



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 8817/2022

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

.....
DATE

.....
SIGNATURE

In the matter between

ABSA BANK LIMITED

Applicant / Plaintiff

And

VAN DER WALT, GERHARD CHRISTIAAN

Respondent / Defendant

Neutral citation: *ABSA Bank Ltd v Gerhard Christiaan van der Walt* (Case No: 8817/2022) [2023] ZAGPJHC 680 (09 June 2023)

JUDGMENT

PEARSE AJ:

AN OVERVIEW

1. This application for summary judgment arises out of a motor vehicle instalment sale agreement entered into in 2019 between the applicant credit provider (ABSA) and the respondent consumer (Mr van der Walt).
2. Mr van der Walt denies that he was notified of his rights under the National Credit Act 34 of 2005 (NCA). ABSA is ultimately unable to show compliance with sections 129 and 130. This inability flows from what appear to be administrative errors noted in paragraphs 49. and below – ABSA used registered mail instead of Mr van der Walt's specified manner of communication (delivery to his nominated physical address) and, in any event, erred in capturing and/or using the physical address provided by Mr van der Walt. The summary judgment application should thus be adjourned to allow for due and proper notification. It follows that the wasted costs of adjournment should be borne by ABSA.

THE PROCEEDINGS

The agreement

3. A certificate of registration in respect of a 2019 Toyota Fortuner 4.0 V6 4x4 A/T motor vehicle with engine number 1GRH223742 and chassis number AHTKU3FS200280417 was issued on 25 July 2019.

4. An instalment sale agreement in respect of the vehicle was concluded between the parties on 26 July 2019. The agreement, recorded in Afrikaans, contains the following terms of relevance to this case:

4.1. The contact telephone number of Mr van der Walt is inserted as “012 808 5160 / 083 471 2742”.

4.2. The physical address of Mr van der Walt is inserted as:

“FARM 284 BOEKENHOUTSKLOOF

CULLINAN

CULLINAN

1000”.

4.3. As translated into English, clause 19, entitled “*Your Contact Details*”, records Mr van der Walt’s agreement always to provide ABSA with:

- 4.3.1. his current physical address (and a post box number as his postal address if Mr van der Walt did not want post to be delivered to his physical address);
 - 4.3.2. a working telephone number at which ABSA could reach him;
and
 - 4.3.3. a working email address and cell phone number.
- 4.4. The same clause also records Mr van der Walt's agreement that, for all legal purposes, ABSA could use any of such contact details as last provided by Mr van der Walt to ABSA.

The NCA notice

- 5. According to ABSA, Mr van der Walt last paid an instalment in respect of the vehicle in February 2021.
- 6. The record contains a certificate of balance reflecting an outstanding balance under the agreement of R830,119.29 and an arrears amount thereunder of R120,998.94 at 08 November 2021.

7. On 08 November 2021 ABSA addressed to:

*“MR GERHARD CHRISTIAAN VAN DER WALT
284 BOEKENHOUTSKLOOF
CULLINAN
1000”*

a notice to be served *“BY HAND/REGISTERED MAIL”* on Mr van der Walt:

- 7.1. advising that a sum of R109,877.67 was overdue on his account;
- 7.2. demanding that he make immediate payment thereof;
- 7.3. informing him, in terms of section 129(1) read with section 130(1) of the NCA, that, *“unless payment of the abovementioned arrear amount together with further interest to date of payment is made within 10 (ten) business days of date hereof, action may be instituted against you for termination and enforcement of the aforesaid agreement with our client and for an order that the vehicle be returned to our client immediately”*;
and
- 7.4. cautioning him that, *“if you fail to bring your arrears up to date or fail to negotiate an acceptable repayment arrangement or fail to avail yourself of the remedies available to you as set out hereunder, the result of the legal action instituted against you may be that you may lose the vehicle*

which may be sold at a sale in execution in order to recover the amounts due to our client.”

8. As regards service of the NCA notice on Mr van der Walt:

8.1. a slip imprinted on the NCA notice reflects that on 12 November 2021 a registered letter – item PE 846 675 363 ZA – addressed to:

*“Mr Gerhard Christiaan Van
der Walt
284 Boekenhoutskloof
Cullinan 1000”*

was entrusted to the Saxonwold branch of the Post Office for “[f]ull tracking and tracing”; and

8.2. a “*PARCEL TRACKING RESULTS*” document annexed to the particulars of claim indicates that:

8.2.1. item PE 846 675 363 ZA was accepted by the Saxonwold branch of the Post Office at 13:22 on 12 November 2021;

8.2.2. the item was “*in transit*” out of that branch at 09:48 on 13 November 2021;

8.2.3. the item was “*at office*” at the Cullinan branch of the Post Office at 07:56 on 27 November 2021, when last scanned; and

8.2.4. a “*first notification to recipient*” was sent on that day.

9. It is unclear from the record whether and, if so, on what issues the parties communicated in the ensuing weeks and months.

10. On 01 March 2022, however, ABSA’s attorneys addressed to:

“MR GERHARD CHRISTIAAN VAN DER WALT
284 BOEKENHOUTSKLOOF
CULLINAN
1000”

a letter to be sent “*BY ORDINARY MAIL*” to Mr van der Walt:

10.1. alleging that he was in arrears with payment of instalments under the agreement and advising that “[*o*]ur client has cancelled the credit agreement, alternatively, our client hereby cancels the credit agreement”; and

10.2. demanding that he “*urgently arrange with our offices for the removal of the goods to avoid the costs involved in High Court proceedings and further costs if we have to instruct the Sheriff to attach and remove the goods.*”

The summons

11. ABSA issued summons against Mr van der Walt on 03 March 2022. In its particulars of claim, ABSA pleaded:
 - 11.1. conclusion on 26 July 2019 and material terms of the agreement (annexure B), including that Mr van der Walt chose his residential address as his *domicilium citandi et executandi*;
 - 11.2. compliance by ABSA with its obligations under the agreement;
 - 11.3. breach by Mr van der Walt of his obligations under the agreement;
 - 11.4. dispatch to Mr van der Walt of the NCA notice, including that “[t]he notice was sent by registered post and copies of the notices, together with the track and trace as proof that the notices reached the local post office are attached hereto as Annexure ‘**C1-C2**’” (emphasis added);
 - 11.5. cancellation by ABSA of the agreement; and
 - 11.6. entitlement to: (a) confirmation of cancellation of the agreement; (b) return of the vehicle; (c) leave to approach the court for judgment in respect of damages; and (d) costs of suit.

12. It appears from the record that the summons could not be served on Mr van der Walt on 25 March 2022 “*as the address for service is vague the address could not be found.*” The return of non-service records the following:

“PLEASE PROVIDE A FARM/PLOT NUMBER AS 284 IS THE JR NUMBER AND NOT THE FARM NUMBER.

PROVIDE ME WITH CONTACT DETAILS TO GET DIRECTIONS”.

The re-issued summons

13. It appears that ABSA re-issued summons against Mr van der Walt on 01 June 2022. In its *revised* particulars of claim, ABSA pleads:

13.1. conclusion on 26 July 2019 and material terms of the agreement (annexure B), including that Mr van der Walt chose his attorneys’ address as his *domicilium citandi et executandi*;

13.2. compliance by ABSA with its obligations under the agreement;

13.3. breach by Mr van der Walt of his obligations under the agreement;

13.4. dispatch to Mr van der Walt of the NCA notice, including that “[*t*]he notice was sent by registered post and copies of the notices, together with the

track and trace as proof that the notices reached the local post office are attached hereto as Annexure 'C1-C2' (emphasis added);

- 13.5. cancellation by ABSA of the agreement; and
- 13.6. entitlement to: (a) confirmation of cancellation of the agreement; (b) return of the vehicle; (c) leave to approach the court for judgment in respect of damages; and (d) costs of suit.
14. It appears from the record that the re-issued summons was served on the attorneys for Mr van der Walt on 06 July 2022.

The notices of intention to defend and bar

15. Mr van der Walt delivered a notice of intention to defend the action on 20 July 2022.
16. On 23 August 2022 ABSA's attorneys served on Mr van der Walt's attorneys a notice of bar recording that "*the Plaintiff requires the Defendant, in terms of Rule 26 of the Rules of Court, to file its Plea within five (5) days after delivery of this Notice, failing which the Defendant will be ipso facto barred from pleading and Judgment by Default will be applied for.*"

The plea

17. On 30 August 2022 Mr van der Walt delivered a special and general plea to the particulars of claim. The special plea's denial of the court's jurisdiction was thereafter abandoned. The plea to the merits of the claim admits the agreement but denies its breach and/or valid cancellation. Of relevance for present purposes are paragraphs 9.2 to 9.5 of the plea, which read as follows:

"The defendant specifically pleads that he resides at the Farm Boekenhoutskloof, Cullinan, as per Annexure 'B' to the particulars of claim [the agreement], of which the plaintiff is aware.

The defendant further specifically pleads that the [NCA] notice, as per Annexure 'C1', never reached the defendant as there is no postal delivery at the farm and proper service thereof could therefore not have been effected, and the plaintiff is put to the proof thereof.

The defendant therefore specifically pleads that no such notice was received as required.

As a consequence of the above, and specifically the plaintiff's failure to properly notify the defendant of any breach, the defendant specifically pleads that the plaintiff is precluded from instituting this action as contemplated in clause 15 of the agreement."

18. Mr van der Walt's plea was uploaded on CaseLines on 31 August 2022.

The application for summary judgment

19. On 16 September 2022 ABSA delivered to Mr van der Walt a notice of application for summary judgment in terms of rule 32 informing him of its intention to seek relief in the terms set out in the particulars of claim. An affidavit in support of the application was deposed to by Clifford Thomson on behalf of ABSA on the same day. It includes the averments that:

19.1. *“[t]he defendant raised a technical defence of non-compliance with the [NCA] and a special plea of jurisdiction. As I will demonstrate in this affidavit, his defences are misplaced and unsustainable”;*

19.2. *“[o]n the merits, the defendant raises no defence. He does not deny that he is in arrears for the amount alleged, and he does not deny that he is still in possession of the claimed vehicle. He does not, as one would expect of a responsible consumer, even take the court into his confidence as to how he intends to settle the arrears. He does not even surrender the vehicle”;*

19.3. *“[t]he respondent chose his domicilium citandi et executandi for purposes of all notices and correspondence sent by the applicant to the nominated address at 284 Boekenhoutskloof, Cullinan” (emphasis added);*

- 19.4. *“on 08 November 2021 the applicant sent a notice in terms of section 129 of the NCA by post to the address nominated in the agreement by the respondent”* (emphasis added);
- 19.5. *“[a]ccording to the track and trace report from the Post Office, the section 120 notice reached the Cullinan branch of the Post Office and, on 27 November 2021, the Post Office sent a notification to the address nominated by the respondent; which would have informed him that an item was awaiting his collection”* (emphasis added); and
- 19.6. *“I am advised that the applicant complied with the provisions of the NCA to apprise a reasonable consumer of the notice and his default, and the applicant validly terminated the contract with the result that the respondent is in unlawful position of the vehicle. Accordingly, I verify the cause of action made out in the combined summons.”*
20. On 02 November 2022 Mr van der Walt delivered an affidavit resisting the application for summary judgment. The affidavit does not take issue with the merits of the claim pleaded by ABSA but raises what is acknowledged to be a *“technical”* defence that:
- 20.1. although Mr van der Walt did not nominate a *domicilium citandi et executandi* for purposes of the agreement, he was requested to and did provide his physical address, being Farm 284, Boekenhoutskloof,

Cullinan, 1000. That is a farm (as opposed to a postal or street) address to which post is not delivered;

20.2. *ex facie* the documents referenced in paragraphs 7. and above, the NCA notice was neither delivered nor posted to Mr van der Walt's nominated physical address but directed to a different address that does not exist;

20.3. the NCA notice was neither delivered or posted to nor received by Mr van der Walt and did not come to his attention;

20.4. ABSA did not comply with the NCA and is not entitled to summary judgment against him;

20.5. the judgment in *Kubyana*¹ is distinguishable from this case, in that ABSA dispatched the NCA notice to an address not nominated by Mr van der Walt and which does not exist as opposed to any refusal or failure by him to collect the notice from the Post Office; and thus

20.6. *“the application for summary judgment must be dismissed, or at the very least, the Honourable Court is to adjourn the matter in terms of section 130(4)(b) and make an appropriate order setting out the steps that the applicant needs to follow and complete before the matter may proceed.”*

¹ *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) [39]-[40]

The compelling application

21. On 13 December 2022 ABSA delivered its practice note, heads of argument and list of authorities in the summary judgment application and called on Mr van der Walt to do likewise within 10 days. Besides foregrounding what is not in dispute between the parties, the heads of argument prepared by Ziphozihle Raqowa take issue with ABSA's alleged non-compliance with the NCA. It is submitted that the documents referred to in paragraphs 7. and above demonstrate ABSA's compliance with the requirements clarified in *Kubyana* and that “[f]atal to the defendant's defence is the failure to adduce evidence and disclose fully how the notice would not have come to his attention by mere omission of the word ‘farm’ before the address, when the address is correct.”
22. On 10 January 2023 ABSA delivered an interlocutory application to compel Mr van der Walt to deliver submissions in the summary judgment application.
23. By order dated 01 March 2023, the court (per Vally J) directed Mr van der Walt to deliver heads of argument and a practice note in the summary judgment application within three days of service of the order and to pay the costs of the compelling application on the attorney and client scale.
24. Thereafter, a practice note and short heads of argument in opposition to summary judgment were filed by Gerhard de Beer of Mr van der Walt's attorneys.
As appears therefrom:

24.1. Paragraph 6.1 of the practice note confirms the relief sought by Mr van der Walt as being that “*the application for summary judgment be dismissed, and that the court adjourn the matter in terms of section 130(4)(b) and set out steps the credit provider must take before the matter may be resumed.*”

24.2. The heads of argument elaborate on the NCA-related submissions outlined in the answering affidavit referred to in paragraph above, including that “[a]ny item sent to 284 Boekenhoutskloof, Cullinan, would therefore never reach the respondent/defendant as the address does not exist”, as evidenced by the fact that “*the sheriff could not find the property [when endeavouring to serve the original summons] as the address seems to be insufficient.*”

GENERAL PRINCIPLES

25. An application for summary judgment is competent in action proceedings where a plaintiff believes that a defendant does not have a genuine defence to a claim and opposes it merely to delay the grant of relief.²

26. In deciding whether the defendant has a genuine defence, the court considers whether the plea discloses the nature and grounds of a defence to the claim that, on the face of it, is *bona fide* and good in law.³

² *Meek v Kruger* 1958 (3) SA 154 (T) 159B-160E

³ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) 426A-F

27. Rule 32 recognises that a hopeless defence may occasion the plaintiff costs and delays that amount to an abuse of process;⁴ whereas, as an extraordinary remedy, the rule is not intended to deprive the defendant of an opportunity of placing a triable issue before court.⁵ Traditionally, therefore, our courts have tended to require strict compliance with the rule.⁶

28. As amended, rule 32 provides *inter alia* that:

28.1. within 15 court days of delivery of the defendant's plea, the plaintiff applying for summary judgment in respect of a claim must, by affidavit, verify the cause of action and amount of the claim, identify any point of law and the material facts on which it is based, and explain briefly why the pleaded defence does not raise a triable issue; and

28.2. in response, the defendant may satisfy the court, by affidavit or, with leave of the court, oral evidence, that the defendant has a genuine defence to the claim. The affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts on which it is based.

29. In this case, these principles are to be applied in the context of sections 129 and 130 of the NCA. In relevant part, section 129 provides as follows:

⁴ *Job Job Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) [30]-[33]

⁵ *He & She Investments (Pty) Ltd v Brand NO and Others* 2019 (5) SA 492 (WCC) [10]-[11]

⁶ *Mowschenson and Mowschenson v Mercantile Acceptance Corp of SA Ltd* 1959 (3) SA 362 (W) 366E-367B

“(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) ..., may not commence any legal proceedings to enforce the agreement before –

(i) first providing notice to the consumer, as contemplated in paragraph (a) ...; and

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

...

(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)."*

30. Section 130 of the NCA provides, in relevant part, as follows:

"(1) ..., 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 129(1) ...;

(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.

...

(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) *...; and*

(c) *....*

(4) *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 subsection (3)(a) ...*

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) *...;*

(d) *...; or*

(e) *....”*

31. Against the backdrop of these principles and provisions, both parties wrestle with the bearing on this case of the judgment in *Kubyana*. Whilst paragraphs 2 to 5 thereof disclose facts similar to those at issue in this case, Mr Kubyana had designated an address as his *domicilium citandi et executandi* in his instalment sale agreement, Standard Bank had sent a notice in terms of section 129(1) of the NCA to *that* address, via a local branch of the Post Office, the branch had sent a notification to *that* address and Mr Kubyana had failed and/or refused to collect the notice.
32. It is in the context of those facts that paragraphs 39 and 40 of the judgment record the findings of the court in the following terms:

"In sum, the Act does not require a credit provider to bring the contents of a s 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be to make the s 129 notice available to the consumer by having it delivered to a designated address. When the consumer has elected to receive notices by way of postal service, the credit provider's obligation to deliver generally consists of despatching the notice by registered mail, ensuring that the notice reaches the correct branch of the Post Office for collection and ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting her collection. This is subject to the narrow disqualification that, if the steps would not have drawn a reasonable consumer's attention to the s 129 notice, delivery will not have been effected. The ultimate question is whether delivery as envisaged in the Act has been effected. In each case, this must be determined by evidence.

The interpretation of 'delivery' set out in the preceding paragraph is consonant with the statutory objectives of consumer protection and consensual dispute

resolution in that it imposes obligations on the credit provider to ensure that the consumer is adequately informed of her statutory rights to seek extra-curial assistance. It also reflects an appropriate balancing of interests: while the obligation to deliver the s 129 notice rests on the credit provider, if the consumer acts unreasonably the credit provider may go ahead and seek enforcement of the credit agreement notwithstanding the consumer's failure to engage with the contents of the notice.” (Emphasis added; footnotes omitted)

33. Paragraph 54 concludes that, when delivery occurs through the postal service, proof of delivery entails proof by the credit provider that:

33.1. the notice was sent via registered mail to the correct branch of the Post Office in accordance with the postal address designated by the consumer;

33.2. the Post Office issued a notification to the consumer that a registered item was available for her collection;

33.3. that notification reached the consumer, as may be inferred from the fact that the Post Office sent the notification to the correct postal address of the consumer; and

33.4. a reasonable consumer would have collected the notice and engaged with its contents.

34. Paragraph 56 adds that it suffices to bring the notice to a consumer's attention for her "*to have agreed to receive the notice by way of registered mail and then to receive a notification that a registered item is awaiting her attention. This is the case unless a reasonable consumer would not, in the circumstances, have taken receipt of the notice.*"

THE ISSUES

Was there compliance with the NCA?

35. Advocate Thabiso Mhlanga, who appeared for ABSA, observed that Mr van der Walt does not dispute being in breach of the agreement before submitting that:

35.1. ABSA delivered the NCA notice to Mr van der Walt's nominated *domicilium citandi et executandi* in accordance with sections 129(1) and 130(1) read with section 65(1) of the NCA, i.e. in the manner prescribed in the agreement; *alternatively*

35.2. even if he did not nominate a *domicilium citandi et executandi*, i.e. if the agreement prescribes no method of delivery of the notice, Mr van der Walt received it in accordance with section 65(2) of the NCA, which lists making the document available to the consumer "*in person ... at any other location designated by the consumer ... or by ordinary mail*" as a competent method of delivery of the NCA notice.

36. In either event, Mr Mhlanga submitted that the documents referred to in paragraphs 7. and above demonstrate ABSA's compliance with the requirements clarified in *Kubyana*. When pressed, however, Mr Mhlanga confirmed that it is unknown on the papers what form of "first notification to recipient" was sent on 27 November 2021 from the Cullinan branch of the Post Office to "284 Boekenhoutskloof, Cullinan, 1000" or whether such notification reached Mr van der Walt's nominated physical address.
37. Attorney de Beer, who appeared for Mr van der Walt, submitted that the address to which the NCA notice was directed does not exist and, in any event, is not the physical address nominated in the agreement. He added that the agreement references no postal address and there is no postal delivery at Mr van der Walt's farm. Thus, the notice could not have reached him; and, on the papers, did not reach him.
38. Instead, on the argument of Mr de Beer, ABSA could have but did not have the notice delivered by sheriff to the farm. On the facts of this case, therefore, it was submitted that section 65(1) and (2) of the NCA does not avail ABSA.
39. On the authorities, subject to the qualification in *Kubyana* regarding subjective knowledge on the part of the consumer, it remains for the credit provider to aver and prove that a notice in terms of section 129 of the NCA was delivered to the consumer.⁷

⁷ *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) [87]; *Benson and Another v Standard Bank of South Africa (Pty) Ltd and Others* 2019 (5) SA 152 (GJ)

40. Even post-*Kubyana*, moreover, our courts incline towards requiring strict compliance in applying sections 129 and 130 of the NCA to credit agreements between parties.⁸
41. How then are these principles to be applied to the facts of this case?
42. The agreement is a standard-form ABSA document. It regulates the permissible manners of communication between the parties. Mr van der Walt was not asked to provide a postal address; and did not do so. He was asked to provide a physical address; and did so, as recorded in paragraph above. The terms translated in paragraphs 4.3. and above suggest that, if there were to be communication by post, it was to be delivered to the nominated physical address. There is no evidence in the record that that requirement was observed in relation to the NCA notice.
43. It is notable that ABSA has been inconsistent in identifying the address at which it contends it was entitled to communicate with Mr van der Walt in relation to the agreement, as evidenced by the pleaded allegations paraphrased in paragraphs 11.1. and above.
44. In addition, it is evident from the documents referenced in paragraphs 7. to above that, at some time between July 2019 and November 2021, the word “*farm*” was

[16]

⁸ *Kgomo and Another v Standard Bank of South Africa and Others* 2016 (2) SA 184 (GP) [35]-[54]

omitted from the physical address captured and used by ABSA and its attorneys in respect of Mr van der Walt.

45. Whilst such an omission might ordinarily have been inconsequential, there is objective evidence that:

45.1. the sheriff could not locate Mr van der Walt's physical address in the absence of the word "*farm*" in his instructions to serve the original summons; and

45.2. ABSA resorted to re-issuing the summons and serving it at the office of Mr van der Walt's attorneys rather than at his farm.

46. There is no evidence in the record that ABSA instructed the sheriff or took any other step to deliver the NCA notice to the farm.

47. As noted, moreover, it is unknown on the papers what form of "*first notification to recipient*" was sent on 27 November 2021 from the Cullinan branch of the Post Office to "*284 Boekenhoutskloof, Cullinan, 1000*" or whether such notification reached Mr van der Walt's nominated physical address.

48. There is also Mr van der Walt's testimony – that the NCA notice was neither delivered or posted to nor received by him and did not come to his attention – which I am unable to reject or disregard in these proceedings.

49. Hence I consider that compliance with section 129(5) to (7) of the NCA is not demonstrated on the papers, inasmuch as Mr van der Walt indicated in the agreement his preferred manner of delivery of any NCA notice – delivery to his nominated physical address – yet ABSA opted to use registered mail instead.
50. In doing so, an inaccurate or incomplete description of his address was captured and used, such that I am unable to conclude that the Post Office’s notification reached Mr van der Walt at his nominated physical address or at all.
51. To my mind, *Kubyana* is distinguishable on the facts of this case.
52. In the circumstances, I am not satisfied, for purposes of section 130(3) of the NCA, that the procedures required by section 29(1) have been complied with, such that I may proceed to determine the summary judgment application.

What is the consequence of non-compliance with the NCA?

53. I understood Mr Mhlanga to acknowledge *Benson*⁹ as authority for the proposition that, although non-compliance with sections 129 and 130 of the NCA does not nullify a summary judgment application, it generally requires the application’s adjournment “*to permit the credit provider to give notice before the proceedings may be resumed.*”

⁹ *Benson supra* [14]-[17]; see too *Sebola supra* [53]

54. And *Kgomo*¹⁰ is precedent for the understanding that a court would likely err in granting judgment against a consumer – as opposed to adjourning the proceedings and directing pre-resumption steps – in circumstances where an incorrect address is used for delivery of a section 129 notice.
55. In this regard, Mr de Beer stressed the prematurity of a summons issued in the absence of compliance with sections 129 and 130 of the NCA.
56. He urged me to dismiss the summary judgment application *alternatively* to adjourn the proceedings and direct pre-resumption steps.
57. I am not minded to dismiss ABSA's summary judgment application since it is resisted not on the merits of the claim but on a matter of statutory non-compliance that is remediable by further notice to Mr van der Walt. In these circumstances, the interests of the parties and of justice would not be served by consigning the determination of the claim to the costs and delays characteristic of a full-blown trial.
58. As noted in paragraphs 27. and above, however, proper adherence to process and attention to detail are requisites of summary judgment proceedings generally and of those concerning sections 129 and 130 of the NCA specifically. Credit providers seeking to repossess vehicles or other assets may reasonably be expected to display diligence in ensuring that consumers receive due and timely

¹⁰ *Kgomo supra* [55]-[58]

notice of their statutory rights. I consider therefore that I should exercise my discretion in terms of section 130(4) of the NCA to adjourn these proceedings and regulate their resumption.

The outcome and order

59. Mr van der Walt denies that he was notified of his rights under the NCA. ABSA is ultimately unable to show compliance with sections 129 and 130. This inability flows from what appear to be administrative errors noted in paragraphs 49. and above – ABSA used registered mail instead of Mr van der Walt's specified manner of communication (delivery to his nominated physical address) and, in any event, erred in capturing and/or using the physical address provided by Mr van der Walt. The summary judgment application should thus be adjourned to allow for due and proper notification. It follows that the wasted costs of adjournment should be borne by ABSA.

60. In the circumstances, I grant the following order:

60.1. In terms of section 130(4) of the National Credit Act 34 of 2005 (NCA), the summary judgment proceedings initiated and conducted under case number 8817/2022 (the action) are adjourned on the basis that:

60.1.1. should the applicant (plaintiff) wish such proceedings to resume, it is required to provide the respondent (defendant)

with due and proper notice, in terms of sections 129 and 130 of the NCA, in the manner of communication specified and to the physical address designated in the motor vehicle instalment sale agreement entered into in July 2019, of its intention to pursue the action; and

60.1.2. in due course, should the action be unresolved on expiry of any applicable statutory time period, the applicant (plaintiff) may re-enrol the summary judgment proceedings for hearing in the ordinary course.

60.2. The applicant (plaintiff) is to bear the wasted costs of adjournment.

PEARSE AJ

This judgment is handed down electronically by uploading it to the file of this matter on CaseLines. It will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is deemed to be 09 June 2023.

Counsel for Applicant:

Advocate Thabiso Mhlanga

Instructed By:

Smit Sewgoolam Inc

Counsel for Respondent:

Attorney Gerhard de Beer

Instructed By:

DBM Attorneys

Date of Hearing:

01 June 2023

Date of Judgment:

09 June 2023