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[2] **REPUBLIC OF SOUTH AFRICA**

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[8] IN THE HIGH COURT OF SOUTH AFRICA

[9] (WESTERN CAPE HIGH COURT, CAPE TOWN)

[10] REPORTABLE

[11] Case no: 12554/08

[12] In the matter between:

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[14] INVESTEC BANK LIMITED t/a INVESTEC PRIVATE BANK
Plaintiff

[15] and

[16] MAVHUNGU DAVID RAMURUNZI **Defendant**

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[18] Heard: 5 March 2013

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[19] JUDGMENTDELIVERED: 22MARCH 2013

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[1] SAVAGE AJ:

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[20] [1] On 1 August 2008 the plaintiff, Investec Bank Limited trading as Investec Private Bank, issued summons against the defendant, Mr Mavhungu Ramurunzi in terms of which judgment was sought against the defendant for payment of the amount of R120 558.59, together with the return of the cards issued to the defendant by the plaintiff, interest and costs.

[21] [2] The defendant raised a special plea of prescription in respect of the claim, which was argued on 5 March 2013. The basis for the plea is that in spite of summons having been served on the defendant in August 2008, notice in terms of s129(1)(a) of the National Credit Act 34 of 2005 (“NCA”) was only provided to the defendant in April 2012, more than three years after the summons was served, as a consequence of which the claim has prescribed.

[22] [3] A factual dispute exists between the parties as to whether an earlier notice in terms of section 129(1)(a)was provided to the defendant before summons was served in August 2008. The parties seek this Court to determine only the effect of the notice provided to the defendant in April 2012 on the basis that the plaintiff reserves the right to lead oral evidence at a later stage regarding any such earlier notice that may or may not have been provided to the defendant, should this be required.

[23] [4] The plaintiff opposed the special plea on the basis that on 19 April 2012 an order,taken by agreement between the parties, was granted by this Court in terms of which the matter was adjourned as envisaged by s 130(4) [3]

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(1)(b) of the NCA and the plaintiff was required to deliver a notice in terms of s 129(1) by way of email to the defendant before the matter was resumed. This order recorded that it was taken '*with reservation of each of the parties rights*'. The notice in terms of s129(1) was thereafter delivered to the plaintiff as a consequence of which the plaintiff argued that it is entitled to proceed with its claim on the basis of the 2008 summons served.

[24] National Credit Act

[25] [5] S129(1)of the NCA provides that:

[26] *(1) If the consumer is in default under a creditagreement, the creditprovider—*

[27] *(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the creditagreement 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*

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[29] *(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before—*

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[31] *(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and*

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[33] *(ii) meeting any further requirements set out in section 130.*

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[35] [6] The relevant provisions of s 130(1) are as follows:

[36] *(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 –*

[37] *(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;*

[38] *(b) in the case of a notice contemplated in section 129 (1), the consumer has—*

[39] *(i) not responded to that notice; or*

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[40] *(ii) responded to the notice by rejecting the credit provider's proposals; and*

[41] *(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.*

[42] [7] In terms of s130(3) the court may only determine the matter if it satisfied that the provisions of s129 (or 129 or 131 as the case may be) have been complied with, the matter is not pending before the Tribunal and the credit provider has not approached the Court under the circumstances specified.

[43] [8] S130(4) continues:

[44] *(4) In any proceedings contemplated in this section, if the court determines that—*

[45] *(a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;*

[46] *(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—*

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[48] *(i) adjourn the matter before it; and*

[49] *(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed…*

[50] Discussion

[51] [9] A credit provider may not commence with legal proceedings against a debtor in terms of s129(1)(b) before notice in terms of s129(1)(a) has been provided to the debtorandany further requirements have been met in terms s130.

[52] [10] In *Rossouw v Firstrand Bank* 2010 (6) SA 439 (SCA) Maya JA held at 451E-G that –

> [53] '*In the circumstances, the bank did not prove that it delivered the notice. As pointed out earlier, ss 129(1)(b)(i) and 130(1)(b) make this a peremptory prerequisite for commencing legal proceedings under a credit agreement, and a critical cog in a plaintiff's cause of action. Failure to comply must, of necessity, preclude a plaintiff from enforcing its claim; this despite the fact that in this matter it was not disputed the appellants were in arrears and thus breached their contractual obligations. The*

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bank, therefore, failed to make out a case for summary judgment and it ought to have been refused…'

[54] [11] If a credit provider has not complied with the relevant provisions of the NCA, s130(4) permits the court to adjournthe proceedings already instituted and '*make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed'.* Where the court, in the face of non-compliance by a credit provider with the provisions of the NCA, does not adjourn the proceedings and make an appropriate order in terms of s130(4) the effect of such continued non-compliance,given the peremptory nature of ss 129(1)(b)(i) and 130(1)(b),is that a plaintiff is precluded from enforcing its claim.

[55] [12] S15(1) of the Prescription Act 68 of 1969 provides that '(t)*he running of prescription shall, … , be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.*' In terms of s16(1)the provisions of the Prescription Act apply unless such provisions are inconsistent with the provisions of legislation '*which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of a debt or imposes conditions on the institution of an action for the recovery of a debt*'. The NCA constitutes legislation which '*imposes conditions on the institution of an action for the recovery of a debt*'. As much is evident from ss 129(1)(b)(i) and 130(1)(b) which provides a

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‘*peremptory prerequisite for commencing legal proceedings under a credit agreement, and a critical cog in a plaintiff's cause of action’ (per Maya JA in Rossouw supra).* Consequently, the service of a summons by a credit provider on a debtor in circumstances in which there has not been compliance with such peremptory provisions does not interrupt the running of prescription. The running of prescription in such circumstances is only interrupted where, as a matter of fact, there has been compliance with the NCA after the court has adjourned proceedings in terms of s130(4) and ordered such compliance.

[56] [13] Compliance with the provisions of the NCA subsequent to and in terms of an order of court made in terms of s130(4) is not a retrospective act, nor does it have retrospective effect. This is because statutes are construed as operating prospectively only, unless the legislature has clearly expressed a contrary intention (*S v Acting Regional Magistrate, Boksburg* 2012 1 BCLR 5 (CC)*)*.In *Curtis v Johannesburg Municipality*1906 TS 308 at 311 and 312 Innes CJ put it this way:

> [57] ‘*The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only*.’

[58] [14] In*National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (A) at 483H–484A Corbett CJ stated:

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> [59] '*A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past. (This definition appears to merge two canons of interpretation: the presumption against retrospectivity and the presumption against interference with vested rights. This, however, is not of great moment, as both canons lead in the same direction. See Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 (C), at 350 F – 351 D.) *There is an exception to thisrule in the case of a statute which is purely procedural and operates prospectively on all matters coming before the Court after the passing of the statute, though even here it is the intention of the Legislature which is paramount. Moreover, a provision which is procedural in form may in essence affect the substantive rights of persons.*

[60] [15] Both retroactive and retrospective legislation will not be given effect to if vested rights are taken away or impaired, or new obligations are created, or a new duty is imposed, or a new disability is attached in regard to events already past. *Shewan Tomes & Co Ltd v Commmissioner of Customs & Excise*[1955] 4 All SA 272 (A)at 274-5;*Cape Town Municipality v F Robb & Co Ltd* supra 350F–351D; De Ville 205.In *Minister of Safety & Security v Molutsi* 1996 4 SA 72 (A) at 88D–E it was stated that the approach to the interpretation of statutes, within the context of the Constitution,is one –

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> [61] '*mindful of society's distaste for retroactive legislation characterised by a reluctance to accept that accrued and vested rights are intended to be retroactively set at naught unless the legislation in question makes that plain*'.

[62] [16] The service of processupon the debtorfor purposes of Prescription Act must be undertaken in a legally effective manner. Where service of process is premature in terms of a statutory provision, legal proceedings are not effectively commenced and prescription is not interrupted. (*Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 842;*Santam Insurance Co Ltd v Vilakazi* 1967 (1) SA 246 (A) at 253). This conclusion is supported by Laubscher in Extinctive Prescription (1996) at 127 in which he concludes that a '*defective provisional sentence summons will not interrupt prescription and upon dismissal of such a summons the plaintiff will not be entitled to continue with the principle case'*.

[63] [17] The NCA does not state that compliance with the court's order in terms of s130(4) applies retrospectively to the date of service of the summons.In *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC) at 385A-B, Blignault J stated with reference to the Concise Oxford Dictionary that the ordinary meaning of the word 'resume' in the context of the NCA is '*to continue after an interruption*'. It follows therefore that the court acting in terms of s130(4) therefore, following its order regarding

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compliance, will resume proceedings through continuing them after the interruption in which compliance was effected. The NCA is silent on the effect of such procedure on prescription.

[64] [18] In the absence of clear language to this effect,it must be presumed that the legislature did not intend such compliance to have retrospective application. Furthermore, the legislature must be presumed not to have intended to take away vested rights or produce prejudicial effects retrospectively in the absence of language clearly stating such intention. (*Shewan Tomes & Co Ltd v Commmissioner of Customs & Excise* supra 311G–312A; *National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (A) 483H–484A; *Cape Town Municipality v F Robb & Co Ltd* supra 350F–351D; De Ville 205).

[65] [19] The defendant held a vested right to raise a special plea of prescription given the plaintiff's non-compliance with s129(1)(a) prior to April 2012. If compliance with the court's order in April 2012 were to be found to retrospectively 'validate' the summons, this would have the effect of taking away the defendant's vested right to plead prescription. Such a finding would not accord with the language of the statute which makes no provision for such retrospectivity and I am persuaded that the reference to the resumption of proceedings indicates that what is intended is that the adjournment of proceedings pending compliance and thereafter their continuation or

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resumption. Had the retrospective validation of proceedings been intended, this would been apparent from the language of the statute. Accordingly, with the '*prerequisite for commencing legal proceedings under a credit agreement, and a critical cog in a plaintiff's cause of action'* being the provision of a notice in terms of s129(1), the running of prescription is interrupted,where summons has already been served, only on provision of the notice to the debtor, whereafter the credit provider may enforce its claim.

[66] [20] The case of *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA)turned on the interpretation of the notice requirement contained in the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. This Act permits condonation to be granted by the court where notice of legal proceedings has not been provided,if the organ of state relies on a creditor's failure to serve notice and where the debt has not been extinguished by prescription; good cause exists for the failure by the creditor; and the organ of state was not unreasonably prejudiced by the failure. If condonation is granted in terms of s3(4)(c), the court may grant leave to institute the legal proceedings on such conditions regarding notice as the court deems appropriate. The court concluded in *De Witt* that application for condonation may be made by the creditor even after proceedings have been instituted if the debt has not prescribed and that to find differently loses sight of the purpose of condonation (at para 10).Given that the summons was issued and served before the end of the prescriptive period, the court held that it had a

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discretion to condone the late service of the notice after the proceedings were instituted.

[67] [21] Lewis JA at para 12 stated that –

> [68] *'The very purpose of the provision allowing condonation is to give a court a discretion to determine whether the organ of state can rely on non-compliance, whatever form that may take. If this were not so, as was pointed out by Somyalo AJ in Moise the requirement of written notice as a precondition to the institution of legal proceedings would be in itself an absolute bar to such proceedings and would constitute a real impediment to the claimant's access to court. Indeed, a blanket bar to the amelioration by a court of the hardship worked by an inflexible precondition to the institution of proceedings could hardly survive constitutional scrutiny.'*

[69] [22] The learned judge in *De Witt*approached the matter on the basis that what stood to be determined was whether the claim had prescribed as at the time that summons was served. This was on the basis of s3(4)(b)(i) of Act 40 of 2002 which permits a court to grant condonation if it is satisfied that the debt has not been extinguished by prescription.

[70] [23] *De Witt* is distinguishable from the current matter in my mind in that the NCA makes no such reference to prescription within the context

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of s130(4). There is no requirement in the NCA that the court may proceed in terms of s130(4) only if it is satisfied that the debt has not been extinguished by prescription. If such a reference existed, the decision in *De Witt* would find application. However, in the absence of such a reference and on the basis of the ratio in *Rossouw (supra)* I am persuaded that the court, upon there having been compliance with the NCA following the procedure provided in s130(4), must consider whether, at the date of such proper compliance with the NCA as opposed to the date of service of the summons, the debt has been extinguished by prescription or not.

[71] [24] There is a further distinction between the provisions of Act 40 of 2002 and the NCA in that the former requires an application for condonation to be made only if the organ of state relies on a creditor's failure to serve notice. The statute accordingly intended that in spite of no notice having been provided, no condonation would be necessary if the organ of state did not rely on the failure to provide notice. This suggests that notice is not an essential prerequisite for the validity of the summons in all circumstances. The contrary is apparent from the provisions of the NCA which make it clear that the requirement of notice is a peremptory one. There are no circumstances provided in which the requirement of notice may be waived, which read together with ss129(1)(b)(i) and 130(1)(b)clearly indicates the existence of a legislative intention to require notice of legal proceedings upon a debtor in terms of the NCA in all circumstances.

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[72] [25] This is also so given that the notice provided to debtor must in terms of s129(1)(a) '*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'.* As a result, the purpose of the notice required by Act 40 of 2002 and that required by the NCA are distinct in that in the one, an organ of state is informed of legal proceedings to be instituted against it, which failure may be waived, whilst in the other,the debtor is informed of his or her default and steps which he or she may take as a result to resolve the matter are proposed, which notice may not be waived.

[73] [26] In *Dauth v Minister of Safety and Security* 2009 (1) 189 (NC) Lacock J held that for purposes of s 4 of the Act 40 of 2002, a 'premature' summons is to be regarded as valid and effective and that consequently the dicta in *Vilakazi (supra)* and *Evins (supra)*do not apply. For the reasons set out above, I am not persuaded that the conclusion of the learned judge in that matter finds application in the current circumstances.

[74] [27] Consequently, I find that the service of summons in proceedings instituted in terms of the NCA only interrupts the running of prescriptionupon the provisions of the NCA having been complied with. The

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date on which the court must determine whether the debt has prescribed is therefore the date on which there has been proper compliance with the NCA.

[75] [28] In the circumstances, I find that the notice provided by the plaintiff to the defendant in April 2012 in terms of s129(1)(a) was only provided to the defendant more than three years after the service of summons and more than three years after the period of prescription of the claim.

[76] [29] In the circumstances, the plaintiff may only enforce its claim against the defendant if it is able to prove that a notice was provided to the defendant in accordance with the provisions of s129 of the NCA prior to the prescription of its claim.

[77] [30] With regards to the issue of costs, I am satisfied that costs should stand over for later determination.

[78] Order

[79] [31] In the result, I make the following order:

[80] 1. I declare that the defendant's special plea of prescription is upheld.

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[82] 2. Costs stand over for later determination.

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[86] KM SAVAGE
ACTING JUDGE OF THE HIGH COURT

[87] Appearances:

[88] Plaintiff: W Jonker instructed by De Klerk &Van Gend

[89] Defendant: M D Ramurunzi (in person)

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