The Conundrum of the Non-compulsory Compulsory Notice in terms of Section 129(1)(*a*) of the National Credit Act

CORLIA VAN HEERDEN*
University of Pretoria

ANDRÉ BORAINE**
University of Pretoria

1 Introduction

Section 129(1)(*a*) of the National Credit Act[1] plays a pivotal role in the enforcement of credit agreements. Section 129(1)(*b*), read together with ss 130(1) and 130(3)(*a*) of the Act, essentially compels a credit provider to deliver a notice in terms of s 129(1)(*a*) to the consumer prior to enforcement of a credit agreement to which the NCA applies. These provisions are cast in mandatory terms.

From a civil procedural perspective, it may therefore be asked whether the particulars of claim to the summons should indicate that such notice was given prior to the commencement of enforcement proceedings. It may also be asked what a defendant's response should be to a summons that does not refer to compliance with such procedure and what the consequences of non-compliance would be. It may also happen that the notice in question was given, but that the particulars of claim are silent regarding this fact.

The purpose of this discussion is therefore to investigate the procedural interaction between s 129(1)(*a*) and s 130(4)(*b*), which determines the scope of a court's powers in the event of non-compliance with s 129(1)(*a*). We aim to indicate the necessity of compliance with s 129(1)(*a*) prior to debt enforcement.

2 Debt Enforcement in terms of the NCA

2.1 General

The NCA provides for debt enforcement in two stages, namely the required procedures prior to debt enforcement, and debt procedures in court. It has introduced a novel procedure prior to debt enforcement by means of s 129(1)(*a*). This subsection provides that if a consumer is in default under a

* B Proc LLB LLM LLD. Associate Professor, Department of Mercantile Law, University of Pretoria.
** B Iur LLB LLM LLD. Professor, Department of Procedural Law, University of Pretoria.
[1] 34 of 2005; hereafter the 'NCA' or the 'Act'.

Cite as: (2011) 23 *SA Merc LJ* 45–63.

credit agreement, the credit provider 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, so that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the agreement up to date.

Section 129(1)(*a*) has to be read with s 129(1)(*b*). The latter provides that, subject to s 130(2), a credit provider may not commence any legal proceedings to enforce a credit agreement before first giving notice to the consumer as contemplated in s 129(1)(a) or s 86(10),[2] as the case may be, and before meeting any further requirements as set out in s 130.

Section 130 provides for debt procedures in a court and subs (1) specifically provides that, subject to subs (2), a credit provider may approach a court *only* (our emphasis) if, at the 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 s 86(9)[3], or section 129(1) as the case may be;
> (*b*) in the case of a notice contemplated in section 129(1), the consumer has –
> (*i*) not responded to that notice; or
> (*ii*) responded to the notice by rejecting the credit receiver's proposals; and
> (*c*) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.'

2.2 The Prerequisites Introduced by the NCA before a Court may Determine the Matter

Section 130(3) introduces a number of aspects on which a court must be satisfied before it will determine a matter in any proceedings to which the NCA applies, for instance that in the case of proceedings to which ss 127, 129 or 131 apply, the procedures required by those sections have been complied with.[4]

Within the context of s 129(1)(*a*), the plaintiff credit provider will therefore have to make an allegation in the particulars of claim[5] regarding compliance with the said section before the court will determine the matter.

2.3 Powers of a Court when Determining the Matter

Unlike its predecessor, the repealed Credit Agreements Act,[6] the NCA, which is a much more comprehensive piece of legislation, provides for specific orders that a court considering a credit agreement in respect of which

---

[2] This discussion focuses on s 129(1)(*a*) of the NCA and does not deal with debt review as envisaged by s 86 nor with its implications for the enforcement of a credit agreement to which the NCA applies.

[3] It is submitted that this reference is incorrect and should be to s 86(10). See JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell *Guide to the National Credit Act* (2010 update) in par 12.7.2.

[4] Section 130(3)(*a*) of the NCA.

[5] It should be observed that although a claim will usually be instituted by way of summons, application by way of notice of motion may, subject to the ordinary rules, be considered in appropriate instances. However, the s 129(1)(*a*) notice requirement will apply equally in such instance.

[6] Act 75 of 1980.

non-compliance with certain provisions of the Act is alleged, may, and in some instances, must make. These powers are contained in s 130(4). The specific provision relevant to this discussion is s 130(4)(*b*), which provides as follows:

> '[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 130(*a*), or has approached the court in circumstances contemplated in subsection (3)(*c*) the court *must* –
> (*i*) adjourn the matter before it; and
> (*ii*) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed' (our emphasis).

It therefore appears that in case of non-compliance with s 129(1)(*a*), the matter will have to be dealt with in accordance with s 130(4)(*b*) and that the court has no discretion to deal with it in a manner other than that provided for in the that section.[7]

3 Perspectives on the Purpose, Scope and Application of Section 129(1)(*a*)

3.1 General

The use of the word 'may' in s 129(1)(*a*) is misleading as it might create the impression that a credit provider is not compelled to deliver a s 129(1)(*a*) notice prior to enforcement of a credit agreement.[8] However, when s 129(1)(*a*) is read together with ss 129(1)(*b*) and 130(1), it becomes clear that compliance with s 129(1)(*a*) prior to enforcement of a credit agreement is compulsory.[9]

In order to determine whether there has been proper compliance with s 129(1)(*a*), it is necessary to consider what such compliance would entail. The aspects discussed below,[10] are relevant in this regard.

3.2 The Time Period Applicable to Section 129(1)(*a*)

Section 129(1)(a) is silent on any time limits applicable to it. However, clarity on this aspect is provided by s 130(1)(*a*) which, as indicated, stipulates that the consumer must be in default under the credit agreement for at least 20 business days,[11] and that at least 10 business days must have elapsed after the credit provider delivered a s 129(1)(*a*) notice to the consumer, to which the consumer either did not respond or responded by rejecting the proposals made

[7] Scholtz et al op cit note 3 in par 12.9.3.
[8] Idem in par 12.4.2.
[9] Ibid.
[10] In pars 3.2-3.8 below.
[11] See ss 2(5)(*a*)-(*c*) of the NCA.

therein.[12] Thus, a consumer has at least 10 business days after the delivery of a s 129(1)(*a*) notice to respond to it.

3.3 Method of Giving Notice

Section 129(1)(*a*) does not state how the relevant notice should be provided to the consumer. However, s 130(1), which inter alia refers to the notice in terms of s 129(1)(*a*), makes it clear that the said notice has to be 'delivered' to the consumer although it does not indicate the specific manner in which such delivery should occur. The Act unfortunately does not contain a definition of 'deliver'. Section 65 deals with the right to receive documents and provides that every document that is required to be delivered to a consumer in terms of the Act, must be delivered to the consumer in the prescribed manner, if any.[13]

Section 65(2) further provides that if no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must make the document available to the consumer through one or more of the following mechanisms, namely:[14]

> '(*a*) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;
> (*b*) by fax;
> (*c*) by email;
> (*d*) by printable web-page.'

The credit provider must deliver the document to the consumer in the manner chosen by the latter from the options mentioned above.[15]

The only other provision in the Act that appears to be relevant in this context, is s 168. It stipulates that, unless otherwise provided in the Act, a notice, order or other document, that must in terms of the Act be served on a person, will have properly been served when it has been either *delivered* (our emphasis) to that person, or sent by registered post to that person's last known address. However, it should be observed that s 130(1)(a) requires the notice to be 'delivered' and not 'served' although 'service' in terms of s 168, actually entails nothing more than what is otherwise understood by 'delivery'.[16]

It should also be stressed, however, that the Act contains a definition of the word 'prescribed' indicating that 'prescribed' means 'prescribed by regulation'. Regulation 1 of the Regulations[17] promulgated in terms of the NCA contains an extensive definition of the word 'delivered' and provides, inter alia, that

---

[12] Scholtz et al op cit note 3 in par 12.4.3. These periods may run simultaneously.
[13] Section 65(1) of the NCA.
[14] Section 65(2)(*a*)(*i*)-(*iv*) of the NCA.
[15] Section 65(2)(*b*) of the NCA.
[16] See C van Heerden & H Coetzee '*Marimuthu Munien v BMW Financial Services (Pty) Ltd*' (2009) 12 *Potchefstroom Electronic LJ* 333-360.
[17] Published as GN R489 in *Government Gazette* 28864 of 31 May 2006, as amended by GN R1209 published in *Government Gazette* 29442 of 30 Nov 2006.

'[d]elivered, unless otherwise provided for, means sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, the recipient's registered address'.

The issue of delivery and whether a consumer actually has to receive the s 129(1)(*a*) notice have lead to various contrasting judgments.

The one point of view, which appears to have been suggested in *Absa Bank v Prochaska t/a Bianca Cara Interiors*,[18] is that the words 'draw the default to the notice of the consumer', 'providing notice' and 'delivered a notice' in the context in which these appear in connection with s 129(1)(*a*), cumulatively reflect an intention on the part of the Legislature to impose upon the credit provider an obligation which requires much more than the mere dispatching of the notice s 129(1)(*a*) notice to the consumer in the manner prescribed in the Act and its Regulations.[19] Thus, the credit provider is required to bring the default to the attention of the consumer in a way which provides an assurance to a court, considering whether or not there has been proper compliance with the procedural requirements of ss 129 and 130, that the default has indeed been drawn 'to the notice of the consumer'.[20] This view, which effectively entails that the notice should actually be received by the consumer, has subsequently been supported in *Firstrand Bank v Dhlamini*[21] and a number of other judgments.[22]

However, an opposite view was taken in *Munien v BMW Financial Services (Pty) Ltd*[23] where the Court reached the conclusion, by means of construing various provisions in the Act as pointing towards such an intention by the Legislature, that a s 129(1)(*a*) notice is to be delivered in accordance with the definition of 'delivered' as set out in reg 1. The Court, per Wallis J, posed the question whether a s 129(1)(*a*) notice is delivered if it is sent by registered post to an address selected by the consumer, irrespective of whether it is capable of being delivered at that address and of whether it comes to the attention of the consumer.[24] It indicated that the answer should be in the affirmative for the simple reason that it is what the definition of 'delivered' states,[25] and further remarked that the methods of delivery mentioned in the definition of 'delivered' were widely divergent and that in each case it is the sending of the document, and not its receipt, that amounted to delivery.[26]

---

[18] 2009 (2) SA 512 (D).
[19] Par 55.
[20] Ibid.
[21] [2010] JOL 25158 (GNP).
[22] See, eg, *Imperial Bank v Khubeka* unreported, GNP, 4 Feb 2010, case no 28713/2008.
[23] 2010 (1) SA 549 (KZD) in par 12.
[24] Ibid.
[25] Ibid.
[26] Ibid. According to the Court this is hardly surprising as in at least two of those instances, namely sending by fax and sending by email, the sender would have no certain means of establishing that a notice has been received. In the case of posting by registered post a number of matters could intervene to prevent the intended recipient from actually receiving the notice. The Court further remarked that it would have been relatively easy to formulate a rule that made it clear that the notice had to be received and come to the attention of the consumer, but that the Legislature chose to say that the 'sending' of the document would mean that it was delivered. The Court therefore held that it was not possible, in its view, to give a meaning to this provision that requires receipt by the addressee, and that that it is the case

The decision in *Munien v BMW Financial Services* was soon approved in the unreported decision in *Firstrand Bank Ltd v Bernardo*[27] and more recently in *Starita v Absa Bank Ltd*.[28]

The controversy surrounding the delivery of a s 129(1)(*a*) notice was recently resolved by the Supreme Court of Appeal in *Rossouw v Firstrand Bank Ltd*,[29] which held that no regard should be had to the definition of the word 'delivered' in reg 1, but that delivery for purposes of s 129(1)(*a*) should occur in the manner chosen by the consumer in accordance with s 65(2).[30] The Court further held that the fact that the Legislature granted the consumer of a right to choose the manner of delivery, inexorably pointed to an intention to place the risk of non-receipt on the consumer's shoulders and that actual receipt of the s 129(1)(a) notice is the consumer's responsibility.[31]

It should further be mentioned that it appears that the preferred method of delivery of a s 129(1)(*a*) notice in practice is to send it by registered post.[32]

3.4 Address for Notification

Section 129(1)(*a*) is further silent on the address for delivery, but the definition of 'delivered' in the regulations makes it clear that such delivery should take place at the address chosen by the consumer in the credit agreement.

In this regard s 96 of the Act is also relevant. It provides that when a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, the Act or any other law, the party giving notice must deliver that notice to the other party at the address of that other party as set out in the agreement or at the address most recently provided by the recipient in accordance with s 96(2).[33] The latter section provides that a party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered post or electronic mail, if that other party has provided an email address. It is submitted that the nature of a s 129(1)(*a*) qualifies it as a legal notice for purposes of s 96.[34]

In *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*,[35] the Court held

---

whether the non-receipt is due to the lack of postal delivery or to the fact that the addressee had moved. It indicated (in par 13) that this interpretation was not surprising as it is consistent with the approach taken in the predecessors of the NCA in regard to the giving of notice to a debtor before exercising rights in terms of a contract. See *Marques v Unibank* 2001 (1) SA 145 (W) for the position under the Credit Agreements Act 75 of 1980.

[27] Unreported, ECC, 28 Apr 2009, case no 608/2009.

[28] 2010 (3) SA 443 (GSJ). However, it should be observed that in this decision Gautschi AJ employed a different reasoning to come to the same conclusion as Wallis J as regards the necessity of receipt of a s 129(1)(*a*) notice sent by registered post.

[29] 2010 (6) SA 439 (SCA).

[30] Pars 21-30.

[31] Par 31.

[32] See *Munien v BMW Financial Services* in note 23.

[33] Section 96(1) of the NCA.

[34] Scholtz et al op cit note 3 in par 12.4.5.

[35] Supra note 18.

that in order to constitute proper compliance with s 129(1)(*a*), the notice, if sent by registered post, has to be sent to the specific, correct address as chosen by the consumer in the credit agreement.[36] Although the NCA, unlike the former Credit Agreements Act, does not expressly provide that the address chosen in the contract will serve as domicilium citandi et executandi, it is submitted that the practical effect of s 96 is that the address chosen in the contract will serve as that address.[37]

3.5 Which Consumers Must Receive Notice?

It is submitted that in all instances where it is sought to enforcement a credit agreement to which the NCA applies, a s 129(1)(*a*) notice must be delivered to the consumer prior to such enforcement. This means that the notice has to be delivered to a consumer who is a natural person and who is a party to a credit agreement to which the Act applies, and also to a juristic person who is a party to a credit agreement in respect of which the Act only has limited application.[38]

It should further be observed that s 129(1)(*a*) does not specify or limit the type of credit agreement to which it applies; nor does it limit delivery of the notice to, for example, claims for return of goods. Thus, it would seem that whenever a consumer is in default in respect of a credit agreement to which the Act applies, regardless of the type of credit agreement and the contemplated relief sought by the credit provider, a s 129(1)(*a*) notice has to be delivered to the consumer.

3.6 Form and Content

There is no prescribed form for the s 129(1)(*a*) notice. It is submitted that the notice may be incorporated in a letter of demand addressed to a defaulting consumer. It is imperative, though, that the notice should draw the consumer's attention to his or her default and should also contain the proposals mentioned in s 129(1)(*a*), namely that the consumer may approach a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction in order to resolve a dispute or to devise and agree on a plan to repay the credit agreement debt.

The notice should further indicate that if the consumer fails to respond to it within 10 business days from its delivery, or if he or she responds by rejecting the proposals it contains (and provided that such consumer is at that stage

---

[36] The Court indicated in par 55 that the credit provider cannot content itself with sending the notice to an address which, because of its similarity in some respects with the address chosen by the consumer in the credit agreement, might by chance or good fortune be accepted by the post office and/or the postman as the same address as that which had been chosen by the consumer in the credit agreement.

[37] See s 5(1) of the repealed Credit Agreements Act. The reason why the NCA does not mention the words domicilium citandi et executandi is most probably due to the plain language-requirement of s 64. See also Van Heerden & Coetzee op cit note 16 at 330.

[38] See the definition of 'juristic person' in s 1 of the NCA as well as s 6. See also Scholtz et al op cit note 3 in par 12.4.11.

already 20 business days in default), the credit provider may enforce the credit agreement.

3.8 Purpose of Section 129(1)(*a*)

It is clear that the s 129(1)(*a*) notice presents a consumer with certain alternatives that he or she may consider prior to debt enforcement, in order to deal with the debt, alternatives which, if successful, might obviate the need for costly and often protracted litigation. It accordingly appears to be a compulsory procedure devised by the Legislature in favour of the consumer, obligating the credit provider to first propose certain alternatives by means of which the issue could possibly be resolved before turning to litigation. Where a s 129(1)(*a*) notice is not delivered prior to the commencement of legal proceedings, the purpose of providing a means of avoiding litigation will be defeated.

4 Discussion

4.1 Non- compliance with Section 129(1)(*a*)

Given that compliance with s 129(1)(*a*) prior to the enforcement of a credit agreement appears to be a compulsory prerequisite when it comes to ss 129(1)(*b*), 130(1) and 130(3)(*c*), it is important to establish whether such compliance indeed occurred in a specific instance.

From the earlier discussion of s 129(1)(*a*), a number of conclusions on the issue of compliance with the subsection may be drawn.

It is submitted that if no s 129(1)(*a*) notice was delivered at all prior to the enforcement of a credit agreement to which the NCA applies, it constitutes clear non-compliance with the that section. However, if a s 129(1)(*a*) notice was delivered to a consumer in accordance with the prescriptions of reg 1 of the NCA – for instance if it were sent by registered post, but was not received by the consumer – it is submitted, with reference to *Rossouw v Firstrand Bank Ltd*,[39] that such delivery by registered post does not amount to non-compliance.[40] Delivery of a s 129(1)(*a*) notice to an incorrect address, which is different from the address provided by the consumer in the credit agreement or was changed in accordance with the provisions of s 96, will constitute non-compliance.[41] Where a notice in terms of s 129(1)(*a*) is delivered that fails to propose both options, namely that the consumer may approach the persons mentioned in it for either resolving a dispute or developing and agreeing on a repayment plan, it is submitted that it would amount to non-compliance. Likewise a notice that fails to draw the consumer's attention to his or her default or that fails to inform a consumer

[39] Supra note 29.
[40] See *Munien v BMW Financial Services* supra note 22.
[41] *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* supra note 18.

that he or she has 10 business days from delivery of the notice to respond to the proposals contained in it, failing which enforcement steps may follow.

Clearly, where a credit provider approaches a court prior to expiry of the 10 business days from delivery of the s 129(1)(*a*) notice, it will similarly amount to non-compliance and any enforcement proceedings will be premature.[42] In practice, instances have also occurred where the specific credit agreement itself afforded the consumer a longer period to respond to notices, for example 14 business days. It is submitted that in such case any action instituted prior to the expiry of the contractually agreed period will be premature.[43]

4.2 Compliance with Section 129(1)(*a*) and the Credit Provider's Cause of Action

It is significant that s 129 is entitled 'Required procedures prior to debt enforcement'. As indicated, s 129(1)(*b*) read with s 130(1) makes it clear that a credit provider may not enforce a credit agreement to which the NCA applies without first delivering to the consumer a notice in terms of s 129(1)(*a*). As also indicated, s 130(3) further provides that 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 the NCA applies, the court may determine the matter *only* if it is satisfied that, inter alia in the case of proceedings to which s 129 apply, the procedures required by that section have been complied with.

It therefore appears that a credit provider will not be able to commence enforcement proceedings in respect of a credit agreement unless compliance with s 129(1)(*a*) is alleged in the particulars of claim to the summons. The initial perception is thus created that an allegation of compliance with s 129 is a sine qua non for the commencement of legal proceedings to enforce a credit agreement. This leading to the inference that an allegation of compliance with s 129(1)(*a*) appears to be necessary to complete the credit provider's cause of action. In fact, it was held in *African Bank Ltd v Myambo*[44] that 'by virtue of s 129(1)(*b*)(*i*) the credit provider's cause of action is not complete unless the s 129-notice . . . has been given'.[45]

However, the provisions of s 130(4)(*b*) of the Act put a surprising spin on things by providing that where there is inter alia non-compliance with s 129(1)(*a*), the court is obliged to adjourn the matter before it and to make an appropriate order setting out the steps the credit provider must complete before the matter may be *resumed*. As indicated, the court is afforded no

---

[42] *First Rand Bank v Dhlamini* supra note 21 in par 9.

[43] See *Standard Bank of South Africa Ltd v Rockhill* 2010 (5) SA 252 (GSJ).

[44] 2010 (6) SA 298 (GNP).

[45] At 20 of the unreported judgment. This aspect was echoed in *Beets v Swanepoel* [2010] JOL 26422 (NC) in pars 18 and 19, where, with reference to JM Otto *The National Credit Act Explained* (2006) at 87, the Court distinguished between a peremptory notice-to-sue requirement and a statutory pre-enforcement notice, and indicated that in respect of a statutory pre-enforcement notice (such as the one contained in s 129 of the NCA) which forms part of the cause of action, condonation of non-compliance is not competent.

discretion and must make the aforesaid order if there is non-compliance with s 129(1)(a).[46]

In *Standard Bank of South Africa Ltd v Rockhill*,[47] the defendants in an application for summary judgment disputed compliance with s 129(1)(*a*) by alleging that they did not receive the notices that were sent by registered post.[48] They further pointed out that in terms of the mortgage bond in question, it was agreed that letters and notices posted by the plaintiff would be regarded as having been received within 14 days after posting and that the plaintiff had approached the court prematurely.[49] The Court remarked inter alia that s 129(1)(*a*) is an *impediment* to commencing any legal proceedings to enforce a credit agreement and it indicated that in the event of non-compliance with the subsection, 'the court's hands are tied and it must act in accordance with s 130(4)(b)'.[50] The Court consequently adjourned the application for summary judgment sine die and afforded the plaintiff the opportunity to provide a s 129(1)(*a*) notice to the defendants.

It therefore appears that in spite of the mandatory wording of the notification requirement, non-compliance with s 129(1)(*a*), whether it involves the notice not having been sent at all or whether it has, for instance, been sent to an incorrect address, is not fatally defective to a credit provider's pleadings. That is so given the statutory obligation on a court to make an order in terms of s 130(4)(*b*) which allows for the matter to be adjourned and *resumed* after the steps ordered by the court, have been taken.

The question therefore arises as to the exact procedural nature of the apparently compulsory s 129(1)(*a*) notice. On the one hand, the NCA makes it clear in no unequivocal terms that delivery of the notice prior to enforcement is absolutely mandatory. On the other hand, it treats non-compliance with the s 129(1)(*a*) notice very mildly, to such an extent that it neutralises the apparent compelling nature of the section as a credit provider who has not sent a s 129(1)(*a*) notice or who for instance sent the notice to an incorrect address prior to enforcement, will attract only an order in terms of s 130(4)(*b*) in respect of such failure.

It may therefore be asked whether it is indeed necessary for a credit provider to deliver a s 129(1)(*a*) notice to a consumer prior to enforcement in view of the 'alleviating' nature of s 130(4)(*b*). A further and equally relevant question is what exactly the effect is of an order in terms of s 130(4)(*b*) and whether it holds any benefit at all for the consumer other than possibly a favourable cost order as a result of the obligatory adjournment of the matter.

---

[46] Section 130(4)(*b*) uses the word 'must', thus indicating that compliance with the provision is compulsory. Neither A Boraine & S Renke 'Some Practical and Comparative Aspects of the Cancellation of Instalment Agreements in terms of the National Credit Act 34 of 2005' (2008) 41 *De Jure* 1 at 7 and 10, nor the Court in *Beets v Swanepoel* supra note 45 considered the possible effect of s 130(4)(*b*) on non-compliance with the s 129 notice requirement.

[47] Supra note 43.

[48] Par 4.

[49] Pars 6 and 7.

[50] Pars 17 and 18.

We will attempt to answer these questions shortly with reference to various scenarios that may occur during enforcement, depending on whether the matter is undefended or defended.

4.3 Implications of Non-compliance with Section 129(1)(*a*) with regard to Various Procedures

Procedurally it may happen that the summons does not contain an allegation regarding compliance with s 129(1)(*a*), or that it does indeed contain such an allegation but compliance is disputed by the consumer.

Where a summons fails to contain an allegation that a s 129(1)(*a*) notice was delivered prior to enforcement, two possibilities exist: either a notice was delivered and this was inadvertently not mentioned in the summons, or the notice was not delivered at all.

Where the summons does allege compliance with s 129(1)(*a*) and such compliance is disputed, judicial decisions indicate that such non-compliance is usually based on the allegation that the consumer did not receive the notice or that it was sent by registered post to an incorrect address.[51]

It should further be borne in mind that proceedings in which the issue of non-compliance may arise can either be undefended or defended. It is thus therefore necessary to consider the implications of non-compliance in both undefended and defended proceedings. Each of these instances will be dealt with on the basis that where it is ordered in terms of s 130(4)(*b*) that a s 129(1)(*a*) notice be delivered to the defendant before the matter may resume, the consumer does in fact not respond to the said notice within the relevant period or responds by rejecting the proposals contained in the notice. A separate discussion will focus on the implications that may follow where a consumer to whom a s 129(1)(*a*) notice is delivered pursuant to a s 130(4)(*b*) notice, does in fact decide to take up the proposals mentioned in it.

4.3.1 Where the Matter is Undefended

Where no s 129(1)(*a*) notice at all was sent to the consumer prior to the commencement of the enforcement proceedings and no such allegation therefore appears in the particulars of claim, there will be no ground for a mere amendment of the particulars of claim to the effect that the notice had been sent. Where the matter is undefended, a court will, however, not be able to dismiss the application for default judgment on the basis of non-compliance with s 129(1)(*a*), but will be obliged to make an order in terms of s 130(4)(*b*). In a magistrate's court, the application for default judgment will most likely be returned with a query indicating that the plaintiff must complete the steps in terms of s 129(1)(*a*) before the court will consider the matter. Where default judgment is applied for in a high court, the application will be postponed, most likely sine die, and the plaintiff will be ordered to

[51] In this regard see, eg, *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* supra note 18.

complete the steps set out in s 129(1)(*a*). Practically it will mean that the plaintiff will have to deliver a s 129(1)(*a*) notice to the defendant and that after compliance with the court's order, the application for default judgment may (depending on whether it is a magistrate's court or high court matter) be re-submitted or re-enrolled, and resumed. The credit provider's particulars of claim will then have to be amended prior to re-applying for default judgment to reflect the delivery of a s 129(1)(*a*) notice as ordered.

In the case where a s 129(1)(*a*) notice had indeed been sent, but the plaintiff (credit provider) failed to allege that fact in the particulars of claim to the summons, it is submitted that the problem may be addressed by an amendment of the particulars of claim as soon as the plaintiff realises the mistake. Where the matter is undefended and the particulars of claim to the summons contain no allegation regarding compliance with s 129(1)(*a*) at the time that the plaintiff applies for default judgment, a court will, however, be obliged to act in accordance with s 130(4)(*b*). It is submitted that a court will in such an instance not dismiss the application for default judgment but will, if it is a magistrate's court matter, most likely return the request for default judgment with a query requiring the plaintiff to first complete the steps as prescribed by s 129(1)(*a*) before it will consider the application for default judgment. If it is a high court matter, the court will have no option other than to adjourn the application for default judgment , most likely sine die, and direct the plaintiff to complete the steps as set out in s 129(1)(*a*). Because the plaintiff had actually sent the notice, but merely failed to make the appropriate allegation, it will not be necessary to re-deliver such a notice and the plaintiff will then merely have to effect an amendment to the particulars of claim indicating that it has complied with s 129(1)(*a*) before it will be able to re-submit or re-enrol the application for default judgment.

4.3.2 Where the Matter is Defended

Where a consumer defends legal proceedings seeking to enforce a credit agreement in respect of which there appears to be non-compliance with s 129(1)(*a*), various possibilities may arise because of the variety of procedural remedies available in defended action or application proceedings.

4.3.2.1 Point in limine

Where an applicant-plaintiff seeks to enforce a credit agreement by, for instance, applying for a final attachment order, compliance with s 129(1)(*a*) will have to be alleged in the founding affidavit in support of the application. Where such an allegation is lacking, it may either be because no s 129(1)(*a*) notice was delivered prior to the commencement of the enforcement proceedings or because the applicant-plaintiff inadvertently failed to make such allegation despite actually having delivered a s 129(1)(*a*) notice. In defended matters it may also happen that compliance with s 129(1)(*a*) is alleged by the applicant-plaintiff, but that the respondent-defendant disputes such compliance.

It is submitted that in application proceedings the issue of non-compliance, whether it is raised as a result of the absence of an allegation of compliance or to dispute an allegation of compliance, will usually be raised by means of a point in limine in accordance with Magistrate's Court Rule 29(4) or High Court Rule 33(4).[52] Where no allegation regarding compliance with s 129(1)(*a*) is made in the founding affidavit, a court will be obliged to uphold the point in limine, but will be restricted to the provisions of s 130(4)(*b*) as regards the order that it can make. Where it thus transpires that no s 129(1)(*a*) notice has been delivered at all, a court will have no discretion but will have to order that the matter be adjourned and that the plaintiff complete the steps in terms of s 129(1)(*a*). The result will thus be that the applicant-plaintiff will have to deliver a s 129(1)(*a*) notice to the respondent and that the matter may resume after expiry of the relevant number of days after delivery if the responded does not respond to the proposals in the notice or responds by rejecting them. The applicant-plaintiff will then also most likely be required to file a supplementary affidavit indicating that it has complied with its s 129(1)(*a*) obligation.

Where a s 129(1)(*a*) notice was in fact delivered but there is no appropriate allegation in the pleadings, the applicant-plaintiff will most likely during argument on the point in limine draw the court's attention to the fact that a s 129(1)(*a*) notice had actually been delivered prior to the enforcement proceedings. In such an instance, because there actually was compliance with s 129(1)(*a*), a court will not be obliged to make an order in terms of s 130(4)(*b*) and it will not be necessary to re-deliver the s 129(1)(*a*) notice, but the court will most likely require a supplementary affidavit by the applicant-plaintiff, dealing with the fact that the s 129(1)(*a*) notice was duly delivered prior to enforcement.

In the event that the founding affidavit does contain an allegation of compliance with s 129(1)(*a*) but such compliance is disputed, because it is, for example, alleged that the notice was sent to the incorrect address, the issue will be argued during the hearing of the point in limine. If the court holds that there was due compliance with s 129(1)(*a*), cadit quaestio. However, if the court holds that, despite the allegation of compliance, there was no proper compliance with s 129(1)(*a*), the only order that it is empowered to make is in terms of s 130(4)(*b*), namely to adjourn the matter and indicate the steps to be completed by the applicant-plaintiff before the matter may be resumed. The applicant-plaintiff will then be obliged to deliver a s 129(1)(*a*) notice to the correct address and the matter will resume if the relevant time limit had expired and the respondent failed to respond to the proposals in the notice or

[52] These rules provide that if in any pending action it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and it may order that all further proceedings be stayed until such question has been disposed of. The court must at the request of any party make such order unless it appears that the questions cannot conveniently be decided separately.

rejected the same. It is submitted that a court will in such an instance require a supplementary affidavit by the applicant-plaintiff dealing with compliance with s 129(1)(*a*) pursuant to the s 130(4)(*b*) order before it will allow the matter to resume.

4.3.2.2 Exception

An exception may be described as a 'legal objection to the opponent's pleading' on the basis that the pleading fails to disclose a cause of action or defence.[53]

When an exception is raised with regard to the particulars of claim to a summons on the basis that it fails to disclose a cause of action or lacks an allegation necessary to complete a cause of action, the effect is usually that if the exception is upheld, the plaintiff will either be afforded an opportunity to amend the summons or, if an amendment cannot cure the defect, upholding the exception will effectively dispose of the matter. If one has regard to the position as it played out under the repealed Credit Agreements Act, where the allegation regarding compliance with s 11 of that Act was regarded as necessary to complete the credit grantor's cause of action,[54] the fact that such compliance was inadvertently not alleged although the notice had been sent, had the effect that the problem could be cured by a mere amendment of the plaintiff's particulars of claim. However, where no allegation was made regarding compliance with s 11 and it transpired that no such notice was sent prior to the commencement of the enforcement proceedings, such omission was fatally defective to the plaintiff's pleading and could not be cured by an amendment. The result in such a case was that the plaintiff was forced to withdraw the action and tender costs. It then had to deliver a s 11 notice to the defendant and proceed with a fresh summons in which due compliance with s 11 was alleged.

Where, in respect of enforcement of a credit agreement to which the NCA applies, a summons lacks an allegation of compliance with s 129(1)(*a*), it is submitted that it is a defect which, because of an apparently mandatory pre-enforcement requirement, goes to the root of the pleading and in respect of which an exception can be raised. If a summons lacks an allegation regarding compliance with s 129(1)(*a*), but such notice was in fact delivered prior to the commencement of enforcement, a court will uphold an exception as the pleading itself lacks an allegation apparently necessary to complete the cause of action. However, it will not be necessary for the court to invoke s 130(4)(*b*) because the notice had actually been delivered and a mere amendment of the particulars of claim to allege this fact will cure the defect.

Where such an exception is raised and it transpires that no s 129(1)(*a*)

---

[53] C Theophilopoulos, AWT Rowan, CM van Heerden & A Boraine *Fundamental Principles of Civil Procedure* (2006) at 197. See also HJ Erasmus, DE van Loggerenberg & PBJ Farlam *Superior Court Practice* (2010 update) at B1-151.

[54] NJ Grové & JM Otto *Basic Principles of Consumer Credit Law* (2002) at 45.

notice was delivered prior to the commencement of legal proceedings, a court will be obliged to act in accordance with s 130(4)(*b*) by adjourning the matter and ordering the plaintiff to complete the steps in terms of s 129(1)(*a*) before the matter may resume. Therefore, unlike the 'usual' position where there has been non-compliance with a statutory prescription apparently necessary to complete the plaintiff's cause of action, the defect in this case is not fatal and does not dispose of the matter but has a mere dilatory effect. Once the plaintiff has then complied by delivering a s 129(1)(*a*) notice and has amended the particulars of claim to the summons to this effect and, provided the relevant time period has expired and the defendant has either not responded to the proposal at all or responded by rejecting the proposal, the matter may be resumed.

It was held in *Beets v Swanepoel*[55] that compliance with s 129(1)(*a*), which requires a statutory pre-enforcement notice, forms part of the cause of action and that in the absence of such a legal notice, no enforcement is possible. The lack of an averment of compliance with s 129(1)(*a*) renders a particular set of particulars of claim excipiable.[56]

However, where compliance with s 129(1)(*a*) is alleged but it is disputed because, for instance, it was sent to an incorrect address, it is submitted that the exception procedure is not the appropriate remedy to address such non-compliance as the pleading itself is not defective.

It is trite that an exception based on a mere technical ground will not succeed unless the excipient can show prejudice.[57] It is submitted that where there has been non- compliance with s 129(1)(*a*), the defendant will be able to demonstrate prejudice by, for instance, arguing that s 129(1)(*a*) affords him or her certain rights that may have the effect of resolving the dispute between the parties and that he or she was not afforded the opportunity to exercise those rights.

4.3.2.3 Summary Judgment

From the case law it appears that the defence is often raised to an application for summary judgment that there was non-compliance with the provisions of s 129(1)(*a*), either because the notice was not received (although it was delivered to the correct address) or because it was delivered at an incorrect address. As indicated , it was held in *Rossouw v Firstrand Bank Ltd*[58] that because the consumer has the option to choose the mode of delivery of the s 129(1)(*a*) notice as mentioned in s 65(2), the consumer should also bear the risk of non-receipt of it. It is thus submitted that if a s 129(1)(*a*)

[55] Supra note 46.

[56] Par 13. Although the Court referred to s 129(1)(*b*), it is clear that it had the statutory pre-enforcement notice in s 129(1)(*a*) in mind.

[57] See Theophilopoulos et al op cit note 53 at 201. The object of an exception is not to take advantage of a technical flaw but to dispose of the case, or a portion of it, in an expeditious manner or to protect the excipient against an embarrassment which is serious enough to merit the costs of an exception. See *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty)(Ltd)* 1961 (1) SA 704 (C).

[58] Supra note 29.

notice is duly sent by registered post, non-receipt of it would not constitute non-compliance for purposes of the NCA.

Generally, to avoid summary judgment, a defendant wishing to satisfy the court by means of an opposing affidavit that he or she has a bona fide defence to the action must disclose fully the nature and grounds of the defence and the material facts relied upon for it.[59]

In *Standard Bank of South Africa Ltd v Van Vuuren*,[60] the Court held that the respondent in an application for summary judgment raises a bona fide defence to the plaintiff's claim where it alleges that there was not proper service of the mandatory notice in terms of s 129(1)(*b*) – rather (*a*) – of the NCA prior to the institution of proceedings.[61] In *Standard Bank of South Africa Ltd v Rockhill*,[62] the Court referred to but disagreed with the decision in *Standard Bank of South Africa Ltd v Van Vuuren*, and pointed out that the Court there did not deal with the provisions of ss 130(3) and 130(4) of the NCA.[63] It indicated that while non-compliance with s 129(1)(*a*) is an impediment to commencing any legal proceedings to enforce a credit agreement, it does not constitute a bona fide defence of the nature envisaged by rule 32(3)(*b*)[64]and then declared[65] that '[t]he fact that s 130(4)(*b*) envisages the resumption of the proceedings following the court having made an appropriate order, illustrates that non-compliance with section 129(1)(*a*) does not constitute a *bona fide* defence for summary judgment purposes'.

We are in agreement with this dictum in *Standard Bank of South Africa Ltd v Rockhill*. It is submitted that non-compliance with s 129(1)(*a*) does not amount to a defence on the merits but can at the most be a dilatory defence,[66] especially given the operation of s 130(4)(*b*).

Where a consumer thus raises non-compliance with s 129(1)(*a*) in its opposing affidavit, a court which finds that there has indeed been non-compliance with s 129(1)(*a*), will not be entitled to grant the consumer leave to defend as a result of such non-compliance. The reason is that that does not amount to a bona fide defence that should stand over to be proved at trial. A court is obliged to follow the provisions of s 130(4)(*b*) and adjourn the application for summary judgment, preferably sine die, and order the steps to be taken by the credit provider before the matter may resume. It can also not choose to dismiss the application for summary judgment on the basis of non-compliance with s 129(1)(*a*) as s 130(4)(*b*) allows for the matter to resume after the steps as ordered have been taken.

---

[59] See *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) in par 38.

[60] 2009 (5) SA 557 (T).

[61] Par 11. Apparently the notice had been served on an address, by attachment to the main gate, which was incorrect and not known to the defendant: see par 6.

[62] Supra note 43.

[63] Par 16.

[64] Par 17.

[65] Ibid.

[66] See *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA (ECP). See further C van Heerden & DJ Lotz 'Over-indebtedness and Discretion of Court to Refer to Debt Counsellor – *Standard Bank of South Africa Ltd v Hales*' (2010) 73 *Tydskrif vir Hedendaagse Romeins- Hollandse Reg* 502.

Where, for instance in the situation sketched above, an application for summary judgment is adjourned in accordance with s 130(4)(*b*), the plaintiff will have to deliver the s 129(1)(*a*) notice to the defendant at the correct address and will have to amend the particulars of claim to its summons to reflect that it has done so. Should the defendant then not respond to the s 129(1)(*a*) notice within the relevant time, or respond by rejecting the proposals contained in it, the application for summary judgment may be re-enrolled and resumed. And if the consumer raised no other bona fide defence in its opposing affidavit apart from the issue of non-compliance with s 129(1)(*a*) – which per se does not constitute a bona fide defence – summary judgment could be granted against the defendant.[67]

4.3.2.4 Trial

In the unlikely event that it transpires as late as the trial concerning a credit agreement to which the NCA applies that there was non-compliance with s 129(1)(*a*) prior to the commencement of enforcement, it appears that a court will have no option other than to adjourn[68] the matter, quite likely sine die, and to order the credit provider to deliver such notice and that the matter will resume again provided that the appropriate time period has expired and the consumer has either not responded to the s 129(1)(*a*) notice or responded by rejecting the proposals contained in it.[69] If the consumer does not take up the proposals in the notice, the postponement at this late stage will largely amount to a costly and delaying exercise in futility. Having regard to the challenges of congested trial rolls, such an apparently simple postponement might create a delay of a considerable number of months.

4.3.2.5 Implications Where Consumer Who Receives a Section 129(1)(*a*) Notice Pursuant to a Section 130(4)(*b*) Order Takes up the Proposals Mentioned in It

As indicated, the above procedures have been discussed with reference to the premiss that the consumer who receives a s 129(1)(*a*) notice pursuant to a s 130(4)(*b*) order, fails to respond to it in time, or rejects the proposals mentioned in it. It is clear that even in such an event, non-compliance with s 129(1)(*a*) results in considerable cost and delay.

A consumer who receives a s 129(1)(*a*) notice in any of the circumstances set out above as a result of an order in terms of s 130(4)(*b*), is also entitled to take up any of the two proposals mentioned in it. It is also clear that in terms of s 130(1), such consumer has at least ten business days after delivery of the notice to decide whether or not to take up the proposals made in the notice.

---

[67] See *Standard Bank of South Africa Ltd v Rockhill* supra note 43.

[68] It is submitted that unless the consumer indicates, prior to an order in terms of s 130(4)(*b*), that it is not going to make use of the proposals afforded by a s 129(1)(*a*) notice, a court will have to postpone a matter at least for a period that will cover the ten business-day period afforded to a consumer in terms of s 130(1) after delivery of such notice.

[69] *Standard Bank of South Africa Ltd v Rockhill* supra note 69.

However, there appears to be no specific time limit, as stated in s 130(1), that indicates the number of days within which the process following upon the taking up of such a proposal has to be finalised. No specific process is actually prescribed and it is unclear what the effect would be if the consumer takes up the proposals but fails to carry them out properly, or if the credit provider fails to co-operate. As it has been held that s 129(1)(*a*) does not facilitate debt review, it follows that the procedure and time limits set out in s 86 and reg 24 will not apply in this instance.

It therefore appears that in such a case the result of acceptance of one of the s 129(1)(*a*) proposals may be that the dispute relating to the credit agreement can be resolved, or that a plan to bring the payments under the credit agreement up to date can be devised and agreed upon, which may lead to the matter being settled without the need for further litigation. However, it may also have the effect that the consumer can effectively 'stall' proceedings and create considerable delay. In any event, it is obvious that cost and delay are the side-effects of non-compliance with s 129(1)(*a*) prior to enforcement.

5 Conclusion

From the preceding discussion it appears that despite the compulsory wording of s 129(1)(*b*) read together with ss 130(1) and 130(3), compliance with s 129(1)(*a*) cannot in practice be said to be an absolute prerequisite for completing the credit provider's cause of action. That is so since the operation of s 130(4)(*b*) effectively neutralises such a proposition by allowing for the matter to be adjourned and resumed after the steps ordered by the court to comply with s 129(1)(*a*), have been taken. It appears that compliance with s 129(1)(*a*) can at the most be regarded as a formal statutory pre-prerequisite, compliance with which prior to the commencement of enforcement appears to be compulsory, but non-compliance with which is not fatally defective to the credit provider's pleading as a result of the obligation placed on the court by s 130(4)(*b*) with regard to the orders it may make in the event of non-compliance.

From the consequences of failure to comply with s 129(1)(*a*) as illustrated above, it is clear that, despite the absurdity surrounding this issue, it would certainly not be in the best interests of a credit provider merely to ignore the provisions of s 129(1)(*a*) prior to enforcement unless such credit provider is prepared to fall into a trap of a costly delay.

It is therefore submitted that despite the absurd operation of s 130(4)(*b*), as long as the latter provision remains part and parcel of the NCA, it would be best practice for a credit provider timeously to deliver a duly drafted s 129(1)(*a*) notice to the consumer's correct address prior to enforcement to prevent the absurd consequences triggered by an application of s 130(4)(*b*) and in order to save time and costs.

Given the objectives of s 129(1)(*a*), it is submitted that the essential purpose of the notice is to avoid costly litigation by resolving a dispute or

bringing payments under a credit agreement up to date. The objectives of these pre-enforcement rights that the Legislature has sought to afford consumers, will clearly be defeated if a s 129(1)(*a*) notice is not delivered *prior* to the commencement of legal proceedings.

It is further submitted that s 130(4)(*b*) operates in a manner that is totally contrary to the intention of the Legislature by allowing credit-agreement disputes and default by consumers to be dealt with prior to costly and protracted enforcement proceedings.[70]

It is trite that the Legislature does not intend to make legislation which will lead to absurd results. However, it is submitted that the operation of s 130(4)(*b*) is the catalyst for a series of unfortunately absurd consequences. It effectively makes a mockery of the apparently mandatory pre-litigation nature of the s 129(1)(*a*) notice and the whole purpose and effect of ordering the consumer to take the steps set out in it, and it increases in absurdity as the case progresses. It is thus submitted that the absurdity caused by the operation of s 130(4)(*b*) should be addressed either by deleting the section in its entirety, or by substituting it with a more sensible provision.

———————

[70] See *Firstrand Bank Ltd v Olivier* 2009 (3) SA 353 (SE) in par 18 where Erasmus J held that the NCA in s 129 read with Part C (*sic*) of Chapter 4 would encourage a consumer to approach a debt counsellor before the credit provider approaches the court in terms of ss 129 and 130 as it is clearly desirable that parties, through the intercession of a debt counsellor, attempt to develop and agree on a plan to bring payments under the agreement up to date.