

SOUTH AFRICA / JUDGMENT

## Van der Merwe v Standard Bank of South Africa (A511/2013) [2015] ZAGPPHC 1106 (2 September 2015) [2015] ZAGPPHC 1106

COURT

North Gauteng High Court, Pretoria

BEFORE

TM Makgoka, NM Mavundla, C Pretorius

CASE / FILE NUMBER

A511/2013

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A511/2013

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

DATE: 2/9/2015

In the matter between:

PAUL JOHANNES VAN DER MERWE

Appellant

and

STANDARD BANK OF SOUTH AFRICA LTD

Respondent

### J U D G M E N T

MAKGOKA, J

[1] The issue in this appeal is whether service of a summons wherein a credit provider claims cancellation of a credit agreement, without complying with s 129(1) of the National Credit Act 34 of 2005 (the NCA), to which the credit agreement applies, constitutes a repudiation of

the credit agreement. The respondent (the plaintiff in the trial court) had issued two separate summonses in May and June 2010 against the appellant (the defendant in the trial court) for the enforcement of three credit agreements it had concluded with the appellant in respect of three motor vehicles. For the sake of convenience, the parties shall be referred to as in the trial court, that is, the respondent as the plaintiff and the appellant as the defendant.

- [2] It was common cause that the defendant had fallen into arrears when the two summonses were served on him. In the respective particulars of claim the plaintiff alleged that the credit agreements were cancelled by the service of the summonses and that it was entitled to the return of the motor vehicles. The defendant filed a plea and a counterclaim in respect of each summons, in which he alleged that the plaintiff was not entitled to cancel the credit agreements because the plaintiff had not sent a notice in compliance with s129 of the NCA. Therefore, the purported cancellation constituted a repudiation of the credit agreements, which repudiation the defendant accepted. According to the defendant, this allowed him to cancel the agreements and to tender the return of the motor vehicles against the payment of all amounts paid by him to the plaintiff in respect of the agreements.
- [3] In the trial court, the two actions were consolidated. The court made an order in terms of rule 33(4) of the Uniform Rules of Court that a stated case must be presented. In terms of paragraph 3 of the order, the stated case was for the court to determine:
1. Whether the plaintiff had complied with the notice requirements before service of summons on the defendant, with reference to the provisions of s 129(1) read with s 130 of the National Credit Act 34 of 2005 and the relevant agreements;
  2. In the event it is found that the plaintiff did not comply with the requirements:
    - 2.1 whether the service of summons on the defendant constituted a repudiation of the relevant credit agreements, which entitled the defendant to resile from the agreements as the defendant had purportedly done as set out in his pleas and their counterclaims;
    - 2.2 whether the agreements were terminated by service of the defendant's pleas and counterclaims;
    - 2.3 whether the plaintiff is entitled to a postponement of the case in terms of s 130(4)(b) of the Act in order to afford the plaintiff an opportunity to comply with s 129.
- [4] The two relevant sections of the NCA are ss 129 and 130. Section 129 deals with required procedures before debt

enforcement. It provides that if the consumer is in default under a credit agreement, the credit provider may not commence any legal proceedings to enforce the agreement before first providing notice to the consumer, drawing the default to the notice of the consumer in writing and proposing that the consumer refer the credit agreement to a number of entities referred to in the section, 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.

[5] From the above, it is clear that the s 129 notice is not meant to serve as a typical letter of demand or a notice of cancellation of an agreement. Rather, it is mainly meant to sustain the agreement. The bodies which a consumer is entitled to refer the credit agreement to, are meant to assist the consumer to overcome the difficulties that had resulted in the default, with a view to enable the consumer continuing with the agreement.

[6] Section 130(4)(b), on the other hand, is concerned with procedures in court. It provides:

"In any proceedings contemplated in this section, if the court determines that:

(a) .

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in sub-section 3(a) or has approached the court in circumstances contemplated in sub-section 3(c) the court must -

(i) adjourn the matter before it;

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

[7] The trial court (AA Louw J) concluded that the plaintiff had not complied with s 129, read with s 130, on the grounds that the addresses to which the notices were sent were farm addresses where there was no postal delivery. It was also common cause that the notices were not received by the defendant, and that they were in fact, returned to the plaintiff unclaimed .[1]

[8] However, the court concluded that the service of summons pursuant to such non-compliance, in which the return of the vehicles is claimed, did not constitute a repudiation of the credit agreements. Accordingly, the court concluded that the agreements were not terminated. It postponed the matter in terms of s 130(4) in order to afford the plaintiff an opportunity to rectify its

non-compliance with s 129(1). The defendant is aggrieved with these findings, and appeals against them with leave of the trial court. There is no cross-appeal against the finding that the plaintiff had not complied with s 129(1). As a result, the only issue before us is whether by its service of summons on the defendant claiming return of the vehicles without complying with s 129, the plaintiff repudiated the agreement, entitling the defendant to either accept or reject the repudiation.

- [9] It was common cause that the plaintiff had not acquired the right to cancel the agreement because it had not complied with the provisions of s 129. That takes care of the first question of the stated case. There, the parties part ways. It is on the effect of that non-compliance that the parties adopt diametrically opposed views. The plaintiff submits that there was no repudiation in the circumstances, and that the court was obliged to adjourn the matter as it did.
- [10] The defendant's argument, on the other hand, is that the plaintiff's non-compliance, followed by the summons in which return of the vehicles was claimed, constituted unlawful conduct. This opened the door for acceptance of the repudiation

by the defendant, which it did and cancelled the agreements. Once the agreements had been cancelled, according to the defendant, there was nothing left of the contract which could be rectified, as the rights and obligations of the parties with regard to further performance came to an end. It is further contended that, under those circumstances, any further notice in terms of ss 129 and 130, including s 130(4)(b) subsequent to a cancellation of the contracts, would be of no consequence.

- [11] I consider first, the issue of repudiation, followed by a discussion of the effect of s 130(4)(b). The test to determine whether there had been repudiation is trite. In *Nash v Golden Dumps (Pty) Ltd* [2] the test was set out as follows:

"Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated ..."

- [12] The test for repudiation is an objective one. It is a matter of perception of a reasonable person placed in the position of the aggrieved party. The question is whether a notional reasonable person would conclude that proper performance will not be forthcoming.[3] The approach is that a court, faced with the enquiry of whether a

party's conduct amounted to repudiation, must superimpose its own assessment of what the innocent party's reaction to the guilty party's action should reasonably have been. Consistent with that approach, a court in making its assessment must take into account all the

## background

material and circumstances that should have weighed with the innocent party.[4]

- [13] Both in the trial court and in this court, the defendant relied heavily on an unreported judgment of a single judge of this court in *Volkskas Bank Bpk v Lotter*, case number 17526/1990. In that case, the Credit Agreement Act 75 of 1980 was applicable. Like here, there was no proper compliance by the credit provider in sending the relevant pre-litigation

notice to the defendant. Instead of sending it to a chosen domicilium address, the notice was sent to a postal address. The court found that the issuing and service of summons by the bank on the defendant

under those circumstances amounted to a repudiation of the agreement by the bank.

- [14] The trial court declined to follow the reasoning of the court in *Volkscas*, for two reasons. Firstly, it held that the conduct of the plaintiff in issuing a summons under circumstances where it had not complied with a statutory notice, did not amount to a repudiation of the agreements. In particular, it found that a reasonable consumer would regard the plaintiff's conduct as being consistent with enforcement of the contracts, rather than repudiating them. For those reasons the defendant's counterclaims were dismissed. Secondly, it held that in any event, *Volkscas* was distinguishable from the present case by reason of s 130(4)(b), which affords a second opportunity for a credit provider to rectify non-compliance by adjourning the matter and set out the steps the credit provider must take before the matter may be resumed.
- [15] I do not intend to discuss at any length as to whether there was repudiation, because, to my mind, such an enquiry can never arise in the context of a summons issued pursuant to a credit agreement governed by the NCA, regard being had in particular, to the provisions of s 130(4)(b). In my view, the consumer is prevented from pleading repudiation to the extent that such alleged repudiation is based on non-compliance with s 129. Simply put, non-compliance with s 129 can never be a basis for attacking the validity of the summons. Before I express myself further on this aspect, I need to dispose of a dispute that arose between the parties' counsel as to what the trial court was called upon to determine.
- [16] Mr Strydom SC, counsel for the defendant, quite forcefully, argued that the learned trial Judge oversimplified the issues by confining himself to the question whether there had been compliance with the NCA. According to counsel, the "true issue" was not only whether there was compliance with ss 129 and 130, but whether the plaintiff breached the agreements by "repudiating" them, allowing the defendant to accept the repudiation and cancel the agreements on his part. Put differently, counsel pressed that the issue was a contractual one, in particular, whether the plaintiff was entitled to cancel the agreements and reclaim the vehicles, and if not, whether such conduct amounted to repudiation, entitling the defendant to cancel the agreements. It was also contended that the plaintiff's case in the particulars of claim 'was not to claim another chance to rectify its defective conduct, whereafter it should be allowed to cancel the agreements in future.'
- [17] This criticism of the learned trial judge is unwarranted. In my view, there was no doubt as to what the issues before the court were. I have set them out in para 3 above. There is no ambiguity about any of the issues stated for determination. The very fact that counsel invites us to consider what he says was "the true issue", calls for an interpretation or contextualisation of the stated case. This would only be necessary if there was ambiguity, which I do not find. The issues for determination were clear: whether there compliance with

s 129, and if not, what the consequences were.

- [18] The second point of criticism is that despite the trial court's finding that the first and second agreements do not contain a *lex commissoria* and therefore the right to terminate had to first be acquired in terms of common law, the court went on to conclude that whether the right to cancel can be acquired after the institution of the actions, was not a question before the trial court for

### **determination.**

Mr Swart SC, counsel for the plaintiff pointed out that the question whether the agreements contained a *lex commissoria* and whether the plaintiff had acquired a common law right to cancel the agreements, were not issues that had to be decided by the trial court. I agree.

- [19] As stated in the preceding paragraph, the stated case is very clear as to what was to be determined by the trial court. The issues raised by the defendant's counsel did not form part of the case stated for determination before the trial court. There is a good reason why they were not. The stated case was based on the pleadings. In his respective pleas, the defendant never relied on the absence of a *lex commissoria* to contend that the plaintiff had not acquired the right to cancel the agreement. Throughout, the defendant had consistently pinned his hope on the non-compliance with the provisions of s 129 read with s 130. The thrust of his respective pleas is found in paragraph 3 with its various sub-paragraphs, comprising over 3 pages. None of those contains a complaint about what is being argued before us. Each one of them was about non-compliance with s 129. I therefore find no merit in this argument. The learned trial judge was correct in his conclusion that the *lex commissoria* aspect was not before him for

### **determination.**

- [20] I return now to s 130(4)(b) and its effect. Just to recap, the section provides that upon a finding that there was non-compliance

with s 129, the court "must" adjourn the matter. In this regard, it was contended on behalf of the defendant that upon proper interpretation, the legislature had not intended to oblige a court to allow compliance with ss 129 and 130 after the contract had been cancelled. It should be remembered that the defendant's argument is that the agreements were terminated when he filed his plea and counterclaim in respect of each matter, in response to the plaintiff's "repudiation". Therefore, according to the defendant, by the time the matter came before the trial court, there were no longer agreements in place as the agreements had been terminated as stated above. The argument is that any other interpretation would be meaningless as there was no longer any contractual relationship between the parties.

- [21] The difficulty with this approach is that it is assumed, as a point of departure, that there was repudiation by the plaintiff in its particulars of claim and cancellation by the defendant in his pleas and counterclaims. None of these took place, and can never take place, in the

context of the NGA and in particular of s 130(4)(b). The reason is this. Section 130 is titled "Procedures in court". It is therefore clearly envisaged that questions as to whether there has been proper compliance with ss 129 and 130, can only be determined when the matter comes before a court for adjudication, be it for default or summary judgment, or for trial.

- [22] The sequence is important. First and foremost, the court would make a determination as to whether there is compliance with ss 129 and 130. Until that takes place, the preceding steps, including the notice in terms of s 129, the summons or application, are deemed to be valid. In other words, the process up to that stage is insulated. It is precisely for that reason that in the present case, the parties requested the court to first make a determination as to whether there had been compliance with ss 129 and 130.
- [23] The next step is a consideration whether there had been compliance with s 129 notice. Such a consideration can only take place within the confines of ss 129 and 130. Within those confines is the built-in mechanism in s 130(4)(b) for curing any defects in the s 129 notice. It is only after a finding of non-compliance with s 129, that the consequences of such non-compliance come into operation. There is only one consequence - adjournment with directives. There is no room at this stage, for anything else, let alone a consideration of substantive common law concepts like repudiation. All that the court has to establish at that stage, is the procedural step of giving notice envisaged in s 129 read with s 130. If it had not been done according to the provisions of the NCA, the court must afford the credit provider an opportunity to cure the defect.
- [24] Counsel for the defendant also placed reliance on the trite common-law presumption that the legislature does not intend to alter the common law unless it is clear from the language of the statute that the very object is to alter or modify it. [5] In the context of the present case, it was submitted that the legislature could not have intended s 130(4)(b) to alter the common law by doing away with the common law right of a consumer to accept as a repudiation, a credit consumer's cancellation of the agreement without first acquiring that right, for example, a pre-litigation notice, as is the case here.
- [25] A purposive construction is called for in interpreting the relevant provisions of the NCA. In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [6] the Constitutional Court explained that it is necessary that the provisions of the NCA should be read in the light of the subject matter with which they are concerned, to enable the court to arrive at the true intention of the legislature. By enacting s 130(4)(b), the legislature had clearly intended that a summons issued pursuant to a defective s 129 notice was never a nullity for that reason - under any circumstances. This is so as the enquiry as to the non-compliance precedes any other consideration, and once non-compliance is found, the court must adjourn the matter, and no further enquiry is permitted. The exclusion of any further enquiry means that there can never be a stage where repudiation and acceptance, come into consideration.

[26] The effect of s 130(4)(b) is therefore that no invalidity or nullity shall be visited upon any action or application by the credit provider merely for the reason that it was preceded by non-compliance with s 129 read with s130. The sum total is therefore that indeed the legislature had intended, in clear and plain terms in s 130(4)(b), to do away with a consumer's right to rely on the defects in the pre-litigation notice as a defence or to attack the validity of the action or the application

[27] The effect of s 130(4)(b) has been considered by both the Constitutional Court and the Supreme Court of Appeal. In *Sebo/a & another v Standard Bank of South Africa Ltd & another* [7] Cameron J said:

"In my view the notice requirement in s 129 cannot be understood in isolation from s 130. This emerges from three considerations. First, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while s 129(1)(b) appears to prohibit the commencement of legal proceedings altogether ('may not commence'), s 130 makes it clear that where action is instituted without prior notice, the action is not void. Far from it. The proceedings have a 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."

[28] In *Investec v Ramarundzi* [8] the Supreme Court of Appeal had to consider the section in the context of prescription. It held that the purpose of s 130(4) is to ensure that any shortcoming in the pre-summons enforcement procedures is made good. Lewis JA neatly summed up the position as follows:

"Section 130(4) is unusual, for it requires a court to pause (adjourn) the proceedings so that the service provider gives the consumer the benefit of notice as to his or her options - a notice that should ordinarily be given before summons is issued and served. It is the consumer who might be prejudiced were he or she not to be given those options. Thus the proceedings have a life, as Cameron J has said, and are not void, despite the absence of a s 129 notice. The very fact that a court must make an order as to how the proceedings are to be continued indicates the validity of the summons rather than its nullity"[9]

[29] When viewed through this prism, it is clear that the formulation of the stated case was superfluous, to the extent the court was requested to determine, in the event it finding that the plaintiff had not complied with s 129, whether the service of summons amounted to repudiation of the contracts. Of course this can never be, in view of the clear and peremptory provisions of s 130(4)(b). There is only one route for the court to take once it determines that there was non-compliance - the court must adjourn the proceedings. It has no residual discretion to consider anything else. Thus, the only legally competent question before the trial court was whether there was compliance with s 129. If there was none, s 130(4)(b) kicks in automatically, and nothing else could arise from that non-compliance other than an adjournment with directives from the court. This demonstrates a need to

formulate questions for

## determination

clearly, bearing in mind the applicable law. The Supreme Court of Appeal has emphasised this in a number of cases. [10]

- [30] The trial court was therefore undoubtedly correct in its conclusion that once it had determined that the plaintiff had not complied with s 129, it was enjoined by s 130(4)(b) to adjourn the matter and afford the plaintiff an opportunity to comply with s 129. This is the distinguishing feature between the Credit Agreement Act, which was applicable in the Vo/kskas case, and the NCA. The former did not have an equivalent of s 130(4)(b), which is why it was possible for Mynhardt J to conclude that the service of a summons without complying with the pre-litigation notice constituted repudiation of the agreements.
- [31] Given the view I take of the present matter, I refrain from expressing a firm view as to the correctness of that conclusion. For the present purposes, it is sufficient to find, like AA Louw J, that the two cases are distinguishable. To conclude in the manner contended for on behalf the defendant, would require one to treat s 130(4)(b) as pro non scripto. Section 130(4)(b) is clearly designed to prevent a consumer, who, like the defendant, being in breach of an agreement, from opportunistically latching onto a bona fide procedural defect by the credit provider in sending a s 129 notice, to free him or herself from the agreement which they had breached, in the first place.
- [32] To summarise, on a plain reading of the sections, a finding of non-compliance by the court automatically triggers an adjournment of the proceedings in terms of s 130(4)(b). It is clear that the legislature had intended that non-compliance with s 129 should not be fatal to the credit provider's summons. It is in a way, a legislative "safety valve" or 'fall back mechanism' for the credit providers. Thus, the NCA does not allow the consumer to raise as a defence, the fact that the credit provider has not complied with s 129.
- [33] In the result the appeal falls to fail. Costs should follow the event. Both parties employed two counsel. Given the novel nature of the issue raised in the appeal, involving, as it does, the interpretation of a section of an important statute, I am of the view that the employment of two counsel was warranted.
- [34] In the result the following order is made:
1. The appeal is dismissed with costs, including the costs of two counsel.

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TM Makgoka

Judge of the High Court

I agree

NM Mavundla

C Pretorius

Date of hearing: 29 April 2015

## Judgment

delivered: 2/3/2015

### Appearances

For the Appellant: Adv T Strydom SC

Instructed by: Joop Lewies Inc., Pretoria

For the Respondent: Adv. BH Swart SC

Instructed by: Findlay & Niemeyer, Pretoria

[1] At the relevant time, the Constitutional Court had not delivered the path-lighting judgments in *Sebola v Standard Bank* 2012

(5) SA 142 (CC) and *Kubyana v Standard Bank* 2014

(3) SA 56 (CC). The authority at that stage was judgment of the Supreme Court of Appeal in *Rossouw v First Rand Bank Ltd* 2010 (6) SA 439 (SCA) para 3.1, in terms of which actual receipt was the responsibility of the consumer, not of the credit provider.

[2] *Nash v Ga/den Dumps (Pty) Ltd* 1985

(3) SA I (A) at 220-F.

[3] *Dalaco International (Pty) Ltd v Intamarket* [2000] ZASCA 82; 2001

(2) SA 284 (SCA) para 16.

[4] *Datacolor International* paras 19 and 20

[5] *Studer, -aad van Pretoria v Van Wyk* 1973 (21 SA 779 (A) at 784).

[6] *Department of Land Affairs and others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007

(6) SA 199 (CC) paras 52 and 53.

[7] *Sehula and another v Standard Bank and another* 2012

(5) SA 142 (CC) paras 52 and 53.

[8] *Investec Bank v Ramarunzi* 2014

(4) SA 394 (SCA)

[9] Investec v Ramarunzi para 22.

[10] See for example, Commissioner for Customs and Excise v Standard General Insurance Company Ltd 200 1 (1) SA 978 (SCA) para 4; Denel (Edms) Bpk v Vorster 2014 (4) SA 481 (SCA) para 3; ABSA Bank Ltd v Bernet 201 1 (3) SA 74 (SCA) para 21; FNB v Clear Creek Trading [2015] ZASCA 6 (9 March 2015).

[10] See for example, Commissioner for Customs and Excise v Standard General Insurance Company Ltd 200 1 (1) SA 978 (SCA) para 4; Denel (Edms) Bpk v Vorster 2014 (4) SA 481 (SCA) para 3; ABSA Bank Ltd v Bernet

201 1 (3) SA 74 (SCA) para 21; FNB v Clear Creek Trading [2015] ZASCA 6 (9 March 2015).

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