NCA 34 of 2005 lays emphasis on the wording of section 129(1)(a), which requires the credit provider to ‘draw the default to the notice of the consumer’. It is therefore a requirements that that (a) the credit provider has delivered the section 129 notice in compliance with the Act and the credit agreement, (b) the proceedings are not premature and (c) there is nothing to suggest otherwise, then a Court will normally be satisfied, on a balance of probabilities, that a consumer has in fact received the notice.

[35]. Section 129(1)(a) requires a credit provider, before commencing any legal proceedings to enforce a credit agreement,[36] to draw the default to the notice of the consumer in writing. 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.[37] Specifically, the notice must “propose” that the defaulting consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud, with the intent that the parties resolve their dispute, or agree on a plan to remedy the default.

[36]. A credit provider must show that it has taken the steps necessary to draw the notice to the attention of the reasonable consumer. While this means a court must be ‘satisfied’ that the notice was received at the consumer’s stipulated address, proving this will normally require something less: the credit provider must show only that the notice was delivered to the appropriate post office, and that it has not been returned to sender. Where an ‘opportunistic’ consumer deliberately declines to collect a notice, the NCR contended that the credit provider can protect itself by enlisting the Sheriff of the Court to serve the notice personally on the consumer.

[37]. Sections 129 and 130 requires the following –

[37.1.]. The credit provider's summons or particulars of claim should allege that the notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed in the absence of contrary indication, and the credit provider may credibly aver, that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office. The credit provider to only proves "delivery", and for this proof of despatch of the notice (and not receipt at the consumer's address, nor delivery to the post office in question) would be sufficient. [38]

[37.2.]. 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).

[37.3.]. Section 129(1) says that legal proceedings may not be commenced before the credit provider "draw[s] the default to the notice of the consumer", [39] or before "first providing notice to the consumer". [40]

[37.4.]. Section 130(1)(a), however, uses one of these meanings of notice only. It permits court proceedings if 10 business days have passed since the credit provider delivered a notice to the consumer as contemplated" in section 129(1). [41] It is true that this refers back to section 129.

[37.5.]. Subsection (2) provides that a party to a credit agreement may change its address 'by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that party has provided an email address'.

[38]. Delivery is affected when a document is made available to a consumer 'by ordinary mail'. Section 65(2) covers a consumer's choice of registered mail. This is not only because postal delivery is expressly sanctioned, and registered post is 'a more reliable means' of postal delivery, [42] but also because 'the greater includes the lesser.' [43] At the very least, despatch of the section 129 notice must be effected by registered mail. Since proof of actual delivery to a specified address is not practicable, despatch to a registered address, at least, must be required for delivery under section 130. Registered mail is essential. Even though registered letters may go astray, at least there is a 'high degree of probability that most of them are delivered.' [44] The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by section 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

[39]. In practical terms, this means the credit provider must obtain a post-despatch 'track and trace' print-out from the website of the South African Post Office. The 'track and trace' service enables a dispatcher who has sent a notice by registered mail to identify the post office at which it arrives from the Post Office website. This can be done quickly and easily. The registered item's number is entered, the location of the item appears, and it can be printed.

Dies Non

[40]. This ground for the exception became 'moot' as the 2nd plaintiff removed its application for default judgment read with the requirements of section 129 of the NCA 34 of 2005.

Payments by the defendants to the 2nd plaintiff

[41]. The defendants allege that they have made some payments to the 2nd plaintiff. The payments seem to have been made after the 2nd plaintiff after the 2nd plaintiffs' instituted legal action against the defendants.

[42]. However the defendants did not made payments in full of the outstanding amounts.

[43]. The allegations of being in contact with the 2nd plaintiff stand to be contested as a defence in a court of law against the initial summons of the 2nd plaintiff by leading evidence in this regard.

## CONCLUSION

[44]. From the above, it is clear that the defendants allegations against the 2nd respondents in its notice to except is unfounded and should fail.

ORDER

[45]. The following order is made –

[45.1.]. The defendants exception is dismissed with cost.

[45.2.]. The defendant are ordered to pay the cost of the 2nd plaintiff jointly and / or severally, the one paying the other absolvent, on a party-and-party scale.

SIGNED AND DATED THIS 21ST DAY OF AUGUST 2020.

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MBOMBELA DIVISION

[MIDDELBURG]

Date : 20TH AUGUST 2020

## Judgment

: 21ST AUGUST 2020

PLAINTIFFS

Anina Marais

Email: Anina@birmans.co.za

Louis1@birmans.co.za

## DEFENDANTS

## Unknown

- [1] Page 107 of the indexed bundle.
- [2] Page 107 of the indexed bundle referring to Paragraph A , B and C.
- [3] Annexure EDT 1.
- [4] See annexure .....page where the physical address for service is indicated.
- [5] Annexure EDT 2 page.....
- [6] Annexure EDT 3 page.....
- [7] Annexure EDT 4 page.....
- [8] Annexure EDT 5 page.....
- [9] Annexure EDT 6 page .....
- [10] Certificate of balance as annexure EDT8.
- [11] Page 97 of the indexed bundle.
- [12] Page 104 of the bundle.
- [13] Page 107 of the bundle.
- [14] Page 103 of the bundle.
- [15] Page 30 of the bundle.
- [16] Page 64 and to 69 of the bundle.
- [17] Page 72 to 77 of the bundle.
- [18] Page 78 of the bundle.
- [19] Page 79 to 82 of the bundle.
- [20] Page 1 of the bundle.
- [21] Page 103 of the bundle payment reflected being made on 3rd July 2019.
- [22] Page 104 of the bundle
- [23] 1922 AD 16 at 23
- [24] Evins v Shield Insurance Co Ltd 1980 [2] SA 814 A at 825G
- [25] See in this regard the decision SA Independent Order of Mechanics & Fidelity Benefit Lodge v General Accident Fire and Life Assurance Corp Ltd 1916 CPD 457.

- [26] See in this regard the decision *Thornton v Royal Insurance Co Ltd* 1958 (4) SA 171 (C) at 174G.
- [27] See in this regard the decision *Vogel v Kleynhans* 2003 (2) SA 148 (C) at 151
- [28] See in this regard the decision *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A).
- [29] 1922 AD 16 at 23
- [30] *Sebola and Others v Standard Bank of South Africa Ltd and Another (CIT)* (98/2011) [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (5) BCLR 785 (CC) (7 June 2012) main judgment at [57].
- [31] *Id.*
- [32] Clause 37.1. page 40; Section 65(2) is relevant, especially since it appears in Part A of Chapter 4 of the Act, which is concerned with “consumer rights”. It provides: “If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must— (a) make the document available to the consumer through one or more of the following mechanisms— (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer’s expense, or by ordinary mail; (ii) by fax; (iii) by email; or (iv) by printable web-page; and (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).’ And Section 96 appears in Chapter 5 of the Act, which regulates consumer credit agreements. It appears in Part B of that Chapter, which deals with “disclosure, form and effect of credit agreements”. The provision is headed, “Address for notice”. It reads: “Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at— (a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or (b) the address most recently provided by the recipient in accordance with subsection (2).” And Section 168, which appears in Chapter 8, is concerned with the enforcement of the Act. It appears in Part C, which concerns “miscellaneous matters”. It provides: “Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either— (a) delivered to that person; or (b) sent by registered mail to that person’s last known address.”
- [32] Clause 37.1. page 40; Section 65(2) is relevant, especially since it appears in Part A of Chapter 4 of the Act, which is concerned with “consumer rights”. It provides:
- “If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must—*

- (a) make the document available to the consumer through one or more of the following mechanisms—
  - (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;
  - (ii) by fax;
  - (iii) by email; or
  - (iv) by printable web-page; and
- (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).'

Section 96 appears in Chapter 5 of the Act, which regulates consumer credit agreements. It appears in Part B of that Chapter, which deals with "disclosure, form and effect of credit agreements". The provision is headed, "Address for notice". It reads:

*"Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at—*

- (a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or
- (b) the address most recently provided by the recipient in accordance with subsection (2)."

Section 168, which appears in Chapter 8, is concerned with the enforcement of the Act. It appears in Part C, which concerns

*"miscellaneous matters". It provides:*

*"Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either—*

- (a) delivered to that person; or
- (b) sent by registered mail to that person's last known address."

[33] Clause 38.1.3. page 40.

[34] Page 64 to 74 of the indexed bundle.

[35] Section 86 provides for debt review. Section 86(1) provides that a consumer may apply to a debt counsellor to be declared

‘over-indebted’. A debt review application may not be made if the credit provider has proceeded to take the steps contemplated in section 129 to enforce the agreement (section 86(2)). The Supreme Court of Appeal held in *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at para 14 that by giving the section 129(1)(a) notice itself the credit provider has taken ‘steps’ contemplated in section 86(2), and therefore that debt review is no longer available to the consumer.

[36] The Supreme Court of Appeal has held that this includes legal proceedings to cancel the agreement: *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at para 12.

[37] *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) at para 8. It was held in *African Bank Ltd v Myambo NO and Others* 2010 (6) SA 298 (GNP) at 311A-D (judgment of the majority of the Full Court) that since the allegation that notice has been given completes the cause of action, it must be contained in the summons or letter of demand, and not in the request for judgment by consent. This point does not arise in these proceedings.

[38] Page 64 to 82 of the indexed bundle – annexure EDT 5 to EDT 11.

[39] Section 129(1)(a).

[40] Section 129(1)(b)(i).

[41] More fully, section 130(1)(a) refers to a notice “contemplated in section 86(9), or section 129(1), as the case may be”.

All parties agreed that “section 86(9)” was a patent legislative mistake or typographical error, and that the enactment

must read “section 86(10)”. Section 86(10) allows a credit provider to give notice to a consumer who is in default under a credit agreement that is being reviewed “to terminate the review” 60 business days after the consumer applied for the review.

[42] *Rossouw* above n 3 at para 30, per Maya JA.

[43] *Id* at para 57, per Cloete JA.

[44] *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976

(4) SA 994 (A) at 1001B.

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