THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 445/13

In the matter between:

INVESTEC BANK LIMITED T/A
INVESTEC PRIVATE BANK **APPELLANT**

and

MAVUNGU DAVID RAMURUNZI **RESPONDENT**

Neutral citation:	*Investec Bank v Ramurunzi* (445/13) [2014] ZASCA 67 (19 May 2014)
Coram:	**Lewis, Ponnan, Bosielo and Saldulker JJA and Mocumie AJA**
Heard:	**2 May 2014**
Delivered:	**19 May 2014**
Summary:	Where a credit provider institutes action to enforce payment of a debt arising from a credit agreement, the running of prescription in respect of the debt is interrupted by service of the summons even though a notice in terms of s 129(1) of the National Credit Act 34 of 2005 (the NCA) is delivered to the consumer only after the prescription period has elapsed.

ORDER

On appeal from: Western Cape High Court, Cape Town (Savage AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside, and replaced with:

‘The defendant’s special plea that the debt has prescribed is dismissed with costs.’

JUDGMENT

Lewis JA (Ponnan, Bosielo and Saldulker JJA and Mocumie AJA concurring):

[1] Section 129(1) of the National Credit Act 34 of 2005 (NCA) provides that if a consumer is in default in paying a debt, a credit provider may (interpreted, as I shall indicate later, to mean ‘must’) draw the default to the attention of the consumer by notice which sets out the options open to the consumer to resolve his or her default. (I shall refer in general only to s 129, rather than s 129(1), for the sake of convenience.) Section 130(3) of the NCA provides that a credit provider may enforce a credit agreement only where there has been compliance with s 129. And s 130(4) *(b)* requires a court, where there has not been compliance with s 129, to adjourn the matter and make an order setting out the steps to be taken in order to ensure compliance by the credit provider.

[2] The issue in this appeal is whether a credit provider's claim against a consumer prescribes in circumstances where, although summons has been issued and served on the consumer prior to the elapse of three years from the debt becoming due in terms of the Prescription Act 68 of 1969, the credit provider has complied with the provisions of s 129 of the NCA only after the proceedings have been adjourned by a court in terms of s 130(4) to enable the credit provider to send the requisite notice, which is done more than three years after the debt has become due. Put differently, does a summons served before the requisite notice in terms of s 129 of the NCA has been delivered to the consumer interrupt the running of prescription? Is the summons of no effect until the s 129 notice has been served?

[3] The Western Cape High Court (Savage AJ) held that service of a summons without first having served a notice under s 129 did not interrupt the running of prescription. She thus upheld an argument that in effect amounted to a special plea, but gave the service provider the opportunity to lead evidence to show that there had in fact been compliance with s 129 of the NCA. The appellant, Investec Bank Ltd (the bank), abandoned its right to lead such evidence when seeking leave to appeal against the high court order. That court gave leave to appeal to this court on the strength of the argument that its decision was contrary to the principles expressed by Cameron J in *Sebola & another v Standard Bank of South Africa Ltd & another* 2012 (5) SA 142 (CC). The Constitutional Court considered that where an action is instituted without prior compliance with s 129 of the NCA the summons is not void: the bar on obtaining judgment is not absolute but only dilatory, and leads to a pause in the proceedings until there is compliance.

[4] The appeal thus depends on an interpretation (yet again) of ss 129 and 130 of the NCA, read with the Prescription Act. But a brief discussion of the facts giving rise to the action and the defence of prescription is first necessary. I should note at this stage that the consumer, the respondent, Mr M D Ramurunzi appeared for himself in both the high court and this court.

[5] In July 2003 the bank issued a credit card to Mr Ramurunzi. In December of the following year the bank financed his purchase of a Jaguar X type motor vehicle. The credit card was linked to a 'journey card' for the Jaguar. In February 2008 the bank wrote to Mr Ramurunzi advising that he was in arrears with payment on his

account. In March 2008 it sent a notice in terms of ss 123 and 129 of the NCA advising that he was in breach, owed some R20 987, that his credit facility had been suspended and that the bank was entitled to claim the balance outstanding in respect of the Jaguar motor vehicle. It advised him of the options open to him in terms of s 129 of the NCA.

[6] The notice was sent by ordinary mail and by registered mail to the address Mr Ramurunzi had chosen as his domicilium citandi and executandi when he first entered into a credit agreement with the bank. In July 2008 a certificate of balance was issued by the bank reflecting that Mr Ramurunzi owed it the sum of R120 588. And on 1 August 2008 the bank issued and served summons (at the same address) claiming this amount plus interest. Mr Ramurunzi responded to the summons by email, stating that he had changed his address and that the summons had been served on his former address. He also advised that he had sent notice of his change of address to the bank in August 2008. Whether the bank received the notice of change of address is in dispute. It was this dispute in respect of which the high court would have heard oral evidence had the bank not abandoned its reliance on the service of the s 129 notice in March 2008. It is accordingly not relevant on appeal.

[7] In September 2008 the bank applied for summary judgment. Mr Ramurunzi opposed the application on a number of grounds and apparently the application was refused: he was given leave to defend. In his plea (amended in June 2009) Mr Ramurunzi raised two special defences: that the bank had no locus standi (a point subsequently abandoned) and, second, that the bank had failed to deliver a s 129 notice before commencing proceedings.

[8] The matter remained unresolved (there is no reason why that is so apparent from the record) until 19 April 2012 when the parties held a pre-trial conference in terms of rule 37 of the Uniform Rules of Court. The minutes of the meeting reflect that Mr Ramurunzi indicated that he was persisting with his two points in limine. They agreed that the matter be adjourned as envisaged in terms of s 130(4)*(b)* of the NCA. The agreement was made an order of court on 19 April 2012 and referred to the reservation of rights by both parties; the action was postponed to 26 November 2012. In terms of the order the bank was required to send a new s 129 notice to Mr Ramurunzi by email, which it did in April 2012.

[9] The hearing of the action started in March 2013. At the outset Mr Ramurunzi argued that because the s 129 notice had been sent to him only after a period of three years had elapsed since the debt became due, the claim had prescribed. It was agreed that the high court would determine that point before any evidence was led as to whether a s 129 notice had in fact been duly delivered to Mr Ramurunzi within the prescription period. Savage AJ found, as I have said, that prescription was not interrupted when the summons was served (assuming non-compliance with s 129). She thus issued a declaratory order that the 'special plea of prescription' was upheld, and that the costs of the hearing would stand over for later determination.

[10] I turn now to the relevant legislative provisions. Section 15(1) of the Prescription Act provides:

'The running of prescription shall, subject to the provisions of subsection (1), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.'

A summons is such a process as is a notice of motion in an application.

Subsection (2) states:

'Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment . . . .'

[11] Section 16 of the Prescription Act provides that the provisions in the chapter dealing with extinction of debts shall, 'save in in so far as they are inconsistent with the provisions of any Act of Parliament 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*, apply to any debt arising after the commencement of this Act'. (My emphasis.)

[12] It is Mr Ramurunzi's argument that the provisions of ss 129(1) and 130(4) of the NCA impose conditions on the institution of action under the Prescription Act as envisaged in s 16(1), and thus affect the way in which an action will interrupt the running of prescription. The high court accepted this argument, finding that without

prior compliance with s 129 the summons was void. I shall return to Mr Ramurunzi's argument after dealing with the relevant provisions of the NCA.

[13] In so far as relevant, s 129(1)*(a)* provides that if a consumer is in default, the credit provider *may* (interpreted by this court as *must* in *Nedbank Ltd & others v National Credit Regulator & another* 2011 (3) SA 581 (SCA)) draw the default to the notice of the consumer in writing and alert the consumer to the various options available to him or her under the NCA. Section 129(1)(*b)* provides that a credit provider may not commence any legal proceedings to enforce the credit agreement before first providing the s 129(1)*(a)* notice or other notices required in terms of specific provisions of the NCA.

[14] Section 130 of the NCA regulates debt procedures in a court. Subsection 3 provides that a court may determine a matter only if it is satisfied that, in the case of proceedings to which s 129 (amongst others) applies, that section has been complied with. But subsection 4 then allows for compliance to be effected after the proceedings have commenced. The subsection provides that:

'[I]n any proceedings contemplated in this section, if the court determines that--

. . .

(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; . . .'

[15] The high court found, as I have said, that delivery of a s 129 notice is peremptory, a finding consistent with judgments in this court, including *Roussow & another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA), and in the Constitutional Court in *Sebola* (above) and more recently in *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1 (20 February 2014). It held also that the NCA constitutes legislation which imposes conditions on the institution of action for the recovery of a debt, such that non-compliance with s 129(1) of the NCA rendered service of the summons ineffective. The notice served pursuant to the court order made in terms of

s 130(4)*(b)* of the NCA did not retrospectively validate the summons, held the high court: Mr Ramurunzi had a vested right to plead prescription.

[16] The high court considered (and Mr Ramurunzi on appeal argued) that the summons had been served prematurely. It relied on the majority judgment of Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) which dealt with the prescription of a dependant's action under the Compulsory Motor Vehicle Insurance Act 56 of 1972. Section 25 of that Act required that before action could be instituted against an authorized insurer for damages suffered as a result of a motor accident, the plaintiff had to send a claim in the prescribed form setting out the nature of the bodily injuries suffered, medical reports and various other details to the insurer. Section 25(2) read:

'No such claims shall be enforceable by legal proceedings commenced by a summons served on the authorized insurer before the expiration of a period of 90 days from the date on which the claim was sent or delivered by hand . . . to the authorized insurer.'

[17] The plaintiff had sent a claim in the required form in respect of her claim for personal injuries sustained in a motor collision that occurred when her husband had been killed in a collision. But although she had indicated in the form that she also had a dependant's action for loss of support, she had not given the requisite details of her damages in this regard. When she instituted action for damages for personal injury and for loss of support against the insurer it raised the defence that she had not properly served the requisite notice in respect of the claim for loss of support. She subsequently delivered another notice in the prescribed form claiming damages for loss of support, amended the summons so as to exclude the claim for loss of support, and issued a second summons in respect of that action. The insurer raised a special plea that the claim for loss of support had prescribed.

[18] This court held that while the two claims (for personal injury and for loss of support) arose from the same occurrence they were separate and independent causes of action, and that the claim for loss of support had prescribed. Although the court indicated that it was possible for a second summons to be re-served after compliance with s 25(2) of the MVA, in that case the second claim form was served after three years had elapsed from the date when the causes of action arose. The first summons had not interrupted prescription in respect of the claim for loss of

support because the requisite claim form had not been delivered timeously (at 842C-H).

[19] The high court relied also on a passage in M M Loubser *Extinctive Prescription* p 127 where the author states that the service of process on a debtor must commence in a 'legally effective manner'. Thus where a provisional sentence summons is defective it does not interrupt prescription (*Barclays National Bank Ltd v Wollach* 1986 (1) SA 355 (C)). This begs the question whether the summons in this matter was defective because it was not preceded by delivery of a s 129 notice on Mr Ramurunzi.

[20] Although the NCA is silent on the effect on prescription of non-compliance with s 129, the high court held that the legislature could not have intended compliance to have retrospective application. The principles set out in *Evins* thus applied. It also distinguished cases that have dealt with the effect of non-compliance with notice provisions in other legislation, such as the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, where express provision is made for a court to condone non-compliance with notice provisions. Because there is no express provision allowing for condonation, said the high court, failure to comply with s 129 before the end of the three-year prescription period meant that the bank's claim against Mr Ramurunzi had prescribed.

[21] On appeal, the bank argued that this conclusion was not consonant with the analysis of ss 129 and 130 of the NCA in *Sebola*. Cameron J said (paras 52 and 53):

'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 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.' (My emphasis.)

[22] Apart from the fact that this finding is binding on this court, it is the only logical analysis of the purpose and effect of s 130(4)*(b)*. Section 130 regulates debt procedures in court. It ensures that any shortcoming in the pre-summons enforcement procedures is made good: that is for the benefit of the consumer. He or she is entitled to the opportunity, before the debt can be recovered, to embark on the processes envisaged by the NCA – to seek debt counseling or alternative dispute resolution, for example, or even to make payment. That purpose is different from that in legislation like the MVA, where the purpose of sending a claim 90 days before serving summons is to enable the insurer to assess the claim and deal with litigation accordingly. There was thus no need for a provision in that legislation that would allow for proceedings to be adjourned so that a claim in the prescribed form could be served after the summons was served.

[23] 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.

[24] It is true, as Mr Ramurunzi argued, that *Sebola* did not deal with prescription pertinently. *Sebola* was concerned with the issue of delivery of a s 129 notice as was *Kubyana* (above). But it is implicit in the reasoning in *Sebola* that an otherwise valid summons interrupts prescription when it is served. The purpose of s 130(4)*(b)* is to ensure that even though summons has been served, the consumer is still provided with a s 129 notice so that he or she knows what options are available to resolve the matter before the debt is enforced. This is in line with the principles of the common law that have developed in relation to prescription: a summons and particulars of claim can be cured where defective after the period of prescription has run. Even an excipiable summons, or one that is amended so as to introduce a new cause of action (where substantially the same debt is being claimed) has the effect of interrupting prescription (see *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) para 5 and the cases cited in it).

[25] Mr Ramurunzi conceded before us that the summons was valid. But he argued that it had no effect until the s 129 notice had been properly delivered – which occurred more than three years after the debt became due. But he could not explain when interruption would occur in the ordinary course of a credit provider's attempt to enforce a debt. He accepted that the s 129 notice would not itself interrupt prescription if delivered before the summons was served.

[26] In my view, therefore, the summons interrupted the running of prescription when it was served on Mr Ramurunzi. The high court could not, however, grant a judgment against him until, after adjourning the matter for this purpose, a s 129 notice was delivered to him. It was delivered timeously in accordance with the court order. The special plea should have been dismissed and the trial should have continued. The appeal against the order of the high court must thus be upheld.

[27] Mr Ramurunzi submitted that the costs of the appeal should not be awarded against him should he be unsuccessful: the bank had appealed because it wanted to obtain a decision in principle on the interruption of prescription by a summons served before compliance with s 129. The bank argued, on the other hand, that it had been forced to appeal against what it considered to be an incorrect judgment. And while accepting that this was a test case, contended that there were other reasons for pursuing the appeal. Mr Ramurunzi had raised a variety of technical defences over a period stretching from 2008 to 2013, but had not ever raised a defence on the merits.

[28] I see no reason to deviate from the usual rule that costs should follow the cause. It will be recalled that the high court did not make any costs order as, at the time when judgment was given, the bank had indicated that it would lead evidence that a s 129 notice had in fact been properly delivered before the summons was served. Once the bank had abandoned that route it is appropriate that a cost order be made in that court too, and equally, costs must follow the cause.

[29] In the result:

1 The appeal is upheld with costs.

2 The order of the high court is set aside, and replaced with:

‘The defendant’s special plea that the debt has prescribed is dismissed with costs.’

_____

C H Lewis

Judge of Appeal

APPEARANCES:

For the Appellant: J Muller SC

Instructed by:

De Klerk & Van Gend Inc, Cape Town

McIntyre & Van Der Post, Bloemfontein

For the Respondent: In Person