Delivery of the Compulsory Section 129(1) Notice as required by the National Credit Act of 2005*

S Govender** and M Kelly-Louw***

P·E·R

Pioneer in peer-reviewed, open access online law publications

Author

Sarah Govender

Michelle Kelly-Louw

Affiliation

University of South Africa

Email

govender.sarah2507@gmail.com

kellym@unisa.ac.za

Date of submission

8 November 2017

Date published

27 November 2018

Editor Dr G Viljoen

How to cite this article

Govender S and Kelly-Louw M "Delivery of the Compulsory Section 129(1) Notice as required by the National Credit Act of 2005*" *PER / PELJ* 2018(21) - DOI http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3466

DOI
http://dx.doi.org/10.17159/1727-3781/2018/v21i0a3466

Abstract

In terms of section 129(1) of the *National Credit Act* 34 of 2005 (NCA), a credit provider first needs to provide a consumer with notice of his default and a list of possible remedies to overcome the default, before enforcing the agreement in a court of law. This ensures that the consumer is given the opportunity to remedy his default by, for example, undergoing debt counselling instead of having to incur legal costs when defending legal action brought against him by the credit provider. Before the *National Credit Amendment Act* 19 of 2014 came into operation, the NCA neglected to specify how this notice should be delivered to consumers, and this has led to various conflicting decisions. The matter was eventually settled by the Constitutional Court in two separate cases. After the Constitutional Court pronounced on the matter, the *National Credit Amendment Act* came into operation prescribing the manner in which the notice must be delivered. Consumer-credit legislation that existed prior to the NCA coming into operation generally also made provision for similar notices to be delivered to consumers. In this article we briefly look at how the previous consumer-credit legislation dealt with the delivery of similar notices and also consider how the delivery of notices is currently governed by the NCA. Most of the problematic issues surrounding the delivery of the section 129(1) notice have been resolved, but some still remain. One such example is found in a recent Supreme Court of Appeal case, where despite the correct delivery of the notice to the consumer, the notice caused unintended jurisdictional problems for a credit provider trying to enforce the credit agreement.

Keywords

National Credit Act; *National Credit Amendment Act*; previous consumer-credit legislation; consumer protection; default notice; section 129 notice; delivery; delivery of the section 129 notice; *domicilium* address; inform; notify; letter of demand; post office receipt; sent by registered mail/post; section 90(2)(k)(vi); jurisdiction; Post Office track and trace report; 28(1)(d) of the *Magistrates' Courts Act* 32 of 1944.

.....

1 Introduction

Previous consumer-credit legislation[1] left defaulting consumers largely at the mercy of credit providers and provided very little protection for them. In this light the Legislature saw fit to introduce new consumer-credit legislation in the form of the *National Credit Act* (NCA).[2] From the NCA's preamble and section 3 of the Act, it is clear that one of the core objectives of the Act is to provide greater consumer protection.[3] Chapter 6 of the NCA entitled "Collection, Repayment, Surrender and Debt Enforcement" gives effect to the objectives of the Act by stipulating the procedures that a credit provider must follow should he[4] wish to terminate or enforce a credit agreement.

Section 129 of the NCA, which is set out in Chapter 6, was one of the measures specifically put into place by the legislature to enhance consumer protection. Section 129(1)(a) of the NCA provides that if a consumer (debtor) is in default under a credit agreement, the credit provider may send a default notice to the consumer, and if he does, he must draw the consumer's attention to the fact that he has a right to use various alternative dispute resolution mechanisms (for example, he may ask for the assistance of a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction), before the credit provider may institute legal court proceedings. This notice serves not only to inform the consumer of his default, but also proposes that the consumer refer the credit agreement to a debt counsellor, alternate dispute resolution agent, consumer court or ombud with jurisdiction, so that the parties may resolve any dispute under the agreement, or a payment plan may be developed to ensure that the outstanding debt is paid. The aim of section 129(1)(a) "is to facilitate

---

* This article is based on a LLM dissertation completed under the supervision of Professor M Kelly-Louw at the University of South Africa (see Govender *Interpretation of the Section 129(1)(a) Notice*).

** Sarah Govender. LLB (UKZN), LLM (Unisa). Legal Officer and Attorney at the Department of Public Works in KwaZulu-Natal. The opinions expressed are my own and do not reflect the opinions of the Department of Public Works, KwaZulu-Natal. E-mail: govender.sarah2507@gmail.com.

*** Michelle Kelly-Louw. BIuris LLB LLM LLD (Unisa), Dip Insolvency Law and Practice (UJ). Professor in the Department of Mercantile Law, School of Law, University of South Africa. E-mail: kellym@unisa.ac.za.

1 See the *Usury Act* 73 of 1968 (hereafter the *Usury Act*); *Credit Agreements Act* 75 of 1980 (hereafter the *Credit Agreements Act*); *Hire-Purchase Act* 36 of 1942 (hereafter the *Hire-Purchase Act*); and the *Sale of Land on Instalments* Act 72 of 1971.

2 *National Credit Act* 34 of 2005 (hereafter the NCA or the Act).

3 See, eg *Mostert v Firstrand Bank t/a RMB Private Bank* 2018 4 SA 443 (SCA) para 24.

4 In this article words in the masculine gender also include the feminine.

consensual resolution of credit agreement disputes."[5] Section 129(1) places a duty on the credit provider to inform the consumer of the possible assistance that is available before legal action will be instituted.[6] In this regard, the NCA provides greater consumer protection than that offered by any of its predecessors[7] (such as the *Hire-Purchase Act* and the *Credit Agreements Act*) or the *Alienation of Land Act*,[8] in that it not only informs the consumer of his default and the amount in arrears, but also proposes alternative means to remedy it.

A proper interpretation of section 129(1)(a) of the NCA is essential as it has far-reaching consequences for both the credit provider and the consumer. In terms of section 129(1), the credit provider is required to follow procedural requirements in terms of sections 129 and 130 of the NCA before instituting legal action to enforce or recover debt from a defaulting consumer. In terms of section 129(1)(b), until there has been compliance with the requirements of section 129(1)(a), a credit provider is barred from instituting legal proceedings against the defaulting consumer.

Unfortunately, the sloppy and ambiguous drafting of section 129(1) has led to various problems regarding its correct interpretation. For instance, one of the hurdles that needed to be overcome in ensuring a correct interpretation of section 129 was determining whether or not compliance with section 129(1)(a) was compulsory. The use of the word "may" in section 129(1)(a) tended to give the impression that a credit provider had a discretion and was not compelled to give a consumer written notice of his default. However, from other sections of the NCA, for example sections 129(1)(b), 130(3)(a) and 130(4)(b), and from case law and legal arguments, it has since been settled that no legal proceedings can commence unless the prescribed notice is provided to a defaulting consumer.[9]

---

5 *Mostert v Firstrand Bank t/a RMB Private Bank* 2018 4 SA 443 (SCA) para 24. See also *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) paras 40 and 46; and *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) paras 19-23.

6 See, eg *Imperial Bank* v *Kubheka* 2010 JDR 0077 (GNP).

7 See the legislation listed in fn 1 above and see the discussion in para 2 below.

8 See s 19 of the *Alienation of Land Act* 68 of 1981 (hereafter the *Alienation of Land Act)* (for a discussion, see para 3 below).

9 See *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) para 8; *Moegemat v Nedbank Ltd* (ECG) (unreported) case number CA39/2010 of 27 October 2010; *Nedbank Limited v Mokhonoana* 2010 5 SA 551 (GNP); *Standard Bank of South Africa Ltd v Rockhill* 2010 5 SA 252 (GSJ) paras 17 and 18; *Griekwaland-Wes Korporatief Limited v Jacobs* (NCK) (unreported) case number 1995/2010 of 5 August 2011 para 14; *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) paras 22 and 24; and *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v*

Another controversial topic which has been the focus of many judicial decisions since the incorporation of the NCA and which has been extensively debated, was how the peremptory section 129 notice was to be delivered to the consumer. Section 129 in its original format did not specify how the notice was to be delivered to the consumer. Section 129, prior to its amendment by the *National Credit Amendment Act*,[10] simply stated that the credit provider had to draw the consumer's attention to the default notice, but it was not specific as to how this was to be done. For instance, the section did not specify whether the notice was to be hand-delivered, posted or sent via other means. It also did not specify whether or not the notice had to come to the actual attention of the consumer. This uncertainty led to some courts expressing the view that either actual knowledge and/or receipt of the notice by the consumer was required or that credit providers were compelled to do more than merely dispatch the notice.[11] Other courts were of the view that the notice was valid if it had been properly dispatched and consequently that the credit provider would be regarded as having complied with the Act even if the consumer did not actually receive the notice.[12]

This contentious issue of delivery of the notice was initially decided on by the Supreme Court of Appeal in *Rossouw v Firstrand Bank Ltd.*[13] The Constitutional Court later also made a ruling in respect of delivery of the notice in the case of *Sebola v Standard Bank of South Africa Ltd.*[14] In the beginning it seemed that *Sebola* concluded this long-standing debate regarding the correct delivery of the section 129 notice, but unfortunately the decision only sparked a new debate and conflicting views arose in the different High Courts concerning instances where the notices sent via

Ryneveldt 2016 6 SA 102 (SCA) paras 17 and 18. For a detailed discussion of this issue, see Kelly-Louw 2015 *SALJ* 245.

10 *National Credit Amendment Act* 19 of 2014 (hereafter the *National Credit Amendment Act*).

11 See judgments such as *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D); *Standard Bank of South Africa Ltd v Van Vuuren* 2009 5 SA 557 (T); *Firstrand Bank Limited v Ngcobo* 2009 ZAGPPHC 112 (11 September 2009); and *Firstrand Bank Limited v Dhlamini* 2010 4 SA 531 (GNP) para 31.

12 *Firstrand Bank v Bernado* 2009 ZAECPEHC 19 (28 April 2009); *Munien v BMW Financial Services (SA) (Pty) Ltd* 2010 1 SA 549 (KZD) para 54; *Standard Bank of South Africa Ltd v Mellet* 2009 ZAFSHC 110 (30 October 2009)*; Starita v Absa Bank Ltd* 2010 3 SA 443 (GSJ); *First National Bank Ltd v Rossouw* (GNP) (unreported) case number 30624/2009 of 6 August 2009; and *Standard Bank of South Africa Ltd* v *Rockhill* 2010 5 SA 252 (GSJ).

13 *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA).

14 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC).

registered mail were "returned to sender by the respective post offices."[15] These conflicting views, coupled with various ambiguous statements made in the *Sebola* case itself, eventually led to the matter again being discussed and considered by the Constitutional Court in the case of *Kubyana v Standard Bank of South Africa Ltd.*[16] Generally, the latter Constitutional Court judgment properly interpreted what constituted compliant delivery under section 129 in its original format.

During 2015 section 129 was amended by the *National Credit Amendment Act*. Three subsections[17] were inserted into section 129 providing in short that a default notice is permitted to be delivered to a consumer either by registered mail or personally to an adult person at the location designated by the consumer and in the preferred manner of delivery indicated by the consumer in writing. With the amendment of section 129 by the *National Credit Amendment Act*, the Legislature aimed to clarify the confusion that arose regarding the issue of the delivery and receipt of the section 129(1)(a) notice.

In this article brief attention is given to the manner in which default notices were delivered to defaulting consumers in terms of the different pieces of consumer-credit legislation that existed prior to the NCA's coming into operation. Particular attention is given to whether there had to be actual receipt of the notice by the consumer in order to discharge the obligations placed on the credit provider. Focus is thereafter shifted to the manner in which default notices must be delivered in terms of article 19 of the *Alienation of Land Act* and section 129 of the NCA. We consider section 129 of the NCA in its original as well as in its amended format as the section relates to the delivery of a default notice. Specific attention is given to whether the *National Credit Amendment Act* has indeed clarified the ambiguities, and the practical problems that have existed surrounding the delivery of default notices. Last, but not least, we consider *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt*,[18] a recent Supreme Court of Appeal case, where despite the correct delivery of the default notice to the consumer, the

15 See, eg *Nedbank v Binneman* 2012 5 SA 569 (WCC) in contrast with *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD); *Balkind v Absa Bank* 2013 2 SA 486 (ECG); and *Standard Bank of South Africa Ltd v Van Vuuren*, *JG* 2013 ZAGPJHC 16 (26 February 2013.

16 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC).

17 See ss 129(5)(7) of the Act and the discussion in para 4 below.

18 *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt* 2016 6 SA 102 (SCA). See the discussion in para 6 below.

notice caused unintended jurisdictional problems for a credit provider trying to enforce the credit agreement.

2 Default notices in terms of previous consumer-credit legislation

Prior to the implementation of section 129(1)(a) of the NCA there were other pieces of consumer-credit legislation which also placed a similar obligation on credit providers, namely to send default notices to defaulters (consumers). In some instances, credit providers were required to remind consumers of their outstanding debts and inform them of the possibility that they (the credit providers) could enforce their rights in terms of the agreement due to the consumers' default.

The manner in which the default notices were dispatched to consumers in terms of the previous legislation differed. There were also varying interpretations regarding what constituted compliance with this obligation. It has been suggested that the manner in which these notices were sent in terms of the previous legislation plays a persuasive role in the proper interpretation of section 129 of NCA.[19]

The repealed *Hire-Purchase Act* set out in section 12 the procedure that a credit provider had to follow in the event of a default by the consumer in terms of the credit agreement.[20] Originally section 12(b) of the *Hire-Purchase Act* stated that a written demand had to be made by the credit provider to the consumer by registered post, and there had to be a lapse of 10 days before he could exercise certain remedies, such as claiming accelerated payment or damages, if the consumer did not rectify the breach. However, what constituted compliance with this obligation by the credit provider could not be ascertained from reading the Act. Therefore, the question arose of whether or not the consumer had actually to receive the notice.

It was ruled in the case of *Fitzgerald v Western Agencies*[21] that a notice sent out according to the manner stipulated in the *Hire-Purchase Act*, namely via registered mail, was valid. The credit grantor was considered to have discharged the obligation placed on him even if the notice which was sent by registered post did not reach the consumer. This decision was based on an amendment to the *Hire-Purchase Act* through the *Hire-Purchase*

19 Otto and Otto *National Credit Act Explained* para 44.2.
20 For a discussion see Taylor 2010 *De Jure* 106.
21 *Fitzgerald v Western Agencies* 1968 1 SA 288 (T).

Amendment Act.[22] The wording of section 12(b) of the Act was later amended and made a specific provision for the written demand to be either handed over to the consumer or sent by registered post to the consumer at his last known residential business address.

The *Credit Agreements Act* replaced the *Hire-Purchase Act*. Section 11 of the *Credit Agreements Act* provided that a credit provider who wanted to claim return of the goods which may have been the subject-matter of the credit agreement had either to hand over the letter to the consumer and obtain a signed acknowledgement of receipt from the consumer, or alternatively to send a letter by prepaid registered mail to the credit receiver notifying him of his breach and giving him at least 30 days (or 14 days in limited circumstances) to respond. Section 11 thus made it compulsory for a letter to be sent to defaulting consumers in the event that the credit provider wanted to claim the return of the goods to which the credit agreement related. The *Credit Agreements Act*, unlike the NCA, did not state that a default notice had to be sent to the consumer by the credit provider as a prerequisite for his (the credit provider's) claiming payment in terms of a contract and/or the credit provider's enforcing the contract. It was sent only when the credit provider wanted to claim the return of the goods.[23]

In *Holme v Bardsley*,[24] a case dealing with a default notice that was sent in terms of the *Alienation of Land Act* (which is discussed in more detail below),[25] it was held that notices under this Act must reach the purchaser. It has been submitted,[26] however, that the decision in *Holme v Bardsley* was incorrect. In the case of *Marques v Unibank Ltd*,[27] a notice was sent in terms of section 11 of the *Credit Agreements Act*, but the letter was returned marked "unclaimed". The court rejected the decision in *Holme v Bardsley* and decided that the notice in terms of the *Credit Agreements Act* did not necessarily have to come to the attention of the credit receiver consumer.[28] In interpreting how the notice in terms of the *Credit Agreements Act* should have been delivered, it has been suggested that section 7 of the *Interpretation Act*[29] should have been considered.[30] The effect of section 7 of the Interpretation Act is that when a statute requires or authorises service

22 *Hire-Purchase Amendment Act* 30 of 1965.
23 See Otto and Otto *National Credit Act Explained* 119.
24 *Holme v Bardsley* 1984 1 SA 429 (W).
25 See the discussion in para 3 below.
26 Otto "Consumer Credit" para 29(e).
27 *Marques v Unibank Ltd* 2001 1 SA 145 (W)
28 *Marques v Unibank Ltd* 2001 1 SA 145 (W) 155.
29 *Interpretation Act* 33 of 1957 (hereafter the *Interpretation Act.)*
30 See Otto "Consumer Credit" 61.

by post, a document which is contained in a registered letter, properly addressed and with the postage pre-paid, is deemed to have been served at the time that the letter is delivered in the ordinary course of postal business. This creates a presumption in favour of the credit provider for the purposes of section 11 of the *Credit Agreements Act*, in that all that is expected from the credit provider is to act reasonably to bring the notice to the credit receiver's attention.

Van Niekerk v Favel[31] was another case that looked at the delivery of notices in terms of the *Alienation of Land Act*. The judge in *Van Niekerk v Favel* supported the view expressed in *Marques v Unibank Ltd*, namely that the requirement for notification was satisfied if the letter was sent by registered post, irrespective of whether it was received by the intended recipient.

The *Usury Act* of 1926[32] was repealed and replaced by the *Limitation of Disclosure of Finance Charges Act* of 1968.[33] The latter Act underwent significant amendments and was later renamed the *Usury Act* of 1968. The Usury Act made no provision for the dispatch of a default notice as a prerequisite for claiming payment from defaulting consumers.[34] This meant that the credit provider could claim performance any time after the payment of money (for instance, an instalment) had become due in terms of a mortgage agreement, for example, and he could even claim the whole amount outstanding in terms of the agreement based on an acceleration clause in the contract.[35]

Section 13(1) of the repealed *Sale of Land on Instalments Act* provided that the credit provider had to either hand over a default letter to the consumer (the purchaser) and obtain an acknowledgment of receipt thereof or send it by registered post to the consumer's last known residential or business address. The section also *inter alia* provided that the credit provider had to inform the purchaser of his default.

In *Maron v Mulbarton Gardens (Pty) Ltd*[36] the court held that by virtue of the word "inform" (or "informed") in section 13(1) of the *Sale of Land on Instalments Act*, the notice had to reach the purchaser in order for it to be

31 *Van Niekerk v Favel* 2006 4 SA 548 (W).
32 *Usury Act* 37 of 1926.
33 *Limitation of Disclosure of Finance Charges Act* 73 of 1968.
34 See Otto and Otto *National Credit Act Explained* 119.
35 See Otto and Otto *National Credit Act Explained* 119.
36 *Maron v Mulbarton Gardens (Pty) Ltd* 1975 4 SA 123 (W).

considered effective.[37] In the subsequent case of *Maharaj v Tongaat Development Corporation (Pty) Ltd*,[38] Shearer J interpreted the word "inform" as being indicative of what the contents of the letter should be. It should inform the purchaser of the failure in question and make demand to the purchaser to remedy it. He concluded that the credit provider was regarded as having complied with his obligations at the time of posting the notice. It therefore did not have to actually reach the consumer. This matter was, however, taken on appeal.[39]

On appeal, Wessels J compared the two methods of sending notices, as stipulated in the *Sale of Land on Instalments Act*.[40] One method was handing the letter over to the purchaser and obtaining an acknowledgment of receipt thereof, and the second was sending it via registered post to the purchaser at his last known residential or business address. With regard to the first method, Wessels J concluded that the legislature's intention was to ensure that the letter was properly handed over, and this was confirmed by the fact that the effective handing over needed to be confirmed with a signed acknowledgement of receipt by the consumer.[41] With regard to the second method, which was sending the notice by registered mail, he stated that the fact that the notice was to be sent to the consumer's last known address (and not *domicilium*) was so that it could reach the purchaser or, at least, be made available to him at an address where he was likely to be able to receive it.[42] He therefore followed the earlier view expressed in *Maron v Mulbarton Gardens,* namely that in order to be effective, the notice had to reach the consumer.

3 Default notices in terms of the current Alienation of Land Act

The *Alienation of Land Act* repealed and replaced the *Sale of Land on Instalments Act* and is currently still in force. The *Alienation of Land Act* contains provisions relating to breach of contract by those involved in the sale and purchase of land. Certain contracts relating to the sale of land in instalments might also fall within the ambit of the NCA.[43] In such a situation, both the *Alienation of Land Act* and the NCA are applicable. In this case,

37 *Maron v Mulbarton Gardens (Pty) Ltd* 1975 4 SA 123 (W) 125D.
38 *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 1 SA 314 (D) 318E.
39 *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 4 SA 994 (A).
40 *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 4 SA 994 (A) 999-1001.
41 *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 4 SA 994 (A) 1001.
42 *Maharaj v Tongaat Development Corporation (Pty) Ltd* 1976 4 SA 994 (A) 1001.
43 See Kelly-Louw *Consumer Credit Regulation* ch 20.

the seller of land (the credit provider) will have in addition to the requirements set out in the *Alienation of Land Act* also to comply with the notice and all other prerequisites set out in the NCA, for example by first sending the section 129 default notice stipulated in the NCA, if he wants to take legal action against the consumer (the purchaser).[44] In the event of a conflict arising with regard to the applicability of these two Acts, Schedule 1 of the NCA (read with section 172)[45] indicates that the whole of the NCA will prevail to the extent of the conflict.[46] Otto has analysed the interaction between the compulsory section 19 notice in terms of the *Alienation of Land Act* and the compulsory notice contemplated in terms of section 129 of the NCA.[47] He is of the view that the two notices may be combined or could be sent separately, as the main aim of the two sections of the Acts is to ensure that the consumer is informed of his breach and is given the opportunity to rectify it.

In the case of the *Alienation of Land Act*, just as in the previous consumer-credit legislation discussed above, the same question arose, namely whether the default notice had to be received by the consumer for there to be compliance with section 19. Section 19 of the *Alienation of Land Act* regulates (and limits) the right of a seller (a credit provider) to take action in the event of a breach of a contract for the alienation of land. Section 19 of the Alienation of Land Act, prior to its being amended, provided that a credit provider first had to inform the consumer (the purchaser) of the breach of contract concerned. Provision was made for the notice either to be handed to the consumer or to be sent to him at his address by registered post.

Holme v Bardsley[48] was a case decided under section 19 of the *Alienation of Land Act*. In this case, two letters of demand purporting to be in compliance with section 19 were sent via registered mail to the consumer. One was sent to a post box and the other to a residential address. In determining whether there had been compliance on the part of the credit provider in this case, the court considered the objectives and tenor of the

---

44 See, eg *Armadien v The Registrar of Deeds and Wingerin* 2017 2 All SA 431 (WCC).

45 Section 172(1) of the NCA provides: "If there is a conflict between a provision of this Act mentioned in the first column of the table set out in Schedule 1, and a provision of another Act set out the second column of that table, the conflict must be resolved in accordance with the rule set out in the third column of that table."

46 Also see *Armadien v The Registrar of Deeds and Wingerin* 2017 2 All SA 431 (WCC).

47 Otto 2009 42 *De Jure* 166. In *Armadien v The Registrar of Deeds and Wingerin* 2017 2 All SA 431 (WCC) the court stated that the "object of s 19 is plainly equivalent to that of s 129 read with s 130 of the NCA" (para 14). It also said that in the event of there being a conflict between s 19 of the *Alienation of Land Act* and s 129 of the NCA, s 129 would prevail (para 15).

48 *Holme v Bardsley* 1984 1 SA 429 (W).

legislature in drafting section 19, and it stated that the section had been drafted to ensure the protection of the consumer, even though that might be prejudicial to the seller.[49] The court therefore concluded that the fact that one of the letters had been returned "unclaimed" showed that it had never reached the consumer and that the consumer had therefore not been "informed", as required by the Act.[50]

However, section 19 of the *Alienation of Land Act* was subsequently amended by the *Alienation of Land Amendment Act* of 1983.[51] The latter Act *inter alia* deleted the word "informed" in section 19(1) and replaced it with the word "notified". In *Van Niekerk v Favel*[52] the court confirmed that the requirement for notification in terms of section 19 is satisfied if the letter is sent by registered post, irrespective of whether or not it is received by the intended recipient (the consumer/purchaser).

It has been correctly stated that replacing the word "informed" with "notified" in the *Alienation of Land Act* was an "attempt to make receipt of the notice unnecessary".[53] It has also been argued[54] that while the words "informed" and "notified" may appear to be synonymous, the difference lies in the fact that the word "inform" implies that the information reaches the mind of the person, while "notify" does not imply this. Notify means giving notice and does not necessarily mean that the contents of the notice have to come to the attention of the person to whom the notice is addressed.[55]

4 The original section 129 (default) notice

4.1 Conflicting interpretations of the delivery and receipt requirements of the section 129 notice in earlier case law

Before section 129 of the NCA was amended by the *National Credit Amendment Act* in 2015, there was no indication from a plain reading of the section of whether the notice needed to actually come to the attention of the defaulting consumer or if it was sufficient for the notice merely to be dispatched in accordance with the Act. Furthermore, it was impossible to ascertain, by reading section 129 alone, how the default notice was to be

49 *Holme v Bardsley* 1984 1 SA 429 (W) 431.
50 *Holme v Bardsley* 1984 1 SA 429 (W) 432.
51 *Alienation of Land Amendment Act* 51 of 1983.
52 *Van Niekerk v Favel* 2006 4 SA 548 (W). Also see the discussion in para 2 above.
53 Otto 2010 *SA Merc LJ* 597-598.
54 Otto 2010 *THRHR* 138.
55 Cloete J in *Senatle v CEO of the South African Social Security Agency* 2009 ZANWHC 11 (30 April 2009) para 11.

delivered, as no method of delivery was provided for in this section. It was therefore initially necessary to look beyond section 129 to determine the intention of the legislature in this regard. The relevant sections of the NCA, which supposedly shed light on how the notice was to be delivered, were sections 65, 96 and 168. Regulation 1 of the 2006 Regulations,[56] which defines the term "delivered", was also considered to be useful.

The problematic issue of the delivery of the section 129(1)(a) notice and the question of whether such a notice had to be actually received by the consumer to constitute proper compliance with section 129(1) have been addressed in various cases since the inception of the NCA. In the beginning there were generally two schools of thought in this regard. One derived from the adoption of a strict and rigid approach, and the other from a more flexible approach.

An example of the strict approach is found in the case of *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*.[57] Here the court did not address the meaning of "delivery" for the purposes of section 129(1)(a). However, the court did find that the use of the words "draw the default to the notice of the consumer", "providing notice" and "delivered a notice" in sections 129 and 130 of the Act were clearly indicative of the fact that the credit provider was required to do more than merely dispatch the default notice to be in compliance with his statutory obligations.[58] The court said that the credit provider was required to bring the default to the attention of the consumer in such a manner as to provide an assurance to the court, considering whether or not there had been proper compliance with the procedural requirements of sections 129 and 130, that the default had indeed been drawn "to the notice of the consumer".[59] Unfortunately the court did not set out what practice was required of a credit provider in delivering a section 129(1)(a) notice.[60] By implication, the notice had to come to the attention of the consumer. In this case the court held that when a *domicilium* address was chosen by the consumer, the credit provider had to ensure that the address to which the section 129(1)(a) notice was sent was similar in every respect to the chosen *domicilium* address. The view that the notice actually

56 Regulations published in GN R489 in GG 28864 of 31 May 2006 (hereafter the Regulations).

57 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D). For a discussion of this case, see Otto 2010 *THRHR* 136.

58 Kelly Louw 2010 *SA Merc LJ* 580.

59 *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) 524H.

60 Kelly-Louw 2010 *SA Merc LJ* 581.

had to be received by the consumer was subsequently supported in a number of other judgments.[61]

Other courts were more flexible and of the view that actual notification to the consumer was not a requirement, as long as the credit provider had sent the notice to the address given by the consumer. This more lenient view was best depicted in the case of *Munien v BMW Financial Services (SA) (Pty) Ltd*,[62] where the court reached its decision by considering sections 65, 96 and 168 of the NCA together with the definition of "delivered" in the Regulations. In supporting the view of the credit provider in the *Munien* case, the court held that while the manner of delivery was prescribed by the NCA, the method of delivery was set out in the Regulations. Since the Regulations state that a document is delivered if it is sent by one of the four methods set out in section 65(1) (by hand, mail, e-mail or fax) the court concluded that the section 129(1)(a) notice was therefore delivered if sent by registered post to the address chosen by the consumer, irrespective of whether or not it actually came to the attention of the consumer.[63] This interpretation was supported and followed in number of other judgments.[64]

The issue with the delivery of the notice eventually served before the Supreme Court of Appeal in *Rossouw and Another v FirstRand Bank Ltd.*[65] The Supreme Court of Appeal followed an approach similar to that laid down in the *Munien* case (that is, the more flexible approach) – namely that delivery of the notice occurred when the notice was sent by registered post to the address chosen by the consumer, irrespective of whether the notice was actually received by the consumer. In reaching its conclusion, the Supreme Court of Appeal concentrated on section 65 of the NCA and held that sending the default notice by registered mail to the consumers' *domicilium* was one of the possible methods of delivery contemplated by that section. With regard to the interpretation of "delivered" in the Regulations, the court held that this definition was relevant only for the

61 See, eg *Firstrand Bank v Dlamini* 2010 4 SA 531 (GNP); and *Firstrand Bank Limited v Ngcobo* 2009 ZAGPPHC 112 (11 September 2009).

62 *Munien v BMW Financial Services (SA) (Pty) Ltd* 2010 1 SA 549 (KZD).

63 See *Munien v BMW Financial Services (SA) (Pty) Ltd* 2010 1 SA 549 (KZD) para 12. See also Van Heerden and Boraine 2011 *SA Merc LJ* 48-49.

64 See, eg, *Firstrand Bank v Bernado* 2009 ZAECPEHC 19 (28 April 2009); *Standard Bank of South Africa v Mellet* 2009 ZAFSHC 110 (30 October 2009); *Starita v Absa Bank Ltd* 2010 3 SA 443 (GSJ); *Standard Bank of South Africa v Rockhill* 2010 5 SA 252 (GSJ); and *Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport* 2010 5 SA 518 (KZP).

65 *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA). For a full discussion of this case, see Kelly-Louw 2010 *SA Merc LJ* 568; and Vlcek and Sithole 2010 *Without Prejudice* 32.

purpose of interpreting the different regulations dealing with the delivery of documents, and that it should not be used in interpreting sections 129(1)(a) and 130(1) of the NCA. Therefore, what constituted delivery had to be found by analysing the provisions of the Act itself, specifically sections 65, 96 and 168.[66]

The Supreme Court of Appeal explained[67] that "send" meant to despatch by whichever means, but did not include the receipt of the sent item.[68] The court emphasised the fact that where the consumer chose the manner in which to receive documents, the risk of non-receipt lay with the consumer, as it was within the consumer's own knowledge which means of communication would ensure that the document was delivered to him.[69] Therefore, actual receipt of the notice by the consumer was not a requirement. This was so, as long as the notice was sent to the chosen address (the *domicilium* address) set out in the credit agreement and the delivery method (for example, by registered mail) also selected by the consumer in the agreement was used.[70]

4.2 The Constitutional Court's views

During 2012 the controversial issue surrounding the delivery of the section 129(1)(a) notice arose again, but this time before the Constitutional Court in *Sebola v Standard Bank of South Africa Ltd.*[71]

In *Sebola* the credit provider sent out the section 129(1) notice via registered mail to the chosen post box address of the consumers.[72] It was later discovered, however, that the notice had never reached the consumers, as the post office "track and trace" system showed that it had erroroneously been sent to another post office, a wrong one.[73]

The court *a quo*[74] held that it was not a requirement that the section 129(1) notice sent by the credit provider had to come to the actual attention of the consumer. However, the decision of the court *a quo* was delivered before

66 See *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) paras 21-27.
67 *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) paras 31-32.
68 *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) para 30.
69 *Rossouw v FirstRand Bank Ltd* 2010 6 SA 439 (SCA) para 32.
70 See *Greeff v FirstRand Bank Ltd* 2012 3 SA 157 (NCK), where the judgment by the Supreme Court of Appeal in the *Rossouw* case was followed and applied.
71 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC). For a discussion, see Eiselen "In the Wake of Sebola" 103-116.
72 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 5.
73 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 3.
74 *Sebola v Standard Bank of South Africa* 2011 ZAGPJHC 229 (15 August 2011).

the judgment by the Supreme Court of Appeal in *Rossouw* had been handed down. The court *a quo* granted the consumers leave to appeal its decision.[75] The consumers appealed to the full bench of the same court, which at that time believed that the decision handed down in *Rossouw* had settled the matter. The full court therefore held that it was not neccessary for the consumer to have the notice come to his actual attention, and on these grounds dismissed the appeal.[76] The consumers thereafter approached the Constitutional Court in order for it to interpret section 129(1) of the NCA.

Cameron J, who delivered the majority judgment, held that the NCA did not require the credit provider to prove that the default notice had actually come to the attention of the consumer or that it had been delivered to a specific address, as this would ordinarily be impossible to do. He added, that although it might be difficult for the credit provider to show that the notice came to the attention of the consumer, the credit provider had to make allegations that would satisfy the court from which enforcement was sought that the notice, on a balance of probabilities, had reached the consumer.[77] Therefore, where the notice was posted, mere despatch of it was not sufficient. Due to the risk of non-delivery by ordinary mail Cameron J emphasised that registered mail was essential, because though "registered letters may go astray, at least there is a high degree of probability that most of them are delivered."[78] He added that even when a registered letter was sent there was a possibility that proof of registered despatch by itself was not enough. Thus, it was not sufficient for the credit provider to simply allege and provide proof that the notice had been sent by registered mail to the address chosen by the defaulting consumer. A credit provider also had to prove that the notice was received by the correct post office. Thus, the mere dispatch of a notice was not enough and at the very least, the credit provider "must obtain a post-despatch 'track and trace' print-out from the website of the South African Post Office" to show that the notice had been delivered to the relevant post office.[79] If the notice reached the correct post office, in the absence of an indication to the contrary, a court could accept that there was adequate proof of delivery of the notice to the defaulting consumer.[80]

Cameron J pointed out that if the consumer were to contend that he never actually received the notice, the court should establish "the truth of the

75 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) paras 10 and 11.
76 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) paras 12–14.
77 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 74.
78 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 75.
79 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 76.
80 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 86.

claim" and check if the credit provider had complied in terms of the Act.[81] If the credit provider had not, then the matter had to be adjourned in terms of section 130(4)(b) of the NCA, in order for the credit provider to take the steps directed by the court to enable the consumer to exercise his rights.[82]

At first, it appeared that the Constitutional Court's judgment in *Sebola* had ended the long-lasting debate regarding the delivery of the section 129 notice. That view was short lived, as two different High Courts (that is the Western Cape High Court, Cape Town and the Kwazulu-Natal High Court, Durban) started interpreting and applying the *Sebola* judgment differently.[83] In both cases the credit providers had sent the section 129(1) notices by registered mail to the relevant post offices, and in both instances the notices had been returned to the credit providers as "uncollected". The respective High Courts gave conflicting judgments which again confused credit providers as to how they had to go about proving that they had complied with the obligations imposed by section 129(1) of the NCA in delivering a default notice to a consumer.

In *Nedbank Ltd v Binneman*[84] the credit provider obtained a track and trace report from the post office, as required in the *Sebola* case, proving that the section 129(1) notice had been sent by registered mail and had indeed reached the correct (relevant) post office. The consumer had not responded to the Post Office' notification to collect the registered item from the post office, so in reality the notice had not reached the consumer as it had been returned to the credit provider.

The court (per Griesel J) held that mere proof that the section 129 notice had been sent by registered mail and proof that it had reached the correct (relevant) post office was enough to prove that the notice had been delivered. So, the fact that the notice had not been collected by the consumer from the post office was irrelevant. According to the court, the Constitutional Court in *Sebola* had not overruled the principle laid down by the Supreme Court of Appeal in *Rossouw* that the risk of non-receipt of the

81 *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) para 87.

82 Section 130(4)(b*)* provides that if the credit provider has not complied with the requirements of s 129 the court must adjourn the matter before it and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed.

83 See *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC); and *Absa Bank Ltd v Mkhize* 2012 5 SA 569 (WCC). For a discussion of these cases, see Van Heerden and Coetzee 2012 *LitNet Akademies Regte*; Fuchs 2013 *PELJ* 376; Fuchs 2014 *THRHR* 217; and Eiselen "In the Wake of Sebola" 103-116.

84 *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC) paras 2 and 8.

notice was placed on the defaulting consumer.[85] The consumer, who in terms of the NCA has the right to choose the address to which the notice must be delivered, should bear the risk of notices going astray. Therefore, all that the *Sebola* case had achieved, in Griesel J's view, was to clarify that despatch *per se* was insufficient, and that there also had to be proof that the notice had reached the correct post office.[86]

The court acknowledged that it was not immediately clear what was meant by the phrase "in the absence of contrary indication", which had been used in the *Sebola* case, but held that for the purposes of the case before the court it was unnecessary to speculate as to its precise meaning.[87] The evidence before the court proved that the notice had been sent by registered post to the agreed address and that the notice in reality reached the correct post office. Therefore, the credit provider had provided proper notice to the consumer as required by section 129, and the risk of non-receipt as a result rested squarely with the consumer.[88]

A different interpretation of the *Sebola* judgment was given in the case of *Absa Bank Ltd v Mkhize.*[89] The court (per Olsen AJ) rejected the view adopted in the *Binneman* case that *Sebola* had not overruled the reasoning adopted in *Rossouw*. According to Olsen AJ the *Sebola* judgment had in fact overruled the reasoning adopted in *Rossouw,* and therefore the risk of non-receipt did not rest squarely with the consumer.[90]

Olsen AJ referred to the majority judgment of *Sebola* in this judgment, and held that if there was conclusive evidence that the section 129 notice had not reached the consumer or the consumer's address, this was important and could not be ignored, as was seemingly suggested in the *Rossouw* and *Binneman* cases.[91] According to Olsen J, the majority in *Sebola* could not have sanctioned a court's ignoring evidence that the section 129 notice had not reached the consumer or his address. This is what would be required, in the cases before him, to conclude that compliance with section 129(1) had been proved.[92] Therefore, *Sebola* was not merely a confirmation of *Rossouw* with added evidential requirements relating to proof. *Sebola*

85 *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC) para 6.
86 *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC) paras 4–6.
87 *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC) para 7.
88 *Nedbank Ltd v Binneman* 2012 5 SA 569 (WCC) para 8. The *Binneman* judgment was endorsed in *Absa Bank Ltd v Petersen* 2013 1 SA 481 (WCC).
89 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD).
90 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) para 58.
91 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) para 51.
92 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) para 51.

required proof that the notice had probably come to the attention of the consumer and did not endorse the decision in *Rossouw* that the risk of non-delivery lies with the consumer.[93]

Consequently, proof of delivery to the correct post office did not discharge the credit provider's duty to notify the consumer in terms of section 129 where there was conclusive proof that the notice had not reached the consumer. The evidence before the court had to prove on a balance of probabilities that the notice had reached the consumer.[94] Olsen AJ concluded that due to the fact that the notices had not been collected by the respective consumers, there was non-compliance with section 129 (as decided in *Sebola*), and as a result the cases had to be adjourned, as contemplated by section 130(4)(b) of the NCA. The credit provider was ordered to resend the notices via registered mail, as well as all other available methods, in order to ensure that they were received by the consumer.

The credit provider appealed to the Supreme Court of Appeal against the judgment of Olsen AJ.[95] The credit provider argued that the court *a quo* in *Mkhize* had interpreted *Sebola* incorrectly.[96] The Supreme Court of Appeal, however, found that the order of the court *a quo* in *Mkhize* (that is, postponing the application for default judgment in terms of section 130 of the NCA) could not be appealed, as it was merely interlocutory or dilatory in nature. As the order of the court *a quo* was not definitive of the rights of the parties and still had to be dealt with, the Supreme Court of Appeal could not consider the substantive part of the credit provider's appeal and accordingly it dismissed the appeal.

The issue of delivery of the section 129(1) notice came before the Constitutional Court for a second time in the case of *Kubyana v Standard Bank of South Africa Ltd.*[97] However, this time it was merely to clarify the same court's earlier decision expressed in *Sebola*.

In *Kubyana* the section 129 notice was sent to the consumer's chosen *domicilium* by registered mail and the post office track and trace report confirmed delivery to the correct post office. There was also proof to the

93 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) paras 50–58. This judgment was supported in *Balkind v Absa Bank* 2013 2 SA 486 (ECG) and *Standard Bank of South Africa Ltd v Van Vuuren, JG* 2013 ZAGPJHC 16 (26 February 2013).

94 *Absa Bank Ltd v Mkhize* 2012 5 SA 574 (KZD) paras 55-56.

95 *Absa Bank Ltd v Mkhize* 2014 5 SA 16 (SCA).

96 *Absa Bank Ltd v Mkhize* 2014 5 SA 16 (SCA) para 2.

97 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC).

effect that two notices were sent to the consumer advising him that he had to fetch a document (that is, the section 129 notice) from the post office.[98] The consumer did not respond to either of these notices from the post office and as a result, the section 129 notice was returned to the credit provider marked by the post office as "uncollected". The court *a quo*[99] held that the fact that the section 129 notice had been sent by registered mail to the address chosen by the consumer and reached the correct post office, which had sent two collection notifications to the consumer, meant that no further obligations were placed on the credit provider to use additional means to ensure that the consumer received the notice. Instead, the consumer had a duty to explain why the notices had not reached him, despite the attempts of the credit provider.[100]

The matter then served before the Constitutional Court. It was essential for the Constitutional Court to clarify its earlier decision in *Sebola,* because the High Courts were interpreting and applying the *Sebola* decision differently.[101]

The majority judgment (per Mhlantla AJ) held that the credit provider had shown that it had complied with the NCA by proving that the notice had been sent via registered mail to the correct post office. By doing this, the credit provider might credibly aver receipt of the notice by the consumer, and to require anything further from the credit provider would be too onerous and would allow consumers to ignore validly sent notices with impunity.[102]

The Constitutional Court considered and agreed with the findings it had made in *Sebola* and those of the court *a quo* that there was no need for the credit provider to prove that the notice had come to the subjective attention of the consumer, nor was it a requirement that the notice be served personally on the consumer.[103] In this respect, section 129 stipulated that the credit provider, after all, had to "draw the default to the notice of the consumer in writing". In the words of section 65(2) of the NCA, by making the document available to the consumer, in one of the methods set out in

98 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 5.
99 See *Standard Bank of South Africa Ltd v Kubyana* 2012 ZAGPPHC 259 (8 November 2012).
100 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) paras 7 and 8.
101 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) paras 16-17.
102 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 12.
103 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) paras 31 and 39.

the section, the credit provider discharges this obligation of having to draw the default notice to the attention of the consumer.[104]

Furthermore, the Constitutional Court confirmed its earlier view in *Sebola* that the postal service was an acceptable mode of delivery. The court quoted that part of the judgment in *Sebola* where it said that mere despatch did not suffice and the credit provider was required to furnish proof that reasonable measures had been taken to bring the notice to the attention of the consumer. While relying on *Sebola*, the court stated that when a consumer had elected to receive notices by way of post, the credit provider's obligation to deliver therefore generally consisted of (1) respecting the consumer's election; (2) undertaking the additional expense of sending notices by way of registered mail rather than ordinary mail; (3) ensuring that any notice was sent to the correct branch of the Post Office for the consumer's collection; and (4) obtaining proof that the Post Office issued a notification to the correct postal address of the consumer that a registered item was available for his collection.[105]

The Constitutional Court again endorsed its view expressed in *Sebola* that a credit provider needed to take steps that would ensure that the notice was brought to the "attention of a reasonable consumer".[106] According to the court, the credit provider indicated how he had complied with the obligations placed on him by the NCA. The credit provider had sent the section 129 notice via registered mail to the branch of the Post Office nominated by the consumer, and the post office had sent two notifications to the consumer's designated address, indicating that an item was awaiting his collection. Despite these attempts by the credit provider, it had received no response from the consumer. The court held that if the consumer had unreasonably failed to respond to the section 129 notice, he would have eschewed reliance on the consensual dispute resolution mechanisms provided for by the NCA, and would subsequently, not be entitled to disrupt enforcement proceedings by claiming that the credit provider had failed to discharge its statutory notice obligations.[107] So where the credit provider had complied with the requirements and received no response from the consumer within the period designated by the NCA, the court failed to see what more could

104 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 31.

105 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) paras 32, 43 and 54.

106 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 33. The court in *Sebola* made references to the "reasonable consumer" (see *Sebola v Standard Bank of South Africa Ltd* 2012 5 SA 142 (CC) paras 49 and 77).

107 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 35.

be expected of the credit provider.[108] For example, where a consumer has elected to receive notices by way of registered mail, he is duty bound to respond to notifications from the Post Office requesting him to collect registered items unless, in the circumstances, a reasonable person would not have responded. It was up to the consumer to show that the notice had not come to his attention and explain the reasons why it had not.[109] The onus was thus on the consumer to explain why it could not reasonably be expected of him to have attended to the section 129 notice, if he wished to escape the consequences of that notice.[110]

The Constitutional Court summarised the situation as follows:[111]

> Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour.

The court set out the necessary steps that the credit provider needed to take in order to effect delivery and bring the notice to the attention of a reasonable consumer, where the consumer elected to receive the notices via post. Where delivery of the section 129 notice occurred through the postal service, proof that the credit provider had discharged its statutory obligations entailed proof by the credit provider that:[112]

> (a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;
>
> (b) the Post Office issued a notification to the consumer that a registered item was available for her collection;

108 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 48.
109 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 48.
110 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 53.
111 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 53.
112 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 54.

> (c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary...; and
>
> (d) a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a)-(c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.

The court in *Kubyana* concluded that the credit provider had complied with the above requirements. It could therefore reasonably be assumed that the notifications from the Post Office had reached the consumer. This was so, because the consumer never denied receiving the two notifications from the Post Office and he also never gave any explanation as to why he had not collected the document from the post office despite the notifications.[113]

The *Kubyana* case resolved the uncertainty that was created by a few ambiguous statements made in the *Sebola* case.[114] *Kubyana* provided clarification regarding what the credit provider needed to do to meet the obligations imposed by the NCA in respect of the delivery of the default notice. The case elucidated in particular what the scenario was if default notices were returned by the post office "unclaimed" or "uncollected" – a matter not settled in *Sebola.* In *Kubyana* the Constitutional Court explained its earlier decision in the *Sebola* case by making it evident that a credit provider needed only to submit evidence that it had provided a section 129 notice to a consumer in such a manner that it could be expected to have reached the consumer. Thereafter, the onus of proof shifted to the consumer to prove that the notice, reasonably speaking, had not come to his attention.[115] Furthermore, *Kubyana* confirmed that the *Sebola* judgment did not change the more objective approach taken by the Supreme Court of Appeal in *Rossouw,* where the court accentuated the responsibilities of the consumer (for instance, that the risk of non-receipt of the notice was placed on the defaulting consumer).[116] However, after the *Kubyana* judgment had been delivered, certain amendments were made to section 129 of the NCA by the *National Credit Amendment Act.*

---

113 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) paras 55-58.

114 See Kelly-Louw "Consumer Credit" 272.

115 See Kelly-Louw "Consumer Credit" 269. See also *Armadien v The Registrar of Deeds and Wingerin* 2017 2 All SA 431 (WCC) where the court applied these two Constitutional Court judgments to determine whether or not the credit provider had properly delivered the s 129 notices.

116 See Kelly-Louw "Consumer Credit" 272.

5 The amended section 129 (default) notice

The *National Credit Amendment Act* was signed by the President on 16 May 2014,[117] but came into effect only on 13 March 2015. The *National Credit Amendment Act* amended section 129 of the NCA *inter alia* by adding three subsections to it. They provide as follow:

> (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 drafted based on the *Sebola* judgment that was the prevailing authority at the time. The new subsections are in line with the interpretation adopted in the *Sebola* case. The subsections clarify the issue of the delivery of the section 129(1) notice to a defaulting consumer before the credit provider may institute legal proceedings against such a consumer. They make it clear that actual knowledge of the notice by the consumer is not required. The subsections provide for two methods of delivery (that is, per registered mail or delivery in person) of the default notice. They also set out how a credit provider should go about proving that he has complied with the obligations placed on him in terms of section 129(1)(b) of the NCA. A consumer must specify, in writing, the manner in which he prefers the notice to be delivered to him. The subsections provide that proof of delivery of the notice must be recorded, so that no misunderstandings arise with regard to the receipt of the notice. Proof of delivery is satisfied, depending on the manner in which the notice is given to the consumer, if: (1) either the authorised agent of the postal service confirms in writing that the notice was delivered to the correct post office;[118] or (2) the recipient signs for the receipt of the notice.[119] In either case, the

117 GN 389 in GG 37665 of 19 May 2014.
118 Section 129(7)(a) of the NCA.
119 Section 129(7)(b) of the NCA.

credit provider does not have to prove that the notice came to the actual attention of the defaulting consumer.

While the new subsections provide valuable guidance and much-needed clarification on the issue of the delivery of the section 129(1) notice, there are still some unresolved issues.[120] For example, no mention is made of the situation where the credit provider sends a default notice per registered mail to the correct address of the consumer and it reaches the correct post office, which then duly notifies the consumer to fetch the registered letter but, for whatever reason, the consumer neglects to fetch the notice. At the time the *Kubyana* judgment dealing with this specific issue was delivered the *National Credit Amendment Act* had already been drafted (but was not in operation yet) and the *Kubyana* judgment was therefore not taken into consideration during the drafting of the amendments. The *Kubyana* case[121] stipulated that where the credit provider had complied with all the requirements for delivery described above, there was nothing further that could be required from the credit provider, and the defaulting consumer would therefore bear the onus of proving that the notice had not come to his attention, and would have to provide reasons for this. However, the lack of explicit direction from the legislature as to what the situation would be if the consumer did not fetch the notice, despite the credit provider's having complied with all its notification obligations in section 129, has the potential to again create confusion. For instance, one could interpret this to mean that it is the intention of the legislature with the *National Credit Amendment Act* that mere proof of receipt by the correct post office is sufficient and will constitute compliance, despite indications that the notice was not received. However, in our view the *Kubyana* judgment still governs the situation where default notices are not collected by consumers.

6 A few comments

It is evident, from these court cases, particularly the lengthy judgments handed down by the Constitutional Court in the *Sebola* and *Kubyana* cases, that the decisions pertaining to the proper interpretation of the delivery of the section 129(1)(a) notice were influenced by a multiplicity of factors. One of the factors considered by many of the courts was the previous consumer-credit legislation, which contained similar provisions for the delivery of default notices. The previous consumer-credit legislation generally made provision for two methods by which the default notices could be delivered

120 Also see Otto and Otto *National Credit Act Explained* 123.

121 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) paras 35-36.

to consumers, namely by hand or registered mail.[122] The repealed *Usury Act* and the repealed *Credit Agreements Act* did not require that the credit provider send a demand to a defaulting consumer before being able to claim payment in terms of the contract. The *Credit Agreements Act* did, however, require that the credit provider send a default notice if he wanted to claim the return of the goods. The previous consumer-credit legislation, except for the *Sale of Land on Instalments Act*, did not require that the default notice actually come to the attention of the consumer. The *Alienation of Land Act*, which is still in operation, also provides for a default notice to be sent to a consumer using one of the two aforementioned methods and does not require that the notice come to the actual attention of the consumer.[123]

Another factor considered by many of the courts when they interpreted the delivery of the section 129(1)(a) notice was the purposes of the NCA. The courts emphasised the need to ensure that the objectives of the Act were met, by striking a balance between the rights of the consumer and those of the credit provider. This was especially important as the NCA is generally more focused on the protection of the consumer than that of the credit provider.[124]

After considering all these and other factors, the Constitutional Court in *Sebola* set out what was required from the credit provider where he sent the section 129 notice per registered mail. It emphasised that the credit provider had to produce a track and trace printout from the Post Office indicating that the notice had reached the correct post office. Unfortunately, the court in *Sebola* neglected to consider or pronounce on the rather obvious possibility that while the track and trace printout from the Post Office would indicate that the notice had been delivered to the correct post office there could also be an indication that the notice had not been collected by the consumer and was thus being returned as "unclaimed" to the credit provider. Fortunately this issue was addressed and settled by the Constitutional Court in *Kubyana.* The *Kubyana* judgment, like the *Rossouw* judgment, emphasises the reciprocal duty of care required by both the credit provider and the consumer in order to achieve the objectives set out in the NCA. The *Kubyana* case not only specified what was required of the credit provider to fulfil his obligations in terms of the NCA, but also what was required of a defaulting consumer.

---

122 See the discussion in para 2 above.

123 See the discussion in para 3 above.

124 See, eg, *Mostert v Firstrand Bank t/a RMB Private Bank* 2018 4 SA 443 (SCA) para 24.

Sections 129(5) to (7) of the NCA now prescribe the two acceptable methods for delivering the section 129(1)(a) notice. Provision is made for the default notice to be delivered to consumers either by hand to an adult person at the location designated by the consumer, or by registered mail. No other methods of delivery of the notice are permitted. With the amendments to section 129, the issue of delivery of the default notice in terms of the NCA is now more aligned with what previous consumer-credit legislation stipulated as being the two methods of delivering their respective default notices. Although it is to be welcomed that the *National Credit Amendment Act* has resolved the issue of what the methods of delivery of the section 129 notice are, it is a pity that the legislature failed to take today's technological advancements into account when it set out the two methods of delivery.

With society and businesses moving away from paper-based communication, it would be interesting to learn how many consumers still have physical post boxes. In a country like South Africa, where the postal service have been plagued in recent years by various employee strikes,[125] one cannot help but wonder whether this old-fashioned method of delivery should still receive such preference today. These strikes by postal workers caused various businesses to move away from relying on the Post Office and instead to relying on electronic forms of communication with their consumers. The legislature, sadly, has also not endorsed other methods of delivering default notifications, such as sms (short message service) or e-mail (electronic mail) notifications. For instance, a section 129 notice could easily be brought to the attention of a consumer in the form of a sms that provides a unique hyperlink to that consumer's section 129 notice.[126] This notice might even be accessed and read on the mobile phone itself. Moreover, proof of delivery of the sms (or the fact that the consumer clicked on a particular hyperlink) could be provided by the network operators. Another means of bringing the default notice to the attention of the consumer and of proving that the notice most likely came to the attention of the consumer is to ensure that e-mails sent are tagged with a read receipt. In this way, the credit provider would be able to show that the e-mail was indeed opened and, in all likelihood, must have come to the attention of the consumer. Whilst these technologically advanced means of delivering notices have not been included in the *National Credit Amendment Act*, it is noteworthy that the Randburg Magistrates' Court in two recent cases

125 Madlopha 2017 https://www.news24.com/SouthAfrica/News/post-offices-cwu-members-vow-to-protest-until-demands-are-met-20170928.

126 For a similar view, see Eiselen "In the Wake of Sebola" 116.

regarded "digital letters of demand" as being similar in status to conventional registered post,[127] and so as complying with the provisions of the NCA. It is unclear whether other courts, particularly High Courts, would follow suit. Should they do so, this would probably necessitate the Supreme Court of Appeal's having to make a definite ruling in this regard. However, based on a pure and strict reading of the current provisions of section 129 of the NCA, it appears unlikely that the provisions also include these means of delivering the default notices. Although we regret this flaw in the Amendment Act, we cannot simply read into the NCA that which we should like to see there, when it is not.

Section 129 now not only provides for the consumer to specify – in writing – the manner in which a notification of a default should be delivered, but also indicates what would constitute proof of delivery so that no disagreements can arise. It is specifically stated that proof of delivery is satisfied by written confirmation by the postal service or its authorised agent of delivery to the relevant post office or postal agency or by the signature or identifying mark of the recipient. Regrettably the legislature neglected to consider the situation where, despite confirmation by the postal service that the notice was sent to the correct post office and that subsequent notifications were sent to the consumer, the consumer, for whatever reason, nevertheless failed to collect the default notice. In other words, the situation where there is evidence that the consumer did not receive the notice. The amended section 129 does not require that the consumer must actually receive the notice. It simply states when it will be deemed that it was delivered, but neglects to deal with the situation where there is proof that the consumer did not receive the notice. Therefore, it is our view that the *Kubyana* judgment will still govern such a situation and should be read in conjunction with section 129. This means that if the credit provider can show that he properly delivered the notice via registered mail and in compliance with section 129, there is nothing further that can be required from the credit provider. The consumer who tries to dispute compliance by the credit provider in such an instance will have to adduce evidence to show why the notice never reached him (eg he was hospitalised during that period, or out of the country), despite the attempts of the credit provider to notify him of his default. Should the consumer not be able to furnish reasons that are acceptable to the court as to why he never fetched or received the notice, it

127 Witness Reporter *Witness* 3; Colling 2018 http://www.polity.org.za/article/court-finds-registered-digital-communication-carries-same-weight-as-its-traditional-predecessor-2018-05-30.

will be to his own detriment. Thus, the *Kubyana* judgment is still relevant and complementary to section 129.

The *Kubyana* and *Sebola* cases consequently are not outdated. These cases still provide valuable authority for matters not dealt with or settled by the *National Credit Amendment Act* and should be read in conjunction with the amended section 129.[128]

Although most issues regarding the delivery of a section 129(1)(a) notice have now been resolved, a completely new issue relating to the notice recently arose in *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt*.[129] In this case the credit provider (the appellant) had entered into an unsecured credit agreement governed by the NCA with the consumer (the respondent). The credit agreement had been entered into in Bloemfontein and in terms of the agreement the monthly repayments were to be made into the credit provider's bank account in Bloemfontein. The consumer defaulted on his repayments in terms of the agreement and the credit provider sent a section 129 notice via registered mail to the consumer's *domicilium citandi et executandi,* which was in Kimberly. The consumer failed to respond to the notice and the credit provider sent another letter of demand, but this time in terms of section 56 of the *Magistrates' Courts* Act 32 of 1944.[130] It appears that the second letter of demand was hand delivered to the consumer in Kimberley. To this letter the consumer responded by giving written consent in Bloemfontein to judgment in respect of the debt, and the interest and costs, in terms of the *Magistrates' Courts Act*.

However, when the credit provider applied for judgment in the Bloemfontein Magistrates' Court, the magistrate dealing with the matter refused to grant judgment. Reliance was placed on section 28(1)(d) of the *Magistrates' Courts Act*, which states that one of the grounds upon which jurisdiction may be found is by the fact that the whole cause of action arose within the jurisdiction of that court. The magistrate held that delivery of the section 129 notice was an element of the cause of action and consequently, since delivery of the letter had taken place in Kimberly, the Bloemfontein Magistrates' Court lacked jurisdiction, as the whole cause of action did not arise within the jurisdiction of that court.[131]

---

128 See Kelly-Louw "Consumer Credit" 272.

129 *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt* 2016 6 SA 102 (SCA).

130 *Magistrates' Courts Act* 32 of 1944 (hereafter the *Magistrates' Court Act*).

131 *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt* 2016 6 SA 102 (SCA) para 5.

The matter then went on appeal before the Free State High Court, Bloemfontein. On appeal, the court held that the delivery of the section 129 notice "does not form part of the cause of action", but that it "completed the cause of action".[132] Therefore, the delivery of the notice gave rise to jurisdiction and since the section 129 notice had not been delivered in Bloemfontein, the Bloemfontein Magistrates' Court lacked jurisdiction to deal with the matter.

The matter then came before the Supreme Court of Appeal and the issue that needed to be decided was whether delivery of the section 129 notice constituted part of the cause of action. The credit provider argued that while delivery of the section 129 notice had to be claimed and proved, it was a procedural step that did not form part of the cause of action and consequently did not have any bearing on section 28(1)(d) of the *Magistrates' Court Act*. The credit provider argued that the cause of action was manifested when the agreement, having been entered into in Bloemfontein, was breached in Bloemfontein and this was sufficient to found the jurisdiction of the Bloemfontein Magistrates' Court.[133]

The Supreme Court of Appeal disagreed. It considered the definition of cause of action. It held that in the event that a statute stipulates that a notice must be given prior to commencing action, then the giving of that notice is essential to the successful pursuit of that claim, and proving that notice was given formed part of the cause of action.[134]

The court considered the purpose of the NCA and the importance of the delivery of the section 129(1)(a) notice as emphasised in *Sebola* and *Kubyana*. The Supreme Court of Appeal held that it was essential that a creditor aver compliance with section 129 of the NCA in order for it to disclose a cause of action resulting from default under a credit agreement. Should the creditor fail to make such averment, the summons would be rendered excipiable.[135]

The court concluded that the giving of the section 129 notice was critical to founding jurisdiction as contemplated in section 28(1)(d) of the *Magistrates' Court Act*. As the delivery of the notice in this case took place outside the jurisdiction of the Bloemfontein Magistrates' Court, the cause of action did not arise "wholly within the district or regional division" of that court and the

132 *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt* 2016 6 SA 102 (SCA) para 6.
133 *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt* 2016 6 SA 102 (SCA) para 7.
134 *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt* 2016 6 SA 102 (SCA) para 13.
135 *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt* 2016 6 SA 102 (SCA) para 18.

Bloemfontein Magistrates' Court therefore lacked jurisdiction.[136] The appeal was accordingly dismissed.

Although the judgment in *Blue Chip* is probably correct, it will not solve the practical difficulties this judgment creates. The scenario that presented itself in *Blue Chip* is not unique and will in all likelihood present itself often. As a consumer is permitted to choose any address to which the section 129 notice should be delivered, similar problems regarding jurisdiction will constantly arise in practice. In terms of section 129(5) the notice must be sent by registered mail or be delivered to an adult person at the location designated by the consumer. The credit provider is compelled to use the address selected by the consumer and cannot decide to use another address of the consumer.[137] For instance, where the notice was sent to an incorrect address a court is forced to set aside a default judgment.[138]

There are various problems and different opinions regarding the exact jurisdiction of a magistrates' court and a high court for the purposes of the enforcement of a credit agreement and the consents to jurisdictions in terms of section 90(2)(k)(vi) of the NCA.[139] Due to the uncertainty, credit providers might have limited options to prevent jurisdiction problems similar to those that arose in *Blue Chip.* Matters relating to jurisdiction for the purposes of the enforcement of a credit agreement are, of course, made worse by the fact that the NCA does not contain any specific provision dealing with jurisdiction in respect of the person of the consumer. Accordingly, it has been suggested that the provisions relating to jurisdiction in respect of the person of a defendant as set out in section 28(1) of the *Magistrates' Court Act* should be applicable where a magistrates' court is approached.[140]

Section 90(2)(k)(vi) dealing with consents to jurisdiction in the NCA in essence aims to prevent forum shopping[141] by the credit provider and high legal costs for the consumer. For instance, by forcing a credit provider to use the court closest to where the consumer resides or works, or litigating

136 *Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt* 2016 6 SA 102 (SCA) para 21.

137 See *Greeff v FirstRand Bank Ltd* 2012 3 SA 157 (NCK).

138 See *Kgomo v Standard Bankof South Africa* 2016 2 SA 184 (GP); and Otto and Otto *National Credit Act Explained* 120.

139 For a discussion of the problematic aspects of this section, see Kelly-Louw "Consumer Credit" para 86 in endnotes 33 and 34 at 162-163; Scholtz *et al National Credit Act* paras 9.3.3 and 12.3; and Otto and Otto *National Credit Act Explained* in footnotes 60 and 61 at 59-60.

140 Scholtz *et al National Credit Act* para 12.3.

141 *Nedbank Ltd v Mateman; Nedbank Ltd v Stringer* 2008 4 SA 276 (T).

in the magistrates' court instead of the High Court.[142] Particularly relevant to the discussions herein is section 90(2)(k)(vi)(bb) of the NCA, which specifies that a provision of a credit agreement is unlawful if it expresses, on behalf of the consumer, a consent to the jurisdiction of any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept. Section 90(2)(k)(vi)(bb) is considered to restrict the credit provider to the court in whose area the consumer works or lives, or where the goods are kept/located.[143] Roestoff and Coetzee state that the purpose of this section is to oust the jurisdiction of the court, including the High Court, not closest in distance to the consumer's residence, or the consumer's place of work, or the place where the goods are kept.[144] Otto points out that if this interpretation is correct, it would appear that a "well-known ground of jurisdiction contained in s 28(1)(d) of the *Magistrates' Courts Act* 32 of 1944 may not be agreed upon."[145] Otto states that section 90(2)(k)(vi)(bb) therefore forbids provisions in agreements expressing consent to jurisdiction on any ground other than the residence or employment of the consumer or the location of the goods. However, according to him, the section does not exclude jurisdiction by operation of law, by means of the provisions of section 28(1)(d) of the *Magistrates' Courts Act*. Otto remarks that this was "probably not the (subjective) intention of the legislature, particularly when one considers how provisions regarding jurisdiction were formulated in previous legislation."[146] He refers specifically to section 21 of the repealed *Credit Agreements Act,* which contained a provision to the effect that the application of section 28(1)(d) of the *Magistrates' Courts Act* was excluded in respect of credit agreements governed by the *Credit Agreements Act*, unless the credit receiver no longer resided in South Africa. The NCA has no similar provision and it has been said that this seemingly entails that the prohibition against basing jurisdiction for the purposes of the enforcement of a credit agreement on the fact that the cause of action wholly arose within the district of a specific magistrates court does not apply to credit agreements governed by the NCA.[147]

---

142 See *Absa Bank Ltd v Myburgh* 2009 3 SA 340 (T); and *Absa Bank Ltd v Pretorius* 2008 JOL 21209 (T).

143 See Kelly-Louw "Consumer Credit" para 86 in endnotes 33 and 34 at 162-163; and Otto and Otto *National Credit Act Explained* in footnote 61 at 59-60.

144 See Roestoff and Coetzee 2008 *THRHR* 678; and for the expression of a similar view see Van Heerden 2008 *TSAR* 840.

145 Otto and Otto *National Credit Act Explained* in footnote 61 at 59-60.

146 Otto and Otto *National Credit Act Explained* in footnote 61 at 60.

147 Scholtz *et al National Credit Act* para 12.13 at 12-114(2).

Be that as it may, if a consumer has elected a specific address for the delivery of the section 129 notice, the credit provider will have no choice but to comply with the election. This is so, even if the address selected by the consumer is not necessarily his residential or employment address or the address where the goods are located. This could lead to a situation where credit providers will start limiting consumers' free choice to select an address for the delivery of section 129 notices, to avoid later jurisdictional problems. The section 129 notice serves many different purposes in terms of the NCA. Its purposes are not only to notify the consumer of his outstanding arrears, or to start the debt collection process, but also, extremely importantly, to inform the consumer of the possible assistance that is available before legal action will be instituted.

In *Kubyana* the Constitutional Court stressed that "an appropriate balance between the competing interests of both parties to a credit agreement" should be struck when sections 129 and 130 of the NCA are applied, because the "offer of credit is crucial to the economy" of South Africa.[148] We are not convinced that the Supreme Court of Appeal in *Blue Chip* truly balanced the rights of the credit provider with those of the consumer or interpreted this aspect of section 129 in a manner that gives effect to the purposes of the NCA[149] as section 2(1) of the NCA dictates. The effect of the *Blue Chip* judgment might indeed thwart the intentions of Part C of Chapter 6 of the NCA. The NCA is very resolute to ensure that the debt collecting procedure set out in Part C of Chapter 6 of the Act is followed by credit providers, and it goes so far as to state that where there is a conflict between sections 57 and 58 of the *Magistrates' Court Act* and *inter alia* sections 129 and 131 (ie, repossession of goods) of the NCA, the listed sections of the NCA will prevail.[150]

The *Courts of Law Amendment Act*,[151] currently awaiting an incorporation date, will amend the *Magistrates' Court Act* significantly. For instance, the *Courts of Law Amendment Act* will insert a subsection (3) into section 45 of the *Magistrates' Court Act,* which will read that

> [a]ny consent given in proceedings instituted in terms of section 57, 58, 65 or 65J by a defendant or a judgment debtor to the jurisdiction of a court which

148 *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 89.

149 Set out in s 3 of the NCA.

150 See s 172(1) read with Schedule 1 to the NCA.

151 *Courts of Law Amendment Act* 7 of 2017 (see GN 769 in GG 41017 of 2 August 2017 (assented to on 31 July 2017; and commencement to be proclaimed)).

> does not have jurisdiction over that defendant or judgment debtor in terms of section 28, is of no force and effect.

The *Courts of Law Amendment Act* will also amend sections 57 and 58 of the Magistrates' Court Act substantially and will provide *inter alia* that the provisions of both these sections will apply, subject to the relevant provisions of the NCA, where either the application or request for judgment is based on a credit agreement under the NCA.[152] The NCA clearly states that where there is a conflict between Chapter IX (i.e. provisions dealing with the execution of judgment debts) of the *Magistrates' Court Act* and *inter alia* sections 127, 129 and 131 of the NCA, the listed sections of the latter Act will prevail.[153]

It is doubted whether the legislature would have intended to negatively affect a credit provider in this manner for merely delivering the section 129 notice to the chosen address of the consumer, as he is required to do in terms of the NCA.

It would be welcomed if the legislature could also bring section 129 in line with the *Kubyana* judgment and end the prevailing ambiguities that still persist surrounding the delivery of the notice. If any future Amendment Act could also offer guidance on how to deal with the practical jurisdictional problem that arose in the *Blue Chip* case, it would simplify matters even more. Unfortunately, it is clear from a reading of the recent National Credit Amendment Bill of 2018[154] that these aspects are not receiving the necessary attention from the legislature.

Bibliography

Literature

Eiselen "In the Wake of Sebola"
Eiselen S "In the Wake of Sebola" in Visser C and Pretorius JT (eds) *Essays in Honour of Frans Malan* (LexisNexis Durban 2014) 103-116

152 See ss 57(5) and 58(3) to be inserted into the *Magistrates' Court Act* by the *Courts of Law Amendment Act* 7 of 2017.

153 See s 172(1) read with Schedule 1 to the NCA.

154 The Draft National Credit Amendment Bill, 2018 was published in Gen N 922 in GG 41274 of 24 November 2017. Public hearings were held on the draft Bill during January 2018 and some amendments followed which resulted in the National Credit Amendment Bill 30 of 2018. The Bill was approved by the National Assembly on 12 September 2018 and has been transmitted to the National Council of Provinces for concurrence (see Sabinet 2018 http://www.sabinetlaw.co.za/economic-affairs/legislation/national-credit-amendment-2018).

Fuchs 2013 *PELJ*
Fuchs MM "The Impact of the National Credit Act 34 of 2005 on the Enforcement of a Mortgage Bond: *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC)" 2010 *PELJ* 377-392

Fuchs 2014 *THRHR*
Fuchs MM "Regsposisie Indien 'n Artikel 129(1)(a)-kennisgewing Ingevolge die National Credit Act 34 van 2005 nie die Verbandskuldenaar Bereik het nie" 2014 *THRHR* 217-230

Govender *Interpretation of the Section 129(1)(a) Notice*
Govender S *The Interpretation of the Section 129(1)(a) Notice of the National Credit Act 34 of 2005 According to Case Law* (LLM-dissertation UNISA 2015)

Kelly-Louw 2010 *SA Merc LJ*
Kelly-Louw M "The Default Notice as Required by the National Credit Act 34 of 2005" 2010 *SA Merc LJ* 568-594

Kelly-Louw *Consumer Credit Regulation*
Kelly-Louw M *Consumer Credit Regulation in South Africa* (Juta Cape Town 2012)

Kelly-Louw "Consumer Credit"
Kelly-Louw M "Consumer Credit" in Joubert WA and Faris JA (eds) *The Law of South Africa* 3rd ed (LexisNexis Durban 2014) Vol 8

Kelly-Louw 2015 *SALJ*
Kelly-Louw M "The Overcomplicated Interpretation of the Word 'May' in Sections 129 and 123 of the National Credit Act" 2015 *SALJ* 245-257

Otto "Consumer Credit"
Otto JM "Consumer Credit" in Joubert WA, Faris JA and Harms LTC (eds) *The Law of South Africa* 2nd ed (LexisNexis Durban 2004) 1-214

Otto 2009 *De Jure*
Otto JM "Aanmanings by Afbetalingsverkoopkontrakte van Grond en die National Credit Act" 2009 *De Jure* 166-174

Otto 2010 *THRHR*
Otto JM "Kennisgewings kragtens National Credit Act: Moet die Verbruiker Dit Ontvang? — *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D)" 2010 *THRHR* 136-144

Otto 2010 *SA Merc LJ*
Otto JM "Notices in Terms of the National Credit Act: Wholesale National Confusion. *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors*; *Munien v BMW Financial Services*; *Starita v Absa Bank Ltd*; *FirstRand Bank Ltd v Dhlamini*" 2010 *SA Merc LJ* 595-607

Otto and Otto *National Credit Act Explained*
Otto JM and Otto R-L *The National Credit Act Explained* 4th ed (Lexis Nexis Durban 2016)

Roestoff and Coetzee 2008 *THRHR*
Roestoff M and Coetzee H "Consent to Jurisdiction – Unlawful Provision in a Credit Agreement in terms of the National Credit Act – is the Jurisdiction of a Court Ousted thereby" 2008 *THRHR* 678-688

Scholtz *et al National Credit Act*
Scholtz JW *et al Guide to the National Credit Act* (LexisNexis Durban 2008) (loose-leaf)

Taylor 2010 *De Jure*
Taylor H "Enforcement of Debt in terms of the National Credit Act 34 of 2005, Trial and Celebration? A Critical Evaluation" 2010 *De Jure* 103-119

Van Heerden 2008 *TSAR*
Van Heerden CM "Perspectives on Jurisdiction in terms of the National Credit Act 34 of 2005" 2008 *TSAR* 840-855

Van Heerden and Boraine 2011 *SA Merc LJ*
Van Heerden CM and Boraine A "The Conundrum of Non-compulsory Notice in terms of Section 129(1)(a) of the National Credit Act" 2011 *SA Merc LJ* 45-63

Van Heerden and Coetzee 2012 *LitNet Akademies Regte*
Van Heerden C and Coetzee H "Artikel 129(1)(a) van die Nasionale Kredietwet 34 van 2005: Verwarrende Verwarring oor Voldoening" 2012 *LitNet Akademies Regte* 254-297

Vlcek and Sithole 2010 *Without Prejudice*
Vlcek D and Sithole P "NCA Enforcement Notices – The Final Word" December 2010 *Without Prejudice* 32-33

Witness Reporter *Witness*
Witness Reporter "Judgments Set Precedent to Allow Digital Debt Letters" *Witness* (4 June 2018) 3

Case law

Absa Bank Ltd v Mkhize 2012 5 SA 574 (KZD)

Absa Bank Ltd v Mkhize 2014 5 SA 16 (SCA)

Absa Bank Ltd v Myburgh 2009 3 SA 340 (T)

Absa Bank Ltd v Petersen 2013 1 SA 481 (WCC)

Absa Bank Ltd v Pretorius 2008 JOL 21209 (T)

Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors 2009 2 SA 512 (D)

Armadien v The Registrar of Deeds and Wingerin 2017 2 All SA 431 (WCC)

Balkind v Absa Bank 2013 2 SA 486 (ECG)

Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt 2016 6 SA 102 (SCA)

Firstrand Bank v Bernado 2009 ZAECPEHC 19 (28 April 2009)

Firstrand Bank Limited v Dhlamini 2010 4 SA 531 (GNP)

Firstrand Bank Limited v Ngcobo 2009 ZAGPPHC 112 (11 September 2009)

First National Bank Ltd v Rossouw (GNP) (unreported) case number 30624/2009 of 6 August 2009

Fitzgerald v Western Agencies 1968 1 SA 288 (T)

Greeff v FirstRand Bank Ltd 2012 3 SA 157 (NCK)

Griekwaland-Wes Korporatief Limited v Jacobs (NCK) (unreported) case number 1995/2010 of 5 August 2011

Holme v Bardsley 1984 1 SA 429 (W)

Imperial Bank v Kubheka 2010 JDR 0077 (GNP)

Kgomo v Standard Bankof South Africa 2016 2 SA 184 (GP)

Kubyana v Standard Bank of South Africa Ltd 2014 3 SA 56 (CC)

Maharaj v Tongaat Development Corporation (Pty) Ltd 1976 1 SA 314 (D)

Maharaj v Tongaat Development Corporation (Pty) Ltd 1976 4 SA 994 (A)

Maron v Mulbarton Gardens (Pty) Ltd 1975 4 SA 123 (W)

Marques v Unibank Ltd 2001 1 SA 145 (W)

Moegemat v Nedbank Ltd (ECG) (unreported) case number CA39/2010 of 27 October 2010

Mostert v Firstrand Bank t/a RMB Private Bank 2018 4 SA 443 (SCA)

Munien v BMW Financial Services (SA) (Pty) Ltd 2010 1 SA 549 (KZD)

Nedbank Limited v Mokhonoana 2010 5 SA 551 (GNP)

Nedbank Ltd v Binneman 2012 5 SA 569 (WCC)

Nedbank Ltd v Mateman; Nedbank Ltd v Stringer 2008 4 SA 276 (T)

Nedbank Ltd v National Credit Regulator 2011 3 SA 581 (SCA)

Rossouw v FirstRand Bank Ltd 2010 6 SA 439 (SCA)

Sebola v Standard Bank of South Africa 2011 ZAGPJHC 229 (15 August 2011)

Sebola v Standard Bank of South Africa Ltd 2012 5 SA 142 (CC)

Senatle v CEO of the South African Social Security Agency 2009 ZANWHC 11 (30 April 2009)

Standard Bank of South Africa Ltd v Kubyana 2012 ZAGPPHC 259 (8 November 2012)

Standard Bank of South Africa Ltd v Mellet 2009 ZAFSHC 110 (30 October 2009)

Standard Bank of South Africa Ltd v Rockhill 2010 5 SA 252 (GSJ)

Standard Bank of South Africa Ltd v Maharaj t/a Sanrow Transport 2010 5 SA 518 (KZP)

Standard Bank of South Africa Ltd v Van Vuuren 2009 5 SA 557 (T)

Standard Bank of South Africa Ltd v Van Vuuren, JG 2013 ZAGPJHC 16 (26 February 2013

Starita v *Absa Bank Ltd* 2010 3 SA 443 (GSJ)

Van Niekerk v Favel 2006 4 SA 548 (W)

Legislation

Alienation of Land Act 68 of 1981

Alienation of Land Amendment Act 51 of 1983

Courts of Law Amendment Act 7 of 2017

Credit Agreements Act 75 of 1980

Hire-Purchase Act 36 of 1942

Hire-Purchase Amendment Act 30 of 1965

Interpretation Act 33 of 1957

Limitation of Disclosure of Finance Charges Act 73 of 1968

Magistrates' Courts Act 32 of 1944

National Credit Act 35 of 2005

National Credit Amendment Act 19 of 2014

Sale of Land on Instalments Act 72 of 1971

Usury Act 37 of 1926

Usury Act 73 of 1968

Government publications

GN R489 in GG 28864 of 31 May 2006

GN 389 in GG 37665 of 19 May 2014

GN 769 in GG 41017 of 2 August 2017

Gen N 922 in GG 41274 of 24 November 2017

Internet sources

Colling 2018 http://www.polity.org.za/article/court-finds-registered-digital-communication-carries-same-weight-as-its-traditional-predecessor-2018-05-30

Colling N 2018 *Court Finds Registered Digital Communication Carries Same Weight as its Traditional Predecessor* http://www.polity.org.za/article/court-finds-registered-digital-communication-carries-same-weight-as-its-traditional-predecessor-2018-05-30 accessed 4 June 2018

Madlopha 2017 https://www.news24.com/SouthAfrica/News/post-offices-cwu-members-vow-to-protest-until-demands-are-met-20170928

Madlopha V 2017 *Post Office's CWU Members Vow to Protest until Demands are met* https://www.news24.com/SouthAfrica/News/post-offices-cwu-members-vow-to-protest-until-demands-are-met-20170928 accessed 4 September 2018

Sabinet 2018 http://www.sabinetlaw.co.za/economic-affairs/legislation/national-credit-amendment-2018

Sabinet 2018 *National Credit Amendment 2018* http://www.sabinetlaw.co.za/economic-affairs/legislation/national-credit-amendment-2018 accessed 17 September 2018

List of Abbreviations

NCA	National Credit Act
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg