SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 499/2015

In the matter between:

BLUE CHIP 2 (PTY) LTD t/a BLUE CHIP 49 **APPELLANT**

and

CEDRICK DEAN RYNEVELDT & 26 OTHERS **RESPONDENTS**

and

NATIONAL CREDIT REGULATOR **AMICUS CURIAE**

Neutral citation: *Blue Chip 2 (Pty) Ltd v Ryneveldt* (499/15) [2016] ZASCA 98 (03 June 2016)

Coram: Theron, Wallis, Pillay, Petse and Willis JJA

Heard: 18 May 2016
Delivered: 03 June 2016

Summary: Magistrates' Court Act 32 of 1944 - jurisdiction - s 28(1)*(d)* - cause of action arising wholly within the district or regional division - delivery of notice in terms of s 129(1)*(a)* of the National Credit Act 34 of 2005 - a material element of the cause of action - delivery thereof outside the area of jurisdiction of the magistrate's court is fatal to claim since cause of action did not wholly arise within the district or regional division.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Van Zyl J and Reinders AJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Pillay JA (Theron, Wallis, Petse and Willis JJA concurring)

[1] The appellant, Blue Chip 2 (Pty) Ltd trading as Blue Chip 49, is a credit provider in terms of the National Credit Act 34 of 2005 (NCA). It entered into a number of small unsecured credit agreements with the respondents. These were all entered into at Bloemfontein and in terms of the respective agreements, specific monthly instalments had to be paid on specified dates into the bank account of the appellant held at Bloemfontein. The documents in the record refer mostly to Cedrick Dean Ryneveldt (to whom I will refer to as the respondent), presumably as a test case the result of which would be applicable to all others. In the circumstances, I will only deal with his case. It is common cause that he entered into a credit agreement on 28 June 2013 in an amount of approximately R20 000, and defaulted on the payments. The appellant then sought payment of the total amount due and payable in terms of the agreement, namely R25 134.

[2] Being a credit agreement, it fell squarely within the provisions of the NCA. Upon the default, the appellant caused a notice in terms of s 129(1)*(a)* of the NCA (the s 129 notice) to be delivered by registered post to the respondent's elected domicilium citandi et executandi, which was in Kimberley and outside the Bloemfontein Magistrates' Court's jurisdiction. It was common cause that the said notice reached the post office in Kimberley, which duly gave the respondent notice to collect it.

[3] The respondent did not react to the notice within the prescribed period and the appellant then issued a letter of demand in terms of s 56 of the Magistrates' Court Act 32 of 1944 (the Act). It seems that this letter of demand was hand delivered to him in Kimberley informing him of the status of his account and pointing out that the full amount was due and payable. In response thereto, the respondent gave written consent in Bloemfontein to judgment in respect of the debt, interest thereon and costs in terms of s 58 of the Act. The consent document clearly showed that the appellant intended to seek judgment in the magistrates' court in Bloemfontein.

[4] The appellant thereupon submitted a written request to the clerk of the Bloemfontein Magistrates' Court for judgment to be entered in its favour. The clerk referred the request for judgment to the magistrate to be dealt with.

[5] The magistrate called for argument and on 31 July 2014 refused to grant the judgment in favour of the appellant, for lack of jurisdiction. He reasoned that s 28(1)*(d)* of the Act had not been complied with in that the delivery of the s 129 notice, being an element of the cause of action, did not occur within the area of jurisdiction of the court and consequently he did not have jurisdiction to deal with the matter.

[6] The appellant appealed to the Free State Division of the High Court, Bloemfontein. The high court, although holding that a s 129 notice 'does not however, form part of the cause of action', concluded that the delivery of the s 129 notice 'completed' the cause of action. Consequently, because the notice was delivered outside the area of jurisdiction of

the Bloemfontein Magistrates' Court, the claim did not wholly arise within its area of jurisdiction as required by s 28(1)*(d)* of the Act. It reasoned that the delivery of the notice is a fact 'giving rise to jurisdiction' and since delivery of the notice took place outside the area of jurisdiction of the Bloemfontein Magistrates' Court, that court did not have jurisdiction to deal with the matter. It consequently dismissed the appeal. This court then granted special leave to appeal.

[7] In this court, it was argued on behalf of the appellant, that the conclusion of both the magistrate and the high court a quo was wrong. Simply, it was the case of the appellant that while delivery of the s 129 notice had to be alleged and proved, it was a procedural step that did not form part of the cause of action and consequently did not have any bearing on s 28(1)*(d)* of the Act. The cause of action, it was argued, was manifested when the agreement, having been entered into in Bloemfontein, was breached in Bloemfontein and this was sufficient to found the jurisdiction of the Bloemfontein Magistrate's Court.

[8] There was no appearance for the respondent but the National Credit Regulator was before the court as amicus curiae. Mr Grobler, counsel for the amicus curiae, argued that the delivery of the s 129 notice outside the area of jurisdiction of the Bloemfontein Magistrates' Court prevented that court from having the necessary jurisdiction to hear the matter since the cause of action did not arise 'wholly within the district or regional division' as required by s 28(1)*(d)* of the Act.

[9] The issue therefore to be determined in this appeal is whether the delivery of the s 129 notice constitutes part of the cause of action. There are a number of discordant judgments in the magistrate's court on this issue. This judgment will clarify the position.

[10] Being a creation of statute, the magistrate's court derives its powers from the Act. As was stated in *Ndamase v Functions 4 All*:[1]

'It is well-established that the magistrate's court has no jurisdiction and powers beyond those

[1] *Ndamase v Functions 4 All* [2004] ZASCA 32; 2004 (5) SA 602 (SCA) para 5.

granted by the Act.'

Sub-section 28(1)*(d)* of the Act reads:

'**28 Jurisdiction in respect of persons**

(1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other:

. . .

(d) any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division;

. . . .'

[11] The magistrate examined whether he had the power to deal with the matter. He referred to the decision in *Whyte v Rathbone.*[2] The facts were that the parties had entered into a loan agreement by signing an acknowledgment of debt within the district of Durban. No date(s) for the repayment of the loan was agreed upon. It was therefore necessary for the defendant to be placed in mora and a letter of demand was posted to him. This letter was not proved to have been delivered to him within the jurisdiction of the Durban Magistrates' Court. The court held that it did not have the necessary jurisdiction to hear the matter since the cause of action did not wholly arise within the district (of Durban), as contemplated in s 28(1)*(d)*.

[12] The meaning of the expression 'cause of action', when the identically worded predecessor to s 28(1)*(d)* was in operation, was authoritatively laid down in *McKenzie v Farmers' Co-Operative Meat Industries Limited*[3] where the definition of 'cause of action', adopted from *Cook v Gill* (L.R., 8 C.P. 107), was held to be '. . . every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

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[2] *Whyte v Rathbone* 1936 NPD 549.
[3] *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23.

[13] One of the issues in *Evins v Shield Insurance Co Ltd*[4] was whether claims for bodily injuries and loss of support constituted two separate rights of action under the common law and the Compulsory Motor Vehicle Insurance Act 56 of 1972 respectively when flowing from the same set of facts. In dealing with that question, the court found it necessary to refer to the term 'cause of action'. At 838 D-F, Corbett JA, writing for the majority of the court adopted the approach as set out in *McKenzie*, quoting the definition of 'cause of action' referred to in para 12 above. In the same matter, Trollip JA, writing for the minority, stated at 825 E-H:

'I still remain somewhat uncertain whether appellant's claims for her bodily injuries and her loss of support constitute two separate rights of action under the common law and the Compulsory Motor Vehicle Insurance Act 56 of 1972 ("the CMVI Act"). I prefer to use the term "right of action" to "cause of action" because, I think, the former is strictly and technically more legally correct in the present context (cf *Mazibuko v. Singer* 1979 (3) SA 258 (W) at 265 D-G). "Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the dependant's "debt", the word used in the Prescription Act. The term, "cause of action", *is commonly used in relation to pleadings or in statutes relating to jurisdiction or requiring prior written notification of a claim before action thereon is commenced*.'(Emphasis added)

Clearly both judgments are in line with *McKenzie*. Where it is essential to the successful pursuit of a contractual claim that a letter of demand be sent, then the sending of that letter of demand is part of the cause of action. In particular where a statute provides that before an action can be commenced or a claim enforced against a debtor, a notice be given, then the giving of that notice is essential to the successful pursuit of the claim and proving that it was given, is part of the cause of action. Compliance with a directive to serve a notice must both be alleged and proved if a claimant is to succeed and obtain judgment.[5]

[14] The definition of 'cause of action' as set out in *McKenzie* has stood the test of time

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[4] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A).

[5] *Masuka and Another v Mdlalose and Others* 1998 (1) SA 1 (SCA) at 7C-E; *Avex Air (Pty) Ltd v Borough of Vryheid (2)* 1972 (4) SA 676 (N) at 678 C_E; *Minister of Safety and Security v De Witt* 2009 (1) SA 457 (SCA) para 10; *Merry Hill (Pty) Ltd v Engelbrecht* 2008 (2) SA 544 (SCA) para 23.

and almost one hundred years on, has not been altered in any way.[6] There is no compelling argument why it should now be changed.

[15] The purposes of the NCA is broadly described in s 3 thereof as being the following:

'to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective an accessible credit market and industry, and to protect consumers'.

The NCA represents a major overhaul of previous credit regulation and a clean break from the past.

[16] I now turn to the aspect of the s 129 notice and whether there is any reason to hold that it does not form part of the cause of action as contended by the appellant. Section 129(1) of the NCA reads:

'(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) 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 section 86(10), as the case may be; and

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

This section obviously accords with the broad purposes of the NCA as set out in s 3 thereof.

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[6] *Ndlovu v Santam Ltd* [2005] ZASCA 41; 2006 (2) SA 239 (SCA) para 17; *Road Accident Fund & another v Mdeyide* [2010] ZACC 18; 2011 (2) SA 26 (CC) para 19; *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* [2014] ZASCA 169; 2015 (3) SA 532 (SCA) para 23.

[17] It is clear from s 129(1)*(a)* and *(b)* that prior to commencing legal proceedings to enforce an agreement, the credit provider must deliver a written notice to the consumer wherein attention is drawn to the default in repayment, setting out various options open to him or her whereby the pressure of the default could be alleviated. In other words, it is a mandatory requirement which must be satisfied before judgment can be granted for recovery of the outstanding debt. In *Sebola v Standard Bank,*[7] para 74 it was held that given the significance of the s 129 notice, 'the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer'. In *Kubyana v Standard Bank of South Africa Ltd*,[8] para 34, the purpose of a s 129 notice was explained as aiming to 'establish a framework within which the parties to the credit agreement, in circumstances where the consumer has defaulted on her obligations, can come together and resolve their dispute without expensive, acrimonious and time-consuming recourse to the courts'.

[18] The delivery of a s 129 notice is a peremptory step which is a pre-requisite for any judgment sought on a claim arising out of a default of a credit agreement. The failure to take the necessary steps prior to judgment, will result in a court refusing to grant judgment in favour of the claimant. It is a step which is recognised in the NCA as essential to granting judgment in favour of a claimant. Hence in para 87 of *Sebola*, it is pointed out that if indeed a litigant has failed to comply with any provision of the NCA, including s 129, s 130(4)*(b)* provides for steps which may be taken in order to remedy the situation in terms of an order of the court. A failure to allege and prove compliance with s 129(1) (even after s 130 procedures) would render a summons excipiable and the matter would end without judgment in favour of the claimant being granted.

[19] As was said by Majiedt AJP in *Beets v Swanepoel*[9] (para 19):

'. . . a plaintiff must in my view aver compliance with these sections [s 129 and s 130] in the summons or particulars of claim to disclose a cause of action where the suit is based on a credit

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Although the word 'may' is used in s 129(1)*(a)*, the notice is a mandatory requirement. See *Nedbank Ltd & others v National Credit Regulator & another* [2011] ZASCA 35; 2011 (3) SA 581 (SCA) para 8.

[7] *Sebola & another v Standard Bank of South Africa Ltd & another* [2012] ZACC 11; 2012 (5) SA 142 (CC).

[8] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC).

[9] *Beets v Swanepoel* [2010] ZANCHC 55.

agreement to which the Act applies. It is a material averment, the absence whereof would render the pleading excipiable. Without the requisite notice, a claim cannot be enforced.'

The reason for this is that the pleadings would lack a proper cause of action.

[20] In order to disclose a cause of action to enforce a claim emanating from a default of a credit agreement, an averment of compliance with s 129 must be contained in the summons and proved. Delivery of a s 129 notice forms part of the cause of action. It is an essential component of a plaintiff's cause of action.[10] It must occur before a cause of action can be said to have arisen. Absent compliance therewith, there would be no cause of action.

[21] The giving of the notice is therefore critical to the question of jurisdiction in relation to s 28(1)*(d)* of the Act. Since it is common cause that delivery of the s 129 notice took place outside the area of jurisdiction of the Bloemfontein Magistrates' Court, the cause of action did not arise 'wholly within the district or regional division' of that court. It follows therefore that the magistrate was correct in finding that he could not deal with the matter for lack of jurisdiction. The high court was also correct to dismiss the appeal.

[22] It was also argued on behalf of the appellant that the respondent had consented to the jurisdiction of the Bloemfontein Magistrates' Court when he signed the consent to judgment. Mr Botes SC however conceded that if that court lacked jurisdiction, the consent to judgment cannot be relied upon. This is in accordance with s 45 of the Act. In my view, though not necessary to deal with it herein, s 90 and s 91 of the NCA would in all probability also prohibit consent to jurisdiction in these circumstances.

[23] Neither of the parties sought any cost order.

[24] In the result, the appeal is dismissed.

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[10] *Rossouw & another v First Rand Bank Ltd* [2010] ZASCA 130; 2010 (6) SA 439 (SCA) para 38.

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R Pillay

Judge of Appeal

Appearances:

For Appellant:	F W Botes SC (and L Collins) Instructed by: Jordaan Rijkheer Inc, Bloemfontein
For amicus curiae:	S Grobler Instructed by: Honey Attorneys, Bloemfontein