Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

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

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N. REDMAN **2023**

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 21/44429

In the matter between:

INVESTEC BANK LIMITED Plaintiff
(Registration Number 1969/004763/06)

and

OLIVIER CHARLES ZOUZOUA Defendant
(Identity Number […])

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded onto CaseLines. The date and time for hand-down is deemed to be 10h00 ______ 2023

JUDGMENT

REDMAN AJ:

[1] During September 2021, the applicant ("**Investec**") brought an application against the respondent ("**Zouzoua**") wherein it sought payment of an amount of R1 924 122,66 (together with interest and costs) as well as an Order declaring the immovable property described as Erf 74, Carlswald Estate Township, registration division J.R., (Local Authority City of Johannesburg) Gauteng specially executable ("**the property**").

[2] The applicant's cause of action was based on a written loan agreement concluded between Investec and Zouzoua which was secured by means of two covering mortgage bonds registered over the property.

[3] One of the defences raised by Zouzoua in his answering affidavit was that Investec had not complied with the provisions of sections 129 and 130 of the National Credit Act, 34 of 2005, ("**the NCA**"). Zouzoua contended that prior to the institution of the proceedings he had changed his *domicilium citandi et executandi* and accordingly the notice in terms of s 129(1) of the NCA relied upon by the applicant was sent to the incorrect address.

[4] In response to this defence, whilst not conceding that Zouzoua had formally and properly given notice of change of his *domicilium*, Investec brought an interlocutory application seeking the Court's leave to serve and/or re-serve a section 129 notice on Zouzoua by e-mailing a copy thereof to his attorneys of record. Investec also sought an order that the main application resume upon the expiry of ten days after the section 129 notice was e-mailed to the respondent's attorneys.

[5] Zouzoua has opposed the interlocutory application contending that the applicant was only entitled to approach the Court under section 130(4)(b) of the NCA in circumstances where the Court had determined that there was

no compliance with s 129 of the NCA. According to Zouzoua, any application brought under section 130(4)(b) would be premature in the absence of a determination of non-compliance.

PROVISIONS OF THE NATIONAL CREDIT ACT

[6] The agreement relied upon by Investec is a credit agreement within the meaning of the NCA. The following provisions of the NCA are relevant–

6.1. Section 129(1) provides as follows:

"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."

6.2. Section 130 provides as follows:

(1) subject to sub-section (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 the credit agreement for at least twenty business days and –

(a) at least ten 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) ...

(3) Despite any provision of law or contracts 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) ...

(4) In any proceedings contemplated in this section, if the Court determines 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 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."

[7] In terms of s 129(1)(b) of the NCA, a credit provider may not commence any legal proceedings to enforce a credit agreement before –

"(1) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

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

[8] The process of statutory interpretation was described by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, 2012 (4) SA 593 (SCA) at paragraph 18 as follows:

"... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision

appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[9] A default notice under s 129(1)(a) is required to notify the consumer of his/her rights to refer the credit agreement to a debt counsellor, alternatively dispute resolution agent, consumer court or ombud with jurisdiction. The intention is to enable the parties to resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.

[10] Failure to comply with the provisions of s 129(1)(a) does not render the proceedings void. The position was succinctly described by the Constitutional Court in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 CC at para [140] as follows:

"... 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. ..."

[11] The purpose of the NCA is to, *inter alia*, protect consumers and to promote a fair and non-discriminatory marketplace for access to consumer credit. (See preamble to the NCA).

[12] The applicant has brought this application *ex abundante cautela* and premised on the assumption that the requisite notice in terms of s 129(1) relied upon by the applicant was non-compliant with the provisions of the NCA. The Court can thus determine, for the purpose of this interlocutory application, that Investec has not complied with the provisions of s 129(1) of the Act and that it commenced legal proceedings to enforce the agreement prior to providing a notice to Zouzoua as contemplated in s 129(1)(a) of the NCA. There is accordingly nothing precluding this court from making an order in terms of s 130(4) of the NCA.

[13] In terms of s 130(4) of the NCA, upon a finding of non-compliance with s 129(1)(a), the Court must adjourn the matter before it and make an appropriate Order setting out the steps the credit provider must complete before the matter may be resumed.

[14] The purpose of the section is to ensure that the consumer is given adequate notice to enable it to exercise the rights afforded to it under the NCA.

[15] There is nothing in the NCA which precludes a Court from granting an order in terms of s 130(4)(b) at an interlocutory stage. Such order can be made by the Court hearing a default judgment, summary judgment, an opposed application, the trial or in any other proceedings. (See *FirstRand Bank Ltd of South Africa v Phiri and Others* [2013] ZAGPHC 90 (4 April 2013) at para 18 and *Standard Bank of SA v Bekker and Four Similar cases* 2011 (6) SA 111 (WCC) at para 35-3 0?qw).

[16] An interlocutory application was described in *Graham v Law Society, Northern Provinces* 2016 (1) SA 279 (GP) at 289E-F to be –

> *"... an incidental application for an order at an intermediate stage in the course of litigation, aimed at settling or giving directions with regard to some*

preliminary or procedural question that has arisen in the dispute between the parties."

[17] In the instant matter, the failure to comply with s 129(1) of the NCA is manifestly a procedural step which can and should be remedied at the earliest opportunity. It would be nonsensical for the parties to be required to set the main application down for hearing on the opposed roll in circumstances where an order in terms of s 130(4), including the postponement of the matter, would be the inevitable consequence. It would be both convenient and practicable for this aspect to be addressed at an interlocutory stage. S 130(4)(b) vests the Court with a discretion to address the credit provider's failure to comply with the NCA.

[18] The respondent's opposition to the application was without merit. The purpose of the relief sought by the applicant was to give effect to the provisions of the Act and to notify the consumer of his rights thereunder. It is thus surprising that the respondent elected to oppose the relief at all.

[19] In argument, the respondent proposed that service of the notice should be affected on the respondent himself, rather than on his attorney of record. The respondent further contended that an order granted in terms of s 130(4)(b) would affect his rights under the NCA. I do not agree. The primary objective of an Order under section 130(4)(b) is to provide the consumer with the same protection as that which he would have been afforded had the credit provider complied with the Act. An Order under s 130(4)(b) would not deprive the consumer of any rights, or defences, provided to him under the NCA. (See *FirstRand Bank v Phiri supra, paras 27-28*).

[20] In the circumstances I make an Order in the following terms:

1. The main application is adjourned in terms of section 130(4)(b)(i) of the NCA;

2. The applicant shall deliver a notice in terms of s 129(1) of the National Credit Act, 34 of 2005 -

    2.1. by e-mailing a copy thereof to the respondent's attorney of record, Mr Mahango of Bazuka Attorneys at **bazukam@bazukalaw.co.za**; and

    2.2. by pre-paid registered post to 74 Carlswald Avenue, 140 Walton Road, Midrand and/or per Sheriff at 74 Carlswald Estate, 140 Walton Road, Midrand in terms of Rule 4 of the Uniform Rules of Court.

3. The main application will resume ten days after –

    3.1. the applicant has complied with paragraph 2 above as contemplated in s 130(4)(b)(ii) of the NCA; and

    3.2. the respondent has not responded to the s 129(1) notice as contemplated in s 130(1)(a) of the NCA; or

    3.3. the respondent has responded to the s 129(1) notice by rejecting the applicant's proposals as contemplated in s 130(1)(b) of the NCA.

4. The provisions of s 86(2) of the NCA will not be applicable for the period up until the resumption of the main application as envisaged by paragraph 3 above, i.e., Zouzoua may exercise the rights afforded to him in terms of s 129(1)(a) of the NCA up until the date of resumption of the main application.

5. The respondent is ordered to pay the applicant's costs of opposition to this application.

N. REDMAN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:	29 November 2022
Judgment:	07 February 2023

Appearances:

For Plaintiff:	M de Oliveira
Instructed by:	ENS Africa
For Defendants:	MB Mhango
Instructed by:	Bazuka and Co.