The impact of section 129(1)(a) of the National Credit Act on the prescription of credit agreement debt

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OPSOMMING

Die impak van artikel 129(1)(a) van die Nasionale Kredietwet op die verjaring van kredietooreenkomsskuld

Die Nasionale Kredietwet 34 van 2005 vereis aflewering van 'n artikel 129(1)(a)-kennisgewing aan die verbruiker voordat 'n skuld wat voortspruit uit 'n kredietooreenkoms wat binne die trefwydte van die Nasionale Kredietwet val, afgedwing kan word. Hierdie kennisgewing het 'n baie spesifieke doel, naamlik om die verbruiker in te lig oor sy verstek ten aansien van die kredietooreenkoms en sekere alternatiewe geskilbeslegtingsinstansies voor te stel wat die verbruiker kan nader ten einde 'n dispuut op te los of 'n plan daar te stel om sy paaiement kragtens die kredietooreenkoms op datum te bring. Die Wet bepaal uitdruklik dat voldoening aan artikel 129(1)(a) 'n vereiste is voordat verrigtinge ter skuld-afdwinging ingestel kan word. Die Wet bevat egter ook 'n eiesoortige bepaling in artikel 130(4)(b) waarvolgens die hof verplig is om 'n *sui generis* bevel te maak in geval van nienakoming van artikel 129(1)(a), te wete dat die hof verplig is om die verrigtinge te verdaag en die stappe te gelas wat die kredietverskaffer moet doen voordat die saak weer kan hervat. Die vraag onstaan gevolglik wat die rol van artikel 129(1)(a) is in die konteks van verjaring van 'n skuld wat voorspruit uit 'n kredietooreenkoms wat onder die Nasionale Kredietwet val. Hierdie bydrae ondersoek dus die interaksie tussen die Nasionale Kredietwet en die Wet op Verjaring 69 van 1968 en fokus spesifiek op die rol van die artikel 129(1)(a)-kennisgewing in die konteks van verjaring van kredietooreenkomsskuld.

1 INTRODUCTION

The principle of extinctive prescription of debt serves to protect debtors against the tardiness of creditors who, after years of delay and inaction, seek to enforce debts, usually compounded by an impressive accumulation of costs of various kinds. The Roman-Dutch writers, Maasdorp and Grotius, took the position that after a specified period of time, the fault, carelessness or negligence of an owner or creditor in taking care of his property or debt should be visited with certain penalties, *inter alia*, the extinction or rendering unenforceable of a debt because such creditors by their inaction "do an injury to the state by introducing an

uncertainty as to the ownership and endless multiplicity of lawsuits".[1] Thus, prescription "prevents the debtor from having to marshal his defence to a claim long after the event".[2] The Constitutional Court in *Road Accident Fund v Mdeyide*[3] emphasised "the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication". However, as mentioned by Saner, the corollary of this viewpoint is that prescription is not designed to punish innocent inaction.[4]

Since 1970 the Prescription Act[5] provides the statutory framework for the regulation of prescription and sets out the principles pertaining to prescription of debts in Chapter III thereof. The Act does not define the word "debt", but the courts have held that "debt" must be given a wide and general meaning.[6] The word "debt" is wide enough to include any liability arising from and being due or owing under a contract.[7] Saner therefore indicates that the concept of a "debt" in relation to the Prescription Act refers to an obligation to do something, whether by payment or by delivery of goods and services, or not to do something.[8] However, he cautions that the word "debt" refers more generally to the creditor's claim and is wider than the technical term "cause of action", so that it is critical to guard against confusing a debt or "right of action" with the cause of action which begets it.[9] In terms of the Prescription Act, a debt which arises from a contract (for instance a credit agreement as discussed below) prescribes after three years have lapsed since the debt became due.[10] It has been held that, in order to

1 Saner *Prescription in South African law* (Service Issue 21 September 2014) para 1.2 with reference to Maasdorp's *Institutes* 76 and Grotius 2 7 4.

2 Saner para 1.2 fn 6. See also *Solomons v Multilateral Motor Vehicle Accident Fund* [1999] 3 All SA 552 (C) 556c; *Erasmus v Grunow* 1978 4 SA 233 (O) 243b.

3 2011 2 SA 26 (CC) para 8.

4 Saner para 1.2 fn 4. In *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 2 SA 464 (W) it was held that: "It is the idle and slovenly owner, and not he who is alert but incapable of acting, who may lose his property by prescription." See also *MacLeod v Kweyiya* 2013 6 SA 1 (SCA); *MEC for Education, Kwazulu-Natal v Shange* 2012 5 SA 313 (SCA).

5 Act 69 of 1968 (hereinafter the Prescription Act). As pointed out by Saner (para 1.4) any gaps in the Prescription Act have to be filled with reference to the common law.

6 Saner para 3.3.3. See also *African Products (Pty) Ltd v Venter* [2007] 3 All SA 605 (C).

7 *Stockdale v Stockdale* 2004 1 SA 68 (C).

8 Saner para 3.3.3. He indicates that the concept of a "debt" was further scrutinised and, to an extent, broadened by Nugent JA in *Duet and Magnum Financial Services CC v Koster* [2010] 4 All SA 154 (SCA) when he stated: "A 'debt' for purposes of the Act is sometimes described as entailing a right on one side and a corresponding 'obligation' on the other. But, if 'obligation' is taken to mean that a 'debt' exists only when the 'debtor' is required to do something then I think the word is too limiting. At times, the exercise of a right calls for no action on the part of the 'debtor', but only for the 'debtor' to submit himself or herself to the exercise of a right. And if a 'debt' is merely the complement of a 'right', and if all 'rights' are susceptible to prescription, then it seems to me that the converse of a 'right' is better described as a 'liability', which admits of both an 'active and passive meaning'."

9 Saner para 3.3.8. See also *Sentrachem v Prinsloo* 1997 2 SA 1 (A) 15A–E; *Associated Paint and Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 2 SA 789 (SCA) 794.

10 S 10(1) and 11(d) read with s 12 of the Prescription Act. Note should also be taken of s 13(2) which provides that a debt which arises from a contract and which would, but for the provisions of s 13 (that provide for the completion of prescription to be delayed in certain circumstances) become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt

continued on next page

be able to institute an action for the recovery of a debt, a creditor must have a complete cause of action.[11] The prescription of debt under the Prescription Act may, however, be interrupted – either by express or tacit acknowledgement of liability by the debtor, or by means of judicial interruption.[12] The effect of the interruption of prescription is that the running of prescription is suspended in order to provide the creditor with the opportunity to pursue his claim to finality. Section 15(1) and (2) of the Prescription Act deal with judicial interruption of prescription and provide as follows:

> "(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.[13]
>
> (2) 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 to final judgment."[14]

Section 15(2), thus, provides for the lapsing of a judicial interruption of prescription and although it does not state a specific time period within which the creditor must successfully prosecute to finality his claim under the relevant "interrupting" process, it does provide that non-prosecution of the matter to finality will undo such interruption as it shall be deemed not to have occurred.[15] Thus, it means that if the matter is not successfully prosecuted to finality, the creditor's claim would be regarded as having prescribed on a date that is 3 years after it became due and the "conditional" interruption of prescription that occurred in terms of section 15(1) would be totally disregarded.

Section 16 of the Prescription Act further provides that the provisions of Chapter III shall

> "save insofar 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".

The South African credit market is regulated by the National Credit Act[16] which came into full effective operation on 1 June 2007.[17] This Act is notorious for its

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becomes prescribed. Saner para 3.3.3 indicates that the courts have held that the words "a debt is due" must be given their ordinary meaning. In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor – thus the debt must be one in respect of which the debtor is under an obligation to pay immediately.

11 *AngloRand Securities v Mudau* [2011] ZASCA 76 para 9. Saner para 3.3.9, however, indicates that this rule has been eroded and the trend appears for courts to deviate from strict application thereof.

12 Saner para 3.3.5. Interruption of prescription by means of acknowledgement of debt is not relevant to this discussion. However, it should be noted that the effect of an acknowledgement of liability with regard to the interruption of prescription is different to that of judicial interruption of prescription. See s 15(3).

13 Authors' emphasis.

14 Authors' emphasis.

15 See *Silhouette Investments Ltd v Virgin Hotels Group Ltd* 2009 (4) SA 617 (SCA): *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 6 SA 539 (E).

16 Act 34 of 2005 (hereinafter the NCA or Act).

elevation of procedural law as a method to extend consumer protection.[18] In this regard the Act has introduced novel procedures during the pre-enforcement and enforcement stages of credit agreements, and has also granted the courts various new procedural powers.[19] One of the procedures introduced by the NCA which has generated substantial controversy and received constant attention since its enactment, is the procedure in terms of section 129(1)(a) which requires the credit provider to deliver a notice to the consumer prior to judicial enforcement of a credit agreement that falls within the scope of application of the Act. Section 129(1)(a) provides as follows:

> "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."

Section 129(1)(a) has to be read together with section 129(1)(b) and section 130 of the Act. Section 129(1)(b) states that a credit provider may not commence any legal proceedings to enforce a credit agreement before first giving notice to the consumer as contemplated in section 129(1)(a) or section 86(10),[20] as the case may be, and meeting any further requirements as set out in section 130. Section 130 provides for debt procedures in a court and section 130(1) specifically provides that, subject to subsection 130(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 section 86(10), 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."

Section 130(3), *inter alia*, provides that a court may only determine a matter if it is satisfied that, in the case of proceedings to which section 129 applies, the section has been complied with.[21]

The NCA can thus be regarded as an Act "that imposes conditions on the institution of an action for recovery of a debt" as contemplated by section 16 of the Prescription Act. It may therefore be asked whether the provisions of the Prescription Act regarding prescription of debt arising from a contract such as a credit agreement are inconsistent with the provisions of the NCA on the issue of prescription of debt. An overview of the NCA reveals that it does not address the

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17 The NCA has repealed the previous legislation that provided the framework for regulation of the credit market, namely, the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980. For a detailed discussion of the scope of application of the NCA, see Scholtz *et al Guide to the National Credit Act* ch 4 (Service Issue 7, 2015) (hereinafter *Guide to the National Credit Act*).

18 See Van Heerden in *Guide to the National Credit Act* para 12.1.

19 See *idem* para 12.4.

20 S 86(10) refers to the notice to terminate a debt review which must be delivered before enforcement proceedings may be commenced against a consumer who is under debt review.

21 Van Heerden and Boraine "The conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act" 2011 *SA Merc LJ* 45 46 (hereinafter Van Heerden and Boraine).

issue of prescription of credit agreement debt and does not contain any express provisions regarding its interaction with the Prescription Act. As a matter of fact, it is completely silent on the issue of prescription,[22] and does not even mention the Prescription Act in Schedule 1 (rules concerning conflicting legislation) or Schedule 2 (amendment of laws). Thus, one may safely assume that the Prescription Act, as a *lex specialis* on the prescription of debt, in the absence of any prescription provisions of the NCA that can be said to be inconsistent with the Prescription Act, applies to debt in terms of a credit agreement governed by the NCA. One may further assume that, by not mentioning the Prescription Act in the NCA or in Schedule 2 to the NCA, the legislature did not intend, by means of the NCA, to amend the Prescription Act. However, the NCA has introduced a statutory pre-enforcement notice in section 129(1)(a) and the question arises whether and how this new procedural right impacts on the prescription of debt arising from a credit agreement as provided for by the Prescription Act.

The purpose of this contribution, therefore, is to establish the effect of compliance or non-compliance with the peremptory statutory pre-enforcement notice in terms of section 129(1)(a) in the context of prescription of credit agreement debt. Pertinent issues that need to be considered is whether a section 129(1)(a) notice qualifies as a "process" and, further, whether it qualifies as a process whereby payment of a debt is claimed as contemplated in section 15 of the Prescription Act. This will provide an answer to the question whether delivery of a section 129(1)(a) notice may serve to interrupt prescription. Should this question be answered in the negative, the next question to be answered is whether non-compliance with section 129(1)(a) prior to service of a summons nullifies such summons with the result that a summons which is "prematurely" served prior to compliance with section 129(1)(a) will not serve to interrupt prescription. In this regard it will be investigated whether compliance with the statutory pre-enforcement notice contemplated in section 129(1)(a) is part of the credit provider's cause of action or not, as it is generally only service of a summons disclosing a complete cause of action that will interrupt prescription. The *sui generis* procedural provisions of the NCA also require scrutiny to establish whether there are any provisions that may impact upon the role of the section 129(1)(a) notice in the context of prescription of credit agreement debt.

2 THE NATURE OF THE SECTION 129(1)(a) NOTICE REQUIREMENT

2 1 Purpose

A section 129(1)(a) notice is a statutory pre-enforcement notice and has to be delivered to the consumer prior to the commencement of enforcement proceedings in respect of credit agreement debt. In order to understand its role as a pre-enforcement measure in the context of enforcement of credit agreements, it is important to appreciate the proper purpose of a section 129(1)(a) notice. This purpose, as was stated in *Nedbank Ltd v National Credit Regulator*,[23] is limited to the two aspects mentioned therein, namely, to resolve a dispute under the agreement or to develop and agree on a plan to bring the agreement up to date

22 Except for s 166 which deals with prescription of a complaint lodged with the National Consumer Tribunal or a consumer court.

23 2011 3 SA 581 (SCA).

prior to the enforcement of a credit agreement. It deals with one specific credit agreement only and seeks to bring about a consensual resolution to that agreement.[24] It does not contemplate a general debt restructuring as envisaged by sections 86 and 87 of the Act.[25] One may thus conclude that the section 129(1)(a) notice is a procedural mechanism that operates in favour of the consumer and aims to give the consumer the opportunity to avoid costly and protracted debt enforcement proceedings by resolving the matter in one of the ways proposed in section 129(1)(a). As was eloquently stated in *Sebola v Standard Bank of South Africa Ltd*,[26] the procedures mentioned in section 129(1)(a) "are designed to help debtors to restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls".

In *Firstrand Bank Ltd t/a Wesbank Ltd v Whittington*[27] the court held that the section 129(1)(a) notice has as its avowed objective, the avoidance of litigation and that a credit provider cannot be permitted to give such notice *pari passu* with the very summons which the notice is supposed to forestall. It stated that the right granted to the consumer by section 129(1)(a) has a procedural as well as a substantive dimension and if compliance with section 129(1)(a) by a credit provider becomes optional it may well detract from the incentive on the part of the credit provider to actively pursue the alternative dispute resolution mechanisms provided for in the said section.

When read together with section 129(1)(b) and section 130(1) and (3) it becomes clear that compliance with section 129(1)(a) prior to commencing legal proceedings to enforce a credit agreement is mandatory and can be viewed as a "gateway" to credit agreement debt enforcement litigation.[28] Our courts have recognised this mandatory nature of pre-enforcement compliance with section 129(1)(a) in various judgments.[29] The Supreme Court of Appeal confirmed in *Nedbank Ltd v The National Credit Regulator*[30] that delivery of a section 129(1)(a) notice is a mandatory requirement prior to litigation to enforce a credit agreement. These sentiments were echoed by the Constitutional Court in *Sebola v Standard Bank Ltd*[31] as well as in *Kubyana v Standard Bank of South Africa Ltd*.[32]

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24 *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) para 9 with reference to *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 5 SA 618 (KZD) para 12; *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD) para 10; *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 319A.

25 *Nedbank Ltd v National Credit Regulator* para 10.

26 2012 5 SA 142 (CC) para 59. See also *Kubyana v Standard Bank of South Africa Ltd* (para 22) where the Constitutional Court indicated that the purpose of s 129(1)(a) is two-fold: first, it serves to ensure that the attention of the consumer is sufficiently drawn to his or her default. Second, it enables the consumer to be empowered with knowledge of the variety of options he or she may utilise in order to remedy that default.

27 [2014] ZAGPHC 398 (11 December 2014) para 22.

28 *Guide to the National Credit Act* para 12.4.2.

29 See Van Heerden in *Guide to the National Credit Act* para 12.4.

30 2011 3 SA 581 (SCA) para 8.

31 2012 5 SA 142 (CC).

32 [2014] ZACC 1

2 2 Is the section 129(1)(a) notice a "process" whereby a creditor "claims payment of a debt" as contemplated by the Prescription Act?

The concept "process" for purposes of section 15 of the Prescription Act includes "a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced".[33] Saner states that, therefore, what section 15(1) contemplates is essentially the service of a process by which legal proceedings are *effectively commenced*[34] for the payment of the debt in question.[35] He indicates that the word "process" is relative to the requirement that it must be a process in terms whereof a creditor claims payment of a debt.[36] This requirement has three facets to it: the first is that by, or in the process, payment must be claimed; the second is that payment must be claimed by the creditor against whom the claim of prescription is raised; and the third is that the debt in respect of which payment is claimed must be the same or substantially similar to that in respect of which the plea of prescription is raised.[37] A summons claiming payment of a debt under a credit agreement will constitute a "process" for purposes of section 15(1) of the Prescription Act – however, it should be a valid summons that is properly[38] and timeously served[39] before the debt prescribes in order to interrupt prescription. As indicated, section 129(1)(a) of the NCA now adds compliance with a mandatory pre-enforcement notice to the facts that a court must be satisfied of before it can entertain enforcement proceedings in respect of a credit agreement. The section 129(1)(a) notice must precede the summons, thus adding another pre-litigation layer to the enforcement of credit agreements. Therefore, it may be asked what the impact of this notice requirement on the running of prescription is: will prescription of a credit agreement debt be interrupted if a section 129(1)(a) notice is served before the time that the debt prescribes?

Having regard to the contents of section 129(1)(a) it merely refers to a proposal that the consumer approaches certain entities for purposes of dispute resolution or devising a plan and bringing his payments under the credit agreement up to date. These actions are merely proposed, not demanded. The section also

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33 S 15(6). In *Wessels v Coetzee* 2013 JDR 513 (GNP) the court held that "The use of the word 'inclusive' and the word 'any' in section 15(6) denotes a generous and wide description of documents which may commence legal proceedings. It does not direct that a closed *numerus clausus* of documents can be used. To test this wide interpretation it is noteworthy that the words 'only the following documents' were not used in an attempt to fix the category of documents. The section must therefore be given a purposive interpretation."

34 Authors' emphasis.

35 Saner para 3.3.8. See also *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 1 SA 311 (C); *De Bruyn v Joubert* 1982 4 SA 691 (W); and *Park Finance Corporation (Pty) Ltd v Van Niekerk* 1956 1 SA 669 (T).

36 Saner para 3.3.8.

37 *Ibid*. See also *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2004] 1 All SA 129 (SCA); *Thompson & Stapelberg (Pty) Ltd v President Staal Korporasie (Edms) Bpk* 1963 3 SA 293 (O); *Mias De Klerk Boerdery (Edms) Bpk v Cole* 1986 2 SA 284 (N).

38 Saner para 3.3.8 indicates that the service of a process upon a debtor for purposes of the Prescription Act must be undertaken in a legally-effective manner. See further *Brangus Ranching (Pty) Ltd v Plaasskerm (Pty) Ltd* 2011 3 SA 477 (KZP) 481; *Arendsnes Sweefspoor CC v Botha* 2013 5 SA 399 (SCA) para 14.

39 Saner para 3.3.8.

does not indicate that the credit provider who delivers a section 129(1)(a) notice to a consumer is required in such notice to demand payment of his credit agreement debt from the consumer. At the very least, however, it is submitted that the section 129(1)(a) notice ought to alert the consumer to the fact that, should he fail to respond to the notice or should he reject the proposals made in the notice, whilst remaining in default of his obligations under the credit agreement, enforcement proceedings may follow.[40] As indicated above, the purpose of section 129(1)(a) essentially is to *avoid* litigation, not to *commence* litigation. Thus it is submitted that such notice does not qualify as a "process" for purposes of section 15(1) of the Prescription Act.

Therefore, even though in practice the section 129(1)(a) notice is usually incorporated in a letter of demand for payment that is sent to a defaulting consumer,[41] the section 129(1)(a) notice *per se* is in the first instance not a process as contemplated by section 15 of the Prescription Act and in the second instance, even if it did qualify as a process, it is not a process in which a creditor demands payment of a debt for purposes of the Prescription Act. Thus, the delivery of a section 129(1)(a) notice *per se* is not sufficient to interrupt prescription for purposes of section 15 of the Prescription Act. It should also be noted that it has been held that a letter of demand is not a "process' for purposes of section 15(1) of the Prescription Act.[42] Therefore, the incorporation of a section 129(1)(a) notice in a letter of demand will also not serve to elevate the status of such notice to that of a 'process' which may interrupt prescription.

If delivery of a section 129(1)(a) notice does not interrupt prescription, the question that subsequently arises is what the effect of non-delivery of a section 129(1)(a) notice in the context of prescription of debt is. In other words, if a section 129(1)(a) notice is not delivered prior to timeous service of a summons enforcing a credit agreement, does it "invalidate" the subsequent summons that is served prior to prescription with the effect that such summons cannot be regarded to have interrupted the running of prescription?

2 3 Is the section 129(1)(a) notice part of the credit provider's cause of action?

The expression "cause of action" has been held to mean

> "every fact which it will be necessary for the plaintiff to prove . . . in order to support his right to 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".[43]

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40 Van Heerden in *Guide to the National Credit Act para* 12.4.8.

41 *Ibid*. See also *SA Taxi Development Finance (Pty) Ltd v Makhanyi* [2013] ZAPJHC 195.

42 Saner para 3.3.8. See *Timothy Mukahlera v Clerk of Parliament* unreported Judgment High Court Zimbabwe case no 1516/05.

43 *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 838 and the cases cited there. Thus it means: "The entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in a declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."

With regard to its procedural nature, it was held in *Beets v Swanepoel*[44] that a section 129(1)(a) notice is a statutory pre-enforcement notice that forms part of the credit provider's cause of action.[45] In *African Bank Ltd v Myambo*,[46] the court indicated that an allegation of compliance with section 129(1)(a) completes the credit provider's cause of action.[47] The Supreme Court of Appeal held in *Rossouw v Firstrand Bank*[48] that non-compliance with section 129(1)(a)

> "must, of necessity, preclude a plaintiff from enforcing its claim, this despite the fact that in this matter it was not disputed that the appellants were in arrears and thus breached their contractual obligations. The bank, therefore, failed to make out a case for summary judgment and it ought to have been refused".[49]

In *Absa Technology Finance Solutions Ltd v Pabi's Guest House CC*[50] it was held that proof of delivery of the section 129(1)(a) notice forms part of the *facta probanda* in an action for specific performance of cancellation.

However, in *Standard Bank of SA Ltd v Ncobo*[51] the court held that a section 129(1)(a) notice does not form part of the credit provider's cause of action. This was also the opinion of the court in *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveld*.[52]

When measured against the "test" for a "cause of action" as set out in *Evins v Shield*[53] above, it is submitted, in the light of section 130(3)(b) which states that a court may not determine matters in which a credit agreement is being considered unless there is compliance with section 129(1)(a) read together with section 129(1)(b) and 130(1) (which requires delivery of a section 129(1)(a) notice prior to enforcement) that a credit provider will have to prove compliance with section 129(1)(a) before he will be entitled to a determination by a court in a matter concerning a credit agreement. Thus, the NCA has statutorily imported compliance with section 129(1)(a) as part of the credit provider's cause of action in the sense that, without an allegation of compliance with section 129(1)(a), the cause of action is incomplete or at the very least it has imported a pre-enforcement formality

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44 2010 JOL 26422 (NC).

45 See also *Absa Bank Ltd v De Villiers* 2009 3 SA 421 (SEC); *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D); *Munien v BMW Financial Services (SA) (Pty) Ltd* 2010 1 SA 549 (KZD). See Further Scholtz *et al Guide to the National Credit Act* para 12.4.8; Otto and Otto *The National Credit Act explained* (2013)112.

46 2010 6 SA 298 (GNP).

47 2010 6 SA 298 (GNP) 311A–D.

48 2010 6 SA 439 (SCA).

49 As will be clear from the discussion on s 130(4)(b) below, the reasoning of the Supreme Court of Appeal that summary judgment should have been refused is incorrect as s 130(4)(b) obliges a court, in the event of non-compliance with s 130(4)(b), to adjourn the proceedings (ie postpone the summary judgment application, preferably *sine die*) and to make an order regarding the steps that the credit provider should follow before the matter may be resumed.

50 2011 6 SA 606 (FB).

51 [2014] ZHGPPCH 431 (26 June 2014).

52 [2015] ZAFSHC 70 (19 March 2015). The court stated: "The cause of action remains the conclusion of the contract and the breach thereof. The section 129 notice therefore does not become an element of the contract or to the breach thereof. It however *completes* the cause of action." The court held further that the giving and receiving of a s 129(1)(a) notice is a fact "giving rise to jurisdiction" which needs to be set out and proved to vest jurisdiction in terms of s 28(1)(d) of the Magistrates' Courts Act 32 of 1944.

53 1980 2 SA 814 (A).

that mandates compliance absent which the credit provider may not proceed with enforcement.[54] At this point it should be mentioned that Saner concedes that 'it is probably true to say that there is a general movement by the courts away from the stringent application of the general rule that a cause of action should exist at the time of institution of the action'.[55] Thus, he states that a summons served within the time periods prior to prescription may nevertheless interrupt the running of prescription, even if it discloses no cause of action or is otherwise excipiable.[56] Provided it is not fatally defective, a summons may be amended to cure its defectiveness. However, regardless of the general position regarding summonses containing incomplete causes of action at the time of service thereof and its ability to interrupt prescription of debt, it is important to note that the NCA prescribes specific consequences that *must* follow upon non-compliance with section 129(1)(a) and these consequences have an important impact on the effect that non-compliance with section 129(1)(a) has on the credit provider's cause of action and the validity of a summons issued pursuant to non-compliance with section 129(1)(a).

2 4 Non-compliance with section 129(1)(a)

The NCA not only prescribes the wording of the section 129(1)(a) notice and when it should be given, but also dictates how this notice should be delivered, at which address and how notification of change of such address should occur.[57] These prescriptions by the Act regarding compliance with section 129(1)(a) thus mean that many forms of non-compliance with the section may manifest in practice.[58] The most common allegation of non-compliance that appears from an overview of court cases relates to non-delivery of a section 129(1)(a) notice prior to litigation.[59]

Generally the rules of civil procedure dictate that where compliance with a specific notice requirement is peremptory in order to complete a plaintiff's cause of action, the non-compliance with such notice requirement renders premature the summons subsequently issued.[60] Where service of process is premature in terms of a statutory provision, legal proceedings are not effectively commenced and prescription is not interrupted.[61] The appropriate remedy is usually the noting of an exception to the plaintiff's summons by the defendant on the basis that

54 Van Heerden and Boraine 64.

55 Saner para 3.3.9. See also *Zeta Property Holdings (Pty) Ltd v Lefatshe Technologies (Pty) Ltd* 2013 6 SA 630 (CSJ).

56 *Trans-African Insurance v Maluleka* 1956 2 SA 273 (A); *Van Vuuren v Boshoff* 1964 1 SA 395 (T); *Rooskrans v Minister van Polisie* 1973 1 SA 273 (T); *Sentrachem Ltd v Prinsloo* 1997 2 SA 1 (A).

57 The aspect of delivery of the s 129(1)(a) notice and its interpretation by the courts have a long and contentious history. For a detailed discussion thereof see *Guide to the National Credit Act* para 12.

58 For examples of the types of non-compliance with s 129(1)(a) that may occur in practice see Van Heerden and Boraine 54.

59 *Ibid*. For example, no s 129(1)(a) notice was delivered or it was delivered to a wrong address or never reached the correct post office. See also *Guide to the National Credit Act* para 12.

60 Van Heerden and Boraine 58.

61 Saner para 3.3.8. See also *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 842; *Santam Insurance v Vilakazi* 1967 1 SA 246 (A) 253.

the summons does not disclose a completed cause of action.[62] If the exception is upheld the effect would be that the plaintiff would *inter alia* be afforded the opportunity to amend the summons by alleging proper compliance, if such compliance did actually occur prior to the service of the summons.[63] If, however, the non-compliance cannot be cured by an amendment to the summons because it is a *fait accompli*, the exception has the effect of disposing of the plaintiff's claim.[64] If he wishes to pursue his claim again he will have to issue a fresh summons under a new case number once he has complied with the particular statutory pre-enforcement notice that gave rise to the exception.[65]

The NCA has, however, brought its own *sui generis* "game rules" to the enforcement process. These rules significantly change the consequences of certain aspects of non-compliance with the similarly unique procedural requirements set by the NCA. The general "game rules" of civil procedure in certain instances have to exit and make way for the application of the NCA's unique take on procedure. In this context it is important to note that, unlike its predecessor the repealed Credit Agreements Act,[66] the NCA, which is a much more comprehensive piece of legislation with an elaborate procedural focus, provides for specific orders that a court considering a credit agreement in respect of which non-compliance with certain provisions of the Act is alleged, may, and in some instances, must, make. It does not contain a general "condonation"[67] provision which entitles courts to generally condone non-compliance with the NCA, but prescribes very specific orders that the court may or must make. These powers of the court to make the mandated orders in respect of non-compliance with the Act are contained in section 130(4) and the specific provision relevant to this discussion is section 130(4)(b), which provides as follows:

> "In 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(1)(a), or has approached the court in circumstances contemplated in subsection (3)(c) the court *must* –[68]
> (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."

Thus, where there has been non-compliance with section 129(1)(a), it will have to be dealt with in accordance with section 130(4)(b) and the court has no discretion to deal with the matter other than as provided for in the said section. In *Standard Bank of South Africa Ltd v Rockhill*[69] the court indicated that section 130(4)(b) envisages the resumption of the proceedings following the court having made an appropriate order and pointed out that the court does not have a discretion to deviate from the order mandated by section 130(4)(b) and that "the court's hands are tied and it must act in accordance with section 130(4)(b)".

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62 In application proceedings such non-compliance will usually be addressed by raising a point *in limine*.
63 Van Heerden and Boraine 58.
64 *Ibid*.
65 *Ibid*.
66 Act 75 of 1980.
67 Such as, eg, appears in s 4 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.
68 Authors' emphasis.
69 2010 5 SA 252 (GSJ) para 17.

The essence of section 130(4)(b) is that the legislature clearly did *not* intend for non-compliance with section 129(1)(a) to be fatal to enforcement proceedings subsequently instituted.[70] The word 'resumed' in section 130(4)(b) is testament to this intention. Regardless of any construction that may be placed upon the role of a section 129(1)(a) notice *vis-à-vis* a summons that is subsequently issued, the NCA overrides any consequences that would normally have resulted from non-compliance with this statutory pre-enforcement notice, even if it is part of the credit provider's cause of action as subsequently set out in a summons enforcing that credit agreement. This position has been confirmed by the Constitutional Court in *Sebola v Standard Bank Ltd*[71] when it stated that

> "section 130 makes it clear that where the 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 dilatory. The absence of notice leads to a pause, not a nullity".

3 CASE LAW ON PRESCRIPTION OF CREDIT AGREEMENT DEBT

3 1 *Investec v Ramurunzi*

The issue of prescription in the context of non-compliance with section 129(1)(a) came up for consideration in the matter of *Investec Bank Ltd v Ramurunzi*.[72] The facts of this matter were as follows:[73] In July 2003 a credit card was issued by Investec Bank (Investec) to the consumer (defendant) and in December 2004 Investec financed his purchase of a vehicle. These two transactions were linked to one account. In March 2008 a notice in terms of sections 123 and 129 of the NCA was sent and the consumer was *inter alia* advised of his options in terms of section 129. The notice was sent by ordinary mail as well as registered mail to the address chosen by the consumer as his *domicilium* address. In August 2008 Investec issued and served summons at the aforesaid address claiming an amount of R120 588 plus interest. The consumer responded to the summons by e-mail, alleging that he sent a notice of change of his address to Investec in August 2008. This was disputed by Investec. In September 2008 Investec applied for summary judgment, which the consumer opposed and as a result of which he was granted leave to defend. In his plea he, *inter alia*, submitted that Investec had failed to deliver a section 129 notice before commencing enforcement proceedings. At a subsequent pre-trial it was agreed that the impending trial would be adjourned as per section 130(4)(b) of the NCA. The agreement was made an order of court and the trial was adjourned to 26 November 2012. In terms of the order Investec was required to send a new section 129(1)(a) notice to the consumer by email which it did in April 2012. At the trial which eventually commenced in March 2013, the consumer argued that because the section 129(1)(a) notice had only been sent to him after a period of three years had elapsed since the debt became due, the claim had prescribed.

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70 Van Heerden and Boraine 54.
71 2012 5 SA 142 (CC) para 30.
72 2013 JDR 554 (WCC).
73 Paras 5–9.

3 2 High court judgment

The high court commenced its judgment by referring to the *dictum* in *Rossouw* as quoted above.[74] It remarked that where a court in an event of non-compliance with section 130(4)(a) does not adjourn the proceedings and make an appropriate order in terms of section 130(4)(b), the effect of such continued non-compliance, given the peremptory nature of section 129(1)(b)(i) and 130(1)(b), is that a plaintiff is precluded from enforcing its claim.[75] It referred to sections 15 and 16 of the Prescription Act and stated that the NCA constitutes legislation "which imposes conditions on the institution of an action for the recovery of a debt" and that

> "consequently, the service of a summons by a credit provider on a debtor in circumstances in which there has not been compliance with such peremptory provisions does not interrupt the running of prescription. The running of prescription in such circumstances is only interrupted where, as a matter of fact, there has been compliance with the NCA after the court has adjourned proceedings in terms of section 130(4) and ordered such compliance".[76]

The court held that compliance with the provisions of the NCA subsequent to and in terms of an order of court made in terms of section 130(4)(b) is not a retrospective act, nor does it have retrospective effect.[77] It pointed out that the service of process upon the debtor for purposes of interrupting prescription in terms of the Prescription Act must be undertaken in a legally effective manner and that, where service of process is premature "in terms of a statutory provision", legal proceedings are not effectively commenced and prescription is not interrupted.[78] The court further pointed out that the NCA does not state that compliance with the court's order in terms of section 130(4)(b) applies retrospectively to the date of service of the summons and that although the NCA provides for proceedings to resume subsequent to a section 130(4)(b) order, it is silent on the effect of such resumption procedure on prescription.[79] It concluded that, in the absence of clear language to that effect, it must be presumed that the legislature did not intend compliance subsequent to a section 130(4)(b) order to have retrospective application and that the legislature did not intend to take away vested rights or produce prejudicial effects retrospectively.[80]

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74 Para 10. As indicated above, it is submitted that the court in *Rossouw* erred in indicating that the effect of non-compliance is that an application for summary judgment should be dismissed.

75 Para 11.

76 Para 12.

77 Para 13 with reference to the principle that statutes are construed as operating prospectively unless the legislature has clearly expressed a contrary intention. See *Curtis v Johannesburg Municipality* 1906 TS 308; *National Iranian Tanker Co v MV Pericles GC* 1995 1 SA 475 (A); and *S v Acting Regional Magistrate, Boksburg* 2012 1 BCLR 5 (CC).

78 Para 16. See *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 842; *Santam Insurance Co Ltd v Vilakazi* 1967 1 SA 246 (A) 253.

79 Para 17.

80 Para 18. The court stated that the defendant held a vested right to raise a special plea of prescription given the plaintiff's non-compliance with section 129(1)(a) prior to April 2012 and that this right would be taken away if it was held that compliance with section 129(1)(b) retrospectively validated a summons that was served prior to proper compliance with section 129(1)(a).

The court then considered the issue of condonation by the court in terms of the Institution of Legal Proceedings against Certain Organs of State Act[81] as it was dealt with in *Minister of Safety and Security v De Witt*.[82] It indicated that the court in *De Witt* approached the matter on the basis that what stood to be determined was whether the claim had prescribed as at the time summons was served as section 3(4)(b)(i) of the Institution of Legal Proceedings against Certain Organs of State Act permits a court to grant condonation if it is satisfied that the debt has not been extinguished by prescription.[83] It remarked that *De Witt* is distinguishable from the current matter as the NCA makes no such reference to prescription within the context of section 130(4)(b). Thus, it was persuaded that the court, upon there having been compliance with the procedure provided in section 130(4)(b), must consider whether "at the date of such proper compliance with the NCA as opposed to the date of service of the summons, the debt has been extinguished by prescription or not".[84] The court referred to *Dauth v Minister of Safety and Security*[85] where it was stated that for purposes of section 4 of the Institution of Legal Proceedings against Certain Organs of State Act a "premature" summons is to be regarded as valid and effective but indicated that the conclusion of the judge in that matter does not find application in the present circumstances.[86] Thus it upheld the defendant's special claim of prescription as it found that the section 129(1)(a) notice was only provided to the consumer more than three years after the service of the summons and more than three years after the period of prescription of the claim, as a result whereof the service of the summons prior to proper compliance with section 129(1)(a) did not interrupt the running of prescription of the claim against the consumer.

3 2 Supreme Court of Appeal's judgment

The Supreme Court of Appeal reached its judgment without much ado.[87] It pointed out that the High Court, in finding that without prior compliance with section 129 the summons was void, relied on *Evins v Shield Insurance Co Ltd*[88] which dealt with the prescription of a dependant's action under the Compulsory Motor Vehicle Insurance Act of 1972.[89] Section 2 of this Act required that before action could be instituted against an unauthorised insurer for damages suffered as a result of a motor accident, the plaintiff had to send a claim in the prescribed

81 Act 40 of 2002.
82 2009 1 SA 457 (SCA).
83 Para 22.
84 Para 23. It further distinguished the provisions of the Institution of Legal Proceedings against Certain Organs of State Act and the NCA on the basis that the former require an application for condonation to be made only if the organ of state relies on a creditor's failure to serve notice and that therefore notice is not in all circumstances an essential prerequisite for the validity of the summons issued under the Institution of Legal Proceedings against Organs of State Act. However, it pointed out that the contrary is apparent from the provisions of the NCA which make it clear that the notice in terms of section 129(1)(a) is peremptory.
85 2009 1 SA 189 (NC).
86 Para 26.
87 *Investec v Ramurunzi* 2014 4 SA 394 (SCA).
88 1980 2 SA 814 (A).
89 Act 56 of 1972.

form setting out the nature of the bodily injuries suffered, medical reports and various other details to the insurer. Section 25(2) of that Act provided as follows:

> "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 ninety days as from the date on which the claim was sent or delivered by hand to the authorized insurer."

The High Court also relied on a passage in Loubser *Extinctive prescription*[90] where the author states that the service of process on a debtor must commence in a "legally effective manner" and this begged the question whether the summons in *Ramurunzi* was defective because it was not preceded by the delivery of a section 129 notice to the consumer.[91]

On appeal the credit provider argued that the High Court's conclusion that its claim has prescribed due to non-compliance with section 129(1)(a) prior to the issue and delivery of summons was not consonant with the analysis of sections 129 and 130 in *Sebola* as quoted above.[92] The court indicated that apart from the fact that the *Sebola* finding is binding on it, it is the only logical analysis of the purpose and effect of section 130(4)(b).[93] It pointed out that section 130 regulates the debt procedures in court and ensures that any shortcoming in the pre-summons enforcement procedures is made good and that it does this for the benefit of the consumer.[94] The consumer is entitled to the opportunity, before the debt can be recovered, to embark on the processes envisaged by the NCA, to for instance seek debt counselling or alternative dispute resolution or even make payment.[95] This purpose is different from that in litigation like the Motor Vehicle Insurance Act where the purpose of sending a claim within 90 days before serving summons is to enable the insurer to assess the claim and deal with litigation accordingly.[96] Accordingly there was 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 has been served.[97]

The court indicated that 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 and thus it is the consumer who might be prejudiced were he or she not given those options.[98] It remarked:

> "Thus the proceedings have a new 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 continued indicates the validity of the summons rather than its nullity."

The court stated that it was true that *Sebola* did not deal with prescription pertinently but that it was concerned with the issue of the delivery of a section 129

90 127.
91 Para 19.
92 Para 2.3
93 Para 22.
94 *Ibid*.
95 *Ibid*.
96 *Ibid*.
97 *Ibid*.
98 Para 23.

notice.[99] However, it was implicit in the reasoning in *Sebola* that an otherwise valid summons interrupts prescription when it is served.[100] The purpose of section 130(4)(b) is to ensure that even though summons has been served, the consumer is still provided with a section 129 notice so that he or she knows what options are available to resolve the matter before the debt is enforced.[101] 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 and 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.[102]

The consumer conceded that the summons was valid but argued that it had no effect until the section 129 notice had been properly delivered - which occurred more than three years after the debt was due, as a result whereof the court remarked:[103] "He accepted that the section 129 notice would not itself interrupt prescription if delivered before the summons was served."

Thus, the court held that the summons interrupted the running of prescription when it was served on the consumer but that the High Court could not grant a judgment against the consumer until, after adjourning the matter for this purpose, a section 129 notice had been delivered to him. The court indicated that the notice was delivered timeously in accordance with the court order and that the special plea should have been dismissed and the trial continued.[104]

4 DISCUSSION

The High Court in *Ramurunzi* was correct in holding that where a court does not make a section 130(4)(b) order, the effect of continued non-compliance with section 129(1)(a) is that a plaintiff is precluded from enforcing its claim. *In casu*, however, the court did make a section 130(4)(b) order and the credit provider complied with section 129(1)(a) subsequent to that order. The gist of section 130(4)(b) is that the summons issued subsequent to non-compliance with section 129(1)(a) is not invalid and is thus capable of interrupting prescription. Retrospective application of compliance with a section 130(4)(b) order as envisaged by the High Court is simply not an issue, but compliance with a section 130(4)(b) order is, given that the interruption is subject to the provisions of section 15(2) of the Prescription Act. Section 130(4)(b) should, however, not be confused with an order granting condonation for non-compliance with section 129(1)(a). It does not deal with condonation but sets out a *sui generis* order that the court must make to give effect to the intention of the legislature that a consumer should receive a notice proposing dispute resolution or affording him the opportunity to devise and agree on a plan to bring his payments under a credit agreement up to date in order to avoid enforcement proceedings. The court's

99 Para 24.
100 *Ibid*.
101 *Ibid*.
102 *Ibid*. In this regard the court referred to *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 2 SA 622 (SCA) para 5 and the cases cited in it.
103 Para 25.
104 It appears that the consumer did not elect to follow any of the options mentioned in the s 129(1)(a) notice.

reliance upon *Minister of Safety and Security v De Witt*[105] and section 3(4)(b)(i) regarding the court's power to grant condonation was thus misplaced. The judgment of the Supreme Court of Appeal cuts to the essence of section 130(4)(b) namely, as stated in *Sebola*, that a summons issued pursuant to non-compliance with section 129(1)(a) is not a nullity. Thus, such a summons is indeed capable of interrupting prescription despite non-compliance with section 130(4)(b) at the time that summons is served. It should further be noted that, although the question whether a section 129(1)(a) notice is a "process" that interrupts prescription as contemplated in section 15(1) of the Prescription Act was not pertinently addressed, the *obiter* remark[106] by the Supreme court of Appeal that the consumer conceded that the said notice itself does not interrupt prescription, indicates that the court endorsed such view.

In the context of enforcement of credit agreements the notice in terms of section 129(1)(a) fulfils a very important role: the legislature intended this notice to be given to a consumer prior to enforcement proceedings as it is during the pre-enforcement stage that this notice is best able to fulfil its function as a measure which, if successfully employed by a consumer, may serve to avoid the contemplated litigation altogether. It is easy to see the many advantages that avoiding litigation may hold, especially for the consumer.

It is, however, also clear that the legislature considered the possibility that credit providers may in certain instances fail to provide a section 129(1)(a) notice to the consumer prior to litigation or that a credit provider may provide a section 129(1)(a) notice which is, for some or other reason, non-compliant with the provisions of the NCA. With this situation in mind the legislature deliberately introduced section 130(4)(b) which serves as the "safety net" to ensure that every consumer who needs to be provided with a section 129(1)(a) notice gets such a notice, however belated, before final enforcement of the credit agreement. Had the intention of the legislature been to create a notice requirement which, if not met, would nullify any process subsequently instituted, it would not have enacted section 130(4)(b). Thus, care should be taken not to attribute to section 129(1)(a) a role that was never intended for it by the legislature whose clear intention appears from reading section 129(1) and 130(1) together with section 130(4)(b), namely, that non-compliance with section 129(1)(a) is not fatal to litigation subsequently instituted.

It is submitted that a section 129(1)(a) notice has a very limited but also a very important role to play in the context of prescription of credit agreement debt, although not necessarily in the way one would generally expect. The section 129(1)(a) notice is not a process whereby a credit provider claims payment of a debt and delivery of the notice does not interrupt prescription. When one has to consider the role of a section 129(1)(a) notice in the context of prescription, it may at first glance appear that compliance with section 129(1)(a) is largely irrelevant: delivery of the notice, itself, does not interrupt prescription and as long as the credit provider's summons is served before the debt prescribes, the fact that a section 129(1)(a) notice is not delivered prior to such summons having been issued does not invalidate the said summons. However, here lies the sting: for as long as the credit provider fails to comply with section 129(1)(a) he cannot

105 2009 1 SA 457 (SCA).
106 Para 25.

proceed with the enforcement of the credit agreement – he thus cannot successfully prosecute his claim to finality as required by section 15(2) of the Prescription Act. Further, even if he does comply with section 129(1)(a) but only does so after a long and unreasonable time period,[107] a court may decide to punish his inaction as being an abuse of court that warrants dismissal of the action.[108]

Various scenarios come to mind: Where a credit provider has complied with section 129(1)(a) and thereafter fails to issue and serve a summons to claim payment of the debt within three years from the date that the debt became due, the debt will prescribe because section 129(1)(a) does not interrupt the running of prescription. Where the credit provider has delivered a section 129(1)(a) notice and then issued and served a summons within three years after the debt became due but failed to allege compliance with section 129(1)(a), an amendment of the summons (being the step that the court will order in terms of section 130(4)(b)(ii)) to reflect the fact that such notice was indeed served will cure the summons so that the claim will not have prescribed despite the initially defective summons. However, where the credit provider does not deliver a section 129(1)(a) notice to the consumer and also does not serve a summons within the time period before the debt prescribes, the debt will prescribe within three years from the date that the debt became due. Where he does not serve a section 129(1)(a) notice before issue and service of a summons to enforce that specific credit agreement debt, but the summons itself is served on the consumer before the date on which the debt would prescribe, that summons itself, despite non-compliance with section 129(1)(a), is the process which interrupts prescription, courtesy of section 130(4)(b) of the NCA. However, if the credit provider serves a summons to enforce a credit agreement debt prior to the date of prescription of such debt but never affords the consumer the opportunity to receive and respond to a section 129(1)(a) notice, either before or after having served the summons, he seals his own fate of not successfully prosecuting his claim to final judgment as envisaged by section 15(2) of the Prescription Act, thus undoing the interruption of prescription occasioned by the service of the summons. Alternatively, if he after an unreasonable period of inaction since service of the summons complies with section 129(1)(a), he may still be at risk of having his claim dismissed due to abuse of court process.

5 CONCLUSION

The notice in terms of section 129(1)(a) serves the very specific purpose to facilitate pre-enforcement dispute settlement. Its purpose is different to that of the notice requirements in section 4 of the Institution of Legal Proceedings against Certain Organs of State Act and to those contained in section 2 of the Compulsory Motor Vehicle Insurance Act. It also attracts *sui generis* orders in the event of non-compliance which overrides the general effects that such non-compliance would have had in the absence of the peculiar provisions of section 130(4)(b) of the NCA. Credit providers may, therefore, be beguiled into thinking that a section 129(1)(a) notice is not really all that important in the big scheme of things – it does not nullify proceedings already instituted, as it can be cured in

107 An unreasonable time period in this regard will have to be determined with reference to the facts of each particular case.

108 *Cassimjee v Minister of Finance* 2014 3 SA 198 (SCA).

terms of a section 130(4)(b) order, it does not interrupt prescription and as long as the credit provider timeously issues and serves summons despite non-compliance with section 129(1)(a) the summons will interrupt prescription of the debt. However, the clear intention of the legislature is that a credit provider should comply with section 129(1)(a) *before* enforcement – thus, a lax attitude towards compliance with section 129(1)(a) may come back to bite the credit provider at a much later stage. The section affords the consumer the right to dispute resolution and section 130(4)(b) mandates that the court *must* allow him to exercise this right – however belated. This may be very inconvenient for the credit provider in terms of cost and delay and the eventual outcome of the matter. Furthermore, he will not be able to obtain judgment against the consumer until he has complied with section 129(1)(a) and until the time has lapsed within which the consumer should have pursued his options in terms of section 129(1)(a). And, finally, where the credit provider thinks his claim is safe because he has served a summons which interrupted prescription of the debt despite non-compliance with section 129(1)(a), continued non-compliance with the said section may eventually neutralise the aforesaid interruption of prescription and divest him of his claim. Unreasonably late compliance with section 129(1)(a) may see his claim dismissed as abuse of court procedure. Credit providers who fail to comply with section 129(1)(a) thus do so at their own peril.