

# Bye-Bye Mr Postman: A Consideration of the Electronic Delivery of Notices in Terms of the *National Credit Act 34 of 2005*

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## Abstract

The outbreak of the Coronavirus pandemic in South Africa prompted many local companies to consider new ways of conducting business without compromising the legality and compliance aspect of operations. The COVID-19 national lockdown and related restrictions posed a huge challenge in litigious proceedings, in particular with the delivery of legal notices. In South Africa most legislation, such as the *National Credit Act 34 of 2005*, require the physical delivery of legal notices by registered post or by the Sheriff of the Court. The requirement of physical delivery proved difficult during the pandemic due to the existence of various restrictions such as the need for social distancing and the limitations on travel. Electronic delivery consequently became an alternative tool for satisfying the delivery requirement. The electronic delivery of legal notices ensured that notices were correctly delivered to recipients in a timely and cost effective manner. Today the move to the use of electronic services and e-delivery has become more prevalent across all business sectors. However, national legislation has failed to develop in this regard, as most Acts still require the delivery of notices by registered post. This dichotomy has given rise to questioning the legitimacy and security of electronically delivered notices, and to a need to examine whether the time has arisen for legislative change in this position.

## Keywords

Delivery; electronic delivery; email; *National Credit Act*; post.

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## 1 Introduction

Since antiquity there have been different mediums of message delivery. From the ancient use of smoke signals by the Chinese to the use of carrier pigeons and horsemen by the Romans and Egyptians and to the more recent use of postal and courier services, mediums of message delivery have evolved over the centuries, and in this current day and age technology seems to be the primary mode of message delivery.

With the Fourth Industrial Revolution or the age of digitalisation fast dawning upon us, it is interesting to note that communication methods have not escaped this evolution in human civilisation. Technology has in various ways catalysed communication and its processes. On a daily basis we now use technology in the form of emails, SMS's and other e-messages to communicate with each other and deliver important information.

Technology has exponentially modified communication and message delivery. Whereas in the past media such as carrier pigeons, horsemen and even the postal services allowed messages to be delivered in a few days or weeks, technology now allows messages to be sent almost immediately by a simple click of a button. From a social perspective applications such as WhatsApp, Facebook and Twitter (X) have totally transformed our communication methods. Formally, from a business perspective applications such as Microsoft Outlook, Microsoft Teams and Zoom have similarly advanced our ways of interaction. One hesitates to think when last we used any of the traditional modes of communication, or even when last we wrote and posted a paper letter at the Post Office.

The outbreak of the Coronavirus has unarguably accelerated the use of technology as a medium of communication. The Covid-19 pandemic restrictions such as the "stay at home" lockdown regulations and the social distancing and travel restriction requirements implemented by various governments across the world resulted in there being limited face-to-face interaction between human beings, and potentially posed a stumbling block to communication and message delivery. Consequently the use of technology became key to continuing to function in various aspects of life. Technology allowed for work-from-home measures to be implemented worldwide, which allowed employees to fulfil their work duties from home. Mechanisms such as emails, video and audio calls, some of which were seldom used prior to the pandemic, have now become common features of everyday life. In some way it was slightly comforting to know that technology allowed for life to continue despite the challenges in the world. It may even be argued that one of the positives arising from the Coronavirus scare was the realisation of the strong resilience of humankind, and understanding the important role technology plays in our lives.

Ironically, despite the huge technological advancements made and the adoption of technology and e-delivery nationally and internationally, most South African legislation still requires message delivery, or delivery of notices, to be conducted manually by the Post Office, by registered mail, or by the Sheriff of the High Court. A prime example of this is the *National Credit Act 34 of 2005* (the NCA). The Act provides *inter alia* that prior to proceeding with legal action to enforce a credit agreement, notice must be sent to the consumer by registered mail.<sup>1</sup> This requirement is very worrying given the deep-seated challenges being faced by the Post Office,<sup>2</sup> and the lack of action on the part of the legislature to adapt to the times and embrace the use of technology in the law.

Accordingly, the purpose of this paper is to consider the delivery of the section 129 default notice in terms of the NCA. This will be done by first providing a brief description of the traditional media of message delivery and their evolution over the centuries. This will provide an introduction to the next part of this paper, which will consider the NCA, specifically the current media of delivery permitted in the Act. As indicated, it will be noted that the NCA still requires that certain notices must be delivered via post despite the evolution of message delivery and the adoption of technology in various aspects of living and areas of law. Part Three of this paper will briefly discuss important case law that has considered the issue of the e-delivery of notices and will outline the pragmatic approach taken by courts when deciding on the use of technology during legal process. This contribution will conclude by considering whether there is a need for change and whether the legislation should be adapted or amended to allow for the e-delivery of notices.

## **2 A brief history of methods of the delivery of messages<sup>3</sup>**

Message delivery has evolved into a significantly important part of human life. It is also a way of communication – exchanging information, learning and sharing ideas. The ways we communicate and the evolution of message delivery are constantly changing. This section briefly seeks to provide an overview of the evolution of message delivery in human history,

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<sup>1</sup> Section 129 of the *National Credit Act 34 of 2005* (the NCA).

<sup>2</sup> It must be noted that at the time of the writing of this paper the South African Post Office had been placed under provisional liquidation.

<sup>3</sup> This paper and this section do not intend to provide a detailed exposition of the history of message delivery. This section merely provides an overview on the evolution of communicative methods and brings to light how the change in message delivery in the various centuries corresponds with the change in legal delivery methods and requirements.

and to describe how our communication media have developed century by century, from the use of primitive and medieval tools to the current use of modern technology. It will be argued that as our communicative tools develop, the law should also naturally develop to merge these media into its processes.

### **2.1 The carrier pigeon**

One of the first forms of mail or message delivery was by pigeon. These birds were well known for their sense of direction and were thus ideal carriers. They could find a destination and make their way back home. Pigeons were first used by the Ancient Romans and Egyptians to deliver messages by tying a small letter to the neck or foot of the bird.<sup>4</sup> The birds were susceptible to several risks, however such as predators and inclement weather. Accordingly, another medium of delivery had to be adopted to negate these challenges.

### **2.2 The horsemen messenger**

In the fifth and sixth centuries the Romans and Persians developed an extension network of roads that allowed for the delivery of mail through specialised horsemen. They developed resting stations for carriages and allowed horsemen to exchange their horses for fresher horses, thus making the delivery journey less tiring and much quicker.<sup>5</sup> Similarly several road networks were developed in India that allowed messages to be carried across borders by horsemen.<sup>6</sup> This system later developed into the postal and courier service we know today.

### **2.3 The postal services**

The postal service has been used in many countries across the world since the seventeenth century. The development of modern transport systems such as railways and airways allowed mail to be delivered across borders. The postal services have been nationalised by most governments and consequently established a state monopoly over these services.<sup>7</sup>

The history of the postal services in South Africa can be traced back over 500 years.<sup>8</sup> Like most of its international counterparts, the South African

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<sup>4</sup> See Sterling *Military Communications* for an overview of ancient delivery mechanisms.

<sup>5</sup> See Tellier *Urban World History* chs 3-4; Briant *From Cyrus to Alexander* ch 2; and Llewelyn 1995 *Tyndale Bulletin* 337-338.

<sup>6</sup> See Majumdar *Early History and Growth of Postal System in India* 252-280.

<sup>7</sup> See Llewelyn 1995 *Tyndale Bulletin* 342 and his discussion of the Roman *cursus publicus*.

<sup>8</sup> See SAPO 2023 <https://www.postoffice.co.za/About/ar2022part1.pdf>; SAPO 2019 <https://www.postoffice.co.za/about/SAPostOfficestrategicplan1922.pdf>. Also see

Post Office is the national post office of the country and is a state-owned enterprise.<sup>9</sup> In terms of the *Post and Telecommunications Related Matters Act* 44 of 1958 (formerly *Post Office Act*), the South African Post Office is the only entity legally allowed to accept reserved mail. Accordingly, it holds a monopoly in the postal service industry.

#### **2.4 The email and technology**

With the growth of the internet and other technological developments most human communication is now done digitally. It therefore seems natural that our entry into the fourth industrial revolution or the digital revolution will result in the next medium of message delivery, that being delivery by digital and electronic means, such as emails. In fact, it seems that this change may already be happening.

The history and origin of emails dates back to the 1970's, when the very first email was sent by Ray Tomlinson.<sup>10</sup> Over the last 50 years the use of emails has grown exponentially, and it is estimated that there are currently over 5 billion email users worldwide. It is estimated that approximately 347 billion emails are sent on average every day globally. That equates to 231 emails being sent every minute.<sup>11</sup> The growth of the mobile internet has increased the number of email users in Africa, and it is estimated that there are over 525 million email users on the continent, 43 million of whom are in South Africa.<sup>12</sup>

Emails became available in South Africa initially in the early 1990's.<sup>13</sup> During the mid-1990's the use and popularity of emails grew vastly, and they became commonly available. Currently emails are used in almost every part of life, from work to personal matters. Ironically, despite their extensive use both internationally and nationally, the use of emails has not been fully adopted in the legal sphere, where their status is unclear. Most South African legislation, such as the NCA, still requires certain legal documents, such as letters of demand, notices and summons, to be delivered physically either via the post office or by the sheriff.<sup>14</sup> The following section will analyse

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South African History Online 2019 <https://www.sahistory.org.za/article/changes-modern-forms-communication>.

<sup>9</sup> The first South African post office was opened on 2 March 1792 in Cape Town.

<sup>10</sup> See Van Vleck 2012 *IEEE Annals of the History of Computing* 4; Feinler and Vittal 2022 <https://archive.computerhistory.org/resources/access/text/2022/08/102806104-05-01-acc.pdf>.

<sup>11</sup> See Statista 2024 <https://www.statista.com/statistics/617136/digital-population-worldwide>.

<sup>12</sup> Statista 2024 <https://www.statista.com/statistics/617136/digital-population-worldwide>.

<sup>13</sup> See Lawrie *History of the Internet in South Africa* 3-4.

<sup>14</sup> For examples of other court documents required to be delivered by post or sheriff see Rules 9 and 46 of the Uniform Rules of Court (GN R48 in GG 999 of 12 January

the delivery requirements in the NCA and consider whether there is a need for change or transformation of the delivery requirements in South African credit law.

### 3 The NCA and its delivery requirements

Like message delivery, the delivery of legal notices has also evolved over the ages. In medieval England legal notices were initially sent by official court messengers.<sup>15</sup> With the growth of the postage services, certain legal notices were later allowed to be sent by post.

In South Africa several Acts still require legal notices to be delivered by registered post. For example, the NCA, which regulates credit agreements in South Africa, requires certain legal notices, in particular the section 129 notice, to be delivered either by hand or by post. The section 129 notice is arguably one of the most important notices in terms of the NCA. Ironically there has nevertheless been much commentary on the inconsistencies in the law pertaining to the section 129 notice, in particular, on how this notice should be delivered.<sup>16</sup> The subsections below will consider the section 129 notice and its preferred medium of delivery in more detail.

#### 3.1 Delivery of the section 129 notice

Section 129 of the NCA currently reads as follows:

- (1) If the consumer is in default under a credit agreement, the credit provider-
  - (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
  - (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-
    - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
    - (ii) meeting any further requirements set out in section 130.

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1965, as amended by GN R2413 in GG 46789 of 26 August 2022)). Also see s 17 of the *Divorce Act* 70 of 1979; s 41 of the *South African Schools Act* 84 of 1996; and s 6 the *Sectional Titles Schemes Management Act* 8 of 2011.

<sup>15</sup> See Bonner and Smith 1942 *Classical Philosophy* 113; and Hu *Messengers in Later Medieval England* 12-17.

<sup>16</sup> See Singh 2021 *SA Merc LJ* 56; Govender and Kelly-Louw 2018 *PELJ* 1; Kelly-Louw 2010 *SA Merc LJ* 570; and Eiselen 2012 *THRHR* 389.

Section 129 (1)(b) provides that a credit provider may not commence any legal proceedings to enforce a credit agreement before first providing a section 129 (1)(a) notice to the consumer. In its initial form upon the implementation of the NCA, section 129 did not indicate how this notice should be delivered to a consumer, nor did the Act provide any definition for the word “deliver”. This omission resulted in much uncertainty as there was confusion as to how the notice had to be delivered – namely, did the Act require the notice to be delivered: by the sheriff by hand; by the post office by regular post; by the post office by registered mail, or by electronic means such as fax or email? Since the section was silent on the medium of delivery it was debatable as to whether electronic delivery by means of email or fax was acceptable. Due to the lack of guidance in section 129, other provisions of the NCA had to be consulted to determine the mode of delivery section 129 required.<sup>17</sup>

Regulation 1 of the NCA provides that:

‘delivered’ 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.

Section 65 of the Act provides that:

- (1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.
- (2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must:
  - (a) make the document available to the consumer through one or more of the following mechanisms-
    - (i) 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;
    - (ii) by fax;
    - (iii) by email; or
    - (iv) by printable web-page; and

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<sup>17</sup> See Singh 2021 SA *Merc LJ* for a discussion of the history of interpretational challenges with the s 129 notice. Also see *Munien v BMW* 2010 1 SA 549 (KZD); *FirstRand Bank Ltd v Bernardo* (608/09) [2009] ZAECPEHC 19 (28 April 2009); *Rossouw v FirstRand Bank* 2012 6 SA 439 (SCA); *Starita v Absa* 2010 3 SA 443 (GSJ); *FirstRand Bank v Dhlamini* 2010 4 SA 531 (GNP); *Absa v Prochaska* 2009 2 SA 512 (D); *Sebola v Standard Bank* 2012 5 SA 142 (CC); *FirstRand Bank Ltd v Folscher* 2011 4 SA 314 (GNP); *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC); and *Absa v Mkhize* 2012 5 SA 574 (KZD).

- (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a).

Section 96 of the NCA provides that:

- (1) Whenever 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, this Act or any other law, the party giving notice must deliver that notice to the other party at:
  - (a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or
  - (b) the address most recently provided by the recipient in accordance with subsection (2).
- (2) 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 mail, or electronic mail, if that other party has provided an email address.

Section 168 which deals with the service of documents provides that:

Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either:

- (a) delivered to that person; or
- (b) sent by registered mail to that person's last known address.

It can be noted from the above that while some sections of the NCA permit various modes of delivery such as post, fax and email, other sections permit delivery only by hand or post, and do not allow for e-delivery. The National Credit Regulator (NCR) has summarised the position regarding delivery in terms of the NCA as follows:

- i. Where a method of service has been prescribed by the NCA, that method must be followed.
- ii. Where a legal notice must be sent, the method of delivery is either service or delivery to that person, or by registered mail. The address to be used is the one on the agreement or the one most recently chosen by the recipient (section 96).
- iii. Where a method has not been prescribed by the NCA, and where the document to be delivered is not a legal notice, the document can be delivered by ordinary mail, by fax, by email, or by printable web page and as chosen by the consumer.<sup>18</sup>

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<sup>18</sup> See NCR 2022 <https://www.ncr.org.za/documents/GUIDELINE%20FOR%20THE%20DIGITAL%20SERVICE%20AND%20DELIVERY%20OF%20NOTICES%20AND%20DOCUMENTS.pdf> (the NCR Guidelines).



As indicated, section 129 was initially unclear on the medium of delivery and this lacuna resulted in much confusion and inconsistency in practice.<sup>19</sup> Accordingly, the court rolls and academic journals were clogged with countless cases and commentary that interpreted the issue of the delivery of the section 129 notice.<sup>20</sup> As this is a legal notice, case law has favoured the position that delivery by registered post should be the preferred method of delivery for the section 129 notice. This position was confirmed by the Constitutional Court in *Sebola v Standard Bank*<sup>21</sup> and *Kubyana v Standard Bank*.<sup>22</sup> In *Sebola* the Constitution Court held that:

[S]ection 129 requires the notice to be delivered to the debtor by registered post with the creditor being required to supply proof that the notice was delivered to the correct post office.<sup>23</sup>

During March 2015 section 129 was amended by the *National Credit Amendment Act 19 of 2014* (the NCAA). Three subsections were inserted into section 129 and provide as follows:

- (5) The notice contemplated in subsection (1)(a) must be delivered to the consumer—
  - (a) by registered mail; or
  - (b) to an adult person at the location designated by the consumer.
- (6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).
- (7) Proof of delivery contemplated in subsection (5) is satisfied by:
  - (a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
  - (b) the signature or identifying mark of the recipient contemplated in subsection (5)(b).

The three new subsections were based on the *Sebola* and *Kubyana* judgments, the prevailing authority at the time. The subsections provide for two methods of delivery, namely, per registered mail, or delivery in person (no mention is made of electronic delivery of the notice). The amendment

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<sup>19</sup> See Kelly-Louw 2010 *SA Merc LJ* 568; and Kelly-Louw 2015 *SALJ* 245. Also see Steyn *Statutory Regulation of Forced Sale of a Home* 155; Singh *Critical Analysis of the Home Mortgage Foreclosure Requirements* chs 3-4.

<sup>20</sup> See *Absa v Prochaska* 2009 2 SA 512 (D); *Munien v BMW* 2010 1 SA 549 (KZD); *FirstRand Bank v Dhlamini* 2010 4 SA 531 (GNP); *Starita v Absa* 2010 3 SA 443 (GSJ); *Rossouw v FirstRand Bank* 2012 6 SA 439 (SCA). For a detailed analysis of s 129 see Singh 2021 *SA Merc LJ*.

<sup>21</sup> *Sebola v Standard Bank* 2012 5 SA 142 (CC). Also see *Absa v Mkhize* 2012 5 SA 574 (KZD).

<sup>22</sup> *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC).

<sup>23</sup> *Sebola v Standard Bank* 2012 5 SA 142 (CC) para 74.

also set out how a credit provider should go about proving that it complied with section 129(1)(a) and (b) of the NCA.<sup>24</sup>

Despite these developments in providing clarity on the medium of delivery for the section 129 notice, it is submitted that the amendment by the NCAA was an opportunity lost as the legislature failed to take into account the modern age of technology, in particular the use of technology for the delivery of the section 129 notice by electronic means. It is submitted that this would have been the ideal opportunity to bring the law into the current age of technology by allowing delivery of the section 129 notice by email.<sup>25</sup> It is submitted that delivery by email is more reliable than delivery by registered post as electronic communication can be easily tracked and traced.<sup>26</sup> Further, deliveries by electronic media are both cheaper and quicker than using the postal services. It is, therefore, regrettable that this was not provided for in the NCAA.

### **3.2 The Electronic Communications and Transactions Act 25 of 2002**

Since the turn of the century, as a result of rapid technological advancements made worldwide, many countries have been prompted to develop their e-communication laws and build new legal frameworks for this emerging digital sector. In response to these changes the United Nations Commission of International Trade Law (UNCITRAL) developed the *Model Law on Electronic Commerce*, 1996.<sup>27</sup> These laws were an early response by the international community to some of the uncertainties with the digital world.<sup>28</sup> Most importantly, they provided a guideline to lawmakers around the world on how to frame their e-legislation.<sup>29</sup>

In South Africa the *Electronic Communications and Transactions Act 25 of 2002* (the ECTA) is the primary legislation which governs digital communications.<sup>30</sup> The ECTA, which is founded on the *UNCITRAL Model*

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<sup>24</sup> See s 129(7)(a) and (b) of the NCA. Also see *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) and *Absa v Mkhize* 2012 5 SA 574 (KZD).

<sup>25</sup> See Otto and Otto *National Credit Act Explained* 114; Eiselen 2012 *THRHR* 402-403.

<sup>26</sup> This paper is not intended to provide a list of the advantages of electronic delivery of legal notices. For a discussion of this issue see Findlay *et al* 2021 <https://www.youtube.com/watch?v=P81JYA4kffE>; Singh 2021 SA Merc LJ.

<sup>27</sup> Also see Coetzee 2006 SA Merc LJ 245-246; Eiselen 2014 *PELJ* 2805.

<sup>28</sup> See Van der Merwe *et al Information and Communication Technology Law* ch. 6, 164 and UNCITRAL *Promoting Confidence in Electronic Commerce* 1-9. The UNCITRAL recognised the uncertainty that may arise from the widespread growth of e-commerce and responded to this challenge by publishing the Model Laws.

<sup>29</sup> Eiselen 2014 *PELJ* 2807.

<sup>30</sup> See Van der Merwe *et al Information and Communication Technology Law* ch 2. The *Electronic Communications and Transactions Act 25 of 2002* (ECTA) was the product of a due diligence report on e-commerce legal issues in 1999. This report led to a *Discussion Paper on Electronic Commerce* (1999), which eventually resulted in the promulgation of the ECTA on 2 August 2002.

*Law on Electronic Commerce* of 1996, aims to address the world of e-commerce and establish legal principles to govern digital communications and transactions in South Africa.<sup>31</sup> One of the main principles of the ECTA is the functional equivalence principle, which essentially provides that all electronic communications are the functional equivalent of traditional paper-based or hand-based methods and hold the same and equal legal weight.<sup>32</sup> Overall the objective of the ECTA is to promote, facilitate and regulate the use of technology and provide legal recognition to electronic communications. There are several sections in the ECTA which deal with electronic communications and electronic delivery.<sup>33</sup> Section 19(4) provides that where any law requires or permits a person to send a document or information by registered or certified post or similar service, that requirement is met if an electronic copy of the document or information is sent to the South African Post Office Limited, is registered by the said post office and sent by that post office to the electronic address provided by the sender. Section 12 of the ECTA provides "that a requirement in law that a document or information must be in writing is met if the document is in the form of a data message, and is accessible in a manner usable for subsequent reference." Accordingly, in terms of the ECTA a document delivered by electronic means should have the same legal effect and validity as a document delivered by hand or post.<sup>34</sup>

While on a strict interpretation of section 19, the ECTA allows the electronic delivery of legal notices, although still by using the post office, there are several other legislative provisions that allow for the electronic delivery of certain documents and notices independently. Rule 4A(1) of the Uniform Rules of Court provides *inter alia* that the service of documents and notices in any proceedings may be effected by facsimile or electronic mail to the addresses provided. Rule 4A(4) further provides that service under this Rule need not be effected through the Sheriff. Section 44(1)(a) of the *Superior Courts Act* 10 of 2013 provides *inter alia* that in any civil proceedings before a superior court, any summons, writ, warrant, rule, order, notice, document or other process, or any other communication which by any law, rule or agreement of parties is required or directed to be served or executed upon any person may be transmitted by fax or by means of any other electronic medium as provided by the rules. Rule 44(1)(b) further provides that any document received or printed as a result of electronic transmission is of the

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<sup>31</sup> See Eiselen 2014 *PELJ* 2807; Singh 2022 *Stell LR* 619.

<sup>32</sup> See s 2 of the ECTA. See also Coetzee 2006 *SA Merc LJ* 256.

<sup>33</sup> See ss 11, 22 and 24 of the ECTA, which provides *inter alia* that data messages and communications have full legal effect and are valid in law.

<sup>34</sup> Also see s 23 of the ECTA and Art 15 of the *UNCITRAL Model Law on Electronic Commerce* (1996), which deals with the dispatch of e-messages.

same force and effect as if the original had been shown upon the person concerned.

Although the NCA does not specifically allow for the delivery of the section 129 notice via electronic means such as email, it does not in any way prevent or prohibit a section 129 notice from being so sent, nor does the section indicate that the electronic delivery of the notice will result in non-compliance with the Act. As noted above, there are several provisions in the NCA, and other rules and regulations that allow for the delivery of documents via electronic means. In August 2022, the NCR, recognising the importance and growth of electronic communication, published Guidelines providing that where the NCA requires certain notices to be delivered in writing the principles of the ECTA will apply in that notices may be delivered through electronic means such as email.<sup>35</sup> Most importantly, the NCR Guidelines specifically encourage credit providers to have regard to the ECTA in relation to the electronic service and delivery of notices prescribed by the NCA in view of the digitisation of services as a result of the Covid-19 pandemic. The Guidelines further provide that where the NCA has prescribed a method of the service and delivery of a document to be by registered mail, it will be compliant and sufficient if the electronic copy of the document is sent to the post office, and sent by that post office to the electronic address provided by the sender.<sup>36</sup> Although the Guidelines still require the intervention of the post office as the transmitter of the electronic message, the NCR can be commended for promoting the use of electronic delivery services. This is indeed a step in the right direction, and it is noteworthy that the courts have also been very pragmatic with the implementation of electronic delivery. The section below will consider some judicial precedents allowing for e-delivery of the section 129 notice and other legal notices.

#### 4 Case law

South African courts have steadily adopted a favourable approach to the use of technology in court processes and there are many judicial decisions that have affirmed the validity of electronically delivered court notices.

*FirstRand Bank v Ngcobo*<sup>37</sup> was one of the first cases in South Africa that considered the question of whether section 129 allowed for the delivery of the notice via email. This matter involved a summary judgment application by FirstRand against the Ngcobos, who had fallen into arrears with their mortgage repayments. The mortgage agreement provided that the service

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<sup>35</sup> NCR Guidelines 3.

<sup>36</sup> NCR Guidelines 3, referring to s 19 of the ECTA.

<sup>37</sup> *FirstRand Bank Ltd v Ngcobo* (24661/09) [2009] ZAGPPHC 112 (11 September 2009) (hereafter *Ngcobo*).

of documents was to be effected to each party's *domicilium* address by registered post.<sup>38</sup> The Ngcobos claimed that they never received the section 129 notice that was sent via registered post. They further contended that all their communications with the bank had occurred via email, and therefore it was only natural that the section 129 notice should also have been sent via email.<sup>39</sup>

The court held that section 129 has two functions: firstly it creates rights for the consumer, and secondly it creates certain obligations for the credit provider. The rights of the consumer could not be asserted unless the consumer is made aware of them.<sup>40</sup> The main defence by the Ngcobos was that had they received the notice, they would have elected to exercise their rights in terms of section 129.<sup>41</sup> This argument was based on the circumstances that they were led into believing that all the correspondence between the parties, including the sending of legal notices, was to be in the form of emails. The court noted that there had been several email communications between the parties<sup>42</sup> and found that since the bulk of the communication between the parties had taken place by email, the consumer was at liberty to expect that the section 129 notice would also be sent by email.<sup>43</sup> This was a *bona fide* defence for summary judgment purposes and the summary judgment application was dismissed.<sup>44</sup>

The *Ngcobo* case exposes the early flaw in section 129 in not providing a specific form of delivery for the default notice. Importantly, the case acknowledges that service via email may constitute valid delivery in terms of section 129. In this case the delivery by email was permitted despite the fact that the mortgage agreement indicated that notices were to be delivered by registered post. This is a welcome interpretation by the courts, as it acknowledges and gives recognition to email delivery, deeming it the functional equivalent of delivery by post (as provided by the ECTA), and also recognises the important role and use of technology in legal process in

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<sup>38</sup> *Ngcobo* paras 3-4.

<sup>39</sup> *Ngcobo* paras 6, 7 and 9. The consumer claimed that the credit provider had not complied with s 129. The bank argued that they had complied with the mortgage agreement and the NCA as notice was sent to the *domilicium*. There was no requirement or agreement entailing that the bank had to send the notice via email.

<sup>40</sup> *Ngcobo* para 22.

<sup>41</sup> *Ngcobo* para 23.

<sup>42</sup> *Ngcobo* paras 13-19. During most of the email correspondence between the parties, the credit provider had always expressed a willingness to assist the consumer and had even set up a meeting to discuss the consumers' financial position. A second meeting was also going to be set up in compliance with s 129, but this meeting never occurred. The court affirmed that for the purposes of a summary judgment application the defendant was not required to satisfy the court that his allegations were true. He was merely required to show that he had a valid *bona fide* defence in law and there was a reasonable possibility that his defence might succeed at trial.

<sup>43</sup> Kelly-Louw 2010 SA *Merc LJ* 580.

<sup>44</sup> *Ngcobo* para 24.

modern society. It is submitted that service or delivery via email should be preferred in this modern age of technology. Accordingly, it is recommended that section 129 should be amended to allow for delivery of the notice via electronic means.

During the last decade, courts have been very pragmatic in permitting the use of the electronic delivery of legal notices. More recently, in the cases of *FirstRand Bank v Allie*<sup>45</sup> and *FirstRand Bank v Joubert*,<sup>46</sup> the courts approved default judgment applications in instances where section 129 notices in terms of the NCA had been delivered via email as opposed to registered post. In these cases the courts acknowledged that delivery of the section 129 notice via email constituted valid delivery. In the case of *FirstRand Bank v Manie*<sup>47</sup> the court went further in showing its acceptance of electronic delivery by ordering that the Rule 46A notices in terms of the Uniform Rules of Court in that instance must be delivered to the defendants via email as opposed to registered post. In *Manie* the consumer had evaded service of the notices, and under such circumstances the court found it acceptable for the notices to be served upon the consumer electronically.

There are several other South African cases that have confirmed the position that electronic communications can be used to deliver notices and even to conclude formal contracts.<sup>48</sup> One of the most prominent judicial examples of delivery by electronic means was in *CMC Woodworking Machinery v Pieter Odendaal Kitchens*.<sup>49</sup> In this case the court allowed for the service of certain legal notices by means of a Facebook message. In this matter the defendant had evaded service of the notices and the plaintiff applied to be permitted service via Facebook. The court confirmed that Rule 4A of the Uniform Rules of Court specifically incorporates the ECTA as being applicable to effecting service by facsimile or email.<sup>50</sup> Referring to the Canadian case of *Boivin and Associates v Scott*,<sup>51</sup> the court found that the same reasoning for the use of email as a method of service should also apply for service by means of Facebook. In *Boivin* the Canadian court authorised service of the motion proceedings on the address of the defendant on Facebook. Consequently, in *CMC Woodworking* the court

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<sup>45</sup> *FirstRand Bank v Allie* (WCC) (unreported) case number 9410/2020 of 19 April 2021.

<sup>46</sup> *FirstRand Bank v Joubert* (GNP) (unreported) case number 34079/2020 of 21 December 2020.

<sup>47</sup> *FirstRand Bank v Manie* (GNP) (unreported) case number 66436/2019 (date unknown).

<sup>48</sup> See *Jaftha v Ezemvelo KZN Wildlife* 2008 10 BLLR 954 (LC); *Mafika v SABC* 2010 5 BLLR 542 (LC).

<sup>49</sup> *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD).

<sup>50</sup> *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 5 SA 604 (KZD) para 2.

<sup>51</sup> *Boivin and Associates v Scott* 2011 QCCQ 10324.

found that since normal forms of service had been unsuccessful the use of Facebook as a form of delivery was warranted, as it would bring the notice to the defendant's attention.

The above judicial cases acknowledge the validity of notices being delivered via email and other electronic means. Accordingly, it is trite that the delivery of documents and notices via email now constitutes valid and effective delivery. In contrast to the traditional delivery by registered or regular post, the use of email is more cost-effective, rapid and reliable. Moreover, the digital delivery of a document provides a digital track and trace receipt which serves as better evidence to the fact that a document was sent. It is also important to note that there are many legislative provisions and rules that allow for the service of documents via fax or email. As indicated in the preceding section, section 44(1) of the *Superior Courts Act* and Rule 4A of the *Uniform Rules of Court* provide that notices in any civil proceedings may be transmitted by fax, email or any other electronic medium. These Rules are a set of provisions that regulate court processes in South Africa. Accordingly, Rule 44 and Rule 4A essentially should be interpreted to allow section 129 notices to be delivered by email.

Given the advancements in technology and the acknowledgement of its incorporation into the law, it will not be very long before email will be considered the new form of registered mail, and the email address will be used as a *domicilium* address to effect service for legal process. It is thus worrying that section 129 of the NCA still does not expressly allow for delivery by electronic means, and it is submitted that change is needed in this respect.

## 5 Conclusion and recommendations

Generally, the legislature and judiciary are hesitant to acknowledge and adapt to fast-paced changes. This should be understood in the context that laws have to adhere to established procedures in order to promote legal certainty and justice. Fortunately, South Africa's legislature and courts have moved smoothly in recognising the evolution of communication systems and technology. This is evident from the implementation of the ECTA and several other rules and regulations that promote and affirm the use of technology in the law. In addition to the legislative endorsement of technology in the law, the courts are steadily accepting technology into traditional court processes, which is evidenced by the introduction of Caselines in Gauteng and the movement by several judges to hold trials and other proceedings virtually as opposed to in court.<sup>52</sup>

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<sup>52</sup> Caselines is a digital platform that was introduced by the North and South Gauteng High Courts in early 2020. Caselines essentially seeks to serve as a paperless case management system for the courts wherein all court documents such as pleadings,

All of us will recall the outbreak of the Coronavirus in early 2020. At the height of the pandemic an urgent directive was issued by the Judge President of the Gauteng Provincial Division to the effect that all cases were to be issued via Caselines. The outbreak of the virus thus prompted the escalated use of Caselines and also motivated the use of technology in the other aspects of the law, such as engaging in the service or delivery of documents via emails and the use of e-signatures to sign affidavits.<sup>53</sup> Today it seems that this electronic process is slowly becoming the norm, as more and more businesses and attorneys are using technology such as e-delivery and e-signing services in their work and court processes.<sup>54</sup>

However, despite these developments, some legislation, such as the NCA, has stood static and still requires the delivery of notices by post. As indicated in the sections above, this is not only unsatisfactory and outdated, but it is also costly, time-consuming, and unreliable given the inefficiencies of the post office. Accordingly it is submitted that there is a need for change and an amendment in the NCA allowing for delivery by email. Consequently, it is suggested that the following amendments be effected to section 129 (proposed amendments underlined):

- (5) The notice contemplated in subsection (1)(a) must be delivered to the consumer—
  - (a) by registered mail;
  - (b) to an adult person at the location designated by the consumer; or
  - (c) *by e-mail or any other electronic delivery medium to the address chosen by the consumer.*
- (6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).
- (7) Proof of delivery contemplated in subsection (5) is satisfied by—
  - (a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
  - (b) the signature or identifying mark of the recipient contemplated in subsection (5)(b);
  - (c) *electronic proof of delivery or electronic receipt notification successfully sent by the electronic delivery provider.*

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notices and applications can be filed, uploaded and shared. See South African Judiciary 2024 <https://www.judiciary.org.za/index.php/63-caselines>.

<sup>53</sup> See Singh 2022 *Stell LR* 618.

<sup>54</sup> Ss 27 and 28 of the ECTA provide that any public body that *inter alia* creates and accepts the filing and retention of documents may perform such filing in the form of data messages. This section effectively allows the courts to perform their functions electronically.



It is suggested that section 129 be amended to allow any form of electronic delivery, provided that such a medium is accepted by the consumer. This should also be supplemented by an amendment in the ECTA deeming any delivery by email to be equivalent to delivery by registered mail, and a guideline or notice by the NCR affirming this position. It is vital for such a change to be implemented as this development is required to bring our laws in line with the current technological context, failing which we are at risk of our laws becoming outdated and draconian.

In conclusion, it is trite that the digital revolution is moving fast. Technology is changing the face of the law, and the South African legal system cannot afford to stand still. Accordingly, it is submitted that provided the inclusion of technology is incorporated correctly into the legal system, there should not be any prohibitions of the e-delivery of notices. Given the rapid technological developments, it will not be long before the pen, paper, post and postman will be items of the past, and all documents will be delivered electronically.

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## List of Abbreviations

ECTA	Electronic Communications and Transactions Act 25 of 2002
NCA	National Credit Act 34 of 2005
NCAA	National Credit Amendment Act 19 of 2014
NCR	National Credit Regulator
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Mercantile Law Journal
SAPO	South African Post Office
Stell LR	Stellenbosch Law Review

THRHR

Tydskrif vir die Hedendaagse Romeins-  
Hollandse Reg

UNCITRAL

United Nations Commission of International  
Trade Law